UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.: 8:12 CV 2414-SDM-TBM

JERRY WOJCIK, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BUFFALO BILLS, INC., a New York Corporation,

Defendant.
_____/

PLAINTIFF JERRY WOJCIK'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BUFFALO BILLS, INC.'S MOTION TO DISMISS THE COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT [DE-6]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules and Statutes:

Other Authorities:

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COMES NOW, Plaintiff, JERRY WOJCIK, by and through his undersigned counsel and pursuant to the Federal Rules of Civil Procedure, Plaintiff files this Response and Memorandum of Law in Opposition to Defendant, BUFFALO BILLS, INC.'S Motion to Dismiss the Complaint, or in the alternative, Motion for Summary Judgment [DE-6] and further states as follows:

INTRODUCTION

The instant dispute arises from Defendant, BUFFALO BILLS, INC.'S alleged use of mass text messaging in violation of 47 U.S.C. § 227 *et seq.*, the Telephone Consumer Protection Act ("TCPA"). More specifically, the matter before this Court stems from Mr. Wojcik's allegations that the Buffalo Bills football team twice exceeded the limit of five messages per week, as stipulated in the terms and conditions for the team's mobile alert service. Defendant, in

its Motion to Dismiss, alleges Plaintiff failed to state a valid claim under the TCPA, or in the alternative, Defendant is entitled to Summary Judgment.

Regrettably, Defendant's motion is fraught with legal errors, including but not limited to the following: (1) requesting relief from this Court which would violate the Hobbs Act; (2) asking this Court to rewrite the parties agreed upon terms concerning the Buffalo Bills text alert service; and (3) entirely misconstruing the applicable facts and case law. Most perplexing is the fact that Defendant makes the contradictory argument that irrespective of any limitation upon consent, it somehow possessed the authority to freely send text messages to consumers as frequently as it wished, but then states those same consumers should have opted out of the aforesaid service once it breached the terms governing the parties.

Prior to Plaintiff having had an opportunity to conduct any meaningful discovery, Defendant has also filed a declaration in support of its motion for summary judgment alleging that Defendant does not employ an automatic telephone dialing system ("ATDS"). In response, Plaintiff maintains that the aforesaid declaration is conclusory, lacking in any factual basis, and highly premature. Even so, Plaintiff has attached his own declaration in opposition, which raises genuine issues of material fact as to whether Defendant employed the use of an automatic telephone dialing system to operate the Buffalo Bills mobile alert service. In the alternative, Plaintiff would ask this Court defer ruling on same until Plaintiff's counsel has had an opportunity to depose Defendant's declarant.

STANDARD OF REVIEW

A complaint should not be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him

to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). Further, the court's consideration is limited to the assertions made within the four corners of the complaint, to documents attached to the complaint as exhibits or incorporated in it by reference, to matters of which judicial notice may be taken, and to documents either in the plaintiff's possession or of which plaintiff had knowledge and relied on in bringing the suit. *Brass v. American Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). "In short, the function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which may be offered in support thereof." *Amalgamated Bank of New York v. Marsh*, 823 F.Supp. 209, 215 (S.D.N.Y. 1993).

The entry of summary judgment is inappropriate where there exists a genuine and material issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). Substantive law defines which facts are material, and only disputes over facts that might affect the outcome of the case will defeat summary judgment. *Id.* at 248, 106 S.Ct. at 2510. A factual dispute is genuine if a "reasonable jury could return a verdict for the non-moving party." *Id.* Although all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party, once the movants have met their burden of demonstrating the absence of a genuine issue of material fact, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" to prevent its entry. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 547 (1986). It is not sufficient for the party opposing summary judgment to provide a scintilla of evidence supporting its case. *Anderson v. Liberty Lobby, Inc.*, *supra,* 477 U.S. at 252, 106 S. Ct. at 2512.

In ruling on summary judgment motions, the Eleventh Circuit has held that "summary judgment may only be decided upon an adequate record." *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988). "If documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials." *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988). It is improper for a court to rule on summary judgment without allowing the plaintiff the opportunity to conduct discovery. *See Jones v. City of Columbus*, 120 F.3d 248, 253 (11th Cir. 1997) (finding district court abused its discretion in deciding summary judgment when the plaintiffs never had opportunity to examine all the documents they requested or to depose the city officials whose affidavits were offered in support of the motion for summary judgment); *Luberisse v. V & V Sons, Inc.*, No. 07-81064-CIV, 2008 WL 4820071, at *1 (S.D. Fla. 2008) (finding the plaintiff's request for discovery reasonable when the plaintiff has been unable to take depositions of individuals relied upon in the moving party's motion for summary judgment).

I. Congress established the TCPA because it found that unwanted calls are a "nuisance" and pose a risk to consumers.

Americans received 4.5 billion spam text messages in 2011, more than twice as many compared to 2009.[1] The Pew Research Center reports that 79% percent of cellular telephone owners use text messaging; of this group, 69% percent receive unwanted text message spam,

[1] Nicole Perlroth, *Spam Invades a Last Refuge, the Cellphone,* New York Times (published: April 7, 2012; last accessed: November 25, 2012) <http://www.nytimes.com/2012/04/08/technology/text-message-spam-difficult-to-stop-is-a-growing-menace.html>.

25% percent on a weekly basis.[2] "Government figures show monthly robocall complaints have climbed from about 65,000 in October 2010 to more than 212,000 this April. More general complaints from people asking a telemarketer to stop calling them also rose during that period, from about 71,000 to 182,000."[3] In the United States, text message spam now reportedly costs consumers upwards of $300 million annually.[4] It is in this context that Defendant brazenly asserts that the legislative history and applicable case law demonstrates that the instant "factual situation does not fall within the regulatory ambit of the TCPA" and further suggests that the TCPA is somehow limited to "the receipt of unsolicited messages from third-parties…" These statements are demonstrably false.

First, there has been at least one other TCPA class action which has been certified based upon nearly identical circumstances as those in the present matter (i.e. a defendant having exceeding its self-imposed limitation regarding the frequency of text messages). In *Kertesz v. Rick's Cabaret International, Inc.*, S.D. Fla. Case No. 0:11-cv-61289-RNS, the Court approved the following class definition:

> *All individuals in the United States and its territories who signed up online to receive SMS text message alerts from Defendants pursuant to Defendants' written terms and conditions expressly stating that a limited number of text messages will be made by Defendants within a monthly period and who received text messages from Defendants within a monthly period which exceeded the limit.*

(*See* DE-42; Order entered on Aug. 21, 2012).[5] Moreover, there have been a multitude of TCPA

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[2] Source: http://pewinternet.org/Reports/2012/Mobile-phone-problems/Main-findings.aspx (last accessed November 24, 2012).

[3] Source: http://www.foxnews.com/tech/2012/09/17/complaints-about-automated-sales-calls-up-sharply/ (last accessed: November 27, 2012).

[4] Source: http://www.gottabemobile.com/2011/12/22/text-spam-costs-over-300-million-how-to-stop-call-and-sms-spammers-infographic/ (last accessed: November 27, 2012).

[5] In *Kertesz*, the terms and conditions of defendant's website stated: *You may receive up to 8 alerts each month.*

class actions approved wherein the cellular telephone number at issue was obtained from the consumer. In fact, there have been at least three such orders entered within the last six months. *See generally Agne v. Papa John's Intern., Inc.*, --- F.R.D. ----, 2012 WL 5473719 (W.D. Wash. Nov. 9, 2012); *In re Jiffy Lube Intern., Inc., Text Spam Litigation*, S.D. Cal. Case No. 11–md–2261–JM–JMA (*See* Order entered Oct. 10, 2012); *McClintic v. Lithia Motors, Inc.*, W.D. Wash. Case No. C11- 859RAJ (*See* Order entered June 11, 2012).[6]

Plaintiff maintains that the instant matter is also perfectly in line with the stated purposes of the TCPA. In enacting the TCPA, Congress sought to "protect the privacy interests of telephone subscribers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009); *see also, Bonime v. Avaya, Inc.*, 547 F.3d 497, 499 (2nd Cir. 2008) ("Congress's stated purpose in enacting the TCPA was to protect the privacy interests of residential telephone subscribers...."); S. REP. NO. 102-178 at 5 *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services."). The findings of Congress stated that automated calls and prerecorded messages are a "nuisance," an "invasion of privacy," and "when an emergency or medical assistance telephone line is seized, a risk to public safety." *See* Pub.L. 102–243, § 2, ¶¶ 5–6, 9–10, 13–14, 105 Stat 2394 (1991). Additionally, "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer."

[6] Defendant has also cited to *Pimental v. Google, Inc.*, Not Reported in F.Supp.2d, 2012 WL 1458179 (N.D.Cal. April 6, 2012) for the proposition that an order was entered staying the matter pending the ruling on a petition to the Federal Communications Commission. That is quite simply wrong. In the aforementioned case, which was litigated by the undersigned attorney, Judge Yvonne Gonzalez Rogers *denied* defendant's motion to stay the action under the doctrine of primary jurisdiction. An Order of preliminary approval of class action settlement was subsequently entered on November 30, 2012. [*See* DE-97]

Id. ¶ 11. At bottom, then, the TCPA bans calls using automated technology to protect consumers, **placing the burden on the technology users rather than the consumers**, who are ill-equipped to mitigate the nuisance.[7] *See Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999, 1011 (N.D. Ill. 2010) ("[T]he TCPA serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers.").

II. Plaintiff has sufficiently pleaded a violation of the TCPA.

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiff's Complaint need only contain a "short and plain statement of the claim showing that [they are] entitled to relief." Here, Defendant claims that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as further modified by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), has somehow radically altered Rule 8(a)(2) and created a fact-pleading standard that Plaintiff has failed to meet.[8] That is simply not the case and Defendant's argument has been rejected time and again by federal courts nationwide on similar facts involving spam text messaging in violation of the TCPA. *See, e.g., Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1168 (N.D. Cal. 2010); *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010).

While *Twombly* and *Iqbal* did much to clarify the standard of review applicable to motions under Rule 12(b)(6), they did not, as Defendants suggest, radically alter federal pleading

[7] *Strickler v. Bijora, Inc.,* Slip Copy, 2012 WL 5386089 (N.D.Ill. October 30, 2012) (holding that the TCPA leaves open multiple feasible alternative channels for communication); *see also, Berg v. Merchants Assoc. Collection Div., Inc.,* 586 F.Supp.2d 1336, 1344 (S.D.Fla. 2008) (calling automated telephone messages an "inherently risky method of communication" and noting that debt collectors use such a mode of communication at their peril).

[8] Courts nationwide, including in this District, have noted that certain allegation need not be specific, particularly when the information at issue is in the possession of the defendant. *See Daniel v. Pizza Zone Italian Grill & Sports Bar, Inc.,* 2008 WL 793660, at *2 (M.D.Fla. Mar. 24, 2008) (Merryday, J.) ("bare bones allegations" of gross sales are acceptable; requiring more would only encourage "gross speculation" from the plaintiff and would "not provide the defendant with meaningful information because the defendant already has [ ] such information") (citation omitted). Moreover, in *Erickson v. Pardus*, 551 U.S. 89 (2007), decided two weeks after *Twombly*, the Court clarified that *Twombly* did not signal a switch to fact-pleading in the federal courts. *Erickson* reaffirms that under Rule 8 "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Villegas v. J.P. Morgan Chase & Co.*, No. C09-00261, 2009 WL 605833 (N.D. Cal., Mar. 9, 2009) (citing *Airborne Beepers & Video, Inc. v. AT&T Mobility* LLC, 499 F.3d 663, 667-668 (7th Cir. 2007)).

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

In order to establish a violation of the TCPA, a plaintiff must demonstrate that a defendant called or texted a number assigned to a cellular telephone service using an automatic dialing system. *See Breslow v. Wells Fargo Bank, N.A.*, 867 F.Supp.2d 1316, No. 11–22681, 2012 WL 1448444, at *3 (S.D. Fla. Apr. 26, 2012). The TCPA allows a party to sue to recover its "actual monetary loss" or "to receive $500 in damages" per violation. 47 U.S.C. § 227(b)(3)(B). A party may also sue to enjoin violations of the statute. 47 U.S.C. § 227(b)(3)(A),(C). If the plaintiff establishes that the violations were willing or knowing, the plaintiff is entitled to treble damages. 47 U.S.C. § 227(b)(3).

In the instant matter, all requisite allegations are present. Plaintiff has alleged that Defendant sent text messages to his cellular telephone. [DE-1; ¶¶ 16, 19, 21–22]. Plaintiff has also alleged that the text messages at issue were sent *en masse* using technology that would qualify as an automatic telephone dialing system or device that has the capacity to be used as same. [DE-1; ¶ 24]. Given the purpose of the Buffalo Bills mobile alert service (i.e. the mass

distribution of breaking information regarding the Buffalo Bills to its subscriber fan base) and the sizeable following of the Buffalo Bills on such websites as Twitter and Facebook [*See* DE-1; ¶ 23], it is more than plausible that Defendant employed the use of an automatic telephone dialing system to deliver "*up to the minute news and team alerts*" to the cellular telephones of its subscribers. [DE-1; ¶ 17]. Federal courts have held that similar allegations suggest the use of automatic telephone dialing technology and are legally sufficient to withstand a motion to dismiss.[9] *See Kazemi v. Payless Shoesource, Inc.*, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010); *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165 (N.D. Cal. 2010).

III. Under Hobbs Act analysis, the mere provision of one's cellular telephone number is not the same as "prior express consent."

Defendant misstates the applicable law when it claims that "*persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary*." [DE-6; pp. 6-7]. This hold true only in a debtor-creditor scenario. The aforementioned issue was recently addressed in *Thrasher-Lyon v. CCS Commercial, LLC*, Slip Copy, 2012 WL 3835089 (N.D. Ill. Sept. 4, 2012). In that matter, Judge John J. Tharp, Jr. of the Northern District of Illinois, expounding upon the interplay of the TCPA and the Hobbs Act, explained as follows:

> The FCC's creditor rule, which goes beyond the plain language of the TCPA to mitigate a burden on creditors that was likely not intended by the statute, is binding on this Court, but CCS seeks to expand the FCC's ruling well beyond its moorings in a voluntary transaction giving rise to a debtor-creditor relationship. The Court rejects CCS's argument that it can avail itself of the FCC's creditor rule before a debt even exists. CCS's argument is inconsistent with the rationale behind the 2008 FCC order that envisions an individual who voluntarily makes contact with a provider of services, whether medical, financial, or otherwise, and takes on debt as a result. Nothing in the FCC's rulings suggests that it was

[9] Plaintiff would further submit that the alternate possibility, i.e. the Buffalo Bills *manually* text messaged potentially tens of thousands of mobile phone subscribers the score of a game at halftime or a list of inactive players prior to game time, is highly improbable.

> intended to apply outside the context of a debtor-creditor relationship. Accordingly, the Court does not find the FCC's creditor rule, or the cases applying it, applicable or instructive in the very different factual context of this case.
>
> CCS insists that it would be "bizarre" to interpret the statute to require "elaborate" consent using "magic words," but there is nothing bizarre about giving effect to all of the words in the statutory language. It is what courts are required to do. Bizarre would be to read "express consent" as "implied consent." In ordinary parlance, there is no such thing as "implied express consent"—that is an oxymoron. Giving out one's phone number, at least outside of the special relationship sanctioned by the FCC, is not "express" consent to besiegement by automated dialing machines. One "expresses" consent by, well, expressing it: stating that the other party can call, or checking a box on form or agreeing to terms of service that explicitly permit automated telephone contact. *See Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009) ("Express consent is consent that is clearly and unmistakably stated.") (citation omitted). "Express" connotes a requirement of specificity, not "general unrestricted permission" inferred from the act of giving out a number, as CCS urges. Agreeing to be contacted by telephone, which Thrasher– Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called about a debt she did yet know Farmers believed she owed.
>
> When a text can be applied as written, a court ought not revise it by declaring the legislative decision 'absurd.' *Soppet v. Enhanced Recovery Co.,* 679 F.3d 637, 642 (7th Cir.2012). No doubt CCS and other robo-callers think it unduly burdensome to obtain advance express consent to receive robocalls, given the modern proliferation of cellular phones and the decreasing incidence of grounded residential telephone lines. But it is not this Court's prerogative to amend the statute to conform to changing times or to attempt to improve it. *See id.* In any event, and as explained above, there is nothing absurd about Congress's determination to require express consent before subjecting telephone consumers to a barrage of automated phone calls or prerecorded messages. As the statute's title advertises, it was enacted for the benefit of telephone consumers and, accordingly, Congress required consumers to opt *in*—expressly—to robocalls than to take steps to opt out or to expressly limit the scope of their consent any time they disseminate their phone numbers, as CCS would have it. The language of the statute makes consent the exception, not the default.

Thrasher-Lyon at *5 (internal citations omitted). *See also Griffith v. Consumer Portfolio Serv., Inc.*, No. 10-c-2697 (N.D. Ill. Aug. 16, 2011) (refusing to permit defendant to re-litigate the issue of whether a predictive dialer qualifies as an automatic telephone dialing system pursuant to the Hobbs Act); *Sterling Realty Co. v. Klein*, 2005 TCPA Rep. 1353 (N.J.Super.Ct. Mar. 21, 2005)

(holding that "the fact that a plaintiff had given a business card to [the defendant] and asked him to 'stay in touch' does not constitute 'express' consent to send advertising faxes"); *Kondos v. Lincoln Prop. Co.*, 2001 TCPA Rep. 1036, No. 00-8709-H, slip op. 3-4 (Tex.Dist.Ct. July 12, 2001) (rejecting the FCC's "established business relationship" exception where fax recipients had filled out the defendant's forms and included their fax numbers, because the FCC's construction of the statute would amend "the TCPA's definition of unsolicited advertisement *from* a fax sent without the recipient's 'prior express invitation or permission' to a fax sent without the recipient's prior express *or implied* invitation or permission." (all emphasis in original)).

Assuming *arguendo*, even if this Court were to apply the FCC's creditor rule as the applicable legal standard on the issue of consent, Plaintiff would still ultimately prevail. This is because the aforesaid legal doctrine contemplates "instructions to the contrary" and in the matter before this Court such instructions are in fact present. Mr. Wojcik has alleged that "[t]he Buffalo Bills website, terms and conditions, and confirmatory text message all unequivocally state that the subscribers consent to and will be limited to the receipt of no more than five (5) text messages during any one week period." [DE-1; ¶ 20].

Defendant also improperly relies upon a 2012 FCC Order that does not even go into effect until 2013. The language cited by Defendant is the following:

> While we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages. As was roundly noted in the comments, wireless use has expanded tremendously since passage of the TCPA in 1991. We believe that requiring prior express written consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely.

[DE-6; p. 9]. Again, while the language has absolutely no legal relevance until October 16, 2013, it serves Defendant no better than the previously explained FCC's creditor rule. This is because the language Defendant cites is immediately preceded by the following admonition:

> Additionally, we note that many commenters expressed concern about obtaining written consent for certain types of autodialed or prerecorded calls, including debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications. **Again, such calls, to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wireline consumers, but require either written or oral consent if made to wireless consumers and other specified recipients.**

27 FCC Rcd 1830 (Adopted: Feb. 15, 2012) (emphasis added). Despite Defendant's protestations to the contrary, it cannot reframe the consent in this case into something other than what it is – limited to the receipt of no more than five text messages per week.

IV. It is undisputed that the parties clearly and unmistakably agreed to no more than 5 text messages per week.

As stated *ad nauseam*, the terms and conditions of the Buffalo Bills mobile alert service, as well as the website advertisement and initial confirmatory text message, all unequivocally state no subscriber to said service shall receive more than five text messages in any given week. Any attempt by Defendant to read same otherwise flies in the face of well-established contract law.[10] *See generally Abena v. Metropolitan Life Ins. Co.*, 544 F.3d 880, 884 (7th Cir. 2008) ("A poorly drafted contract term is still a contract term."); *Schwartz v. Comcast Corp.*, 256 Fed.Appx. 515, 520 (3d Cir. 2007) (customer is bound by terms on internet website); *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098, 1102 (Fla. 5th DCA 2006) (if any ambiguity exists, it will be strictly construed against the drafter). Moreover, it is hornbook law that

[10] Again, in what is a demonstrable misrepresentation to this Honorable Court, Defendant states "Wojcik admits to expressly consenting to receive *at least* five text messages per week…" [DE-6; p. 4] (emphasis added). **At no point has Plaintiff ever made such an allegation.** The Complaint in fact explains (several times) that Plaintiff agreed to the receipt of *no more than* five text messages per week. [DE-1; ¶¶ 16-20, 25, 34-35, 38-39].

consent, by definition, contemplates some sort of limitation, express or otherwise. *See* Restatement (Second) of Torts § 892A, cmt. d ("The terms and reasonable implications of the consent given determine whether it includes the particular conduct. * * * Unless the understanding is made clear by express language, these questions of interpretation are normally for the trier of fact to determine." * * * "Even when no restriction is specified the reasonable interpretation of the consent may limit it to acts at a reasonable time and place, or those reasonable in other respects."); Restatement (Second) of Torts, § 583, cmt. d. ("[A] consent may be limited to a publication to a particular person or at a particular time or for a particular purpose. If so, the publication is privileged only if made within those limitations."); *see also* Restatement (Second) of Torts § 652F cmt. b (2008) (consent may be limited in duration, geographical scope, or by other factors). In the present matter, any consent was unmistakably limited by the express language: *You will be opted in to receive 3-5 messages per week for a period of 12 months*. Simply put, these are the terms that Defendant advertised and to what its subscribers agreed.

Defendant asks this Court to ignore certain express terms, while at the same time, it suggests that it is entitled to some sort of relief under those same terms as well. [DE-6; pp.12-13 ("Given his admitted unilateral ability to voluntarily opt-out of the Text Service at any time…")]. Defendant argues in its Motion to Dismiss that Plaintiff could have simply stopped the messages at any time by exercising his contractual right to opt out. *Id.* Unfortunately, this is not a recognized defense under the TCPA. *Holtzman v. Turza*, 2010 WL 3076258, at *5 (N.D.Ill.2010) ("[m]itigation of damages is not a defense under the TCPA, and each instance of a violation is independently actionable."); *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 868 N.E.2d 270, 275 (Ohio 2007) ("There is no duty to mitigate in TCPA cases."); *Manuf. Auto Leasing, Inc. v.*

Autoflex Leasing, Inc., 139 S.W.3d 342, 347 (Tex.Ct.App.2004); *Onsite Computer Consulting Svs., Inc. v. Dartek Computer Supply Corp.*, 2006 WL 2771640, at *4 (Mo.Ct.App.2006) ("Plaintiff was not required to mitigate its damages by calling Defendant."); *Jemiola v. XYZ Corp.*, 126 Ohio Misc.2d 68, 802 N.E.2d 745, 750 (Ohio Com.Pl.2003) ("plaintiff has no obligation to mitigate damages [under TCPA], since the amount of damages is specifically set by statute and is therefore mandatory"); Fed. Comm. Comm'n, *In re 21st Century Fax(es), Ltd.*, Enforcement Action Letter, Case No. EB–00–TC–)) (March 8, 2000) ("Faxing even an advertisement . . . constitutes a violation of the TCPA . . . . Recipients of unsolicited facsimile advertisements are not required to ask that senders stop transmitting such materials."). Plaintiff similarly maintains that such a "defense" is nonsensical. The only time a consumer could be expected to opt out of the Buffalo Bills mobile alert service is *after* Defendant has breached the terms of its stated agreement; at that point, Defendant has already violated the TCPA. Perhaps unwittingly, it is notable that Defendant tacitly admits liability in its own motion. [DE-6; p. 13 ("…Plaintiff cannot plausibly argue that he has received **more than one** purportedly unauthorized text."] (emphasis added).

V. There is no exemption under 47 U.S.C. § 227(b)(1)(A)(iii) for "informational messages" as the TCPA is content neutral.

Defendant BUFFALO BILLS, INC. is far from a not-for-profit company. The intent of the subject mobile alert service is clarified in one of the first messages received by Mr. Wojcik which reads as follows:

[September 12, 2012]

> Hey fans, do u have our new app? To get BILLS Mobile, click here or enter it into ur mobile browser: http://bit.ly/buffbills Not compatible on all devices.

[*See* Declaration of Jerry Wojcik attached hereto as "Exhibit A"]. The instant lawsuit similarly alleges that the Buffalo Bills send a confirmatory message to its subscribers that pronounces:

> Thanks for joining BILLS alerts, you will receive up to 5msgs/week. U r also entered 2win tix & merch! Text STOP 2quit, HELP 4help. Msg&data rates may apply.

[DE-1; ¶ 19]. Any claim from Defendant that its mobile alert service is noncommercial in nature rings hollow. While not determinative of the present litigation, it should be noted that the "informational" nature of the messages at issue inherently builds fan loyalty and therefor the Buffalo Bills "brand."[11] Irrespective of same, there is no such exemption under 47 U.S.C. § 227(b)(1)(A)(iii) for so-called "informational messages." The FCC has unequivocally stated, "[w]e also reiterate that the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party. **We note that this prohibition applies regardless of the content of the call, and is not limited only to calls that constitute 'telephone solicitations.'"** *In re the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R 559, 565 (Jan. 4, 2008) (emphasis added).[12]

Defendant's reliance upon *Ryabyshchuck v. Citibank (South Dakota) N.A.*, Slip Copy, 2012 WL 5379143 (S.D.Cal. October 30, 2012) and *Ibey v. Taco Bell Corp.*, 2012 WL 2401972, at *2–3 (S.D. Cal. June 18, 2012) is a classic red herring argument. Both of the aforesaid cases

[11] In the context of unsolicited fax transmissions, the FCC has rejected the notion that unsolicited advertisements that offer "free" services are not actionable under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967-01 (May 3, 2006) ("May 2006 FCC Rules"). The FCC has ruled that such fax transmissions, regardless of whether they offer "free" services, are "unsolicited advertisements under the TCPA's definition." *Id*. The FCC noted that the "free" nomenclature often "serve[s] as a pretext to advertise commercial products and services." *Id.*

[12] It should be noted that on September 22, 2011, Rep. Terry Lee of Nebraska sponsored the Mobile Informational Call Act of 2011 (H.R. 3035), which sought in part to exempt certain informational (auto-dialed) calls made to cellular telephones. The proposed legislation was opposed by 48 of 50 Attorneys General and met by public outcry. The bill was later withdrawn on December 15, 2011.

are based upon a single confirmatory opt out message having been sent to a consumer.[13] Conversely, in the matter at bar, no confirmatory opt out message has even been alleged. Likewise, whether Plaintiff could have possibly opted out of the mobile alert service, such conjecture from Defendant is a nonstarter.[14] This is because once a sixth message has been received (during any one week period), the agreement has been breached and the TCPA has consequently been violated. A subscriber to the Buffalo Bills mobile alert service cannot be expected to presage whether the Defendant never intended to abide by its stated terms and conditions. As previously explained, mitigation of damages is not a defense under the TCPA. *Powell v. West Asset Management, Inc.*, No. 10-cv-7852, 2011 WL 1126040 (N.D. Ill. Mar. 24, 2011).

In a similar vein, Defendant also takes the position that a single violation of the TCPA cannot form the basis of a federal lawsuit. [DE-6; pp. 12-13]. This is also incorrect. As noted in *Holtzman v. Turza*, 2010 WL 3076258, at *5 (N.D. Ill. 2010), "each instance of a violation is independently actionable." *See also Jemiola v. XYZ Corp.*, 126 Ohio Misc.2d 68, 802 N.E.2d 745, 750 (Ohio Com.Pl. 2003); *Adamcik v. Credit Control Servs., Inc.*, 832 F.Supp.2d 744, 754 n. 15 (W.D. Tex. 2011) (observing that Congress intended statutory fines in TCPA as measure to deter violations).

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

To state a claim for a violation of the TCPA, a plaintiff must allege facts demonstrating that Defendants made calls with certain equipment termed an "automatic telephone dialing system" ("ATDS"), which Congress defines as "equipment which *has the capacity* (A) to store

[13] Plaintiff would further add that any precedential value as to *Ibey* and *Ryabyschuck* has been recently supplanted by FCC Order as referenced in fn. 14 below.

[14] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling re SoundBite TCPA Petition (Released: November 29, 2012) (holding that "[a]lthough we interpret section 227 as not barring entities from sending certain confirmation text messages, *we acknowledge that consumer consent to receive these messages is not unlimited*.") *Id.* at pg. 7 (emphasis added).

or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(A)(1)(iii); *see also Satterfield*, 569 F.3d at 950 (citing 47 U.S.C. § 227(b)(1)(A)(iii)); *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010). Plaintiff's allegations squarely meet each element.

Defendant argues in support of dismissal of the Complaint that Plaintiff is merely speculating that Defendant used an automatic dialing system or random or sequential number generator. [DE-6; pp. 13-17]. While allegations that merely restate the TCPA's definition of an ATDS may, in and of themselves, fall short of Rule 8(a)'s minimal pleading guidelines, additional allegations that a defendant used a third party or short code to transmit messages "*en masse*" to consumers are sufficient to allege the use of an ATDS in satisfaction of federal pleading requirements. *See Kramer*, 759 F. Supp. 2d at 1172; *Kazemi*, 2010 WL 963225, at *2; *Abbas v. Selling Source, LLC*, 2009 WL 4884471, *3 (N.D.Ill. Dec. 14, 2009). Precisely like the plaintiffs in *Pimental*, *Kramer*, *Kazemi*, *and Abbas*, Plaintiff supports his allegations that Defendant used an ATDS with specific facts regarding the nature of the text messages received and the method in which those text messages were transmitted. In particular, Plaintiff alleges that the text messages were transmitted "*en masse*" by Defendant or a party authorized by Defendant. [DE-1; ¶¶ 14, 24, 26]. Plaintiff also provides additional information implicating the use of ATDS capable technology, including "up to the minute news" [DE-1; ¶ 17] and a potential subscriber base ranging anywhere between 100,000 and 400,000 people. [DE-1; ¶ 23]. At least one court within this Circuit has found that such information plausibly suggests the use of an ATDS. *Buslepp v. B & B Entertainment, LLC*, Slip Copy, 2012 WL 1571410 (S.D. Fla. May 3, 2012). Other federal courts have noted that a plaintiff cannot reasonably be expected to identify the specific technology utilized by defendant without the benefit of discovery. *Hickey v.*

Voxernet, LLC, --- F.Supp.2d ----, 2012 WL 3682978 (W.D.Wash. 2012); *Knutson v. Reply!, Inc.,* No. 10–cv–1267–BEN, 2011 WL 1447756, at *1 (S.D.Cal. April 13, 2011); *Torres v. Nat'l Enter. Sys., Inc.,* No. 12 C 2267, 2012 WL 3245520, at *3 (N.D. Ill. Aug. 7, 2012).

While Plaintiff's well-pleaded facts establish that the equipment used to send the text message advertisements at issue plausibly constitutes an ATDS, it should be noted that in order for this Court to find liability, Plaintiff need not prove that an ATDS was used, merely that the device sending the text messages has the capacity to store and produce phone numbers – use of that capacity is not an element of a TCPA claim. *See Satterfield*, 569 F.3d at 951; *Lozano*, 702 F. Supp. 2d at 1011. In the end, Plaintiff alleges sufficient facts to demonstrate that Defendant's equipment has the requisite capacity to store and produce phone numbers, and thus, the contention that they did not use that capacity is irrelevant in the context of the TCPA. *Id.*

VII. The Buffalo Bills are liable for the text messages which were sent on their behalf by Vibes Media, Inc.

An entity may be held liable under the TCPA even if it hired another entity to send the text messages. In *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 955 (9th Cir. 2009), the defendants (Simon & Schuster and ipsh!net) engaged a third company to physically send the text messages at issue. While Simon & Schuster did not directly send the allegedly violative messages, the Ninth Circuit did not find it problematic that the messages were in fact sent by another firm. *See Kramer v. Autobytel, Inc.,* 759 F.Supp.2d 1165, 1170 (N.D.Cal. 2010); *In re Jiffy Lube Int'l. Inc., Text Spam Litig.,* 847 F.Supp.2d 1253, 1261 (S.D.Cal. 2012); *see also, Account. Outsourcing, LLC v. Verizon Wireless,* 329 F.Supp.2d 789, 805–806 (M.D.La. 2004) (accepting the United States' argument, cited the "rule of statutory construction that makes explicit vicarious liability unnecessary," and held that "congressional tort actions implicitly

include the doctrine of vicarious liability."). In the present matter, the complaint alleges a class consisting of all persons who received messages from "*Defendant or by another party on behalf of Defendant*" in violation of the applicable terms and conditions governing the parties. [DE-1; ¶ 25]. Ironically, Plaintiff's allegations are further supported by the Cassell Declaration which states: *BBI is allowed to utilize Vibes' computer servers and software support for the text messaging service…* [DE-6-1; ¶ 6]. In sum, the allegations, undisputed facts, and applicable case law all support the legal notion that the Buffalo Bills are vicariously liable for the allegedly violative text messages which were sent on their behalf by Vibes Media, Inc.

VIII. There are clearly genuine issues of material fact in dispute; furthermore, Plaintiff should be permitted the opportunity to depose Defendant's declarant as it relates to the technology at issue.

In what could best be described as a legal Hail Mary pass, Defendant has moved for summary judgment based upon the conclusory statements of Vibes Media, Inc.'s ("VMI") Chief Financial Officer, Charley Cassell ("Cassell Declaration"). Mr. Cassell's personal knowledge of VMI's telephony and professional expertise with regard to ATDS capable technology are unexplained. It is also markedly questionable as to why Defendant has proffered the declaration of a corporate officer, typically responsible for managing financial risks of a company, instead of someone more suitable, such as the Vice President of Product and Technology. In a single sentence, Defendant's Declarant states that "[t]he server equipment and software utilized by Vibes, and made available to BBI, does not have (and has not had) the capacity to store or produce telephone numbers using a random or sequential number generator." [DE-6-1; ¶ 10]. Notably absent from Mr. Cassell's conclusions is whether this was in fact the (same or only) technology used by BUFFALO BILLS, INC. to send the text messages at issue to its

subscribers.[15] Furthermore, Mr. Cassell also fails to opine whether VMI utilizes a "predictive dialer" to call the subscribers to the Buffalo Bills mobile alert service.

A predictive dialer is considered an ATDS under the TCPA. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act. Of 1991,* 18 F.C.C.R. 14014, 14093 (2003). "A predictive dialer is . . . hardware, when paired with certain software, [which] has the capacity to store or produce numbers and dial those numbers . . . from a database of numbers." *Id.* at 14091. The FCC states that "the basic function of such equipment . . . [is] the capacity to dial numbers without human intervention." *In the Matter of Rules & Regulations Implementing the Te. Consumer Prot. Act of 1991*, 23 F.C.C.R. 559, 566 (2008). The Cassell Declaration only makes reference to VMI's "server equipment" and "software" – it fails to make any mention of VMI's hardware, dialing technology, or how VMI manages to deliver "*up to the minute news and team alerts*" to what may potentially be tens of thousands of subscribers to the Buffalo Bills mobile alert service. [DE-6-1].

Plaintiff respectfully requests that he be permitted to depose Mr. Cassell and examine the technology utilized by both VMI and Defendant, so that his own retained expert, Randall A. Snyder, may examine the inner workings of same and render a more detailed legal opinion as to why the technology at issue qualifies as an ATDS under current Federal Communications Commission (FCC) guidelines. Plaintiff maintains that his request is reasonable as Rule 56(f) of the Federal Rules of Civil Procedure provides that a district court may deny a motion for summary judgment or order a continuance to permit affidavits to be obtained or depositions to be taken if it appears from the affidavit of the party opposing summary judgment that he or she cannot present by affidavit facts essential to justify his or her position. *See* Fed.R.Civ.P. 56(f). The Eleventh Circuit has held that "the opposing party need not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) in order to invoke the protection of that rule because the written representation by [the opposing party's] lawyer, an officer of the court, is in the spirit of

[15] Also suspiciously omitted from paragraph 10 of the Cassell Declaration are the words "to be called." *See* 47 U.S.C. § 227(a)(1)(A).

Rule 56(f) under the circumstances." *Fernandez v. Bankers Nat'l Life Ins. Co.,* 906 F.2d 559, 570 (11th Cir. 1990) (internal quotations omitted) (alternation in original).

Contemporaneous with the above-stated request to this Honorable Court, Plaintiff proffers the Declaration of Randall A. Snyder in opposition to Defendant's Motion for Summary Judgment. Mr. Snyder is a recognized authority on automatic telephone dialing systems having provided testimony in the seminal case of *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). Mr. Snyder's declaration and *curriculum* vitae are attached hereto as "Exhibit B." Mr. Snyder's testimony fills in the many prominent gaps present in the Cassell Declaration. At the very least, the Declaration of Randall A. Snyder establishes genuine issues of material fact as to whether VMI, on behalf of the Buffalo Bills, employed the use of ATDS technology with regard to the Buffalo Bills mobile alert service. *See Satterfield*, 569 F.3d at 951 (holding that genuine issue of material fact existed as to whether telephone system used by publisher and mobile marketing firm had capacity to both store or produce telephone numbers to be called using random or sequential number generator and to dial such numbers as required to be considered automatic telephone dialing system, thus precluding summary judgment as to consumers' class action claim that publisher and marketing firm violated TCPA); *see also, Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007) (explaining that a court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied.).

CONCLUSION

For the reasons discussed above, Plaintiff respectfully requests that Defendant's Motion to Dismiss the Complaint, or in the alternative, Motion for Summary Judgment [DE-6] be denied, or in the alternative, Plaintiff respectfully requests that this Honorable Court defer ruling

on Defendant's Motion for Summary Judgment until Plaintiff has had an opportunity to depose Defendant's Declarant (Charley Cassell).[16]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 7th day of December 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this 7th day of December 2012 via U.S. mail and/or some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

[16] It remains unknown whether Mr. Cassell is the person with the most knowledge with regard to the telephony used by VMI. Thus, Plaintiff may in fact need to depose some other person at VMI and reserves his rights accordingly.

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