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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 Noah Duguid, *on behalf of himself and all*
20 *others similarly situated*

21 Plaintiff,

22 vs.

23 Facebook, Inc.,

24 Defendant.

Case No.: 3:15-cv-00985-JST

**MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Hearing Date: September 22, 2016
Time: 2:00 PM
Court: Courtroom 9
Judge: Hon. Jon S. Tigar

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIESii

INTRODUCTION 1

STATEMENT OF FACTS2

 I. Plaintiff Received Illegal Automated Text Messages from Facebook .2

 II. Facebook’s Text Messages Were Sent From an Automatic Telephone
 Dialing System Without Human Intervention4

STANDARD OF REVIEW4

ARGUMENT5

 I. Plaintiff Alleges Concrete Injury and Has Standing.....5

 II. Plaintiff Plausibly Alleges Facebook’s Use of an ATDS 8

 A. Plaintiff Plausibly Alleges Facebook’s Use of an ATDS..... 8

 B. The Messages’ Content Supports ATDS Use 13

 C. The Messages’ Context Supports ATDS Use, Not Human
 Intervention 15

 D. Plaintiff Plausibly Alleges Facebook’s Use of Equipment which
 has the Capacity to Sequentially and Randomly Dial 17

 III. Facebook’s Messages Address No Emergency Situation and are Not
 Exempt From TCPA Liability 19

 A. Binding Ninth Circuit Precedent Requires this Court to Uphold the
 TCPA23

 B. Supreme Court Precedent Supports the Ninth Circuit’s Rulings24

 C. Congress’s 2015 TCPA Amendment Cannot Render the Entire
 TCPA Unconstitutional26

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases

1

2 **Cases**

3 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).....4, 5

4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).....4

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10 *Cook, Perkiss & Liehe v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242 (9th Cir. 1990) 5

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 12 Nov. 19, 2014)9

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 14 2015)16

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 18 2016)1, 8, 9, 11

19 *Flores v. Adir Int’l, LLC*, No. CV 15-00076-AB, 2015 WL 4340020 (C.D. Cal. July
 20 15, 2015)14

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 22 2015)18

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 25 Jan. 17, 2013).....8

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 27 2014 WL 4922379 (C.D. Cal. Apr. 16, 2014)18

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2 *Hovila v. Tween Brands, Inc.*, No. C09-0491RSL, 2010 WL 1433417 (W.D. Wash.

3 Apr. 7, 2010).....25

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5 *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015).....6

6 *Knieval v. ESPN*, 393 F.3d 1068 (9th Cir. 2005)5

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8 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992).....5, 6

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14 Jan. 30, 2015).....13, 16, 17

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16 *Meyer v. Portfolio Recovery*, 707 F.3d 1036 (9th Cir. 2012).....8

17 *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639 (N.D.W. Va. 2014).....10

18 *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995)22, 23, 26

19 *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013)18

20 *Neptune v. Whetstone Partners, LLC*, 34 F. Supp. 3d 1247 (S.D. Fla. 2014).....9

21 *Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014 WL 6708465 (N.D. Cal. Nov. 26,

22 2014) passim

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28 May 22, 2013).....8

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 2 *Ryabyshchuck v. Citibank (S. Dakota) N.A.*, No. 11-CV-1236-IEG (WVG), 2012 WL
 3 5379143 (S.D. Cal. Oct. 30, 2012)21
 4 *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009)8, 18, 25, 26
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 9 **Statutes**
 10 28 U.S.C. 2342(1)18
 11 47 U.S.C. § 227 notes § 28
 12 47 U.S.C. § 227(a)(1)1, 9, 17
 13 47 U.S.C. § 227(b)(1)8
 14 47 U.S.C. § 227(b)(1)(A)..... passim
 15 47 U.S.C. § 227(b)(1)(B).....23
 16 **Rules**
 17 Fed. R. Civ. P. 8(a)(2).....4
 18 **Regulations**
 19 47 C.F.R. § 64.1200(f)(4)19, 21, 25
 20 **Other**
 21 <https://www.fcc.gov/guides/wireless-emergency-alerts-wea>20
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 23 *2012*, 27 F.C.C.R. 13615 (2012)22
 24 *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
 25 *1991*, CG Docket No. 02–278, Report and Order, 18 FCC Rcd. 14014 (2003) ...6, 9,
 26 10
 27
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7 *(2006).....20*
8 **Legislative History**
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10 Bipartisan Budget Act of 2015 § 301(a), Pub. L. No. 114-74, 129 Stat. 58426
11
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INTRODUCTION

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2 On March 24, 2016, this Court granted Defendant Facebook Inc.’s
3 (“Facebook”) Motion to Dismiss because the Complaint did not plausibly allege
4 Facebook’s use of an ‘automatic telephone dialing system’ (“ATDS”) under the
5 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(a)(1). The Court
6 found that ATDS “encompass any equipment that stores telephone numbers in a
7 database and dials them without human intervention,” *Duguid v. Facebook, Inc.*, 3:15-
8 cv-00985-JST, 2016 WL 1169365, at *5 (N.D. Cal. Mar. 24, 2016), however the
9 Court held that Plaintiff’s complaint pursued a different theory of ATDS, *id.* at *6
10 (“But Duguid has not alleged that Facebook uses . . . equipment that functions like a
11 predictive dialer.”)), and thus was not plausible.

12 Plaintiff’s Amended Complaint remedies the deficiency head-on. Plaintiff
13 alleges, with factual specificity, that Facebook (1) stored telephone numbers in a
14 database, including Plaintiff’s, and then (2) sent those numbers template-based ‘login
15 notification’ text messages automatically without any human intervention. (Doc. No.
16 53 (“FAC”) ¶¶ 13-33).

17 Plaintiff also alleges, consistent with the Federal Communications
18 Commission’s (“FCC”) 2015 TCPA Order, that Facebook’s system has the *capacity*
19 to sequentially and randomly dial, or that the capacity could be added. (FAC ¶¶ 40-
20 50). Facebook asks the Court to expressly defy the FCC’s 2015 Order and rule that
21 its system cannot be an ATDS if it cannot *currently* dial sequentially or randomly.
22 Under the Hobbs doctrine, the District Court must follow the FCC and find that
23 Plaintiff has sufficiently pled Facebook’s computer-based system’s *capacities* as an
24 ATDS.

25 Facebook argues Plaintiff has failed to allege a concrete harm and thus lacks
26 standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). That is not so.
27 Plaintiff alleges being “frustrated with [Facebook’s] text message bombardment.”
28 (FAC ¶ 25; *see also* FAC ¶ 34). Plaintiff further alleges that Facebook committed

1 “extreme invasions into the privacy of American consumers,” including himself.
2 (FAC ¶¶ 55-56). Finally, Plaintiff alleges economic harm in the form of used-up and
3 interfered-with cellular telephone services for which he pays. (FAC ¶ 36). Any one of
4 these three harms satisfies *Spokeo*.

5 Facebook next argues its errant text messages are of such dire importance as to
6 qualify for the “emergency purposes” exception of the TCPA. The emergency
7 purposes exception is reserved for life-threatening emergencies like natural disasters
8 and Amber alerts, or select, condition-laden messages from financial institutions and
9 healthcare providers. Facebook’s text messages at issue here do not qualify.

10 Finally, Facebook argues that the TCPA provisions at issue here violate the
11 First Amendment. The Ninth Circuit has twice held that they do not. The United
12 States has already defended the constitutionality of the TCPA here and is expected to
13 do so again. The constitutionality of the 2015 TCPA amendment is irrelevant because
14 even if it were unconstitutional, it would be severed from the rest of the TCPA (the
15 part the Ninth Circuit has found constitutional, twice).

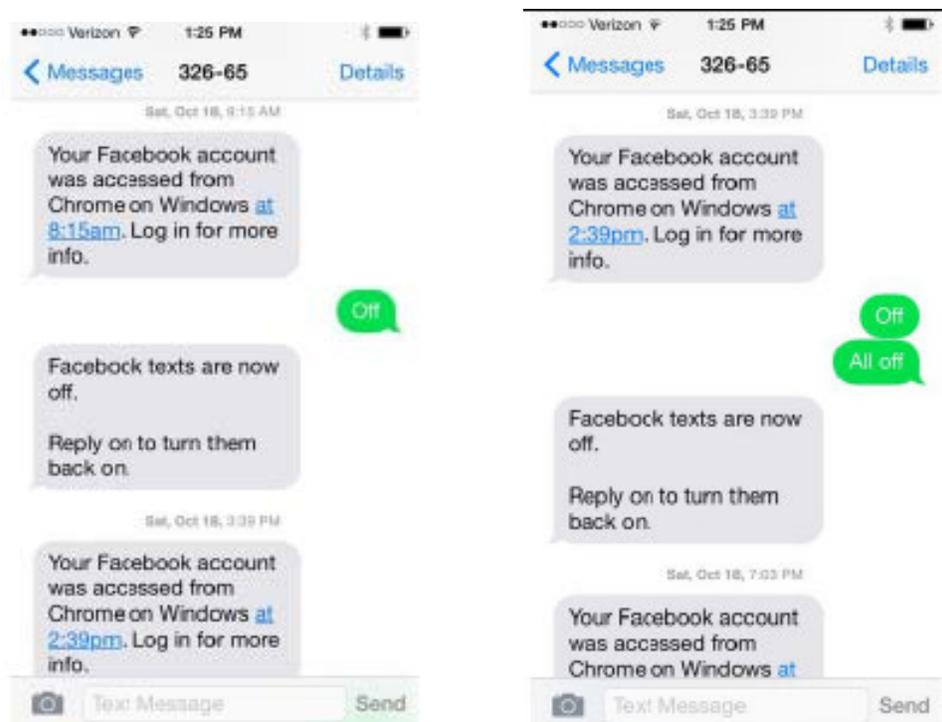
16 **STATEMENT OF FACTS**

17 **I. Plaintiff Received Illegal Automated Text Messages from Facebook**

18 Plaintiff has never had a Facebook account and never provided his cell phone
19 number to Facebook. (FAC ¶ 13). Nonetheless, in January, 2014, Facebook began
20 placing automated text messages to Plaintiff’s cellular telephone. (FAC ¶ 21).
21 Facebook’s messages were sent from number 326-65 (spelling FBOOK), an
22 abbreviated telephone number known as an SMS short code licensed and operated by
23 Facebook or one of its agents on its behalf. (FAC ¶ 22). The messages followed the
24 same pre-loaded template, stating: “Your Facebook account was accessed from
25 [_BROWSER_] at [_TIME_]. Log in for more info.” (FAC ¶¶ 23-30).

26 Plaintiff repeatedly requested that the text messages stop. In response to the
27 text messages, Plaintiff responded “Off.” Facebook responded that the texts “are now
28 off,” yet the texts continued:

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(FAC ¶¶ 25-26). By email, Plaintiff told Facebook that he was receiving unwanted messages and could not make them stop. (FAC ¶ 34). Facebook did not honor Plaintiff's request or respond in any meaningful manner. Instead, Facebook sent Plaintiff an email telling him how to report unwanted content on a Facebook page. (FAC ¶ 35). As Plaintiff told Facebook, the stock, automated email response "missed the point of [Plaintiff's] original abuse report entirely." (FAC ¶ 35, Ex. B).

Facebook provides instructions on its website to deactivate the login notification feature by accessing the subject Facebook account and changing the account settings. (FAC ¶ 52). These instructions are irrelevant to consumers like Plaintiff who do not have access to a Facebook account. Facebook offers no solution for these consumers. (FAC ¶ 58 (class members either (1) did not provide Facebook their number, or (2) were unsuccessful in opting out by responding to Facebook's text messages). In sum, Facebook's automated system is broken, does not offer the protections *required* by the FCC, and provides no way for Plaintiff and similarly situated consumers to stop its aggravating and invasive automated text messages.

1 (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff
2 pleads factual content that allows the court to draw the reasonable inference that the
3 defendant is liable for the misconduct alleged.” *Id.* “Dismissal under Rule 12(b)(6) is
4 appropriate only where the complaint lacks a cognizable legal theory or sufficient
5 facts to support a cognizable legal theory.” *Mendonado v. Centinela Hosp. Med. Ctr.*,
6 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must “accept all factual allegations in
7 the complaint as true and construe the pleadings in the light most favorable to the
8 nonmoving party.” *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

9 If a motion to dismiss is granted, a court should normally grant leave to amend
10 unless it determines that the pleading could not possibly be cured by allegations of
11 other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 247
12 (9th Cir. 1990).

13 ARGUMENT

14 I. Plaintiff Alleges Concrete Injury and Has Standing

15 Facebook first argues Plaintiff lacks standing under the Supreme Court’s recent
16 *Spokeo* decision because “he has failed to allege a concrete injury.” (Doc. No. 65 p.
17 16:18). However, Plaintiff does clearly plead multiple concrete injuries cognizable
18 under *Spokeo*, requiring denial of Facebook’s motion on this basis.

19 Standing consists of three elements: an injury in fact, fairly traceable to the
20 challenged conduct of the defendant, and that is likely to be redressed by a favorable
21 judicial decision. *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*,
22 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)). To establish injury in fact, Plaintiff must
23 show that he suffered an invasion of a legally protected interest that is “concrete and
24 particularized” and “actual or imminent.” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at
25 560). A concrete injury must be *de facto*, *i.e.* it must “actually exist.” *Id.*

26 In *Spokeo*, the Ninth Circuit held that the mere violation of a statutory right is a
27 sufficient injury in fact to confer standing, regardless of actual harm. *Robins v.*
28 *Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014). The Supreme Court vacated, ruling

1 that “Congress’ role in identifying and elevating intangible harms does not mean that
2 a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute
3 grants a person a statutory right and purports to authorize that person to sue to
4 vindicate that right.” *Spokeo*, 136 S. Ct. at 1549. Rather, “Article III standing requires
5 a concrete injury even in the context of a statutory violation.” *Id.*

6 To guide the concrete injury inquiry, the Supreme Court distilled several
7 “general principles” from its prior cases. First, concrete injuries need not be
8 “tangible.” *Id.* at 1549-50. Second, “[i]n determining whether an intangible harm
9 constitutes injury in fact, both history and the judgment of Congress play important
10 roles.” *Id.* at 1549. Accordingly, if the “alleged intangible harm has a close
11 relationship to a harm that has traditionally been regarded as providing a basis for a
12 lawsuit in English or American courts,” the plaintiff will have suffered a concrete,
13 redressable injury. *Id.* Moreover, “Congress is well positioned to identify intangible
14 harms that meet minimum Article III requirements,” thus its judgment in elevating
15 previously inadequate injuries is “instructive and important.” *Id.* (citing *Lujan*, 504
16 U.S. at 578).

17 Here, Plaintiff alleges tangible and intangible harms cognizable under *Spokeo*.
18 Plaintiff alleges economic harm in the form of used-up and interfered-with cellular
19 telephone services for which he pays. (FAC ¶ 36). *See Rules and Regulations*
20 *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02–
21 278, Report and Order, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003) (the
22 “2003 TCPA Order”) (“The [FCC] has long recognized, and the record in this
23 proceeding supports the same conclusion, that wireless customers are charged for
24 incoming calls whether they pay in advance or after the minutes are used.”); *Soppet v.*
25 *Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012) (identifying as
26 actual harms “the cost of airtime minutes and . . . listen[ing] to a lot of useless
27 voicemail”); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 728 (S.D.N.Y. 2015)
28 (“The legislative history of the TCPA makes clear that the provision against

1 autodialing was drafted to protect consumers who pay additional fees for cellular
2 phones, pagers, or unlisted numbers [and] are inconvenienced and even charged for
3 receiving unsolicited calls from automatic dialer systems.” (internal quotation marks
4 omitted)); *see also Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S.,*
5 *P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015) (finding “concrete and personalized injury
6 in the form of the occupation of [plaintiff’s] fax machine for the period of time
7 required for the electronic transmission of the data”).

8 Moreover, Plaintiff alleges being “frustrated with [Facebook’s] text message
9 bombardment” (FAC ¶ 25; *see also* FAC ¶ 34), a harm clearly ‘elevated’ by Congress
10 and recognized by courts. *See* 137 Cong. Rec. 30,821-30,822 (1991) (Statement of
11 Sen. Hollings) (labeling robocalls “the scourge of modern civilization. They wake us
12 up in the morning; they interrupt our dinner at night; they force the sick and elderly
13 out of bed; they hound us until we want to rip the telephone right out of the wall.”);
14 *see also Soppet*, 679 F.3d at 639 (identifying having to “listen to a lot of useless
15 voicemail” as a harm); *Martin v. Pioneer Credit Recovery, Inc.*, No. 2:15-cv-02099-
16 CSB-EIL (C.D. Ill. Jan. 4, 2016) (“Unlike the plaintiff in *Robins*, Plaintiff’s
17 Complaint alleges an actual harm: the unauthorized phone calls he received from
18 Defendant in violation of the TCPA.”). Indeed, not only did Plaintiff endure the
19 unpleasantness of receiving Facebook’s unwanted and entirely irrelevant text
20 messages (they were not for him—he is not a Facebook user), he wasted time and
21 energy asking Facebook to stop the messages, which Facebook ignored. (FAC ¶¶ 25-
22 26, 34-35).

23 Finally, Plaintiff alleges that Facebook committed “extreme invasions into the
24 privacy of American consumers,” including himself. (FAC ¶¶ 55-56 (consumers
25 complaining of text messages from Facebook “at all hours of the night”). Invasion of
26 privacy “has traditionally been regarded as providing a basis for a lawsuit in . . .
27 American courts,” *Spokeo*, 136 S. Ct. at 1549, and Congress sought to elevate
28 invasions of privacy committed via consumers’ phones with autodialers, *see* 47

1 U.S.C. § 227 notes § 2 (“The Congress finds that: . . . [b]anning automated or
 2 prerecorded telephone calls . . . is the only effective means of protecting telephone
 3 consumers from this nuisance and privacy invasion.”); *see also Satterfield v. Simon &*
 4 *Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“The purpose and history of the
 5 TCPA indicate that Congress was trying to prohibit the use of ATDSs to
 6 communicate with others by telephone in a manner that would be an invasion of
 7 privacy. . . . [A] voice message or a text message are not distinguishable in terms of
 8 being an invasion of privacy.”). Accordingly, Plaintiff has alleged concrete harms
 9 and has standing.

10 **II. Plaintiff Plausibly Alleges Facebook’s Use of an ATDS**

11 **A. Plaintiff Plausibly Alleges Facebook’s Use of an ATDS**

12 Seeking to turn the motion to dismiss into one for summary judgment,
 13 Facebook argues that its system cannot be an ATDS because “the messages were not
 14 sent en masse and were sent with human intervention.” (Doc. No. 65 p. 17:15-16). At
 15 the pleading stage, “a plaintiff must allege that ‘(1) the defendant called a cellular
 16 telephone number; (2) using an automatic telephone dialing system; (3) without the
 17 recipient’s prior express consent.’” *Duguid*, 2016 WL 1169365, at *4 (quoting *Meyer*
 18 *v. Portfolio Recovery*, 707 F.3d 1036, 1043 (9th Cir. 2012)); 47 U.S.C. § 227(b)(1).
 19 The bar for alleging ATDS is low, especially in the case of text messages, where the
 20 only facts are as to the receipt of the messages themselves:

21 Plaintiffs alleging the use of a particular type of equipment under the
 22 TCPA are generally required to rely on indirect allegations, such as the
 23 content of the message, the context in which it was received, and the
 24 existence of similar messages, to raise an inference that an automated
 dialer was utilized. Prior to the initiation of discovery, courts cannot
 expect more.

25 *Robbins v. Coca-Cola-Co.*, No. 13-CV-132-IEG (NLS), 2013 WL 2252646, at *3
 26 (S.D. Cal. May 22, 2013) (quoting *Gragg v. Orange Cab Co., Inc.*, No. C12-
 27 0576RSL, 2013 WL 195466, at *2 n.3 (W.D. Wash. Jan. 17, 2013)); *see Duguid*,
 28 2016 WL 1169365, at *4 (“Because it may be difficult for a plaintiff to identify the

1 specific type of dialing system used without the benefit of discovery, courts have
2 allowed TCPA claims to proceed beyond the pleading stage where a plaintiff's
3 allegations support the inference that an ATDS was used.”); *see, e.g., Cunningham v.*
4 *Kondaur Capital*, No. 3:14-1574, 2014 WL 8335868, at *6 (M.D. Tenn. Nov. 19,
5 2014) (finding plaintiff sufficiently alleged use of ATDS where alleged “[text]
6 messages were repeated within a short span of time and consisted of the same
7 content”); *Neptune v. Whetstone Partners, LLC*, 34 F. Supp. 3d 1247, 1250 (S.D. Fla.
8 2014) (finding plaintiff sufficiently alleged use of ATDS where he “describe[d] the
9 generic content of the messages, *i.e.*, a prerecorded voice reminding Plaintiff that his
10 payment was due”); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1129 (W.D.
11 Wash. 2012) (plaintiff stated a claim where alleged “that Voxer transmit[ted]
12 automated text messages to lists of cell phone numbers that Voxer [was] given access
13 to,” and “the generic form of the message”); *In re Jiffy Lube Intern., Inc. Text Spam*
14 *Litig.*, 847 F. Supp. 2d 1253, 1260 (S.D. Cal. 2012) (class action plaintiffs sufficiently
15 alleged use of ATDS where plaintiffs “stated that they received a text message from
16 an SMS short code and that the message was sent by a machine with the capacity to
17 store or produce random telephone numbers”).

18 Plaintiff far surpasses the required threshold. The TCPA defines ATDS as
19 “equipment which has the capacity—(A) to store or produce telephone numbers to be
20 called, using a random or sequential number generator; and (B) to dial such numbers.”
21 47 U.S.C. § 227(a)(1) (emphasis added). This definition contemplates “autodialing
22 equipment that either stores or produces numbers.” 2003 TCPA Order, at ¶ 132.
23 Thus, as acknowledged by this Court, equipment is an ATDS if it “stores telephone
24 numbers in a database and dials them without human intervention.” *Duguid*, 2016 WL
25 1169365, at *5 (quoting *Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014 WL
26 6708465, at *1 (N.D. Cal. Nov. 26, 2014)). Moreover, the FCC has repeatedly
27 rejected ATDS definitions “that fit only a narrow set of circumstances in favor of
28 broad definitions which best reflect[] legislative intent by accommodating the full

1 range of telephone services.” *Rules and Regulations Implementing the Telephone*
2 *Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-
3 278, FCC 15-72, at ¶ 16 (July 10, 2015) (the “2015 TCPA Order”) (internal quotation
4 marks omitted). “The basic functions of an autodialer are to dial numbers without
5 human intervention and to dial thousands of numbers in a short period of time.” 2015
6 TCPA Order, at ¶ 17 (internal quotation marks omitted). “Human intervention,” in
7 turn, means significant human involvement in the *dialing* of a number, and any
8 human involvement with phone number compilation is irrelevant. *See* 2003 TCPA
9 Order, at ¶ 132 (“The basic function of [ATDS], however, has not changed—the
10 capacity to *dial* numbers without human intervention.”) (emphasis added and
11 omitted); *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639, 654 (N.D.W. Va. 2014)
12 (“[I]t is irrelevant under the FCC’s definition of a predictive dialer that humans are
13 involved in the process of creating the lists that are entered into the Campaign
14 Manager software.”).

15 Plaintiff plausibly alleges Facebook’s use of powerful automated equipment
16 that stores and dials thousands of numbers in short periods of time without human
17 intervention. First, Plaintiff alleges that Facebook *stores* telephone numbers in a
18 database. Plaintiff alleges, and Facebook acquiesces, that Facebook acquires
19 telephone numbers when consumers sign up for a Facebook account. (FAC ¶¶ 14, 19,
20 38; Doc. No. 65 p. 21:8-11 (“As the Court recognized, the login messages were sent
21 only after one or more individuals took a series of steps: someone signed up for
22 Facebook, “add[ed] [the] mobile number[] to [the] account,” and activated login
23 notifications by text message” (alterations in original))). Facebook then stores
24 these telephone numbers in a database, to be dialed when “someone . . . access[es]
25 that account from a new or unrecognized device.” (Doc. No. 65 p. 21:11-12; *see also*
26 FAC ¶ 16). Accordingly, Facebook *stores* the telephone numbers to be called.

27 Second, Plaintiff alleges that Facebook called Plaintiff *without human*
28 *intervention*, *i.e.* no human being is involved in the sending of Facebook’s login

1 notifications. “Facebook established an automated ‘login notification’ process through
2 which it sends automated, computer-generated text messages to cellular telephones
3 when a Facebook account is accessed from a new device” (FAC ¶¶ 14, 16, Ex.
4 A). In Facebook’s own words, Facebook’s automated login notifications must be
5 “activated” by adjusting settings on a Facebook account. (Doc. No. 65 p. 21:10).
6 Facebook’s login notifications are then “trigger[ed]” when “someone . . . access[es]
7 that account from a new or unrecognized device.” (Doc. No. 65 p. 21:12). This does
8 not describe a Facebook employee observing the new login attempt, picking up a
9 device, and messaging Plaintiff. This describes a sophisticated automated system
10 which messages stored phone numbers automatically upon a Facebook account being
11 accessed. Again, Plaintiff need not prove these capacities—he must plausibly allege
12 them. Plaintiff’s allegations of a predictive dialer-like system fall in line with those in
13 *Nunes*, 2014 WL 6708465 (alleging equipment which stores then dials numbers
14 without human intervention), acknowledged in the Court’s March 24, 2016 Order.
15 *Duguid*, 2016 WL 1169365, at *5.

16 Third, Facebook’s automated messaging system is powerful, capable of
17 extreme invasions into consumers’ lives, and fits within the broad-definition/
18 common-sense approach compelled by the FCC. Facebook services over a billion
19 Facebook accounts. (FAC ¶ 55). The login notifications are sent regarding every
20 Facebook account for which they are activated. (FAC ¶ 14; Doc. No. 65 p. 21:8-12).
21 Plaintiff himself received numerous login notification text messages, supposedly
22 regarding a single Facebook account. (*See* FAC ¶¶ 23-26; Doc. No. 65 p. 21:9-11). It
23 is therefore more than plausible, and indeed highly likely, that no Facebook employee
24 is triggering (never mind writing) each and every one of what must be millions of
25 login notification text messages. They are, as the Amended Complaint pleads, sent
26 automatically, without human intervention.

27 Moreover, the broad-definition/common-sense approach supports the
28 plausibility of an ATDS, where Facebook utterly failed to set up a reasonable means

1 for consumers to opt out of its errant computer-generated messages (as expressly
2 required by the FCC), and thus continued to message consumers after they
3 specifically requested the messages ‘stop’ or be turned ‘off.’ “[A] called party may
4 revoke consent at any time and through any reasonable means. A caller may not limit
5 the manner in which revocation may occur.” 2015 TCPA Order, at ¶ 47. “Consumers
6 may revoke, for example, . . . directly in response to a call initiated or made by a
7 caller. . . . [C]onsumers **must** be able to respond to an unwanted call—using either a
8 reasonable oral method or a reasonable method in writing—to prevent future calls.”
9 2015 TCPA Order, at ¶ 64 (emphasis added). Here, Plaintiff reasonably requested
10 that Facebook cease by responding to Facebook’s messages: “Off.” (FAC ¶ 25).
11 Facebook immediately responded via an automated message: “Facebook texts are
12 now off. Reply on to turn them back on.” (FAC ¶ 26). However Facebook’s
13 messages were not off—they continued to come in just as they had before Plaintiff’s
14 request. (FAC ¶ 26). Plaintiff is not alone—other consumers report having the same
15 issue. (FAC ¶ 54 (“I have tried texting ‘Off’ ‘OFF’ ‘off’ “STOP’ ‘Stop’. NONE of
16 them have stopped the text messages.”)). Accordingly, under the broad-definition
17 approach compelled by the FCC, this Court should not hesitate to find that Plaintiff
18 has pled that Facebook’s system is the exact type of automated equipment capable of
19 extreme invasions of privacy which was targeted by Congress and which is prohibited
20 by the TCPA. *See Soppet*, 679 F.3d at 639 (“But [ATDS] lack human intelligence
21 and, like the buckets enchanted by the Sorcerer’s Apprentice, continue until stopped
22 by their true master.”).

23 The Third Circuit’s decision in *Dominguez v. Yahoo, Inc.*, 629 Fed. App’x 369
24 (3d Cir. 2015), overturning summary judgment for the defendant on the ATDS issue,
25 strongly supports Plaintiff’s argument that ATDS has been plausibly pled. There, the
26 plaintiff acquired a new cell phone number and began receiving text messages
27 regarding the number’s former user’s Yahoo email account. *Id.* at 370. Here, Plaintiff
28 is not a Facebook user and received text messages on his cell phone regarding

1 someone else's Facebook account. (FAC ¶¶ 13, 21). There, Yahoo's text messages
2 were triggered each time a new email reached the subject email inbox. *Dominguez*,
3 629 Fed. App'x at 370. Here, Facebook's text messages were supposedly triggered
4 upon the subject Facebook account being accessed from a new location or device.
5 (Doc. No. 65 p. 21:9-11). There, the plaintiff responded "stop" and "help" to some of
6 the text messages, and sought help from Yahoo's customer service, all to no avail.
7 *Dominguez*, 629 Fed. App'x at 370-71. Here, Plaintiff responded "Stop" to
8 Facebook's text messages. Facebook responded "Facebook texts are now off," but
9 the texts continued. (FAC ¶¶ 25-26). Plaintiff also emailed Facebook, also to no
10 avail. (FAC ¶¶ 34-35). The Third Circuit held that material facts remained and
11 overturned summary judgment for Yahoo. *Dominguez*, 629 Fed. App'x at 372-73.
12 This Court should hold that Plaintiff's pleading plausibly states a claim and deny
13 Facebook's motion.

14 B. The Messages' Content Supports ATDS Use

15 Facebook argues that its system used to send login notifications cannot possibly
16 be an ATDS because no two messages to Plaintiff were completely identical (Doc.
17 No. 65 pp. 18-19) and, putting it another way, it did not send the same exact message
18 "en masse" (Doc. No. 65 pp.21-22). That Facebook's system does not send text
19 message spam en masse, but instead sends slightly varied messages from templates
20 using a set of algorithms, does not mean the system is not an ATDS. Indeed, the term
21 "*en masse*" appears to have been introduced into TCPA vernacular by the
22 unsuccessful plaintiff in *McKenna v. WhisperText*, No. 5:14-CV-00424-PSG, 2015
23 WL 428728, at *2 (N.D. Cal. Jan. 30, 2015). No requirement exists in the TCPA or
24 FCC regulations or orders that an ATDS send the same exact message 'en masse.' *See*
25 2015 TCPA Order, at ¶ 16 (rejecting ATDS definitions "that fit only a narrow set of
26 circumstances in favor of broad definitions which best reflect[] legislative intent by
27 accommodating the full range of telephone services.").

28

1 to send messages to Plaintiff and the class, and that Facebook’s computers filled in
2 the browser and time information. There is nothing implausible about Facebook
3 setting up a system whereby browser and time of login attempts (data readily
4 available to Facebook) is inputted into a text template and sent to consumers’ cell
5 phone numbers (which Facebook has already collected and stored). It is implausible
6 that human Facebook employees input browser and time-stamp information for each
7 and every login notification, direct it to specific cell phone numbers, and then hit
8 send, millions or billions of times over. *Flores* differed, where the defendant was a
9 small-time debt collector and the text messages included a reference number specific
10 to the plaintiff, a debtor from whom the defendant sought to collect.

11 C. The Messages’ Context Supports ATDS Use, Not Human Intervention

12 Facebook next argues that it did not use an ATDS because of the “context in
13 which [its messages] w[ere] received.” (Doc. No. 65 p. 19:4). The ‘context’ in which
14 Plaintiff and the classes received Facebook’s messages was (1) after specifically
15 asking Facebook to stop, or (2) despite never having provided Facebook a cell phone
16 number to message in the first place. (FAC ¶ 58 (stating class definitions)). This
17 context supports liability. *See* 47 U.S.C. § 227(b)(1)(A); *see, e.g., Nunes*, 2014 WL
18 6708465, at *2 (rejecting defendant’s argument that it had consent to autodial).

19 Facebook argues the context is that some person, somewhere, attempted to log
20 into some unknown person’s Facebook account, triggering Facebook’s messages, and
21 qualifying as ‘human intervention.’ (Doc. No. 65 p. 19). But the ‘trigger’ fact pattern
22 is not developed through discovery—Plaintiff pleads only that he received text
23 messages from Facebook, and that Facebook has a ‘login notification’ system in
24 place. There is no proof at this juncture that any human attempting to log into a
25 Facebook account caused the messages to be sent to Plaintiff. In fact, Plaintiff’s
26 experience indicates a malfunctioning system, where Facebook continued to send
27 Plaintiff text messages after Facebook responded that it would stop. Who is to say,
28

1 before discovery, that Facebook’s system was not also malfunctioning as to when its
2 messages were ‘triggered’? Fact determinations cannot be made at the pleading stage.

3 Second, even if Facebook’s ‘trigger’ theory is factually accurate, that is not
4 human intervention under the law. Under all case precedent, human intervention
5 means a human consciously decides to send each message. *See Derby v. AOL, Inc.*,
6 No. 15-cv-00452-RMW, 2015 WL 3477658, at *3 (N.D. Cal. June 1, 2015) (“[T]his
7 case involves personalized text messages, composed by individual AIM users, sent to
8 numbers chosen and manually inputted by the users.”); *McKenna*, 2015 WL 428728,
9 at *3 (“McKenna’s allegations make clear that the Whisper App can send SMS
10 invitations only at the user’s affirmative direction to recipients selected by the user.”);
11 *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (“In
12 order for a text dispatch notification to be sent to a customer, the customer must have
13 first provided some amount of information to the dispatcher, the dispatcher must have
14 pressed ‘enter’ to transmit that information to both the TaxiMagic program and the
15 nearest available driver, and the driver must have pressed ‘accept’ on his or her
16 Mobile Data Terminal.”); *Glauser*, 2015 WL 475111, at *6 (group text messages at
17 issue “were either sent by group members themselves, and merely routed through
18 defendant’s application, or in the case of the Welcome Texts, triggered by the group
19 creator’s addition of plaintiff to the group.”).

20 Here, it is not the case that a person decides to send the message (or any
21 message) to Plaintiff’s number, or even that a human’s entering of a phone number
22 prompts a template text message. Rather, under Facebook’s theory, the numbers are
23 stored and then automatically “triggered” when some person, somewhere, attempts to
24 access from a new location a Facebook account for which “login notifications” are
25 turned on. (Doc. No. 65 p. 21:12). This is not the conscious decision-making to send
26 a text messages that has been previously adjudicated ‘human intervention.’ Indeed,
27 the person allegedly triggering the message—the login attempter—has no intention of
28 sending anyone a text message. This is especially true of the login attempter

1 attempting to commit “fraud” or “identity theft” as anticipated by Facebook, as in that
2 case, a message being sent is against the login attempter’s direct interest—undetected
3 hacking. (Doc. No. 65 p. 28:1-2). Here, it is clearly Facebook itself that is robotically
4 sending the text messages. No human intervention is occurring in the actual sending
5 of the message.

6 Facebook relies on *WhisperText* to support its human intervention theory. The
7 system there is clearly distinguishable. In *WhisperText*, “[w]henever a new user
8 download[ed] the Whisper app from WhisperText, the message ‘Whisper will text
9 your friends for you’ appear[ed] on the screen automatically.” 2015 WL 428728, at
10 *2. The user then chose whether or not to upload contacts to Whisper’s database. By
11 selecting contacts, the user affirmatively indicated that those contacts should be
12 messaged. *Id.* A third party then took the contacts and sent the contacts text
13 messages. The plaintiff was such a contact, *i.e.* he received a text message when
14 some person with his contact selected his number as one to be messaged. *Id.*

15 The analysis here is inapposite. Here, no person decided to send Plaintiff any
16 message. Nobody hit ‘send.’ Some speculated and unknown person’s login attempt
17 to an unknown Facebook account, with no intent for anyone to be sent any message,
18 is a far cry from someone selecting Plaintiff’s contact information as a person to be
19 messaged. Facebook’s human intervention theory does not jibe with established case
20 law.

21 D. Plaintiff Plausibly Alleges Facebook’s Use of Equipment which has the
22 Capacity to Sequentially and Randomly Dial

23 Whether or not Facebook’s system functions like a predictive dialer, its system
24 is still an ATDS under the TCPA, because it has the capacity to sequentially and
25 randomly dial. 47 U.S.C. § 227(a)(1); *see Nunes*, 2014 WL 6708465, at *2 (“[T]he
26 complaint contains a secondary theory about how Twitter’s equipment qualifies as an
27 [ATDS]. In paragraph 61, Nunes alleges that . . . the equipment ha[s] the capacity to
28 ‘generate’ numbers at random or sequentially (rather than merely pulling and dialing

1 numbers from a database without human intervention) . . .”). “[A] system need not
2 actually store, produce, or call randomly or sequentially generate telephone numbers,
3 it need only have the capacity to do it.” *Satterfield*, 569 F.3d at 951. Moreover, “the
4 capacity of an [ATDS] is not limited to its current configuration but also includes its
5 potential functionalities.” 2015 TCPA Order, at ¶ 16.¹

6 Here, as in *Nunes*, Plaintiff has alleged that Facebook’s system, like Twitter’s,
7 can randomly or sequentially generate numbers to be dialed. (FAC ¶ 40). Plaintiff
8 adds factual support above and beyond that alleged in *Nunes*. Facebook’s system is
9 computer-based and “involves many computer servers equipped with multiple
10 software applications,” and thus “has the capacity to generate random numbers”
11 through use of a “pseudorandom number generator.” (FAC ¶ 40). The system can
12 also generate sequential numbers. (FAC ¶ 42). If the system does not have the current
13 ability to randomly or sequentially generate numbers, that capacity can be trivially
14 added with minimal computer coding, *i.e.* within potential functionality. (FAC ¶¶ 44-
15

16 ¹ This Court is without power to ignore the FCC’s 2015 TCPA Order. *See Glauser v.*
17 *GroupMe, Inc.*, No. C 11-2584 PJH, 2015 WL 475111, at *5 (N.D. Cal. Feb. 4, 2015)
18 (“[T]he FCC has issued regulations . . . and under the Hobbs Act, the court is bound
19 by those FCC rulings.”); *Hernandez v. Collection Bureau of America, Ltd.*, No SACV
20 13-01626-CJC(DFMx), 2014 WL 4922379, at *3 (C.D. Cal. Apr. 16, 2014) (quoting
21 28 U.S.C. 2342(1)) (“Under the Administrative Orders Review Act, known more
22 informally as the Hobbs Act, the Court of Appeals is vested with ‘exclusive
23 jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the
24 validity of—all final orders of the [FCC] made reviewable by section 402(a) or title
25 47.’”); *see also Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir.
26 2014) (overruling district court’s holding that it had jurisdiction to review 2008 FCC
27 ruling); *Leyse v. Clear Channel Broadcasting, Inc.*, 545 Fed. App’x 444, 454-455 (6th
28 Cir. 2013) (finding that FCC’s 2003 TCPA Order required deference under Hobbs
Act); *Nack v. Walburg*, 715 F.3d 680, 685-86 (8th Cir. 2013) (FCC regulation
required deference under Hobbs Act); *CE Design, Ltd. v. Prism Business Media, Inc.*,
606 F.3d 443, 446-47 (7th Cir. 2010) (holding district court lacked jurisdiction to
consider FCC’s regulation of TCPA regarding “established business relationship”
defense).

1 50). Facebook does not even dispute Plaintiff’s factual pleading, as Twitter did in
 2 *Nunes*. See 2014 WL 6708465, at *2 (“Twitter argues that . . . [its] equipment would
 3 need to be dramatically reconfigured . . .”).² As in *Nunes*, Plaintiff’s pleading raises
 4 “an evidentiary matter that cannot be resolved at the pleading stage,” *id.*, and
 5 Facebook’s motion must be denied.

6 **III. Facebook’s Messages Address No Emergency Situation and are Not**
 7 **Exempt From TCPA Liability**

8 Facebook argues its unwanted messages qualify for the “emergency purposes”
 9 exception to the TCPA. See 47 U.S.C. § 227(b)(1)(A) (outlawing the making of “any
 10 call (*other than a call made for emergency purposes* or made with the prior express
 11 consent of the called party) using any [ATDS] or an artificial or prerecorded voice”)
 12 (emphasis added). The emergency purposes exception neither applies to nor justifies
 13 Facebook’s failure to heed consumers’ requests to simply stop its text messages.

14 The FCC defines “emergency purposes” as “calls made necessary in any
 15 situation affecting the health and safety of consumers.” 47 C.F.R. § 64.1200(f)(4). In
 16 its original 1992 ruling implementing the TCPA, the FCC ruled that the emergency
 17 exception could apply to utility companies’ calls to customers regarding service
 18 outages and interruptions:

19 Service outages and interruptions in the supply of water, gas or
 20 electricity could in many instances pose significant risks to public health
 21 and safety, and the use of prerecorded message calls could speed the
 22 dissemination of information regarding service interruptions or other
 23 potentially hazardous conditions to the public.

23 ² Instead it argues that *Nunes* unfairly expands the definition of ATDS, as Congress
 24 could not possibly have sought to hold it liable for the calls placed to Plaintiff and the
 25 classes. (Doc. No. 65 p.25). As argued in Section II.A. *supra*, Facebook’s system is
 26 the *exact* type of invasive system from which Congress sought to protect the
 27 American public: (1) it calls consumers who have not provided their number or who
 28 have asked Facebook to cease, (2) it does so “at all hours of the night” (FAC ¶ 55), (3)
 it does not provide consumers like Plaintiff (without access to the triggering Facebook
 account) *any* way to stop the calls short of filing a lawsuit.

1 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*
2 Report and Order, 7 F.C.C.R. 8752, 8777-78 ¶ 51 (1992) (the “1992 TCPA Order”).
3 In 2012, the FCC ruled that calls made pursuant to the Warning Alert and Response
4 Network (“WARN”) Act are made for “emergency purposes” and meet the
5 exemption. 2012 TCPA Order, at ¶ 17. Congress established WARN as a “unified
6 national hazard alert system” to “alert the public to any imminent threat that presents
7 a significant risk of injury or death to the public.” *See* Warning, Alert and Response
8 Network (“WARN”) Act, H.R. 5556, 109th Cong. § 2(b)(1) (2006) (enacted).³
9 Messages sent pursuant to WARN include Wireless Emergency Alerts (“WEA”) used
10 to “send emergency alerts regarding public safety emergencies, such as evacuation
11 orders or shelter in place orders due to severe weather, a terrorist threat or chemical
12 spill.” *See* <https://www.fcc.gov/guides/wireless-emergency-alerts-wea> (last visited
13 June 4, 2015). WEA covers “only critical emergency situations” and are sent only as
14 (1) alerts “issued by the President,” (2) “alerts involving imminent threats to safety or
15 life,” or (3) AMBER alerts. *Id.*

16 Conversely in 2012, the FCC refused to exclude non-telemarketing,
17 informational-only calls from TCPA liability:

18 None of our actions change requirements for prerecorded messages that
19 that are nontelemarketing, informational calls, such as calls by or on
20 behalf of tax-exempt non-profit organizations, calls for political
21 purposes, and calls for other noncommercial purposes, including those
22 that deliver purely informational messages such as school closings. Such
23 calls continue to require some form of prior express consent under the
24 TCPA and the Commission’s rules, if placed to wireless numbers and
25 other specified recipients.

26 2012 TCPA Order, at 1831 ¶ 3. The FCC’s ruling affirmed that automated calls are
27 subject to the TCPA even if they have a hypothetical usefulness to consumers.
28

³ This document was previously filed for the Court’s convenience. (Doc. No. 30-2).

1 In 2015, the FCC “exempt[ed] from the TCPA’s consumer consent
2 requirements, with conditions, certain pro-consumer messages about time-sensitive
3 financial and healthcare issues.” 2015 TCPA Order, at ¶ 125. These exemptions
4 apply only to messages sent from a “financial institution” or “healthcare provider.” *Id.*
5 at ¶¶ 138, 147. Messages may only be sent to numbers provided by a sender’s
6 customers/patients. *Id.* at ¶¶ 138, 147. Moreover, the exemption is conditioned on the
7 provision of “a mechanism for recipients to easily opt out of future calls” and that the
8 financial institution or healthcare provider “honor opt-out requests immediately.” *Id.*
9 at ¶¶ 137-38, 147. Finally, the calls cannot be charged or counted against the
10 recipient’s phone plan in any way. *Id.* at ¶¶ 139, 148.

11 Here, Facebook’s login notification text messages were non-telemarketing,
12 informational calls subject to TCPA liability. Far from addressing a “situation
13 affecting the health and safety of consumers,” Facebook’s messages were supposedly
14 meant to notify consumers when access to their Facebook account was attempted
15 from a new location. Important here, the messages at issue failed this purpose, and
16 were not “necessary” by any stretch. 47 C.F.R. § 64.1200(f)(4). Indeed, Plaintiff has
17 no Facebook account, thus the messages were not only unnecessary, they were
18 completely irrelevant and harassing. The same is true for the class members, who,
19 like Plaintiff, received Facebook’s messages despite (1) never giving Facebook their
20 cell phone number, or (2) specifically requesting that Facebook’s messages stop.
21 (FAC ¶ 58). Thus the calls at issue are the exact type of “intrusive, nuisance calls”
22 targeted by Congress. (*See* Doc. No. 65 p. 27:15-16 (citing *Ryabyschuck v. Citibank*
23 (*S. Dakota*) *N.A.*, No. 11-CV-1236-IEG (WVG), 2012 WL 5379143, at *2 (S.D. Cal.
24 Oct. 30, 2012)).

1 Nor does Facebook qualify for the financial institution/healthcare provider
 2 exemption. Facebook is not a financial institution or healthcare provider.⁴ The
 3 messages gave no express opt-out, as required for that exemption to apply. (*See* FAC
 4 ¶¶ 23-26). And when Plaintiff and others requested “Stop,” Facebook ignored the
 5 requests. (FAC ¶ 26, 54).

6 The FCC has “emphasize[d] the limited nature of this [emergency purposes]
 7 exception,” and stated its intention to “be vigilant in monitoring and taking
 8 enforcement action against [ATDS operators] who attempt to use it for calls that are
 9 not for emergency purposes.” *In the Matter of Implementation of the Middle Class*
 10 *Tax Relief & Job Creation Act of 2012*, 27 F.C.C.R. 13615, 13628–29 ¶ 28 (2012).⁵
 11 The few circumstances affirmatively ruled by the FCC to trigger the emergency
 12 purposes—power outages, alert from the President, alerts of terrorist attacks, AMBER
 13 alerts—demonstrate that Facebook’s messages do not belong in this discussion.

14 **IV. The TCPA Does Not Violate the First Amendment**

15 Facebook, a company that has historically unprecedented access into U.S.
 16 consumers’ homes, computers, and cell phones, argues the TCPA, a statute passed on
 17 concerns for U.S. consumers’ privacy, violates its constitutional right to free speech.
 18 Facebook makes this argument although the Ninth Circuit has repeatedly held that the
 19 TCPA is a constitutional content-neutral time/place/manner speech restriction passing
 20 intermediate scrutiny. *See Campbell-Ewald v. Gomez*, 768 F.3d 871 (9th Cir. 2014),
 21 *cert. granted*, 135 S. Ct. 2311 (2015), and *aff’d*, 136 S. Ct. 663 (2016), *as revised*
 22 (Feb. 9, 2016); *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995).

23
 24 _____
 25 ⁴ Facebook likens itself to Venmo. (Doc. No. 65 p. 27 n.5). The comparison is not
 26 well taken. Facebook cites no financial harm that could be suffered through a
 27 Facebook account hack. Moreover, Plaintiff did not even have a Facebook account,
 28 thus its continued messages served no purpose at all.

⁵ This document was previously filed for the Court’s convenience. (Doc. No. 30-4).

1 A. Binding Ninth Circuit Precedent Requires this Court to Uphold the
2 TCPA

3 Ninth Circuit precedent requires this Court to uphold the TCPA—or at least the
4 pre-2015 amendment TCPA—as a valid content-neutral restriction. In *Moser*, 46
5 F.3d 970, the Ninth Circuit rejected a First Amendment challenge to the TCPA’s 47
6 U.S.C. § 227(b)(1)(B), which makes it unlawful “to initiate any telephone call to any
7 residential telephone line using an artificial or prerecorded voice to deliver a message
8 without the prior express consent of the called party.” Like § 227(b)(1)(A), at issue
9 here, that section contains an exception for a “call [that] is initiated for emergency
10 purposes.” The court of appeals held that § 227(b)(1)(B) is a content-neutral time,
11 place, and manner restriction because it “regulates all automated telemarketing calls
12 without regard to whether they are commercial or noncommercial.” *Moser*, 46 F.3d at
13 973. Applying intermediate scrutiny, as directed by Supreme Court precedent, *see*
14 *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746 (1989), the Ninth
15 Circuit held that this provision is consistent with the First Amendment.

16 In *Campbell-Ewald*, 768 F.3d 871, the Ninth Circuit reaffirmed its reasoning in
17 *Moser* and upheld the constitutionality of § 227(b)(1)(A), the very provision at issue
18 here. The court recognized that *Moser* had rightly treated the TCPA as a content-
19 neutral time, place and manner restriction, emergency exception included, 768 F.3d at
20 876, and further concluded that the Act serves a significant government interest in
21 protecting privacy, *id.* at 876–77. The *Campbell-Ewald* court also found §
22 227(b)(1)(A) to be narrowly tailored and to leave open ample alternative channels for
23 the communication of information. *Id.* Rejecting appellant’s contention that “the
24 government’s interest only extends to the protection of residential privacy, and that
25 therefore the statute is not narrowly tailored to the extent that it applies to cellular text
26 messages,” the court observed that “there [wa]s no evidence that the government’s
27 interest in privacy ends at home,” but that, “to whatever extent the government’s
28 significant interest lies exclusively in residential privacy, the nature of cell phones

1 renders the restriction of unsolicited text messaging all the more necessary to ensure
 2 that privacy.” *Id.* at 876.⁶ Accordingly, the Ninth Circuit has held that the TCPA—
 3 inclusive of its emergency exception—is constitutional, and this Court must follow
 4 suit.

5 B. Supreme Court Precedent Supports the Ninth Circuit’s Rulings

6 The Ninth Circuit got it right. “[T]he government may impose reasonable
 7 restrictions on the time, place, or manner of protected speech, provided that the
 8 restrictions ‘are justified without reference to the content of the restricted speech, that
 9 they are narrowly tailored to serve a significant governmental interest, and that they
 10 leave open ample alternative channels for communication of the information.’” *Ward*,
 11 491 U.S. at 791 (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288,
 12 293, 104 S. Ct. 3065 (1984)); *see also Doe v. Harris*, 772 F.3d 563, 577-78 (9th Cir.
 13 2014) (citing *Ward*). “The principal inquiry in determining content neutrality, in
 14 speech cases generally and in time, place, or manner cases in particular, is whether the
 15 government has adopted a regulation of speech because of disagreement with the
 16 message it conveys.” *Hill v. Colorado*, 530 U.S. 703, 719, 120 S. Ct. 2480 (2000)
 17 (quoting *Ward*, 491 U.S. at 791). Far from regulating the dissemination of any
 18 particular viewpoint or ideal, the TCPA outlaws making “**any call** (other than a call
 19 made for emergency purposes or made with the prior express consent of the called
 20 party) using any automatic telephone dialing system or an artificial or prerecorded
 21 voice.” 47 U.S.C. § 227(b)(1)(A) (emphasis added); *see also McCullen v. Coakley*,
 22 134 S. Ct. 2518, 2532 (2014) (“The broad reach of a statute can help confirm that it
 23 was not enacted to burden a narrower category of disfavored speech.”). Indeed,
 24 Congress passed the TCPA for the content-neutral purpose of protecting consumers’
 25

26 ⁶ District courts nationwide have likewise found the TCPA constitutional. *See*
 27 *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga.
 28 2013); *Strickler v. Bijora, Inc.*, 2012 WL 5386089, at *5–6 (N.D. Ill. Oct. 30, 2012);
Abbas v. Selling Source, LLC, 2009 WL 4884471, at *7–8 (N.D. Ill. Dec. 14, 2009).

1 privacy. *See Satterfield*, 569 F.3d at 954 (“The purpose and history of the TCPA
2 indicate that Congress was trying to prohibit the use of ATDSs to communicate with
3 others by telephone in a manner that would be an invasion of privacy.”); *see also*
4 *Hovila v. Tween Brands, Inc.*, No. C09-0491RSL, 2010 WL 1433417, at *9 & n.3
5 (W.D. Wash. Apr. 7, 2010) (stating privacy purpose and listing Congress’ findings).

6 Facebook argues the TCPA’s “emergency purpose” exception renders the
7 TCPA a content-based restriction on speech. Facebook’s argument conflates the
8 content of an automated call with the purpose for which it is made. “The term
9 *emergency purposes* means calls made necessary in any situation affecting the health
10 and safety of consumers.” 47 C.F.R. § 64.1200(f)(4) (underline added). Thus it is the
11 situation in which a message is sent that determines whether the exception applies,
12 and the actual content of the speech is not determinative.

13 To illustrate, faced with power outages, a utility company might send
14 automated messages to its customers stating: “Power outages expected for the next 2
15 days.” The utility company would not be liable for this message because it would
16 have been sent to its customers to address an emergency situation affecting the health
17 and safety of consumers. *See* 1992 TCPA Order, at ¶ 51. Meanwhile, if Facebook
18 sent this very same message through its login notification system, unrelated to any
19 actual power outage, the emergency purpose exception would certainly not apply.
20 Conversely, if the utility company, again faced with power outages, attempted to send
21 the same emergency warning but through some error sent nonsensical, indecipherable
22 automated messages, the utility company would not be liable because the messages
23 would still have been sent for emergency **purposes**. Thus, liability is not a function
24 of the content of the message, but rather the overall context in which that message is
25 sent. The TCPA thus exempts emergency calls based on the **purpose** for which the
26 calls are made, not on **content**, and is therefore a content-neutral restriction. *See, e.g.,*
27 *Hill*, 530 U.S. at 730 (statute deemed content-neutral because it applied not based on
28 the speech’s content, but whether the speech was made “within 100 feet of a health

1 care facility”); *McCullen*, 134 S. Ct. at 2530 (statute content-neutral because its
2 application depended not on *what* was said, but whether it was said at a “reproductive
3 health care facility”); *cf. Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)
4 (holding unconstitutional town ordinance controlling size and appearance of roadside
5 signs—non-commercial speech—based on the content of signs’ message, *i.e.*
6 ideological sign vs. political signs had different size restrictions).

7 Not only is the TCPA (1) content-neutral, it is also (2) “narrowly tailored to
8 serve a significant governmental interest” and (3) “leave[s] open ample alternative
9 channels for communication of the information.” *Campbell-Ewald Co.*, 768 F.3d at
10 876. The significant governmental interest is the protection of consumers’ privacy.
11 *Satterfield*, 569 F.3d 954; *Moser*, 46 F.3d at 974. The TCPA is narrowly tailored to
12 decrease automated call intrusions. *Moser*, 46 F.3d at 974-975. Finally, the TCPA
13 leaves open ample alternative channels for communication—indeed it only prohibits
14 automated calls made without the called party’s consent. 47 U.S.C. § 227(b)(1)(A);
15 *see also Moser*, 46 F.3d at 975 (“The restrictions . . . leave open many alternative
16 channels of communication, including the use of taped messages introduced by live
17 speakers or taped messages to which consumers have consented, as well as all live
18 solicitation calls. That some companies prefer the cost and efficiency of automated
19 telemarketing does not prevent Congress from restricting the practice.”). As such, the
20 TCPA is a constitutional content-neutral time/place/manner restriction on speech.

21 C. Congress’s 2015 TCPA Amendment Cannot Render the Entire TCPA
22 Unconstitutional

23 The Bipartisan Budget Act of 2015 amended the TCPA to exempt automated
24 calls “made solely to collect a debt owed to or guaranteed by the United States.”
25 Bipartisan Budget Act of 2015 § 301(a), Pub. L. No. 114-74, 129 Stat. 584. Facebook
26 cites this amendment as a blatant content-based distinction triggering strict scrutiny
27 and a determination that the TCPA is unconstitutional. The constitutionality of the
28 2015 amendment is a moot issue, and Plaintiff makes no argument one way or the

1 other, because (1) the amendment does not apply to the facts here, and (2) even if the
2 amendment were found unconstitutional, the 25-year old remainder of the TCPA
3 would be ‘severed,’ remain in force, and hold Facebook liable.

4 Courts must “avoid nullifying an entire statute when only a portion is invalid.”
5 *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014) (citing *Brockett v.*
6 *Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794 (1985)). Accordingly,
7 under the “doctrine of severability . . . ‘the same statute may be in part constitutional
8 and in part unconstitutional, and . . . if the parts are wholly independent of each other,
9 that which is constitutional may stand while that which is unconstitutional will be
10 rejected.’” *Id.* (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750,
11 772, 108 S. Ct. 2138 (1988)). “Whether an unconstitutional provision is severable
12 from the remainder of the statute in which it appears is largely a question of
13 legislative intent, but the presumption is in favor of severability.” *Regan v. Time, Inc.*,
14 468 U.S. 641, 653, 104 S. Ct. 3262 (1984). Courts should sever unconstitutional
15 provisions “[u]nless it is evident that the Legislature would not have enacted those
16 provisions which are within its power, independently of that which is not.” *Id.*

17 The 2015 amendment is clearly severable. The TCPA was enacted in 1991. It
18 was in force and withstood constitutional scrutiny for 24 years before the 2015
19 amendment. *See, e.g., Campbell-Ewald*, 768 F.3d at 876. Thus, the pre-amendment
20 TCPA is not only *capable* of independence from the amendment, it was independent.
21 Likewise, Congress not only *would* have enacted the TCPA minus the amendment; it
22 did, and kept it that way for 24 years. Accordingly, the pre-amendment TCPA will
23 remain in force regardless of whether the 2015 amendment is unconstitutional,
24 Facebook’s liability here cannot be affected, therefore the amendment should not
25 enter the Court’s consideration.

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CONCLUSION

For the foregoing, Plaintiff respectfully requests the Court deny Facebook's Motion to Dismiss.

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