

24-2649

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

Nathen Barton,

Plaintiff-Appellant,

v.

Walmart, Inc., et al

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:23-cv-05063-DGE
Hon. Robert J. Bryan

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

No Disclosure Statement is required.

Date: 5/25/2024

Nathen Barton

/s/ Nathen Barton
pro-se

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INTRODUCTION

Question 1: When the FCC said text messages that facilitate, complete, or confirm a commercial transaction that **the recipient** has previously agreed to enter into with the sender are not advertisements, did it order by *expressio unius est exclusio alterius* that the same messages to someone like me who didn't agree to enter into a transaction with the sender are advertisements?

Question 2: If a Defendant offers a unilateral contract –consumers have no obligation to pay unless they accept delivery of goods at a later date – are the Defendant's text messages encouraging a customer to accept delivery telephone solicitations if sent to the wrong person like me?

Question 3: The FCC and courts have ruled that consumers can make do-not-call requests using any reasonable means. Were my three “Stops” a reasonable way to ask the Defendant to stop calling, and if so, were their further calls illegal under the TCPA?

Question 4: If a commercial enterprise like the Defendant sends texts as part of its overall strategy of attracting customers, making sales, and bringing customers into its physical stores for even more sales, are those texts telephone solicitation?

I ask this Court to answer “Yes” to all questions, reverse the district court’s granting of a summary judgement to the Defendant, and remand this lawsuit for further action.

JURISDICTIONAL STATEMENT

Pro Se Plaintiff Nathen Barton is a natural person and full-time resident of Clark County, Washington. All the acts alleged in this complaint occurred in Clark County, Washington State, during the year 2022.

Jurisdiction in the District court was correct because of where I resided, and my residence was a nexus where I suffered personal injury and invasion of privacy at the hands of the Defendant. The Defendant was aware they were reaching into the Western area of Washington State by dialing my phone number.

This appeal was filed within 30 days of the entry of judgement. The Court entered judgement on April 9, 2024, and I filed my notice of appeal on April 24, 2024.

ISSUES PRESENTED

Issue #1 – The district court erred by not finding Defendant’s texts were advertisements as the FCC’s 2006 order stated, telephone solicitation under TCPA § 227(c) and its implementing regulations, and commercial text messages under CEMA.

Issue #2 – The district court erred by not finding that many of Defendant’s text messages were *per se* telephone solicitation under TCPA § 227(c) and its implementing regulations, and commercial text messages under CEMA.

Issue #3 – The district court erred by not finding each text message Defendant sent me after I replied “stop” were violations of TCPA § 227(c) and its implementing regulations.

Issue #4 – The district court erred not finding Defendant’s texts to be telephone solicitation under TCPA § 227(c) and its implementing regulations and commercial text messages under CEMA because they were sent in furtherance of its profit seeking commercial enterprise.

STATEMENT OF THE CASE

The (360) area code was created in 1995. New subscribers receive phone numbers recycled from previous subscribers. I.M. was a previous subscriber of (360) xxx-1019 and while it was hers, she gave it to the Defendant as a contact phone number. Later she surrendered the number without telling the Defendant.

I am the father to three boys aged 12, 14, and 17. As they reached their pre-teen years and increasingly spent time out of the house, I got them cell phones. In July of 2020 the 1019 phone number came to me, primarily for the residential use¹

¹ ER 189 – 192 (ECF 72, 17:17-20:12)

of one of my boys. It started receiving unwanted calls and I put it on the FTC's National *Do-Not-Call* list.²

The Defendant started texting the phone almost *eight hundred days after I became the subscriber*. The text messages said things like orders were ready to pickup, or orders had substitutions, was there anything I didn't want? And items were low in stock, what were my substitution preferences for upcoming orders?

I initially thought they were phishing attempts because we hadn't ordered anything from the Defendant and the texts were not personalized.³ Just in case these were not phishing attempts, I soon replied to the Defendant with STOP, exactly as instructed. The Defendant kept calling so I replied STOP two more times.⁴ The calls didn't stop because the Defendant had started filling a box at the bottom of I.M.'s order screen with the 1019 number and pre-checking a box asking for calls. I.M. didn't realize her orders were driving calls to the 1019 number for a long time and I received texts about order fulfillment each time I.M. placed a new order. I was in a catch-22 situation. I wasn't a party to the transactions⁵ and

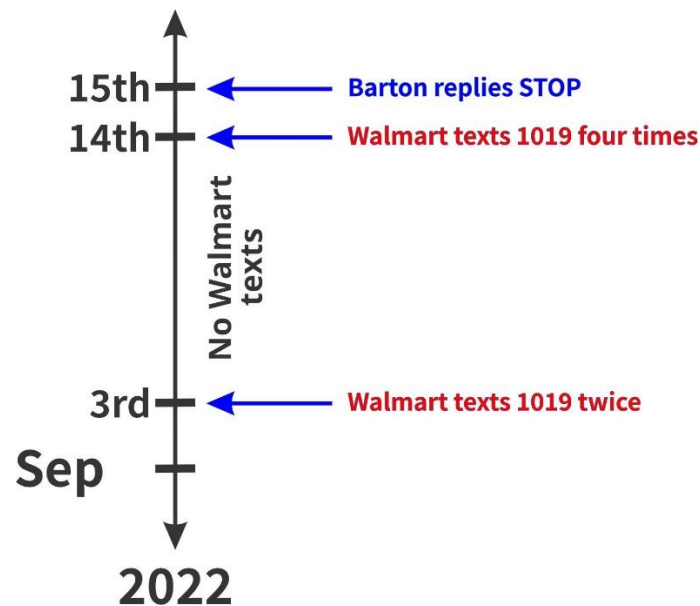
² ER 176 (ECF 72, 4:1-2) pointing to ER 157. It was placed on the FTC's NDNC list long before the calls at issue here.

³ After sending about 15 text messages without any personalization whatsoever, Walmart sent a text message that included the first name of the previous subscriber. Out of the 90 text messages, only two were personalized.

⁴ ER 175 (ECF 72, 3:5)

⁵ ER 175 (ECF 72, 3:2-4)

replying STOP was fruitless because the Defendant starting texting anew every time I.M. placed another online order. The Defendant testified in a deposition that they depend on their customers to update the Defendant when their phone number's change⁶ instead of using the FCC's Reassigned Number Database ("RND").⁷



I.M. was just going about her day placing online orders and the Defendant responded to the online orders with a variety of texts to the 1019 phone, 90 in all.⁸ They had a strong incentive to send the texts because they would not profit unless – and until – I.M. physically went to the Defendant's store and picked up the

⁶ ER 178 (ECF 72, 6:11-21)

⁷ <https://www.fcc.gov/reassigned-numbers-database>

⁸ ER 174 (ECF 72, 2:18-20)

goods. This is a very important detail in this lawsuit. They testified in a deposition:⁹

Q. Okay. And then on this same order, let's assume she used a credit card, and she wasn't charged until pick up, but she never picks up the order. She's never charged?

A. At a certain point after the customer doesn't pick up, the order is cancelled and the authorization hold is returned to the customer. No charge was ever placed on their card.

The Defendant testified that if I.M. didn't pick up her orders, the order is canceled, and no charge is ever placed on her card.

This matches their declaration in ER 41 (ECF 83-1) ¶6-¶7 (emphasis added):

“For store pickup orders, when a customer pays with a credit card or debit card, **Walmart does not charge the credit or debit card until the customer picks up the order.** When a customer pays with an electronic benefit transfer (“EBT”) or gift card, Walmart charges the EBT or gift card at the time of purchase and refunds it if the order is not picked up.

. . . sometimes customers cannot pick up the orders they placed. When this happens, Walmart chooses to effectively “return” the orders by restocking the item(s) and either not charging or refunding the payment card, depending on the type of card used.”

⁹ ER 182 (ECF 72, 10:14-15) Pointing to ER 165-167 (Faitak Dep. Tran. 31:24-33:18) and ER 169-171 ((Faitak Dep. Tran. 48:14-50:10). This snippet is from ER 171 lines 1-10

They sent the texts as part of their business operations - motivating I.M. to come to their store to pick up her orders, and the Defendant didn't want the district court to miss this point:

“Walmart sent the order updates to facilitate the fulfillment of its customer’s previously placed orders”¹⁰ and “Walmart’s purpose for sending these order updates was to facilitate the fulfillment of its customer’s orders”¹¹ and “Walmart’s purpose in sending these text message order updates is to provide information to its customers that will help facilitate the fulfillment of a previously placed order”¹² and “the *context* surrounding the text messages makes clear that the purpose of the messages was to facilitate the fulfillment of I.M.’s existing orders”¹³ and “they provided information to facilitate the fulfillment of orders already placed by its customer”¹⁴ and “The order updates in all five categories contain messages that merely facilitate the fulfillment of an existing order”¹⁵ and “Walmart’s purpose in sending the text message order updates was to facilitate the fulfillment of I.M.’s pending orders”¹⁶ and “the undisputed record evidence establishes that Walmart’s purpose for sending the text message order updates at issue was to facilitate fulfillment of pending orders”¹⁷ and “Walmart’s undisputed purpose in sending the text messages—to facilitate the fulfillment of ongoing

¹⁰ ER 132-133 (ECF 75, 6:26-7:1)

¹¹ ER 133 (ECF 75, 7:17-18)

¹² ER 135 (ECF 75, 9:8-9)

¹³ ER 142 (ECF 75, 16:11-13)

¹⁴ ER 142 (ECF 75, 16:19-20)

¹⁵ ER 143 (ECF 75, 17:20-21)

¹⁶ ER 145 (ECF 75, 19:5-6)

¹⁷ ER 147 (ECF 75, 21:4-5)

transactions”¹⁸, and “the text messages Walmart initiated to the 1019 number were not sent to promote the sale or lease of goods and services but rather to provide the intended recipient with updates about a prior purchase, including to facilitate pick-up and delivery of the purchased items”¹⁹

They weren’t shy in admitting the purpose of the texts was to bring I.M. to the merchandise, but they used all sorts of language to describe I.M.’s relationship to the merchandise the text messages were about – “previously placed orders”, “customer’s orders”, “existing orders”, “orders already placed”, “pending orders”, “ongoing transactions”, and “prior purchase”.

I.M.’s online orders were not purchases. Her online ordering activity simply set in motion *possible* future purchases, when I.M. might show up and accept delivery, the money changing hands if she did, and the Defendant not making a profit if she didn’t. The Defendant testified that if I.M. placed an order, entered a credit or debit card, but never picked up her order, she was never charged. That is not a purchase. If I.M. used a gift or electronic benefit transfer (EBT) card but never picked up her order, she was automatically refunded.²⁰ Because the Defendant only profited if I.M. came to the Defendant’s store and picked up her

¹⁸ ER 147 (ECF 75, 21:10-11)

¹⁹ ER 150 -151 (ECF 75, 24:26-25:1)

²⁰ Walmart never entered into the record what forms of payment I.M. used on the many orders I.M. placed. I.M. testified to using both debit and EBT.

order, they were very motivated to use text messages to encourage I.M. to do so.

And that's what they did. Thirty-eight of them said:

“Your Walmart curbside pickup is ready. Check in before you leave, so we know you're on the way: [[hyperlink to Walmart](#)] Reply HELP for info; STOP to stop”.²¹

Ten of the 90 messages warned:

“Some items may be low in stock. Pick substitution preferences for your upcoming Walmart order: [[hyperlink to Walmart](#)].”²²

Seventeen of the 90 messages asked:

“Your Walmart order has substitutions. Anything you don't want? Please let us know soon: [[hyperlink to Walmart](#)] Reply HELP for info; STOP to opt out”.²³

Five of the 90 said:

“Sorry, some items in your Walmart order weren't available. Review your order: [[hyperlink to Walmart](#)] Re-ply HELP for help; STOP to opt out”.

“We're sorry, some items in your Walmart order were out of stock, so we had to cancel. View details: [[hyperlink to Walmart](#)] Reply HELP for info; STOP to opt out”.²⁴

²¹ See ER 201 (ECF. 15 ¶33, ¶37, ¶39, ¶53, ¶55, ¶59, ¶65, ¶69, ¶73, ¶77, ¶82, ¶84, ¶90, ¶94, ¶99, ¶103, ¶105, ¶107, ¶109, ¶111, ¶116, ¶122, ¶126, ¶128, ¶132, ¶138, ¶146, ¶158, ¶187, ¶189, ¶191, ¶197, ¶199, ¶201, ¶203, ¶207, and ¶211)

²² See ER 201 (ECF 15 ¶86, ¶97, ¶101, ¶118, ¶124, ¶133, ¶173, ¶175, ¶177, ¶183)

²³ See ER 201 (ECF 15 ¶31, ¶35, ¶71, ¶75, ¶80, ¶88, ¶92, ¶114, ¶120, ¶130, ¶136, ¶144, ¶156, ¶166, ¶185, ¶195, and ¶209)

²⁴ See ER 201 (ECF 15 ¶41, ¶63, and ¶67, and ¶142 and ¶160)

There were 30 other messages, from shipping information to order cancelations. Most of the Defendant's texts contained "STOP to opt out" or "STOP to stop". This was the only opt-out instruction the Defendant ever gave, and I followed it. First on September 15, 2022. Then on October 19, 2022. And yet again on November 26, 2022. Their calls kept going, the last one woke me up on March 28, 2023, 83 days after they were served with the lawsuit.

The Defendant had a second profit motive beyond bringing I.M. to the store. Yes, they wanted her to show up and take possession of the goods so they could take possession of her money. They also want additional customer traffic at their stores. "[M]any products available for purchase online can be picked up by the customer or member at a local Walmart store or Sam's Club, *which provides additional customer traffic at such stores and clubs.*"²⁵ They see a reduction in traffic as bad for sales:²⁶

"a reduction in the amount of traffic in our stores and clubs, which would, in turn, reduce the opportunities for cross-store or cross-club sales of merchandise that such traffic creates and could reduce our sales within our stores and clubs and materially adversely affect our financial performance."

My lawsuit pursued claims under the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. 227(c) for text soliciting my cellular telephone number

²⁵ Quoted from [Walmart's 2023 annual report](#) page 19. Emphasis added.

²⁶ Quoted from [Walmart's 2023 annual report](#) page 15.

without consent when my number was registered on the FTC's National Do-Not-Call registry more than 30 days prior to each call. And for similar claims under Washington States Consumer Electronic Mail Act ("CEMA") RCW 19.190 for sending commercial electronic text messages in violation of the act.

On 4/9/2024, the district court ruled for the Defendant and against my claims. The gist of the order (ER 19, ECF 95) was finding that none of their texts to the 1019 phone were "telephone solicitations" under § 227(c) and its regulations, nor were they "commercial text messages" under CEMA. Finding no violation of the TCPA or CEMA, the district court dismissed the case.

I believe this conclusion is wrong for several independent but also connected reasons. Each reason is nuanced so separately written.

SUMMARY OF THE ARGUMENT

Summary of the Argument for Issue 1

The FCC held by *expressio unius est exclusio alterius* that the Defendant's text messages to me²⁷ are advertisements when it stated, "Messages that "facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements". The text messages in the underlying lawsuit stemmed from commercial transactions I was not a party to;

²⁷ Arguably their text messages were sent to my child but as the phone number's subscriber I have standing to bring the suit.

therefore, they were advertisements. Issue #2 discusses that more than just advertisements, they were sent to motivate I.M. to come to the Defendant's store and pick up the Defendant's goods because not until that happened did her money become the Defendant's money, and the Defendant's goods become I.M.'s goods. The Defendant's motivation for sending the advertisements was financial gain so they fall under § 227(c).

Summary of the Argument for Issue 2

Many of the text messages at issue in this lawsuit were directly encouraging the purchase of goods or services so they certainly fall under § 227(c). The purchases described in the underlying lawsuit happened when I.M.'s money became the Defendant's money, and the Defendant's goods became I.M.'s goods. This money changing hands happened long after I.M. went online and placed her orders and the district court correctly understood this: "Walmart charges the customer . . . at the time of pickup/delivery if purchased by debt card or credit card)". The majority of the text messages in the underlying lawsuit unquestionably were sent to encourage I.M. to show up at the Defendant's store and take delivery of the goods, thus accepting the Defendant's offer by performance.

Summary of the Argument for Issue 3

An FCC Declaratory Ruling says that after my first Stop, the Defendant was only permitted one more text message confirming my opt-out request if the

confirmation text followed specific rules. The Defendant received my Stop but continued to text the 1019 number unabated. Per the FCC, those subsequent texts violated the TCPA and the regulations implementing it.

Summary of the Argument for Issue 4

The Defendant initiated the texts as part of its commercial money-making enterprise of selling merchandise to I.M., not “the rare case in which free products are distributed via [text] 'without hope of financial gain’”. For this and another profit motive – providing additional customer traffic at their stores – all the text messages the Defendant sent fall under § 227(c) because they all fell under the definition of telephone solicitation 47 CFR § 64.1200(f)(15).

STANDARD OF REVIEW

I am appealing a summary judgement ruling from the district court where it applied law and statutory interpretation to arrive at what I believe are erroneous conclusions. I believe the standard of review for the application of law to facts and statutory interpretation is De Novo.

ARGUMENT

I. THE DISTRICT COURT ERRORED BY NOT FINDING WALMART’S TEXTS WERE ADVERTISEMENTS AS THE FCC’S 2006 ORDER HELD, AND TELEPHONE SOLICITATION UNDER TCPA § 227(C) AND ITS IMPLEMENTING REGULATIONS.

The district court said:

“The messages were sent after I.M. placed the orders and related to ongoing business transactions.” ER 33 (ECF 95 14, 14-15)

The FCC says these messages, intended for I.M. but sent to me, are advertising. In 2006, the FCC defined what messages facilitating, completing, or confirming a commercial transaction were advertising, and which of these were not. The FCC based their delineation on the *identity* of the recipient – was he or she the person who agreed to enter into a commercial transaction with sender? Or someone else, like me in this lawsuit?

Ninth circuit decision *Phan v. Agoda*, quoted the FCC’s 2006 order:

“Messages that “facilitate, complete, or confirm a commercial transaction that **the recipient** has previously agreed to enter into with the sender are not advertisements.” *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3812 (2006).”²⁸

The *Agoda* court adopted the FCC’s ruling: “Phan agreed to enter a commercial transaction with Agoda. A text message confirming *that* transaction is not advertising”. Emphasis added.

The FCC’s 2006 order held by *expressio unius est exclusio alterius* that the Defendant’s text messages to me are advertisements when it stated, “Messages that

²⁸ [Phan v. Agoda Co. Pte. Ltd.](#), 798 F. App'x 157 (9th Cir. 2020) Emphasis added.

“facilitate, complete, or confirm a commercial transaction that **the recipient has previously agreed to enter into** with the sender are not advertisements”.

This is important for two reasons. First, CEMA’s prohibition is on text messages that are “sent to promote real property, goods, or services for sale or lease”. RCW 19.190.010. Promote is more akin to the TCPA’s *advertise* than *telephone solicitation*.²⁹

Second, this Court defers to the FCC’s interpretations³⁰ and the regulations governing the TCPA define advertisement as “any material advertising the commercial availability or quality of any property, goods, or services.”³¹

To my knowledge, there is no legal authority saying that text messages stemming from commercial transactions *sent to someone other than the person who agreed to enter into the transaction with the sender* are not advertisements. See *Abboud v. Circle K Stores*³² “Plaintiff did not have a business relationship with Defendant before receiving the text messages, Defendant could not have sent the messages to complete a business transaction.”

²⁹ The Merriam-Webster dictionary’s most appropriate definition of “promote” is “to present (merchandise) for buyer acceptance through advertising, publicity, or discounting”.

³⁰ [Chesbro v. Best Buy Stores, L.P.](#), 705 F.3d 913, 917 (9th Cir. 2012)

³¹ [47 CFR § 64.1200\(f\)\(1\)](#)

³² *Abboud v. Circle K Stores*, 2024 WL 1765659 (D. Az. April 24, 2024)

The *Weisbein v. Allergan, Inc.*³³ court found that text message “Hello, please note that Allergan has an additional California Privacy Policy that you can view at www.allergan.com/privacy/ccpa” could be advertising because:

“Further, although defendants' first text message does not directly reference the commercial availability or quality of Botox, “[t]he TCPA does not require that an unwanted and uninvited [text message] make an overt sales pitch to its recipient in order for a cause of action to exist.” *Simon v. RadNet Management, Inc.*, 2015 WL 13653873, *3 (C.D. Cal. 2015) (internal quotation marks omitted). Rather, it is sufficient if the text message is intended to or constitutes a “pretext for advertising a product[.]” *Id.* (internal quotation marks omitted). That is, a text message may inquire about an unrelated subject, e.g., the “customer's satisfaction with a previously purchased product[.]” but if the text message is motivated in part by the desire to sell additional goods or services, the text message may constitute an advertisement”

Also discussed in Issue #2, the Defendant used text messages to motivate I.M. to come to the Defendant’s store and pick up her goods so that the money would change hands.

“the undisputed facts show that the order updates were . . . intended for Walmart’s customer, I.M., and were sent for the purpose of informing I.M. about her pending orders from Walmart.” ER 135 (ECF 75, 9:19-21)

³³ [Weisbein v. Allergan, Inc.](#), 2021 U.S. Dist. LEXIS 52977, *3

Issue #4 discusses how text messages are part of the Defendant's overall strategy to bring customers to its physical locations for the sale of more merchandise. "[M]any products available for purchase online can be picked up by the customer or member at a local Walmart store or Sam's Club, *which provides additional customer traffic at such stores and clubs.*"³⁴ The Defendant's 2023 annual report linked customer traffic and the Defendant's financial performance:

"a reduction in the amount of traffic in our stores and clubs, which would, in turn, reduce the opportunities for cross-store or cross-club sales of merchandise that such traffic creates and could reduce our sales within our stores and clubs and materially adversely affect our financial performance." Page 15.

The profit motive turns text message *advertisement* into *telemarketing*.

"While the content of the calls controlled whether they were "advertisements," their purpose controlled whether they were "telemarketing.'" ³⁵

The Ninth Circuit held calls need not pitch specific products to be solicitations:

"Best Buy argues that its calls were purely informational courtesy calls to RZ members. It further maintains that, because the scripts did not explicitly reference any property, goods, or services within the meaning of 47 U.S.C. § 227(a)(5), the calls did not run afoul of the TCPA and its

³⁴ Quoted from [Walmart's 2023 annual report](#) page 19. Emphasis added.

³⁵ [Golan v. Veritas Entm't, LLC](#), 788 F.3d 814, 820 (8th Cir. 2015)

implementing regulations. We disagree. We approach the problem with a measure of common sense.”³⁶

Most of the Defendant’s calls were focused on encouraging I.M. to show up and accept their unilateral offer by performance, and also to create “opportunities for cross-store or cross-club sales of merchandise that such traffic creates”. All of their calls to me were for the purpose of promoting its for-profit commercial enterprise and the calls should fall under § 227(c).

II. THE DISTRICT COURT ERRORED BY NOT FINDING THAT THE MAJORITY OF WALMART’S TEXT MESSAGES WERE DIRECTLY TELEPHONE SOLICITATION UNDER TCPA § 227(C) AND ITS IMPLEMENTING REGULATIONS.

Many of the text messages I received were directly encouraging the purchase of goods or services. The most relevant definition of “purchase” in the Merriam-Webster dictionary is “to obtain by paying money or its equivalent”.³⁷

The purchases described in the underlying lawsuit happened when the money changed hands. These were specific moments in time. The district court correctly understood this: “Walmart charges the customer . . . at the time of pickup/delivery if purchased by debt card or credit card”.³⁸ ER 34 (ECF 95, 15:19-20).

³⁶ [Chesbro v. Best Buy Stores, L.P.](#), 705 F.3d 913, (9th Cir. 2012)

³⁷ <https://www.merriam-webster.com/dictionary/purchase>

³⁸ Walmart also allowed online orders using gift or electronic benefit transfer (EBT) cards. Walmart testified that online orders using gift/EBT cards were

The Defendant offered a unilateral contract to I.M. – they offered her goods/services but I.M. had no obligation to the Defendant unless and until she accepted delivery. ER 182 (ECF 72, 10:14-15³⁹)

Q. Okay. And then on this same order, let's assume she used a credit card, and she wasn't charged until pick up, but she never picks up the order. She's never charged?

A. At a certain point after the customer doesn't pick up, the order is cancelled and the authorization hold is returned to the customer. No charge was ever placed on their card.

“a unilateral contract involves the exchange of a promise for a performance . . . The offer is accepted by rendering a performance rather than providing a promise.”⁴⁰

charged at the time of order placement, but the customer was still not obligated to pick up the goods. Not-picked-up gift/EBT card orders are automatically refunded with no action required by the customer.

While Appellant believes any text messages received due to gift/EBT card orders are also telephone solicitation because the FCC carved out similar messages to the consumers who initiated the transactions, implying that these messages to consumers who didn't initiate the transactions are advertisements, if this Court was to decide the case turned on orders placed using credit/debit cards vs gift/EBT cards (when the money changed hands), Walmart never gave evidence of what payment methods I.M. used and that fact issue should have precluded granting Walmart summary judgement.

³⁹ Pointing to ER 165-167 (Faitak Dep. Tran. 31:24-33:18) and ER 169-171 ((Faitak Dep. Tran. 48:14-50:10). This snippet is from ER 171 lines 1-10

⁴⁰ [*Sateriale v. R.J. Reynolds Tobacco Co.*](#), 697 F.3d 777, 785 (9th Cir. 2012)

This is a detail that settles many legal issues in the underlying lawsuit. I.M. might make online orders but the Defendant still had to convince her to show up and take delivery. I.M.'s orders were, legally speaking, the Defendant's unilateral contract offer to I.M. – she could place an online order and the Defendant would have it ready for pickup. I.M. did not make a promise in return. She did not promise to pick it up. This unilateral contract was only binding if I.M. performed by going to a Defendant store and picking up the goods, at which point I.M.'s money became the Defendant's, and the Defendant's goods became I.M.'s. This is the definition of a purchase. I.M. could place orders but the Defendant still had to convince her to come and take it before there was a purchase. The text messages identified in ER 24-25 (ECF. 95, 5:11-13, 5:20-22, 6:1-3, and 6:12-14) unquestionably were sent to encourage I.M. to show up at the Defendant's store, take delivery of the goods, and accept their offer by performance.

A September 3, 2022 message that read: “Walmart: Part of your order is ready for curbside pickup until Sat, Sep 03. Check in before you go: <https://w-mt.co/g/3908R1> Reply HELP for info; STOP to opt out.” Dkt. 12 at 19.

An October 29, 2022 message that read: “Your Walmart order has substitutions. Anything you don't want? Please let us know soon: <https://w-mt.co/g/4KyLN4> Reply HELP for info; STOP to opt out.” ECF. 12 at 9.

A November 16, 2022 message that read: “Some items may be low in stock. Pick substitution preferences for your upcoming Walmart order: <https://w-mt.co/g/4NidiA>.” Dkt. 12 at 11.

A January 28, 2023 message that read: “Your Walmart curbside pickup is ready. Check in before you leave, so we know you’re on the way: <https://w-mt.co/g/5zHyUX> Reply HELP for info; STOP to stop.” Dkt. 12 at 24.

The moments in time when I.M. arrived at the Defendant’s store and took delivery of the goods were the purchases. By definition, I.M.’s online activity placing the *orders* was not purchases because I.M. was not obligated to show up, and the goods were not paid for and still belonged to the Defendant unless and until she did. The orders simply set in motion possible *future* purchases, when I.M. *might* show up and accept delivery, the money changing hands if she did.

The text messages identified in ER 24-25 (ECF. 95, 5:11-13, 5:20-22, 6:1-3, and 6:12-14), when sent to Barton, are telephone solicitations. The texts advertised the availability of goods and services for the purpose of encouraging I.M. to show up at the Defendant’s store so they would profit from the sale, and until I.M. showed up and took delivery of the goods and services, and the money changed hands, the goods were still for sale. Put another way, they were sent for the purpose of “encouraging the purchase . . . of . . . goods, or services, which is transmitted to any person” This is the definition of “telephone solicitation” under [47 CFR § 64.1200\(f\)\(15\)](#).

Under CEMA, an electronic commercial text message is defined as “an electronic text message sent to promote . . . goods, or services for sale” RCW

19.190.010(3). The same arguments apply, the text messages identified in ER 24-25 (ECF. 95, 5:11-13, 5:20-22, 6:1-3, and 6:12-14), when sent to Barton, are promoting goods or services for sale. The district court made an error by dismissing my TCPA claims, and even more so my CEMA claims.

Noted in Issue #1, the most fitting definition of CEMA’s ‘promote’ is ‘to present (merchandise) for buyer acceptance through advertising, publicity’. The Defendant firmly established that their intent behind all the texts was to “to facilitate pick-up and delivery of the purchased items”: “Walmart sent the order updates to facilitate the fulfillment of its customer’s previously placed orders”⁴¹ and “Walmart’s purpose for sending these order updates was to facilitate the fulfillment of its customer’s orders”⁴² and “Walmart’s purpose in sending these text message order updates is to provide information to its customers that will help facilitate the fulfillment of a previously placed order”⁴³ and “the *context* surrounding the text messages makes clear that the purpose of the messages was to facilitate the fulfillment of I.M.’s existing orders”⁴⁴ and “they provided information to facilitate the fulfillment of orders already placed by its customer”⁴⁵ and “The

⁴¹ ER 132 -133 (ECF 75, 6:26-7:1)

⁴² ER 133 (ECF 75, 7:17-18)

⁴³ ER 135 (ECF 75, 9:8-9)

⁴⁴ ER 142 (ECF 75, 16:11-13)

⁴⁵ ER 142 (ECF 75, 16:19-20)

order updates in all five categories contain messages that merely facilitate the fulfillment of an existing order”⁴⁶ and “Walmart’s purpose in sending the text message order updates was to facilitate the fulfillment of I.M.’s pending orders”⁴⁷ and “the undisputed record evidence establishes that Walmart’s purpose for sending the text message order updates at issue was to facilitate fulfillment of pending orders”⁴⁸ and “Walmart’s undisputed purpose in sending the text messages—to facilitate the fulfillment of ongoing transactions”⁴⁹, and the last and most damning concession:

“the text messages Walmart initiated to the 1019 number were not sent to promote the sale or lease of goods and services but rather to provide the intended recipient with updates about a prior purchase, including to facilitate pick-up and delivery of the purchased items” ER 150 (ECF 75, 24:24-26)

The Defendant argued fiercely that their texts were to “facilitate pick-up and delivery of the purchased items”. That is the same as if they said the purpose of their texts was to present merchandise for I.M.’s acceptance [showing up to the Defendant’s store to accept delivery so the money changed hands] through advertising or publicity. And that means the Defendant admitted their texts promoted goods under CEMA’s RCW 19.190.010(3).

⁴⁶ ER 143 (ECF 75, 17:20-21)

⁴⁷ ER 145 (ECF 75, 19:5-6)

⁴⁸ ER 147 (ECF 75, 21:4-5)

⁴⁹ ER 147 (ECF 75, 21:10-11)

III. THE DISTRICT COURT ERRORED BY NOT FINDING EACH TEXT MESSAGE WALMART SENT BARTON AFTER BARTON REPLIED “STOP” WERE VIOLATIONS OF TCPA § 227(C) AND ITS IMPLEMENTING REGULATIONS.

An FCC Declaratory Ruling⁵⁰ says that after my first Stop, the Defendant was only permitted one more text message confirming my Stop (if the confirmation text followed specific rules). They were in violation of the TCPA by continuing to text the 1019 number after receiving the my first Stop. The district court erred by letting them move the goalposts on the meaning of STOP after I followed their instructions and replied with STOP.

“Plaintiff’s contention that Walmart did not specify that the “STOP” request related to a single order is belied by the record. After the Plaintiff texted “STOP,” Walmart’s response provides that they will “no longer receive m[essages] about [their] order.” ER 36 (ECF. 95, 17:3-6)

Their text messages contained “STOP to opt out” and “STOP to stop”.⁵¹ I followed their instructions and replied ‘Stop’. This issue seems well settled in this circuit. In *Epps v. Earth Fare Inc.*⁵² the district court said

“The FCC rules "require[] **callers give consumers a direct opt-out mechanism such as . . . a reply of 'STOP' for text messages.** The common thread linking these cases is that

⁵⁰ <https://docs.fcc.gov/public/attachments/FCC-12-143A1.pdf> *Van Patten* cited it as “persuasive guidance”.

⁵¹ Walmart’s first text message on September 3, 2022 said “STOP to opt out”. ER 279 (ECF 12, ¶161)

⁵² *Epps v. Earth Fare Inc.*, No. 16-8221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017)

consumers must be able to respond to an unwanted call . . . using either a **reasonable oral method or a reasonable method in writing** . . . to prevent future calls."

"When assessing whether any particular means of revocation used by a consumer was reasonable," the FCC ruled that the relevant inquiry is:

the **totality of the facts and circumstances** surrounding that specific situation, including, for example, whether the consumer had a **reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance**, and whether the caller could have implemented mechanisms to effectuate a requested revocation **without incurring undue burdens.**" Affirmed on appeal.⁵³

I had a reasonable expectation that I could effectively communicate my *do-not-call* request by replying to their "STOP to opt out" text with Stop. Indeed, they confirmed receipt of my STOP. They never indicated that honoring my Stop request would be a burden, let alone an undue burden. Their responses to my STOP's "that they will "no longer receive m[essages] about [their] order."" did not communicate to me that my *do-not-call* request would not be honored⁵⁴ or give me other reasonable instructions that if followed, would cause them to stop calling me. "Sorry to see you go" sounded like that was the last I would hear from them. It

⁵³ [*Epps v. Earth Fare, Inc.*](#), No. 17-55413, 2-3 (9th Cir. Oct. 26, 2018)

⁵⁴ ER 268 (ECF 12 ¶ 57) Walmart's response to Barton's "Stop" said "Sorry to see you go. You'll no longer receive msgs about your order. For more info please call us at 1-833-235-2112"

wasn't until I sued them that they explained that they never intended a STOP to actually be the opt out they said it was the *40 times* they texted me "STOP to opt out" such as in ER 270 (ECF. 12 ¶161), the very first text they sent me. I also learned that they won't accept a do-not-call request by phone either.⁵⁵ They moved the goal posts *after* my STOP's and it would be terrible public policy to allow telemarketers to change the terms of the opt out *after* the consumer used reasonable a reasonable method to opt out.

“The Court finds that, in the totality of the circumstances, a reasonable person seeking to revoke consent would have tried, at least at some point during the back-and-forth, simply replying "STOP" to cancel--as instructed, rather than ignoring Defendant's revocation method”⁵⁶

I did what the *Rando* court said a reasonable person would do – replied STOP *as instructed*. And I followed the only opt out instruction the Defendant *ever* gave.

⁵⁵ ER 180-182 (ECF 72, 8-10) Walmart's deponent Mr. Faitak testified that the only method he knew of to stop the calls was calling *1-800-Walmart*. Barton tested that by calling *1-800-Walmart*, and YouTube video [youtube.com/watch?v=WPQhbnxSwOk](https://www.youtube.com/watch?v=WPQhbnxSwOk) is a recording of that call. Barton calls, [presses 1](#), eventually reaches [live agent](#) Marco, explains the problem to Marco, and Marco's ultimate advice is there is nothing Walmart can do and [they recommend Barton change his phone number or block the calling numbers](#).

⁵⁶ [Rando v. Edible Arrangements Int'l, LLC](#), Civil Action No. 17-701(JBS/AMD), 20 (D.N.J. Mar. 28, 2018)

“The FCC's ruling are clear—a caller may not designate a method of opting out "in ways that make it difficult or impossible to effectuate revocations"”⁵⁷

Protecting the public from unwanted phone calls is why the FCC ruled in 2015 that consumers can stop calls through any reasonable means⁵⁸ (“a called party may revoke consent at any time and through any reasonable means. A caller may not limit the manner in which revocation may occur” ¶47⁵⁹, and, “callers may not abridge a consumer’s right to revoke consent using any reasonable method” ¶64). See *Van Patten v. Vertical Fitness Grp.* where the ninth circuit adopted this view:⁶⁰

The 2015 Order stressed that consumers "have a right to revoke consent, using any reasonable method including orally or in writing." *Id.* at 7996 ¶ 64. The FCC also specified ways that a consumer may revoke a call: "by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities." *Id.* The FCC emphasized that the TCPA does not permit the calling party to designate the exclusive means of revocation, and instead, the called party must "clearly express his or her desire not to receive further calls." *Id.* at

⁵⁷ [Viggiano v. Kohl's Dep't Stores, Inc.](#), Civ. Action No. 17-0243-BRM-TJB, 8 (D.N.J. Nov. 27, 2017)

⁵⁸ [In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991](#), 30 F.C.C. Rcd. 7961 (2015)

⁵⁹ *Jackson v. First Nat'l Bank of Omaha*, No. CV 20-1295 DSF (JCX), 2022 WL 423440, at *5 (C.D. Cal. Jan. 18, 2022)

⁶⁰ [Van Patten v. Vertical Fitness Grp., LLC](#), 847 F.3d 1037, 1047-48 (9th Cir. 2017)

7997 ¶ 67. It is reasonable for the FCC to interpret the TCPA to permit revocation of consent.

I asked the Defendant to stop texting using their instruction and the word “STOP” that courts have widely recognized as a reasonable way to make a *do-not-call* request. What could be clearer than that? See also *Reaves v. Ketoro, Inc.*⁶¹, certifying a class of consumers who replied “Stop” when the caller intended recipients to click on an opt out hyperlink instead. “The Court additionally notes that replying “Stop” is a common method for opting out of marketing texts.”

The Defendant knew or should have known that I didn’t want any more calls after I first replied STOP. It would be inequitable for them to communicate to me via text without presenting any other opt-out mechanism but Stop, then refuse to allow me to stop the texts via Stop. Had their text messages said “Reply STOP to stop receiving messages about this order, reply STOP ALL to stop receiving messages about all orders”, and I only replied STOP to *that* instruction, perhaps the analysis would be different. But they didn’t and this Court should not let them decide what STOP means to the Defendant *after* they receive STOP from a consumer like me who obeyed their instruction “STOP to opt out”. Further,

⁶¹ [*Reaves v. Ketoro, Inc.*](#), 2020 U.S. Dist. LEXIS 167926, *2

consumers can't call 1-800-Walmart to get the calls to stop because those agents "don't really deal with that kind of stuff".⁶²

My stop back to the Defendant is important because "Congress has delegated the FCC with the authority to make rules and regulations to implement the TCPA".⁶³ An FCC Declaratory Ruling⁶⁴ says that after my opt out, the Defendant was only permitted one more text message confirming my opt-out request if the confirmation text followed specific rules. *Id* at ¶1. Those rules are:⁶⁵

- only confirm the consumer's opt-out request and do not include any marketing or promotional information;
- the only additional message sent to the consumer after receipt of the opt-out request.
- be sent shortly after the consumer's request.

Confirmation of opt-out messages are informational, and the FCC ruled that even a second opt-out confirmation message is a violation.

Even if this Court finds that all of the Defendants text messages in this lawsuit are purely informational, they must respect my opt out: "[N]o text messages other than one confirmation of the opt-out request is encompassed within the consumer's prior express consent". *Id* at ¶12. The district court cited *Moskowitz*

⁶² ER 180-182 (ECF 72, 8-10) The district court erred in refusing to consider the 1-800-Walmart calls.

⁶³ *Satterfield v. Simon Schuster*, 569 F.3d 946, 953 (9th Cir. 2009)

⁶⁴ Footnote 31 of <https://docs.fcc.gov/public/attachments/FCC-12-143A1.pdf> released on November 29, 2012. *Van Patten* cited it as "persuasive guidance".

⁶⁵ *Id* at ¶11

and the *Moskowitz* court found this FCC ruling persuasive.⁶⁶ If the Defendant isn't allowed to send even a second opt-out confirmation message, every message beyond my first "STOP" on September 15, 2022, is a violation of the FCC's order.

The easy way for the Defendant to have avoided this entire situation is for the Defendant to have checked the 1019 number against the FCC's reassigned number database⁶⁷ (RND) somewhere between July 9, 2020, and September 3, 2022, when they started texting it.

"The FCC's Reassigned Numbers Database (RND) is designed to prevent a consumer from getting unwanted calls intended for someone who previously held their phone number. Callers can use the database to determine whether a telephone number may have been reassigned so they can avoid calling consumers who do not want to receive the calls." *Id.*

As the ninth circuit observed in *N. L. v. Credit One Bank*⁶⁸

"In its findings supporting the TCPA, Congress aimed to strike a "balance[]" between "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech ... in a way that protects the privacy of individuals and permits legitimate telemarketing practices."

The *N.L.* court went on to suggest that when a caller has technological and best practices solutions to prevent unwanted calls to reassigned numbers, it doesn't

⁶⁶ [Moskowitz v. Am. Sav. Bank](#), CIV. NO. 17-00299 HG-RT, 23 (D. Haw. Jan. 6, 2020)

⁶⁷ <https://www.fcc.gov/reassigned-numbers-database>

⁶⁸ [N. L. v. Credit One Bank](#), 960 F.3d 1164, 1169 (9th Cir. 2020)

make sense for the balance between individual privacy rights and legitimate telemarketing practices to shift towards entities that refuse to utilize *any* of them.⁶⁹

The Defendant demonstrates they don't really care if they call reassigned phone numbers because they give the job of scrubbing the numbers to their customers.

The things they care about, like opening and closing the stores and stocking shelves, they give to employees. See the following testimony at ER 178 (ECF 72, bottom of page 6). The deposition testimony is at ER 163.

Q: So you rely on the customer to update Walmart that their phone number has cha[n]ged?

A: Yes.

Q: And Walmart doesn't do anything to check for this condition where the customer's phone number has changed?

A: Walmart relies on the customer to provide the information.

The FCC does not endorse this:

“the FCC's website states that “[c]allers can use the [RND] to determine whether a telephone number may have been reassigned *so they can avoid calling customers* who do not want to receive the calls . . . the fact that the FCC created a narrow safe harbor solely for RND users suggests that the FCC endorses (and seeks to incentivize) reasonable reliance upon *the* RND, not an intended recipient's prior express consent.” *Hyton v. TitleMax of Va.*⁷⁰

⁶⁹ ER 178 (ECF 72, 6:9-21)

⁷⁰ [Hyton v. TitleMax of Va.](#), Civil Action 4:21-cv-163, 16 (S.D. Ga. Nov. 7, 2022)

If the district court is upheld, the Defendant can continue thumbing its nose at the FCC and will have no reason to stop dialing wrong numbers.

IV. THE DISTRICT COURT ERRORED NOT FINDING WALMART’S TEXTS TO BE TELEPHONE SOLICITATION UNDER TCPA § 227(C) AND ITS IMPLEMENTING REGULATIONS BECAUSE THEY WERE SENT IN FURTHERANCE OF ITS PROFIT SEEKING COMMERCIAL ENTERPRISE.

All the text messages the Defendant sent 1019 fall under § 227(c) because they were sent for a profit motive.

“Unlike some statutes, the TCPA does not dedicate a section of its text to describing its purpose. However, that does not mean the TCPA does not state its purpose. In fact, Congress explicitly stated the purpose of the TCPA . . .”⁷¹

Congress stated the purpose of the TCPA in 47 U.S. Code § 227(c)(1) “the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” As the *Hill v. Investorplace Media, LLC*⁷² court put it in a case with similar facts:⁷³ “[t]his is not the rare case in which free products are distributed via [text] ‘without hope of financial gain . . . Thus, the

⁷¹ [L.A. Lakers, Inc. v. Fed. Ins. Co.](#), 869 F.3d 795, 803 (9th Cir. 2017)

⁷² [Hill v. Investorplace Media, LLC](#), 2024 U.S. Dist. LEXIS 41709, *10

⁷³ A former customer alleged he opted out of alert texts from InvestorPlace. Six months later he received “cryptocurrency alerts” text messages, investor informational events, links to articles and stock recommendations. Most of the text messages contained a link directing the viewer to a specific page of [Investorplace’s] website hosting the briefing or article discussed.

Court finds these text messages were plausibly sent for the "purpose of encouraging the purchase or rental of, or investment in, property, goods, or services...."

What is a purchase if not a customer giving a merchant money and the customer walking away with the goods. In the Defendant's own words: "Walmart's purpose in sending these text message order updates is to provide information to its customers that will help facilitate the fulfillment of a previously placed order"⁷⁴ The fulfillment sounds like the purchase because the time of fulfillment is when Walmart took I.M.'s money. ER 182 (ECF 72, 10:14-15):

Q. Okay. And then on this same order, let's assume she used a credit card, and she wasn't charged until pick up, but she never picks up the order. She's never charged?

A. At a certain point after the customer doesn't pick up, the order is cancelled and the authorization hold is returned to the customer. No charge was ever placed on their card.

If she [I.M.] never pick up her order "no charge was ever placed on [her] card". How does the Defendant profit if no charge is placed on their customer cards? It is undeniable that their texts were intertwined with their revenue stream from I.M. Not just those directly encouraging I.M. to come to their store and take delivery, all of them. Telephone solicitation is defined in 47 CFR § 64.1200(f)(15)

⁷⁴ Walmart listed five specific types of texts it sent to help facilitate fulfillment of a previously placed order. ER 134-135 (ECF 75, 8:21-9:9).

as "initiation of a telephone call or message for the purpose of encouraging [giving hope] the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person". This is a very broad term – the Merriam-Webster dictionary defines “encouraging” as ‘giving hope’⁷⁵ – and Congress intended telephone solicitation to cover commercial-in-nature calls:

“To come within the definition, a caller must encourage a commercial transaction . . . the record suggests that most unwanted telephone solicitations are commercial in nature”⁷⁶

Giving hope of a commercial transaction does not mean the Defendant must have intended every text message sell a specific item, they can simply be part of a company’s profit-making operations:

“while Defendant's messages may have been informational on their face, it is plausible that they were part of a larger marketing, or profit-seeking, scheme and, as such, fall within the TCPA's prohibition. See *Drug Reform Coordination Network, Inc. v. Grey House Publ'g, Inc.*, 106 F.Supp.3d 9, 12-13 (D.D.C. 2015) (explaining that messages that promote a free good or service “are often part of an overall marketing campaign” . . .

Defendant's argument is unavailing because it ignores the broader context in which the calls were made. Part of that context is the sheer number of communications Defendant initiated with Plaintiff: twenty phone calls, including eighteen voice mails over the course of eleven months. (Compl. ¶¶ 25-

⁷⁵ <https://www.merriam-webster.com/dictionary/encouraging>

⁷⁶ [H.R. Rep. 102-317](#) at 16, 102nd Cong. (1st Sess. 1991).

48). This consistent pattern makes it more likely the calls were part of an overall marketing scheme-businesses typically do not promote free services in such an aggressive manner without any business purpose. See *Boehringer*, 847 F.3d at 95 (explaining that “[b]usinesses are always eager to promote their wares” and, therefore, typically do not provide free services or goods for no reason). And almost all of the calls pertained to services or programs related to Defendant's business, which makes it more likely the calls had a profitmaking purpose. *Id.* at 95-97 (holding that where a message “discuss[es] a subject that relates to the firm's products or services, there is a plausible conclusion that the [message] had the commercial purpose of promoting those products or services”). *Fiorarancio v. Wellcare Health Plans, Inc.*⁷⁷

The 90 texts Barton received stemmed directly from the Defendant’s sales process:

“Walmart presents its customers with a checked box and the language “I want to receive text updates about the status of my order.” *Id.* Near the checked box is a space populated with the phone number . . . If the customer leaves the box checked and neither changes nor removes the phone number, Walmart texts order updates to that number.” ER 134 (ECF 75, 8:14-19).

Order updates from “the largest grocery and home goods retailer in the country” are commercial. None of their 90 messages were about things like product recalls or other information outside of their sales flow. “Walmart sent the

⁷⁷ [*Fiorarancio v. Wellcare Health Plans, Inc.*](#), Civil Action 21-14614 (SRC), 7 (D.N.J. Jan. 11, 2022)

order updates to facilitate the fulfillment of its customer’s previously placed orders”⁷⁸

In a motion to dismiss, the *Less v. Quest Diagnostics Inc.*⁷⁹ court was tasked with deciding if the following call was purely informational:

“Hello, this is a courtesy call from MedXM, a Quest Diagnostics company, on behalf of your health insurance regarding your annual wellness visit. This is a preventative benefit that you are entitled to at no copay. Please call 888-246-7722 to schedule an appointment. Thank you and have a great day.”

It was unable to say it was:

“Questions remain, such as -- What was the business strategy behind Quest/MedXM making the calls? How did the calls generate revenue for Quest/MedXM? Were the call operators paid on a commission or incentivized if recipients booked an appointment?”,

In this case these are easy to answer questions. Noted above, the Defendant collected the money from I.M. at fulfillment – no fulfillment, no profit. They needed I.M. to show up and collect their goods so it could collect her money, and the majority of their texts were clearly intended to motivate her to do just that. But they had two broader motives beyond just making one specific sale.

⁷⁸ ER 132 (ECF 75, 6:25-7:1)

⁷⁹ *Less v. Quest Diagnostics Inc.*, 515 F. Supp. 3d 715, 717 (N.D. Ohio 2021)

Their first additional motive is using texts to foster a relationship with I.M. and customers like her that would keep them happy, placing new orders, and showing up to collect them. “Walmart’s customers, including the customer who placed the orders at issue in this case, welcome the order updates and find them helpful.” ER 135 (ECF 75. 9:22-23). The Defendant said the point of all the texts was “customer service”. *Id* at 7:2. It is obvious why sending these texts benefits the Defendant – unhappy customers don’t pick up their orders and don’t place new ones.

“Although most purchases still occur in Walmart’s brick-and-mortar stores, Walmart’s customers are increasingly buying items online through Walmart’s website and mobile application Walmart’s customers can choose to pick up such orders from a Walmart store or to have them shipped to their homes and businesses. As a courtesy, Walmart gives its customers the option to receive real-time text message updates about their pending orders.” ER 134 (ECF 75, 8:6-13).

They used I.M. to demonstrate their intent behind sending the texts.⁸⁰

Q. Do you find it helpful to receive updates about the status of your orders?

A. I do. It’s definitely nice.

Q. Okay. And why is that?

A. Because I get notified right away, like, if there’s a substitution, or I typically know that if my order is set from like 3:00 to 4:00, that I’ll get the text at 2:45 that it’s ready. It’s always just nice to know that it’s ready.

Q. And it helps you to organize your day?

⁸⁰ See I.M.’s testimony in ER 145-146 (ECF 75, 19:26-20:10)

A. Yes.

Q. And do you consider it to be good customer service that Walmart provides you with those updates?

A. I do.

Their other motive behind the texts is getting customers to show up at their stores for yet another reason – even more purchases. In their 2023 annual report, they said:

“[M]any products available for purchase online can be picked up by the customer or member at a local Walmart store or Sam's Club, *which provides additional customer traffic at such stores and clubs.*”⁸¹ They directly link customer traffic and Walmart's financial performance:⁸²

“a reduction in the amount of traffic in our stores and clubs, which would, in turn, reduce the opportunities for cross-store or cross-club sales of merchandise that such traffic creates and could reduce our sales within our stores and clubs and materially adversely affect our financial performance.”

The district court erred in taking the very narrow view that the texts “were sent to facilitate fulfillment of its customer's previously placed orders and were informative only.” (Dkt. 95, 12:19-20) and refused to look at the bigger picture of how the defendant used the texts for profit, both in the short-term case of customers showing up at the stores to pick up their orders, grooming their

⁸¹ Quoted from [Walmart's 2023 annual report](#) page 19. Emphasis added.

⁸² Quoted from [Walmart's 2023 annual report](#) page 15

customers to make the Defendant their retailer of choice, and to provide additional customer traffic at their stores for “for cross-store or cross-club sales of merchandise”.

There is nothing wrong with any of this for consumers who want the Defendant’s calls, but that doesn’t give them a license to force calls on reassigned numbers in their pursuit of profits:

“the TCPA is a remedial statute intended to protect consumers from unwanted automated telephone calls and messages, it should be construed in accordance with that purpose.”⁸³

The district court should have considered the nexus between their calls going out and their profits coming in. The nexus between calls going out and profits coming in was recognized in *PDR Network*:

“In *PDR Network*,⁸⁴ the Fourth Circuit held that a fax constitutes an “unsolicited advertisement” under §§ 227(a)(5) and (b)(1)(C) of the TCPA if it is “commercial in nature.” 80 F.4th at 472 (quoting *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 224 (6th Cir. 2015)). It accordingly held that the plaintiff had plausibly alleged the necessary commercial nexus because the defendant earned a commission every time a recipient of the fax downloaded the “free” eBook it promoted. *Id.* at 475. Similarly, in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, the Second Circuit ruled that an unsolicited fax promoting a free seminar plausibly violates § 227(b)(1)(C)

⁸³ *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047 (9th Cir. 2017)

⁸⁴ *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 476 (4th Cir. 2023)

because seminar invitees were doctors and the host was a pharmaceutical company who “would presumably hope to persuade [the invited doctors] to prescribe its drugs to patients.” 847 F.3d 92, 97 (2d 2017).⁸⁵

This Court should likewise see the commercial nexus between their texts and how the Defendant uses them to make sales.

CONCLUSION

“Walmart is the largest grocery and home goods retailer in the country”⁸⁶ and they sent the texts in this lawsuit as part of their ongoing profit-making enterprise years after I.M. surrendered the 1019 phone number, and after years of not calling it. The Defendant started texting it because they thought it would increase their profitability. A prudent caller would have done something to verify the number’s current user after such a long period of inactivity. Instead, they used a dark pattern practice to pretend I.M. knowingly consented.⁸⁷

“The TCPA is not limited to telemarketing calls; Congress recognized unsolicited contact as a concrete harm regardless

⁸⁵ [*Hill v. Investorplace Media, LLC*](#), Civil Action 5:23-CV-00111-KDB-DCK, 6-7 (W.D.N.C. Mar. 11, 2024)

⁸⁶ ER 134 (ECF 75, 8:5)

⁸⁷ See ER 79-83 (ECF 77, 10:11-14:11), and ER 134 (ECF 75, 8:14-19) “Walmart presents its customers with a checked box and the language “I want to receive text updates about the status of my order.” *Id.* Near the checked box is a space populated with the phone number . . . If the customer leaves the box checked and neither changes nor removes the phone number, Walmart texts order updates to that number.”

of caller or content, and this harm is similar in kind to harm that has traditionally been redressable by courts.”⁸⁸

But the phone number had changed hands and the Defendant did not use the FCC’s Reassigned Number Database (RND) to prevent unwanted calls in the first place, and did not provide me with a reasonable means to make them stop.

People’s phone numbers changing is well known. Courts have found “[t]here is no dispute that millions of wireless numbers are reassigned each year”,⁸⁹ something that Congress pointed out in 1992: “people change . . . telephone numbers often enough”.⁹⁰ With changing phone numbers and the defendant’s massive customer base (its 2023 annual report says “Each week, we serve approximately 240 million customers”),⁹¹ that is a lot of phone numbers changing hands, and a lot of phone calls going to the wrong people.

But why spend the time and money to use the RND to prevent unwanted texts to the millions of wireless numbers that are reassigned each year when callers can point to the district court’s ruling and shrug their shoulders?

“Because the TCPA is a remedial statute, it should be construed to benefit consumers” *Gager v. Dell Fin. Servs., Llc.*⁹²

⁸⁸ [Romero v. Dep't Stores Nat'l Bank](#), No. 16-56265, 3 (9th Cir. Feb. 28, 2018)

⁸⁹ [Aca Int'l v. Fed. Commc'ns Comm'n](#), 885 F.3d 687, (D.C. Cir. 2018)

⁹⁰ [H.R. Rep. 102-317](#) at 7, 102nd Cong. (1st Sess. 1991).

⁹¹ Quoted from [Walmart’s 2023 annual report](#) page 6.

⁹² [Gager v. Dell Fin. Servs., Llc.](#), 727 F.3d 265, 271 (3d Cir. 2013)

The purpose of the TCPA and CEMA is to prevent unwanted calls initiated with a profit motive. If this Court doesn't do something, the huge quantity of companies who initiate calls stemming from commercial transactions will have no incentive to take even the smallest effort to call the correct person. If the district court's ruling stands, they can text and call wrong numbers endlessly with impunity. The district court should be reversed, and the case remanded for further proceedings.

Date: 5/29/2024

/s/ Nathen Barton
Nathen Barton

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

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**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2024, I caused the foregoing document to be electronically filed with the Clerk of the Court using the ACMS system, which will send notification of such filing to all counsel of record and all pro se parties.