

November 7, 2012

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**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Ex Parte Notice – SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling in CG Docket No. CG 02-278**

Dear Ms. Dortch:

This letter memorializes three separate meetings that took place on Monday, November 5, 2012, with Angela Kronenberg (Legal Advisor to Commissioner Clyburn), Nicholas Degani and Courtney Reinhard (Legal Advisors to Commissioner Pai), and Erin McGrath (Legal Advisor to Commissioner McDowell), related to the legal and policy arguments in support of the SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling (“Petition”).<sup>1</sup> Representing SoundBite at the meetings were SoundBite executives Bob Leahy (Chief Operating Officer and Chief Financial Officer) and John Tallarico (Vice President of Product Management), and Monica Desai, counsel to SoundBite.

During the meetings, SoundBite discussed the need for the Commission to act quickly to clarify that in the narrow circumstance when a subscriber sends a text message choosing to opt-out of receiving future text messages, and a one-time immediate reply is sent back via text to confirm the opt-out, that single confirmation message is not a violation of the Telephone Consumer Protection Act (“TCPA”)<sup>2</sup> or Section 64.1200 of the Commission’s rules.<sup>3</sup>

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<sup>1</sup> SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“Petition”).

<sup>2</sup> Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2000 & Supp. 2005) (“TCPA”).

<sup>3</sup> 47 C.F.R. § 64.1200.

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SoundBite emphasized that given the comment cycle for its Petition has closed, the overwhelming support in the record,<sup>4</sup> the nearly ubiquitous practice of sending opt-out confirmation texts, the recent court decisions supporting the arguments raised by SoundBite,<sup>5</sup> bipartisan Congressional support,<sup>6</sup> and the consumer benefits associated with receiving opt-out acknowledgements and as supported by surveys and research placed in the record,<sup>7</sup> the time is ripe for a ruling clarifying that a single confirmation of an opt-out request is not a violation of the TCPA or Commission rules. SoundBite also emphasized that expeditious action is particularly needed in light of the tremendous pressure mounting on the company caused by existing pending litigation and the uncertainty of future TCPA liability over one-time, opt-out confirmation texts. The costs to defend these lawsuits are tremendous for SoundBite, causing millions of dollars to be spent in litigation fees that could be spent on growing business and creating jobs.

SoundBite highlighted a federal court decision issued just last week squarely addressing and supporting the position taken by SoundBite in its Petition, using “common sense” as the basis for its decision.<sup>8</sup> In finding that a “simple confirmatory response to plaintiff-initiated contact can hardly be termed an invasion of plaintiff’s privacy under the TCPA,” the court stated that courts must use “a measure of common sense” and that imposing liability under the TCPA for a single confirmatory text “would constitute an impermissibly ‘absurd and unforeseen result.’”<sup>9</sup>

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<sup>4</sup> See, e.g., Comments, Reply Comments, and ex parte filings in this proceeding by entities collectively representing thousands of organizations and businesses, as well as consumers, including Consumer Action, CTIA -The Wireless Association®, the Retail Industry Leaders Association, the Mobile Marketing Association, Future of Privacy Forum, Consumer Bankers Association, and the Council of Better Business Bureaus.

<sup>5</sup> See *Ryabyschuck v. Citibank*, Case No. 11-CV-1236 – IEG(WVG)(S.D. Cal. 2012) (Attachment 1); *Ibey v. Taco Bell Corp.*, Case No. 12-CV-0583-H (WVG)(S.D. Cal. 2012).

<sup>6</sup> SoundBite Ex Parte Filing (June 8, 2012) (attaching joint letter in support from Senator John F. Kerry (D-MA) and Senator Scott P. Brown (R-MA)).

<sup>7</sup> SoundBite Ex Parte Filing (June 8, 2012) at 8-9 (describing studies reflecting that providing confirmation of an opt-out request is part of the receipt process that consumers expect and value).

<sup>8</sup> *Ryabyschuck v. Citibank*, Case No. 11-CV-1236 – IEG(WVG)(S.D. Cal. 2012).

<sup>9</sup> *Id.* (citing *Henrique v. US Marshal*, 653 F.2d 1317 (9<sup>th</sup> Cir. 1981)).

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The *Ryabyshchuck* court also found persuasive an earlier decision in *Ibey v. Taco Bell Corp.*, in which the court also concluded that the TCPA does not impose liability for a single, confirmatory text message.<sup>10</sup> In granting Taco Bell Corporation's Motion to Dismiss, the court stated:

The Court concludes that the TCPA does not impose liability for a single, confirmatory text message. The TCPA's statutory and legislative history emphasize that the statute's purpose is to prevent unsolicited automated telemarketing and bulk communications. Further, the Ninth Circuit has explained that "the purpose and history of the TCPA indicate that Congress was trying to prohibit use of ATDSs in a manner that would be an invasion of privacy." Here, Plaintiff expressly consented to contact by Defendant when he initially texted 91318 to Defendant. When Plaintiff decided he no longer wanted to receive in text communications, Plaintiff allegedly notified Defendant that he wished to stop communications, and Defendant allegedly confirmed its receipt of the message and Plaintiff's removal from Defendant's text-message communication list. Defendant's single, confirmatory text message did not constitute unsolicited telemarketing; Plaintiff had initiated contact with Defendant. Further, Defendant's sending a single, confirmatory text message in response to an opt-out request from Plaintiff, who voluntarily provided his phone number by sending the initial text message, does not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA. To impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited telemarketing in a bulk format.<sup>11</sup>

Moreover, there is implicit support of SoundBite's position by a broad range of other government, political, consumer and other organizations - including the American Automobile Association, Center for Disease Control and Prevention, Chicago Transit Authority, Federal Emergency Management Agency, U.S. Fish and Wildlife Service, History Channel, National Healthy Mothers Healthy Babies Coalition, Obama for America, Romney for President, United States Government (USA.gov), AARP, Black Entertainment Television, Consumers Union, the Federal Communications Commission, National Consumers League, and the National Trial Lawyers – because all of these organization send out an opt-out confirmation text message either in connection with a direct text message to the entity or in connection with an opt-out request

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<sup>10</sup> *Ibey v. Taco Bell Corp.*, Case No. 12-CV-0583-H (WVG)(S.D. Cal. 2012).

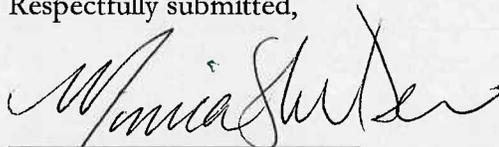
<sup>11</sup> *See id.* at 4-5 (citations omitted)(emphasis added).

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through Twitter.<sup>12</sup> This makes sense – consumers expect acknowledgement of their online requests<sup>13</sup> and, without a confirmation, consumers will likely worry their request had not been received, causing them to have to spend more time trying to verify their request.

Respectfully submitted,



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cc: Elizabeth Andrion  
Angela Kronenberg  
Nicholas Degani  
Courtney Reinhard  
Erin McGrath  
Lyle Elder  
Kris Monteith  
Mark Stone  
Kurt Schroeder  
John B. Adams  
Richard Smith

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<sup>12</sup> SoundBite Comments (April 30, 2012); SoundBite Reply Comments (May 15, 2012).

<sup>13</sup> SoundBite Ex Parte Filing (June 8, 2012) (citing and attaching consumer surveys and studies reflecting that consumers expect such a receipt).

**Attachment 1**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BOQDAN RYABYSHCHUCK, individually  
and on behalf of all other similarly situated,  
  
Plaintiff,

vs.

CITIBANK (SOUTH DAKOTA) N.A., also  
known as City Cards,  
  
Defendant.

CASE NO. 11-CV-1236 - IEG (WVG)

**ORDER:**

**1. DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT;**

[Doc. No. 32]

**2. GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY  
JUDGMENT;**

[Doc. No. 36]

**3. DENYING DEFENDANT'S  
MOTION TO STRIKE.**

[Doc. No. 40]

Before the Court are the parties' cross motions for summary judgment on the dispositive issue of whether certain text messages are actionable under the Telephone Consumer Protection Act (the "TCPA"), and Defendant Citibank (South Dakota), N.A., ("Citibank")'s motion to strike Plaintiff Boqdan Ryabyschuk's declaration in support thereof. For the reasons below, the Court hereby **DENIES** Plaintiff's motion for summary judgment, [Doc. No. 32], **GRANTS** Defendant's motion for summary judgment, [Doc. No. 36], and **DENIES** Defendant's motion to strike, [Doc. No. 40].

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1 **BACKGROUND**

2 This case concerns confirmatory text messages that were sent to cellular phone numbers  
3 voluntarily submitted to Citibank via online credit card applications. Plaintiff, individually and on  
4 behalf of those similarly situated, claims such text messages violate provisions of the TCPA, 47  
5 U.S.C. § 227(b)(1)(A)(iii), and seeks statutory damages of \$500 per negligent violation and up to  
6 \$1500 per knowing or willful violation.

7 **I. Undisputed Facts**

8 On May 14, 2011, Plaintiff provided his cellular phone number to Citibank in an online credit  
9 card application. [Doc. No. 42 at 3-4.] When the number was entered, a pop-up message displayed:  
10 “By providing . . . your mobile number, you agree to receive calls and messages, such as text messages  
11 . . . to service your account.” [See Doc. No. 36 at 3.]

12 On May 16, 2012, Citibank, via third-party vendor using short message service (“SMS code”),  
13 sent the following text message (the “first text”) to the cellular phone number Plaintiff had provided:

14 Free Text Msg.: Citi Cards needs to talk with you regarding your recent application. Please  
15 call 866 365-8962. To Opt-Out reply STOP.

16 [Doc. No. 42 at 3-4 (omitted punctuation in original text).] That same day, after Plaintiff replied  
17 “STOP,” Citibank sent the following text message (the “second text”) to Plaintiff’s cellular phone  
18 number:

19 Free Text Msg: Per your request you will no longer receive text messages from Citi Cards  
20 Credit Dept. If you have any questions call 866-365-8962.

20 [Id.]

21 **II. Procedural History**

22 Plaintiff filed an initial complaint on June 6, 2011, [Doc. No. 1], and the operative first  
23 amended complaint (“FAC”) on August 25, 2011. [Doc. Nos. 10.] The Court denied Defendant’s  
24 motion to dismiss the FAC on November 28, 2011. [Doc. No. 18.] Discovery closed on June 27,  
25 2012. [See Doc. No. 31.] Plaintiff and Defendant filed their present motions for summary  
26 judgment on July 5 and 27, 2012, respectively, [see Doc. Nos. 32, 36], and the Court heard oral  
27 argument by the parties on September 21, 2012, [see Doc. No. 47].

28 Though the FAC alleges that both the first and second texts constitute negligent and/or

1 knowing or willful violations of the TCPA, [see Doc. No. 10 at 4-5], Plaintiff's summary judgment  
2 briefing abandons the first text as basis for his claims. [See, e.g., Doc. No. 42 Plt's Reply at 2 ("It  
3 is the second message that Plaintiff is focused on for this class action."), at 4 ("Plaintiff's case is  
4 the *last call*, not the first call.")] Moreover, at the hearing, the parties asserted that the present  
5 summary judgment motions solely concern Defendant's liability for the second text, sent after  
6 Plaintiff replied "STOP." [Doc. No. 47.]

## 7 DISCUSSION

### 8 I. Motions for Summary Judgment

9 "Summary judgment is appropriate when no genuine and disputed issues of material fact  
10 remain, and when, viewing the evidence most favorably to the nonmoving party, the movant is  
11 clearly entitled to prevail as a matter of law." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946,  
12 950 (9th Cir. 2009) (citing Fed. R. Civ. P. 56). Here, the only issue presented is whether, on the  
13 undisputed facts as a matter of law, the second text is actionable under the TCPA.

14 The TCPA provides:

15 It shall be unlawful for any person within the United States, or any person outside the  
16 United States if the recipient is within the United States—

17 (A) to make any call (other than a call made for emergency purposes or made with the prior  
18 express consent of the called party) using any automatic telephone dialing system  
19 [(“ATDS”)] or an artificial or prerecorded voice—

20 ...  
21 (iii) to any telephone number assigned to a paging service, cellular telephone service,  
22 specialized mobile radio service, or other radio common carrier service, or any service for  
23 which the called party is charged for the call.

24 47 U.S.C. § 227(b)(1)(A)(iii).

25 This statutory language has been interpreted to generally “make it unlawful to use an  
26 automatic telephone dialing system or an artificial or prerecorded voice message, without the prior  
27 express consent of the called party, to call any emergency telephone line, hospital patient, pager,  
28 cellular telephone, or other service for which the receiver is charged for the call.” *Mims v. Arrow  
Financial Services, LLC*, \_ U.S. \_, 132 S.Ct. 740, 745 (2012); *Satterfield*, 569 F.3d at 955 (“TCPA  
exempts those calls ‘made with the prior express consent of the called party.’”) (quoting 47 U.S.C.

1 § 227(b)(1)(A)).<sup>1</sup>

2 In construing the extent and contour of this general prohibition, courts consistently and  
3 properly look to the purpose and history of the statute. *See Mims*, \_ U.S. \_, 132 S.Ct. at 744 (“In  
4 enacting the TCPA, Congress . . .”); *Satterfield*, 569 F.3d at 954 (“the purpose and history of the  
5 TCPA indicate . . .”). Hence, as is widely-acknowledged, “the purpose and history of the TCPA  
6 indicate that Congress was trying to prohibit use of ATDSs in a manner that would be an invasion  
7 of privacy.” *Satterfield*, 569 F.3d at 954. So, too, courts broadly recognize that not every text  
8 message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent  
9 “the proliferation of intrusive, nuisance calls.” *See, e.g., Mims*, \_ U.S. \_, 132 S.Ct. at 744. With  
10 the statute’s purpose in view, the Ninth Circuit recently emphasized that courts look to the  
11 surrounding circumstances in determining whether particular calls “run afoul of the TCPA,” and in  
12 so doing, courts must “approach the problem with a measure of common sense.” *Chesbro v. Best*  
13 *Buy Stores, L.P.*, \_\_ F.3d \_\_, 2012 WL 4902839, at \*3 (9th Cir. Oct. 17, 2012); *see also Mt.*  
14 *Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992) (“Common sense not  
15 dogma is what is needed in order to explore the actual meaning of legislative enactments.”).

16 Here, common sense renders the second text inactionable under the TCPA. *See Henrique*  
17 *v. U.S. Marshal*, 653 F.2d 1317, 1320 (9th Cir. 1981) (“the Court must recognize the common  
18 sense practicalities of the situation presented.”). The lone text message at issue was sent to a  
19 number voluntarily provided by Plaintiff to Defendant without caveat. [Doc. No. 42 at 3-4.] In  
20 the span of a day, Plaintiff received a separate, indisputably inactionable text message (the first  
21 text), responded with a one-word, opt-out request, and received a concise response simply  
22 confirming receipt of the opt-out request (the second text). [*Id.*] These circumstances  
23 “unmistakably” display some measure of prior consent, *cf. Satterfield*, 569 F.3d at 955, and dispel  
24 any allusion to “the proliferation of intrusive, nuisance calls” targeted by the TCPA. *See Mims*, \_  
25 U.S. \_, 132 S.Ct. at 744. Such simple, confirmatory response to plaintiff-initiated contact can  
26 hardly be termed an invasion of plaintiff’s privacy under the TCPA. *Id.* A finding to the contrary  
27 would “stretch an inflexible interpretation beyond the realm of reason.” *See Henrique*, 653 F.2d at

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<sup>1</sup> A “text message is a ‘call’ within the TCPA.” *Satterfield*, 569 F.3d at 954.

1 1320.

2 The Honorable Marilyn L. Huff recently reached this same common sense interpretation in  
3 *Ibey v. Taco Bell Corp.* 2012 WL 2401972, at \*2-3 (S.D. Cal. June 18, 2012). Just as in this case,  
4 the text message at issue in *Ibey* was sent in response to plaintiff's opt-out request, to a number  
5 voluntarily provided by plaintiff, and merely confirmed receipt of plaintiff's opt-out request. *See*  
6 *id.* Judge Huff surveyed the legislative history of the TCPA and concluded that:

7 sending a single, confirmatory text message in response to an opt-out request from  
8 Plaintiff, who voluntarily provided his phone number by sending the initial text message,  
9 does not appear to demonstrate an invasion of privacy contemplated by Congress in  
enacting the TCPA. To impose liability under the TCPA for a single, confirmatory text  
message would contravene public policy and the spirit of the statute.

10 2012 WL 2401972, at \*3.

11 In arguing that *Ibey* was wrongly decided, Plaintiff relies on opinions finding the TCPA  
12 content neutral. [*See e.g.*, Doc. No. 38 at 22 n.32 (citing *Melingonis v. Network Communs. Int'l*  
13 *Corp.*, 2010 WL 4918979, at \*1 (S.D. Cal. Nov. 29, 2010) (“We note that [the TCPA] applies  
14 regardless of the content of the call . . .”).]. But the rationale underlying *Ibey* concerns context  
15 rather than content, and context is indisputably relevant to determining whether a particular call is  
16 actionable under the TCPA. *Chesbro*, \_\_F.3d\_\_, 2012 WL 4902839, at \*3. The plain language of  
17 the statute exempts certain calls in certain contexts. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (exempting  
18 calls sent during an emergency or with prior consent). Moreover, the statute contemplates further  
19 contextual exemptions as delineated by the Federal Communications Commission (“FCC”). *See,*  
20 *e.g.*, *In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,  
21 23 FCC Rcd. 559, 564, 2008 WL 65485 (Jan. 4, 2008) (FCC's 2008 Declaratory Ruling exempting  
22 “calls to wireless numbers provided by the called party *in connection with an existing debt*.”). In  
23 *Ibey*, Judge Huff considered circumstances nearly identical to those presented here and reasoned  
24 that “[t]o impose liability under the TCPA for a single, confirmatory text message would  
25 contravene public policy and the spirit of the statute.” 2012 WL 2401972, at \*3.

26 This Court agrees; imposition of liability under the TCPA for a single, confirmatory text  
27 message would constitute an impermissibly “absurd and unforeseen result.” *Henrique*, 653 F.2d at  
28 1320 (when interpreting the scope of a statute, “the Court must . . . refuse to be compelled into an

1 absurd and unforeseen result.”). In line with the TCPA’s limited purpose, the Ninth Circuit’s  
2 recent emphasis on common sense practicality, and given the particular circumstances of this case,  
3 the Court finds the second text inactionable as a matter of law and therefore **GRANTS**  
4 Defendant’s motion for summary judgment.

5 **II. Defendant’s Motion to Strike**

6 Defendant’s motion to strike raises evidentiary objections inconsequential in light of the  
7 Court’s finding above and is thus **DENIED** as moot.

8 **CONCLUSION**

9 For the reasons above, the Court hereby **DENIES** Plaintiff’s motion for summary  
10 judgment, [Doc. No. 32], **GRANTS** Defendant’s motion for summary judgment, [Doc. No. 36],  
11 and **DENIES** Defendant’s motion to strike, [Doc. No. 40].

12 **IT IS SO ORDERED.**

13 **DATED:** October 30, 2012



14 **IRMA E. GONZALEZ**  
15 **United States District Judge**

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