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

RAFAEL DAVID SHERMAN and  
SUSAN PATHMAN, Individually and  
on Behalf of All Others Similarly  
Situated,

Plaintiffs,

vs.

YAHOO! Inc.,

Defendant.

CASE NO. 13cv0041-GPC-WVG

**ORDER DENYING DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**

[ECF No. 134]

Before the Court is Defendant Yahoo! Inc.’s (“Yahoo”) second motion for summary judgment. (ECF No. 134.) The motion has been fully briefed. (ECF Nos. 152, 157, 180, 181.) Based on the briefing and oral arguments of counsel, the Court hereby DENIES Defendant’s motion for summary judgment.

**BACKGROUND**

This case arises from a text message Plaintiff Susan Pathman (“Plaintiff”) received from an individual via Yahoo’s Mobile SMS Messenger Service (“PC2SMS Service”), which allows registered Yahoo users to send instant messages to mobile devices from their computers through the Yahoo Messenger platform. Specifically, in her First Amended Complaint (“FAC”) Plaintiff alleges that “[o]n or about May of 2013, Yahoo sent an unsolicited SPAM text message to Ms. Pathman (on its own

1 accord) that read: ‘A Yahoo! User has sent you a message. Reply to that SMS to  
2 respond. Reply INFO to this SMS for help or go to y.ahoo.it/imsms.’” (ECF No. 64.  
3 ¶ 18.) This message has been termed the “Welcome Message.” Plaintiff alleges that  
4 this unsolicited text message was sent using an “automatic telephone dialing system”  
5 (“ATDS”), as that term is defined by the Telephone Consumer Protection Act (the  
6 “TCPA”), 47 U.S.C. § 227 *et seq.* (*Id.* ¶ 21.) Plaintiff, individually and on behalf of  
7 those similarly situated, claims such messages violate provisions of the TCPA and  
8 seeks statutory damages of \$500 per negligent violation and up to \$1,500 per knowing  
9 or willful violation. (*Id.* ¶¶ 39-46.)

10 Defendant describes Yahoo Messenger as an instant messaging client that  
11 anyone can download and use free of charge by registering as a user with a Yahoo ID.  
12 (Decl. of Amir Doron Supp. Yahoo’s Opp’n to Class Cert. (“Doron Decl.”) ¶ 2, ECF  
13 No. 129-2.) A registered Yahoo user can send an instant message to a friend’s mobile  
14 device using the PC2SMS Service, which converts the instant message into an SMS  
15 message so that it can be transmitted to the mobile device. (*Id.* ¶ 3.) If the recipient  
16 wishes to reply from his or her mobile device, he or she can send an SMS message and  
17 the Yahoo user will receive it as an instant message. (*Id.*)

18 In order to send a text message through the PC2SMS Service, the Yahoo user  
19 must either select the recipient’s name from the user’s Yahoo contact list which is  
20 stored on a Yahoo server (assuming that name is associated with a mobile number) or  
21 manually input the recipient’s mobile number in the Yahoo Messenger window. (Decl.  
22 of Nitu Choudhary (“Choudhary Decl.”) ¶ 7, ECF No. 152-4; Doron Decl. ¶ 7.)  
23 Whenever a Yahoo user sends a message using the PC2SMS Service, Yahoo  
24 automatically checks a database called the Optin DB to see whether anyone has  
25 previously sent a message to that mobile number using the PC2SMS Service.  
26 (Choudhary Decl. ¶ 8; Doron Decl. ¶ 7.) If that recipient’s mobile number has never  
27 before received a text message sent via the PC2SMS Service, then Yahoo automatically  
28 appends the Welcome Message to the Yahoo user’s message. (*Id.*) Yahoo does,

1 however, set an opt-out period for the Welcome Message. (Boyajian Decl., Ex. 1  
2 (Doron Depo. 75:1-9), ECF No. 134-4.) Thus, after a certain amount of time has  
3 passed (i.e. after the opt-out period expires), a recipient could theoretically be sent a  
4 second Welcome Message. (*Id.*) Plaintiff disputes Yahoo's assertion that the Welcome  
5 Message is appended to the user's message, arguing that it is sent as a separate text  
6 message. (See e.g., ECF No. 152 at 2 (describing the Welcome Message as "a separate  
7 and additional text message")). The parties agree, however, that either way, the  
8 Welcome Message is automatically generated and sent. (ECF No. 134-1 at 3; ECF No.  
9 152 at 8-9.) At the same time, Yahoo saves the new mobile number in the Optin DB  
10 portion of the PC2SMS Service, which was created to prevent potential recipients from  
11 receiving multiple copies of the Welcome Message within the opt-out period. (Doron  
12 Decl. ¶¶ 8-9; Boyajian Decl., Ex. 1 (Doron Depo. 34:21-35:4), ECF No. 134-4.)

### 13 **LEGAL STANDARD**

14 Federal Rule of Civil Procedure 56 empowers the Court to enter summary  
15 judgment on factually unsupported claims or defenses, and thereby “secure the just,  
16 speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477  
17 U.S. 317, 325, 327 (1986); Fed. R. Civ. P. 56. Summary judgment is appropriate “if  
18 the movant shows that there is no genuine dispute as to any material fact and the  
19 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is  
20 material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477  
21 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient  
22 evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

23 The moving party bears the initial burden of demonstrating the absence of any  
24 genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy  
25 this burden by demonstrating that the nonmoving party failed to make a showing  
26 sufficient to establish an element of his or her claim on which that party will bear the  
27 burden of proof at trial. *Id.* at 322–24. If the moving party fails to bear the initial  
28 burden, summary judgment must be denied and the Court need not consider the



1 (iii) to any telephone number assigned to a paging service,  
2 cellular telephone service, specialized mobile radio service, or  
3 other radio common carrier service, or any service for which the  
called party is charged for the call[.]

4 47 U.S.C. § 227(b)(1)(A)(iii) (emphases added). The TCPA defines an “automatic  
5 telephone dialing system” as “equipment which has the capacity (A) to store or produce  
6 telephone numbers to be called, using a random or sequential number generator; and  
7 (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The Ninth Circuit has upheld the  
8 Federal Communications Commission (“FCC”) interpretation that a text message is  
9 considered a “call” within the meaning of the TCPA. *Satterfield*, 569 F.3d at 954. In  
10 July 2015, the FCC ruled that Internet-to-phone text messaging technology is a type of  
11 autodialer under the TCPA. *In the Matter of Rules & Regulations Implementing the*  
12 *Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8017 (2015).

13 Since the statute’s passage in 1991, the FCC has issued regulations expanding  
14 the statutory definition of an ATDS, and this Court is bound by those rulings under the  
15 Hobbs Act.<sup>1</sup> In 2003, the FCC was asked to determine whether predictive dialers fell  
16 within the scope of the TCPA’s definition of automatic dialers and it concluded that  
17 they did because they retained the same basic function—namely, “the capacity to dial  
18 numbers without human intervention.” *Rules and Regulations Implementing the Tel.*  
19 *Consumer Prot. Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14092 (2003).  
20 The FCC affirmed this decision in 2008. *See In the Matter of Rules and Regulations*  
21 *Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling, 23 FCC Rcd.  
22 559 (2008); *Hernandez v. Collection Bureau of Am., Ltd.*, No. SACV-13-01626-CJC,

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23  
24 <sup>1</sup> Under the Hobbs Administrative Orders Review Act, “[t]he court of appeals . . . has  
25 exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity  
26 of— [] all final orders of the Federal Communications Commission made reviewable by section 402(a)  
27 of title 47.” 28 U.S.C.A. § 2342(1); *F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).  
28 “Litigants may not evade these provisions by requesting the District Court to enjoin action that is the  
outcome of the agency’s order.” *ITT World Commc'ns, Inc.*, 466 U.S. at 468; *US W. Commc'ns, Inc.*  
*v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (“The Hobbs Act, 28 U.S.C. § 2342, requires that  
all challenges to the validity of final orders of the FCC be brought by original petition in a court of  
appeals . . . the district court thus lacked jurisdiction to pass on the validity of the FCC regulations”).

1 2014 WL 4922379, at \*2 (C.D. Cal. Apr. 16, 2014). In 2012, the FCC again revisited  
2 the definition of an ATDS and explained that the Commission has emphasized that the  
3 term ATDS “covers any equipment that has the specified *capacity* to generate numbers  
4 and dial them without human intervention regardless of whether the numbers called are  
5 randomly or sequentially generated or come from calling lists.” *In the Matter of Rules  
6 & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling,  
7 27 F.C.C. Rcd. 15391, 15392 n.5 (2012).

8 Applying the FCC’s definition of ATDS, Yahoo argues that the undisputed facts  
9 show that the PC2SMS Service does not have the capacity to send any messages  
10 without human intervention. (ECF No. 134-1 at 9.) As set forth above, the “human  
11 intervention” language is drawn from the FCC’s 2003 Report and Order wherein it  
12 interpreted an ATDS as having “the capacity to dial numbers without human  
13 intervention.” *Rules and Regulations Implementing the Telephone Consumer  
14 Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14092 (2003).  
15 However, in its most recent Ruling and Order, the FCC **rejected** the “argument that the  
16 Commission should adopt a ‘human intervention’ test by clarifying that a dialer is not  
17 an autodialer unless it has the capacity to dial numbers without human intervention.”  
18 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of  
19 1991*, 30 FCC Rcd. 7976 (2015). Instead, the FCC instructed that “how the human  
20 intervention element applies to a particular piece of equipment is specific to each  
21 individual piece of equipment, based on how the equipment functions and depends on  
22 human intervention, and is therefore a case-by-case determination.” *Id.* at 7975.

23 Consideration of the “human intervention” element requires an understanding  
24 of how PC2SMS operates and determining to what extent human intervention is the  
25 impetus for the transmission of the challenged text. Initially, this inquiry entails a  
26 determination of whether there are one or two separate texts. Defendant lumps both  
27 the original user text and the Yahoo informational text together as one inseparable text.  
28 According to Defendant, an informational Welcome Message is appended to the

1 sender's personalized message when a Yahoo user sends a text message to the  
2 consumer's cell phone for the first time through the PC2SMS system. (Dkt. 134-1 at  
3 7.) Plaintiff responds that, in fact, the Welcome message is a separate message  
4 prepared by Yahoo and sent automatically to consumers using cell numbers that are  
5 captured and stored by the Yahoo platform. (Dkt. No.152 at 27.) As proof of this  
6 claim, Plaintiff points to the fact that the Welcome Message received by Ms. Pathman  
7 was received before the two user messages were received. *Id.* At the motion hearing,  
8 Yahoo acknowledged that the Welcome message is sent as a separate text because of  
9 the character limits for text messages. The Court finds that a jury could find that there  
10 are two separate and individual texts, the user text to the consumer and the Welcome  
11 text which is sent automatically by Yahoo as a separate text message.

12 As to the Welcome text, Defendant argues that the evidence shows that the  
13 PC2SMS platform depends upon human intervention by the Yahoo user to send this  
14 text. Defendant asserts that the Welcome text is made possible by the user's input or  
15 selection of the recipient's cell number from the user's Yahoo contact list stored on a  
16 Yahoo server and that, as a result, the PC2SMS cannot qualify as an ATDS.

17 Plaintiff responds that the Welcome text is sent without human intervention and  
18 is automatically dialed and sent by the PC2SMS according to a system of metrics  
19 designed by Defendant. The Yahoo platform automatically checks to see whether a  
20 mobile number has previously received a text via the PC2SMS service within the opt  
21 out period, if it has not, the Welcome text is automatically generated and sent.  
22 (Choudhary Decl. ¶ 8; Doron Decl. ¶ 7.) Further, Plaintiff points to evidence that the  
23 Yahoo user did not ask Defendant to send the Welcome text, know that it would be  
24 sent, or approve the informational text. Lastly, Plaintiff has provided proof that  
25 Defendant, and not the user, composed the contents of the Welcome text that was  
26 automatically delivered. *Cf. Johnson v. Yahoo!, Inc.*, Case No. 14-2028, 2014 WL  
27 7005102, at 5 (N.D. Ill. Dec. 11, 2014) ("When a user sends a personalized message  
28 to a contact, it is clear that that transmission involves human intervention."); *Derby v.*

1 *AOL, Inc.*, No. 15 CV 00452 RMW, 2015 WL 3477658, at \*3 (N.D. Cal. June 1,  
2 2015) (No ATDS where personalized text messages, composed by individual AIM  
3 users, were sent to numbers chosen and manually inputted by the users).

4 To support its position, Yahoo relies on district court cases, which have held that  
5 where a message must be “triggered” by human intervention, the system is not an  
6 ATDS. (ECF No. 134-1 at 8-12 (*citing Glauser v. GroupMe, Inc.*, No. C 11-2584 PJH,  
7 2015 WL 475111 (N.D. Cal. Feb. 4, 2015), *Marks v. Crunch San Diego, LLC*, 55 F.  
8 Supp. 3d 1288 (S.D. Cal. 2014), *Modica v. Green Tree Servicing, LLC.*, No. 14 C 3308,  
9 2015 WL 1943222 (N.D. Ill. Apr. 29, 2015), *Gragg v. Orange Cab Co.*, 995 F. Supp.  
10 2d 1189 (W.D. Wash. 2014), and *McKenna v. WhisperText*, No. 5:14-cv-00424-PSG,  
11 2015 WL 428728 (N.D. Cal. Jan. 30, 2015)). Each of these cases was decided prior to  
12 the July 2015 FCC rule making decision, and involve distinguishable fact patterns with  
13 varying amounts of human intervention by the platform user and actual sender of the  
14 text message.

15 Of these cases, *Glauser* is most analogous to the present case. In *Glauser*, the  
16 court adopted Yahoo’s view that a user unintentionally triggering unsolicited text  
17 messages qualifies as human intervention. The application at issue in *Glauser* was a  
18 group messaging application, which allowed users to create a group and then send text  
19 messages to all group members at the same time. *Glauser*, 2015 WL 475111, at \*1.  
20 The alleged TCPA violation was based on the plaintiff’s receipt of two text messages  
21 welcoming him to a poker group after the group’s creator entered the plaintiff’s mobile  
22 number into the GroupMe application. *Id.* Plaintiff argued that the group creators  
23 never asked GroupMe to send the Welcome Texts, did not send the messages  
24 themselves, and were never informed that the messages would be sent. Once the  
25 numbers were obtained by GroupMe, the “entire process was automated,” and “[n]o  
26 human intervention was needed or involved.” In granting GroupMe’s summary  
27 judgment motion, the court found that the poker group’s creator triggered the welcome  
28 texts by entering the plaintiff’s telephone number and that this human intervention

1 precluded a finding that the application was an ATDS. *Id.* at \*6-7.

2 First, *Glauser* is distinguishable because it was decided before the July 2015  
3 FCC order which backed away from the “human intervention” element by rejecting the  
4 argument that a dialer is not an autodialer unless it has the capacity to dial numbers  
5 without human intervention. 30 F.C.C. Rcd. 7976. In addition, *Glauser* applies a “but-  
6 for” type of analysis which focuses on the triggering event leading up to the offending  
7 text. This form of analysis was rejected by another district court that considered the  
8 “human intervention” issue in the context of the Yahoo PC2SMS platform. In *Johnson*  
9 *v. Yahoo!*, the court observed that “[a] person will always be a but-for cause of any  
10 machine’s action, and therefore, I conclude that the FCC’s ‘human intervention’ gloss  
11 on the statute requires more than but-for causation.” *Johnson v. Yahoo!*, 2014 U.S.  
12 Dist. LEXIS 171325, \*17 (N.D. Ill. Dec. 11, 2014). The Court agrees. The Court finds  
13 that but-for analysis is inconsistent with the July 2015 FCC instruction to apply a case-  
14 by-case analysis to how the human intervention element applies to a particular type of  
15 equipment.

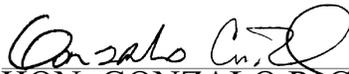
16 Reviewing the evidence in the light most favorable to the Plaintiff, the Court  
17 finds that there are genuine issues of fact as to whether the PC2SMS system is an  
18 ATDS. A reasonable jury could conclude that the Welcome text is produced and sent  
19 by an ATDS as the term is defined in the TCPA.

## 20 CONCLUSION

21 For the foregoing reasons, Yahoo’s second motion for summary judgment is  
22 **DENIED.**

23 **IT IS SO ORDERED.**

24 DATED: December 14, 2015

25   
26 HON. GONZALO P. CURIEL  
27 United States District Judge  
28