Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision	)	CG Docket No. 18-152 CG Docket No. 02-278

To: The Commission

COMMENTS OF CALLFIRE, INC.

CallFire, Inc. ("CallFire") provides these comments in response to the Consumer and Governmental Affairs Bureau of the Federal Communication Commission's Notice and Opportunity for Public Comment on the interpretation of the Telephone Consumer Protection Act in light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* decision. CallFire—a leading international provider of voice and messaging services—has substantial interests in this proceeding, and it strongly urges the Commission to reject the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

I. INTRODUCTION

CallFire is a leader in the field of voice and messaging services, providing a suite of cloud telephony products for customers around the world. CallFire provides user-friendly, intuitive voice and text connectivity products to over 100,000 businesses.[1] CallFire helps all kinds of businesses—from the neighborhood laundromat to national political campaigns—reach their customers through text or voice. With CallFire's text messaging tool, businesses can promote their

[1] *See* CallFire, About us, *available at* https://www.callfire.com/about (last visited Oct. 14, 2018).

events or promotions to their customers instantly via text.[2] With CallFire's voice messaging applications, businesses can talk to their customers about these promotions and events via live voice.[3] And with CallFire's Interactive Voice Response System ("IVR"), CallFire helps businesses interact with their customers in real-time.[4] For example, political organizations use CallFire's IVR to conduct phone surveys of thousands of potential voters at the click of a mouse button, while leading retailers use CallFire's IVR to obtain customer feedback after a customer purchases a product.[5] From businesses with just a handful of customers to businesses with millions of customers, CallFire enables its users to transmit necessary information to their customers, while saving them time and money.

Given its role as a leading provider of voice and messaging services, CallFire has been involved—either as a party or as a nonparty—in countless Telephone Consumer Protection Act ("TCPA") suits across the country.[6] But because CallFire's software platform can only be used to send messages to specific identified numbers that have been inputted into the system by the customer—and the CallFire system does not have the ability to send messages or make calls automatically, without human intervention—courts have consistently held that CallFire is not an Automatic Telephone Dialing System ("ATDS").[7] Indeed, no court has held otherwise.

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[2] *See* CallFire, Our Mission, *available at* https://www.callfire.com/about/our-mission (last visited Oct. 14, 2018).

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See, e.g.*, *Luna v. Shac, LLC*, 122 F. Supp. 3d 936 (N.D. Cal. 2015) (party); *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044 (S.D. Cal. 2015) (party); *Rinky Dink, Inc. v. Elec. Merch. Sys.*, No. C13-1347-JCC, 2015 WL 778065 (W.D. Wash. Feb. 24, 2015) (party); *Ramos v. Hopele of Fort Lauderdale, LLC*, No. 17-62100-CIV, 2018 WL 4568428 (S.D. Fla. Sept. 20, 2018) (non-party).

[7] *See, e.g.*, *Luna*, 122 F. Supp. 3d at 941–42; *Ramos*, 2018 WL 4568428 at *2.

But the Ninth Circuit's decision in *Marks* threatens to sweep companies like CallFire into the definition of an ATDS and make every user of CallFire's software platform a TCPA-violator. It is therefore imperative that the Commission rejects the Ninth Circuit's interpretation of the ATDS definition and instead follows the reasoning of the D.C. Circuit in *ACA International v. Federal Communications Commission*, 885 F.3d 687, 698 (D.C. Cir. 2018). *See also Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 118 (3d Cir. 2018) (holding, consistent with *ACA International*, that the statutory definition of an ATDS requires a device to be able to generate random or sequential telephone numbers and dial those numbers). Given its substantial interests in the confinement of the ATDS definition to the text of the TCPA statute, CallFire provides the below comments in support of its position.

II. THE COMMISSION SHOULD REJECT THE NINTH CIRCUIT'S INTERPRETATION OF THE DEFINITION OF AN ATDS BECAUSE IT WOULD IMPOSE TCPA LIABILITY ON ANY SMARTPHONE USER.

The error in the Ninth Circuit's decision in *Marks* is evidenced most clearly by the fact that the court's interpretation of the ATDS definition would subject anyone whose smartphone is programmed to dial numbers from a stored list to TCPA liability. Indeed, this is the very result that the D.C. Circuit found to be unacceptable when it struck down the FCC's definition of capacity in *ACA International*. In so holding, the D.C. Circuit made unequivocally clear that it would be an unreasonable interpretation of the TCPA to expand the definition of an ATDS to include smartphones:

> It is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.

ACA Int'l, 885 F.3d at 698.

But the Ninth Circuit's interpretation of ATDS in *Marks* presents the very same problem. By including every device that can dial numbers automatically from a stored list within the definition of ATDS, the *Marks* decision makes any smartphone with such programming an auto-dialer. *See Marks*, 2018 WL 4495553, at *9. For example, common smartphone apps like WhatsApp or GroupMe allow users to send text messages to stored groups of contacts.[8] Under the Ninth Circuit's approach, each time an ordinary consumer uses a smartphone with one of these group-messaging apps to text a friend "hey," that customer is subject to $500–$1,500 in TCPA liability. *See* 47 U.S.C. § 227(b)(3). "Nothing in the TCPA," however, "countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans." *ACA Int'l*, 885 F. 3d at 699. To prevent the *Marks* decision from opening the floodgates of TCPA litigation and transforming everyday smartphone users into TCPA-violators, it is critical that the Commission acts quickly to reject the Ninth Circuit's decision in *Marks* and clarify that the definition of an ATDS requires the ability to generate numbers randomly or sequentially.

III. THE NINTH CIRCUIT'S DECISION IN *MARKS* DEFIES ALL APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION.

Contrary to the Ninth Circuit's conclusion that "the statutory text is ambiguous on its face," *Marks*, 2018 WL 4495553, at *8, the text of the statute is clear: a device qualifies as an auto-dialer only if it can generate numbers randomly or sequentially. Indeed, the *Marks* court's holding that the text of the TCPA is ambiguous is particularly puzzling, given that, in a previous case involving the definition of an ATDS, the Ninth Circuit held "that the statutory text is clear and unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). But in

[8] *See, e.g.*, http://whatsapp.com; http://groupme.com.

any event, the *Marks* court's interpretation of the definition of an ATDS ignores the statutory text and legislative history, and the Commission should act swiftly to reject it.

Every applicable principle of statutory interpretation confirms that the ATDS provisions of the TCPA restrict only random and sequential dialers. To begin with, the text of the ATDS definition clearly restricts TCPA liability to devices that are capable of generating random or sequential numbers. Congress defined an ATDS as equipment that "has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The text of the statute thus requires a piece of equipment to be capable of performing three key tasks in order to constitute an ATDS: (1) it must be able to generate random or sequential numbers; (2) it must be able to use that random or sequential number generator in order to store or produce telephone numbers to be called; and (3) it must be able to dial those telephone numbers that it generated. *Id.* By holding that a device qualifies as an ATDS even if it does not "us[e] a random or sequential number generator," the *Marks* court simply crossed out a critical piece of the statutory text. In so doing, the court violated the "cardinal principle" that requires a court "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Notably, the statutory definition of an ATDS contains no mention of "stored lists"—a fact which, under ordinary canons of statutory construction, demands the conclusion that a device's ability merely to store a list of numbers—without generating those numbers randomly or sequentially—is insufficient to qualify it as an ATDS.[9] Indeed, if Congress had wanted to impose TCPA liability on technology that merely has the capacity to store lists of phone numbers, it could

[9] *Cf. N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (noting the "interpretive canon, *expressio unius est exclusio alterius*, 'expressing one item of [an] associated group or series excludes another left unmentioned'").

have easily done so by removing the language regarding random and sequential dialers and adding language regarding devices that store lists of numbers. But Congress did not do so, and the Commission should reject the *Marks* court's invitation to rewrite the statutory text.

The statute's legislative history also reinforces the conclusion that the TCPA restricts only those devices that have the current capacity to generate numbers randomly or sequentially. Committee hearings, committee reports, and floor debates regarding the TCPA were all overwhelmingly focused on the specific harms caused by random and sequential dialing. *See, e.g.*, *Telemarketing Practices: Hearing Before the Subcomm. on Telecommc'ns and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 1–2 (1989) (statement of Rep. Markey) (discussing devices that "sequentially" dial "whole blocks of numbers"); *id.* at 3 (statement of Rep. Rinaldo) (discussing devices that dial numbers "randomly" often only to leave a prerecorded message). Legislators were especially concerned with sequential dialers in particular, because they could dial whole blocks of numbers and thereby overwhelm all of the telephone lines in a hospital, police station, or fire department. *See* H.R. Rep. No. 102-317, at 10 (1991); *see also* S. Rep. No. 102-178, at 2. These concerns are not present for devices that have no ability to randomly or sequentially generate numbers and dial them. Indeed, if Congress had intended to prohibit all calls made from devices using stored lists of numbers, a legislator would have said so, but none did.

The text and legislative history of the TCPA thus make clear that the Ninth Circuit's interpretation of the definition of an ATDS is overbroad and unreasonable, and the Commission should act swiftly to clarify the *Marks* court's error.[10]

[10] The Ninth Circuit's decision also potentially raises serious constitutional questions, including whether the TCPA is narrowly tailored to serve the goal of preventing the harms of random and sequential dialers, and whether the text of the statute provides fair notice that such dialers are prohibited. For a summary of these constitutional challenges to the *Marks* decision, *see* Brief of

IV. THE NINTH CIRCUIT'S DECISION IN *MARKS* IS AT ODDS WITH NUMEROUS FEDERAL CASES HOLDING THAT CALLFIRE'S SOFTWARE PLATFORM IS NOT AN ATDS.

CallFire's software platform—which does not have the ability to send messages or make calls automatically, without human intervention—could potentially qualify as an auto-dialer under the Ninth Circuit's sweeping ruling in *Marks*, despite the fact that the CallFire system can only send messages to specific identified numbers that have been inputted into the system by the customer. In addition to being at odds with the text and purpose of the TCPA, such a result would contradict the rulings of several courts across the country that have held CallFire not to be an ATDS.

For example, just last month, the Southern District of Florida held that CallFire's "EZ-program texting system is not an automatic telephone dialing system under the Telephone Consumer Protection Act." *Ramos*, 2018 WL 4568428, at *2. The Court so held because "the system does not have the ability to send messages automatically or to generate phone numbers," and because the system requires a significant amount of human intervention to send a text. *Id.* Similarly, in *Luna v. Shac*, 122 F. Supp. 3d at 941–42, the Northern District of California held that CallFire's software platform was not an ATDS, despite its ability to send text messages from preprogrammed lists, because the text messages are sent with human intervention.

These decisions are consistent with both the text and the legislative history of the TCPA, and they have created substantial reliance interests for CallFire and its customers. To prevent further confusion and unnecessary litigation, the Commission should disavow the Ninth Circuit's

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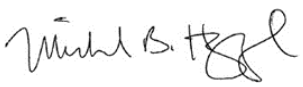
Amicus Curiae Sirius XM Radio Inc. in Support of Defendant-Appellee and Affirmance, *Marks v. Crunch San Diego, LLC*, 2015 WL 9449409, at *11 (9th Cir. Dec. 22, 2015).

interpretation of the ATDS definition and leave the decisions in *Luna, Ramos, and Dominguez* undisturbed.[11]

V. CONCLUSION

Given CallFire's substantial involvement in the field of commercial messaging, it strongly urges the Commission to reject the Ninth Circuit's interpretation of the ATDS definition for the reasons discussed herein.

Respectfully submitted,



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October 17, 2018

[11] The Commission should also adopt a reasonable, justifiable interpretation of the term "capacity," as set forth in *Dominguez*, *Ramos*, and other cases. By so doing, the Commission would both adhere to the statute's language as well as minimize legal and regulatory uncertainty. In addition, the common-sense view of "capacity" articulated in these cases would provide a justiciable standard that can be applied to new technologies and delivery mechanisms as they enter the market. *See, e.g.*, *Dominguez*, 894 F.3d at 119 ("In light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling. Dominguez can no longer rely on his argument that the Email SMS Service had the latent or potential capacity to function as autodialer."); *Ramos*, 2018 WL 4568428, at *2 ("Latent or potential capacity to function as an autodialer does not satisfy the statute.").

2018 WL 4568428
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida,
Fort Lauderdale Division.

Katiria RAMOS, individually and on behalf of all others similarly situated, Plaintiff,
v.
HOPELE OF FORT LAUDERDALE, LLC d/b/a Pandora @ Galleria, and Pandora Jewelry, LLC, Defendants.

Case Number: 17-62100-CIV-MORENO
|
Signed September 20, 2018

Synopsis

Background: Consumer brought putative class action against franchisee that operated jewelry store and franchisor, alleging a text marketing campaign conducted by franchisee violated the Telephone Consumer Protection Act (TCPA). The parties moved for summary judgment.

[Holding:] The District Court, Federico A. Moreno, J., adopted the opinion of Barry S. Seltzer, United States Magistrate Judge, and held that web-based texting program that franchisee used to sent text message to consumer was not an automatic telephone dialing system subject to TCPA.

Defendants' motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (10)

[1] Telecommunications

The appropriate standard to determine whether a program is an automatic telephone dialing system subject to the Telephone Consumer Protection Act (TCPA) is whether the program: (1) lacks the capacity to randomly or sequentially generate phone numbers, or alternatively, (2) lacks the ability to send messages without human intervention. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[2] Telecommunications

Web-based texting program that jewelry store manager used to sent text message to consumer as part of marketing campaign without consumer's prior consent required sufficient human intervention, such that the program was not an "automatic telephone dialing system," and thus, the text did not violate Telephone Consumer Protection Act's (TCPA) prohibition on sending text messages to cellular phone absent an emergency or prior express consent; manager signed into the program and created list of customer phone numbers, removed any landline phone numbers, and uploaded a spreadsheet onto the program's website, he then wrote the message, programmed the date and time of delivery, and the cell phones scheduled to receive the message, and hit send, and company that sold program confirmed that program did not have ability to send messages automatically or to generate phone numbers. Communications Act of 1934 § 227, 47 U.S.C.A. §§ 227(a)(1), 227(b)(1)(A)(iii).

Cases that cite this headnote

[3] Telecommunications

A text message is deemed a "call" under the Telephone Consumer Protection Act's (TCPA) prohibition on using an automatic telephone dialing system to call a cellular phone absent an emergency or prior express consent. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[4] Federal Civil Procedure

Even if consumer received only one text message from jewelry store as part of its text marketing campaign, without her prior express consent, she sustained a cognizable and particularized injury in fact sufficient to confer Article III standing to bring action alleging the text violated the Telephone Consumer Protection Act (TCPA). U.S. Const. art. 3, § 2, cl. 1; Communications Act of 1934 § 227, 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[5] Telecommunications

The decisions in consolidated appellate court actions addressing challenges to Federal Communications Commission (FCC) regulations are binding outside of the circuit in which they are rendered. 28 U.S.C.A. §§ 2112, 2342.

Cases that cite this headnote

[6] Telecommunications

An "automatic telephone dialing system" within the meaning of the Telephone Consumer Protection Act (TCPA) includes devices which automatically call numbers from a pre-programmed list, and "predictive dialers," which automatically call numbers from a list and automatically connect the calls with an available agent. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[7] Telecommunications

An "automatic telephone dialing system" within the meaning of the Telephone Consumer Protection Act (TCPA) covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[8] Telecommunications

The primary consideration in determining whether a devise is an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA) is whether human intervention is required at the point in time at which the number is dialed. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[9] Telecommunications

Compiling a list of numbers into a database does not remove a calling system from the definition of an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA). Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[10] Telecommunications

What constitutes the amount of human intervention required to take a device out of the category of an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA) is a mixed question of fact and law, and the issue is to be determined on a case-by-case basis. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

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ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE

***1** THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Defendant's Motion for Summary Judgment **(D.E. 62)**, Plaintiff's Motion for Summary Judgment **(D.E. 68, 70)**, Plaintiff's Motion for Class Certification **(D.E. 60, 61)** and Defendant's Motion to Exclude the Opinions of Plaintiff's Expert Randall Snyder **(D.E. 83, 99)**. The Magistrate Judge filed a Report and Recommendation **(D.E. 136)** on **August 16, 2018**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

[1] **ADJUDGED** that Defendant's Motion for Summary Judgment is GRANTED. The defining issue in the Report and Recommendation and Plaintiff's principal objection to the Magistrate's Report is whether the EZ-texting program at issue in this case qualifies as an automatic telephone dialing system as defined by the Telephone Consumer Protection Act and the Federal Communications Commission's orders. The Court agrees with the Report and Recommendation that *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018) is binding on this Court and that its interpretation of the FCC's orders establishes the standard to determine the issue at hand. Under *ACA*, the appropriate standard to determine whether the EZ-texting program is an automatic telephone dialing system is whether the program (1) lacks the capacity to randomly or sequentially generate phone numbers, or alternatively, (2) lacks the ability to send messages without human intervention. *ACA*, 885 F.3d at 702; *Swaney v. Regions Bank*, No. 13-00544, 2018 WL 2316452 (N.D. Ala. May 22, 2018) (stating that in *ACA*, the D.C. Circuit invalidated portions of the FCC's 2015 order, but reaffirmed the FCC's 2003 determination that the "defining characteristic of an [automatic telephone dialing system] is the capacity to dial numbers without human intervention") (quoting 2003 FCC Order at 14092).

[2] In this case, it is undisputed that the Defendant's Manager, David Pentecost, signed into the Defendant's system and created a list of customer phone numbers, based on various criteria, such as the date of purchase, amount spent, and the customer's address. He then removed any landline phone numbers, incapable of receiving a text message, and uploaded an Excel spreadsheet onto the EZ-texting website. Pentecost then wrote the message, programmed the date and time of delivery, and the cell phones scheduled to receive the message. He then hit send. This Court agrees with the Report and Recommendation that this amount of human intervention is sufficient to negate the EZ-texting program as an automatic telephone dialing system within the applicable standard.

Plaintiff's main objection is that even though Pentecost created the list of numbers, drafted the text message, and programmed the timing of delivery, the EZ-texting program had that capacity and therefore, it comes under the purview of the Telephone Consumer Protection Act as an automatic telephone dialing system. Plaintiff asserts that the record evidence establishes the system's capacity, and, at the very least, creates an issue of fact as to whether the program had this capacity to generate numbers and send the messages.

***2** The declaration of Jagannathan Thinkaran, the CEO of CallFire, the company that owns the EZ-texting program, confirms that the program can only be used to

send messages to specific identified numbers that have been inputted into the system by the customer, which in this case Pentecost inputted. Thinkaran adds that the system does not have the ability to send messages automatically or to generate phone numbers. Plaintiff's objections focus on the testimony of its expert Randall Snyder, who testified that the Rand( ) function in Excel could be used to generate numbers, but Snyder also testified that he did not test out this function. (D.E. 100-1 at 10-12). In any event, the *ACA* decision states that the FCC could not expand the statutory definition of an automatic telephone dialing system to include "dial[ing] from an externally supplied set of numbers" such as Excel. *ACA*, 885 F.3d at 702 (declining to adopt the expansive view of an automatic telephone dialing system espoused in the FCC's 2015 order). The Court finds that Snyder's testimony is insufficient to create an issue of material fact and that Thinkaran's testimony, coupled with the undisputed evidence of Pentecost's actions in this case, establish that the EZ-program texting system is not an automatic telephone dialing system under the Telephone Consumer Protection Act. It is also

ADJUDGED that the Plaintiff's Motion for Summary Judgment **(D.E. 68, 70)** is DENIED. It is also

ADJUDGED that Plaintiff's Motion for Class Certification **(D.E. 60, 61)** is DENIED as moot. It is also

ADJUDGED that the Defendant's *Daubert* motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th of September 2018.

REPORT AND RECOMMENDATION

BARRY S. SELTZER, United States Magistrate Judge

THIS CAUSE has come before the undersigned upon the Order [DE 40] referring all pre-trial matters to the Magistrate Judge for appropriate disposition or recommendation pursuant to 28 U.S.C. § 636(b)(1)(A). The parties have each filed motions for summary judgment, which are fully briefed. Also pending are Plaintiff's Motion for Class Certification and the Defendants' respective Daubert motions seeking to strike the testimony of Plaintiff's expert, Randall Snyder. For the reasons that follow, the undersigned recommends that Plaintiff's Motion for Summary Judgment be denied, that Defendants' Motions for Summary Judgment be granted, and that the class certification and Daubert motions be denied as moot.

I. BACKGROUND

A. Procedural History

[3] This is an action for damages brought under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 et seq. (the "TCPA"). In pertinent part, the TCPA prohibits any person from using an automatic telephone dialing system ("ATDS") to call a cellular phone absent an emergency or prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). Each TCPA violation results in damages of no less than $500, which may be trebled for willful or knowing violations. 47 U.S.C. § 227(b)(3)(B)-(C). A text message is deemed a "call" under the TCPA. Murphy v. DCI Biologicals Orlando, LLC, 797 F.3d 1302, 1305 (11th Cir. 2015).

Plaintiff, Katiria Ramos ("Ramos"), filed a Class Action Complaint [DE 1] on behalf of herself and all others similarly situated against Defendants Hopele of Fort Lauderdale, LLC, d/b/a Pandora@Galleria ("Hopele") and Pandora Jewelry, LLC ("Pandora") seeking injunctive relief and damages arising from a text marketing campaign conducted by Hopele. According to the Complaint, Hopele sent Ramos two text messages on October 19, 2017, advertising a weekend sale at the Galleria store without obtaining Ramos' prior express consent, in violation of the TCPA. Ramos alleges that Pandora is vicariously liable for the actions of Hopele on the ground that Hopele was acting as Pandora's agent or with apparent agency in sending the marketing texts. Finally, Ramos alleges that Defendants willfully and knowingly violated the TCPA. Ramos has filed a Motion for Summary Judgment [DE 70], as have Hopele [DE 62] and Pandora [DE 19].

Ramos argues that the texting platform used by Hopele was, as a matter of law, an ATDS in violation of the TCPA and that Hopele acted as Pandora's agent, thereby subjecting Hopele and Pandora to TCPA liability. Hopele argues that it is entitled to summary judgment because the web-based texting platform it used does not meet the statutory definition of an ATDS and, additionally, that

Ramos lacks standing under the TCPA because the receipt of a single text message did not cause an injury-in-fact. Finally, Pandora argues that its relationship with Hopele is that of franchisor/franchisee for which no vicarious liability attaches and that the texting platform utilized by Hopele was not an ATDS. Thus, the issues for the Court to determine on summary judgment are: (1) whether the texting platform used by Hopele was, as a matter of law, an ATDS; (2) whether Ramos has standing to bring an action under the TCPA; and (3) whether Hopele acted an agent of Pandora.

B. Undisputed Facts

Pandora designs, manufactures, and sells its own brand of jewelry products. Pandora owns and operates approximately 100 locations in the United States and has over 80 franchisees with approximately 300 locations nationwide. Hopele is a franchisee of Pandora that operates a retail establishment selling Pandora jewelry at The Galleria in Fort Lauderdale, Florida. In 2014, Ramos made a purchase at Pandora Galleria and completed a warranty information card in which she provided her name, address, and cell phone number. The card did not contain a written consent to automated text messages.

1. The text messages

When Plaintiff – and other customers– provided contact information to Hopele at The Galleria store, Hopele employees logged the customers' information into the point of sale system utilized by Pandora franchisees, known as KWI. [1] Hopele also stored contact information obtained from customers through its own store website and from Pandora credit card applications on the KWI system. Hopele used the customer phone numbers stored on the KWI system to conduct its text messaging campaigns.

Hopele's first text message campaign took place in June 2016. In all, Hopele conducted 9 text message campaigns, but Plaintiff's Complaint refers only to the October 19, 2017, campaign, when Ramos received a text notification from Hopele of an upcoming sale at Pandora Galleria. [2] Hopele's text campaigns were conducted by using a platform known as EZ-Texting, which is a web-based software application that is owned and controlled by a company known as CallFire. CallFire does not control the content, destination, or timing of its customers' text messages.

Hopele's managing member, David Pentecost ("Pentecost"), designed and implemented Hopele's text marketing campaigns, including the October 19, 2017 campaign at issue in this matter. [DE 63]. To send a text, Pentecost signed into the KWI system using his username and password. He then created a list of customer phone numbers based upon various criteria such as the customer's date of purchase, minimum amount spent, and South Florida address. After creating the list of customers to contact, he scrubbed the list of landline phone numbers (using another website known as www.searchbug.com and uploaded an Excel spreadsheet of the selected cell phone numbers into the EZ-Texting website. Pentecost then wrote the text message that he wished to send, selected a date and time in the future to send the text message, and clicked on the "send" button to give final confirmation of the message, the date and time of delivery, and the cell phone numbers scheduled to receive the text message.

2. The franchise agreement.

Hopele is a franchisee of Pandora that entered into a franchise agreement to develop and operate a Pandora store at The Galleria Mall in Fort Lauderdale, Florida. The agreement specifies that Hopele is an independent contractor and that neither party is the agent, legal representative, partner, subsidiary, joint venture, or employee of the other. Pursuant to the franchise agreement, Pandora authorized Hopele to use the Pandora trade name in advertising and marketing materials. Hopele was required to, and did, hire a manager who devoted full attention to the general management and the day-to-day operations of the store. The store's signage, layout, and fixtures were to be equipped according to Pandora's specifications. Hopele's inventory was prescribed by Pandora, and Pandora retained the right to set the minimum and maximum prices at which Hopele could sell the merchandise. Hopele was required by the franchise agreement to spend a certain percentage of its gross sales on local marketing, and to participate in, and contribute financially to, cooperative regional marketing campaigns. Hopele was required to participate in all promotional and marketing activities designated by Pandora and was required to get pre-approval for other advertising and promotional material that it wished to use. Hopele, however, did not seek or obtain prior approval

from Pandora for the text marketing campaign conducted by David Pentecost.

II. RELEVANT LAW

A. Legal Standards for Summary Judgment

Summary judgment is authorized where there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The nonmoving party may not simply rest upon mere allegations or denials of the pleadings, but must establish the essential elements of its case on which it will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must present more than a scintilla of evidence in support of its position. A jury must be reasonably able to find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a summary judgment motion, the Court must view the facts in the light most favorable to the nonmoving party. Davis v. Williams, 451 F.3d 759, 763 (11th Cir. 2006). The Court's function at this stage is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The TCPA

[4] The TCPA makes unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ... unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A). An "automatic telephone dialing system" ("ATDS") is defined as "equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The primary issue in the parties' respective for summary judgment motions is whether Hopele used an "automatic telephone dialing system" in violation of the TCPA. [3]

Congress has given the Federal Communications Commission ("FCC") the authority to issue interpretive rules pertaining to the TCPA. See e.g., 47 U.S.C. § 227(b)(2) (directing the FCC to "prescribe regulations to implement the requirements of this subsection"). "The Eleventh Circuit has unequivocally held that final FCC orders are binding on district courts and that district courts 'may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation[.]' " Reyes v. BCA Financial Services, Inc., 312 F.Supp.3d 1308, 1315 (S.D. Fla. 2018) (quoting Murphy v. DCI Biologicals Orlando, LLC, 797 F.3d 1302, 1307 (11th Cir. 2015)). The FCC's interpretations have changed over the years as dialing technology has evolved. In Reyes, Magistrate Judge Goodman explored the evolution of the FCC's definition of an ATDS. Although the Reyes case involved a predictive dialer [4] – and this case does not – the FCC Orders are important to the parties' analyses in this case, and, therefore, are discussed at length herein.

C. The FCC Rules

1. The 2003, 2008, and 2012 Orders

In 2003, the FCC issued an Order that predictive dialers fall within the meaning and statutory definition of an ATDS. In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14093 (2003) (the "2003 Order"). "When the TCPA was passed, telemarketers used dialing equipment to create and dial arbitrary 10-digit phone numbers." Jenkins v. mGage, LLC, 2016 WL 4263937, at *4 (N.D. Ga. Aug. 12, 2016). "Around the turn of the century, however, it became much more cost effective for the teleservices industry to use lists of numbers." Id. (citing the 2003 Order, at 14014). The FCC explained that "in most cases, telemarketers program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call. The principal feature of predictive dialing software is a timing function, not number storage or generation." 2003 Order, at 14091 (internal citations omitted) The FCC ruled that even though predictive dialers dial using lists of numbers, "[t]he basic function of such equipment ... has not changed – the *capacity* to dial numbers without human intervention." Id. (as quoted in Reyes, at 1315) (emphasis added).

In 2008, the FCC reiterated its position that a predictive dialer is an ATDS and is subject to the TCPA. Reyes,

312 F.Supp.3d at 1315 (citing In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 566 (2008) (the "2008 Order")). And again in 2012, the FCC stated that the TCPA's definition of an ATDS "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." Reyes, 312 F.Supp.3d at 1315 (quoting In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15399 (2012) (the "2012 Order")).

Courts have interpreted the FCC's 2003, 2008, and 2012 Orders to mean that "a system can qualify as an ATDS even if it does not 'create and dial 10-digit telephone numbers arbitrarily' but rather 'relies on a given set of [phone] numbers.' " Ammons v. Ally Financial, Inc., —— F.Supp.3d ——, ——, 2018 WL 3134619, at *4 (M.D. Tenn. Jun. 27, 2018) (quoting Maddox v. CBE Group, Inc., 2018 WL 2327037, at *4 (N.D. Ga. May 22, 2018)). The capacity requirement is met if the system had the ability to dial numbers without human intervention, even if that ability was not utilized to make the calls at issue. King v. Time Warner Cable, Inc., 894 F.3d 473, 481 (2nd Cir. 2018) ("[T]he TCPA applies to calls from a device that can perform the functions of an autodialer, regardless of whether it has actually done so in a particular case."). Thus, various courts have noted that, ultimately, "the key feature of an ATDS is the capacity to dial numbers without human intervention." Pozo v. Stellar Recovery Collection Agency, Inc., 2016 WL 7851415, at *3 (M.D. Fla. Sept. 2, 2016) (quoting Wilcox v. Green Tree Servicing, LLC, 2015 WL 2092671, at *5 (M.D. Fla. May 5, 2015)); Ammons, —— F.Supp.3d at ——, 2018 WL 3134619, at *5; Reyes, 312 F.Supp.3d at 1319–22. Judge Cohn of this District specifically found that the 2003 FCC Order applies "beyond the narrow circumstances of predictive dialers" and that an ATDS is defined by "the capacity to dial numbers without human intervention." Legg v. Voice Media Group, Inc., 20 F.Supp.3d 1370, 1375 (S.D. Fla. 2014).

2. The 2015 Order

In 2015, the FCC ruled "that an ATDS need only have the future capacity to dial random and sequential numbers, rather than the present ability to do so." Id. at ——, 2018 WL 3134619 at *5 (citing In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 7974 (2015) ("the 2015 Order")). Thus, the FCC expanded the concept of capacity "to encompass capabilities that could potentially exist with future modifications of software." See King, 894 F.3d 473. Stated differently, the FCC "determined that the 'capacity' of calling equipment 'includes its potential functionalities' or 'future possibility,' not just its 'present ability.' " ACA Int'l v. FCC, 885 F.3d 687, 695 (D.C. Cir. 2018) (quoting the 2015 Order, 30 FCC Rcd. at 7974 ¶ 16).

D. The ACA International Decision

The 2015 FCC Order faced challenges in various courts of appeal, challenges that were eventually consolidated before the D.C. Circuit Court of Appeals in ACA Int'l, 885 F.3d 687, 691. In its March 2018 decision, the D.C. Circuit rejected the FCC's 2015 interpretation of "capacity" as unreasonably and impermissibly expansive:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the questions several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.

Id. at 702. Under the 2015 Order, a cell phone would have the potential capacity to be an ATDS with the addition of a dialing app, thus subjecting cell phone users to potential TCPA liability for group texts. Id. at 700. Thus, the D.C. Circuit struck the 2015 Order for "failing to satisfy the requirement of reasoned decisionmaking." Id. at 703.

Since the ACA decision was issued, litigants throughout the country, and the parties in this case, have argued vehemently about whether and how ACA affects the definition of an autodialer. Ramos argues that the ACA decision is not binding on this court. The undersigned disagrees. See Reyes, 312 F.Supp.3d at 1320–21 (holding

the ACA decision binding); Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3rd Cir. 2018) ("The decision in ACA International has narrowed the scope of this appeal."); Ammons, —— F.Supp.3d at ——, n.8, 2018 WL 3134619, at *5, n.8 ("Although ACA International was decided by the D.C. Circuit, the decision is binding in this Circuit as well."); but see King, 894 F.3d 473 (denying binding authority of the ACA decision, but agreeing with the holding of the D.C. Circuit).

[5] Pursuant to the Hobbs Act, 28 U.S.C. § 2342, federal courts of appeals have exclusive jurisdiction to invalidate FCC orders. Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110, 1113 (11th Cir. 2014). "And when the FCC's regulations are challenged in more than one court of appeals, the panel on multidistrict litigation consolidates those petitions and assigns them to a single circuit. See 28 U.S.C. § 2112." Sessions v. Barclays Bank Delaware, 317 F.Supp.3d 1208, 1210–11 (N.D. Ga. 2018) (citing Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc., 863 F.3d 460, 467 (6th Cir. 2017); Peck v. Cingular Wireless, LLC, 535 F.3d 1053, 1057 (9th Cir. 2008)). The decisions in those consolidated appellate court actions are binding outside of the circuit in which they are rendered. Sessions, 317 F.Supp.3d at 1210–11. Thus, the undersigned concludes that the ACA decision is binding on this Court.

Hopele asks this Court to adopt an expansive view of the ACA decision; it argues that ACA also rejected the 2003, 2008, and 2012 FCC Orders. [DE 84, p.6]. The undersigned disagrees. The ACA decision invalidated portions of the 2015 Order, but left intact the FCC's prior orders. See Dominguez, 894 F.3d at 119 ("In light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of [the] 2015 Declaratory Ruling"); Swaney v. Regions Bank, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018) (the ACA decision did not invalidate the 2003 FCC Rule that predictive dialers may still be autodialers even if they cannot be programmed to generate random or sequential numbers); Reyes, 312 F.Supp.3d at 1321("Still, [defendant] reads too much into ACA International when it concludes that the prior FCC Orders can no longer be relied upon."). Thus, the 2003 Rule that "the defining characteristic of an ATDS is 'the capacity to dial numbers without human intervention' " remains in effect. Swaney, 2018 WL 2316452, at *1 (quoting 2003 FCC Order at 14092). Since ACA, the courts have interpreted the statutory definition of an autodialer in accordance with the FCC's prior rules, that is, that a system is an autodialer if it has the present capacity to function as such. Dominguez, 894 F.3d at 119. Latent or potential capacity to function as an autodialer does not satisfy the statute. [5] Id.; ACA, 885 F.3d at 702.

To summarize, the undersigned concludes that the ACA decision is binding on this Court and, further, that the ACA decision invalidated the FCC's 2015 Order that a dialing system could be classified as an autodialer under the TCPA even if it possessed a latent or potential ability to dial numbers without human intervention. The ACA decision does not affect the definition of an ATDS as set forth in the FCC's 2003, 2008, or 2012 Orders.

III. DISCUSSION

In its motion for summary judgment, Hopele argues that the EZ-Texting program it utilized to send the text messages is not an automatic telephone dialing system as defined by the TCPA and subsequent FCC Orders because (1) it lacks the capacity to randomly or sequentially generate phone numbers, or, alternatively, (2) it could not send text messages without human intervention. [6] Plaintiff counters that the EZ-Texting program was, in fact, an automatic telephone dialing system as defined by the TCPA and subsequent FCC regulations because (1) it had the capacity to store telephone numbers and (2) it could dial those numbers automatically.

[6] **[7]** **[8]** Hopele argues that recent case law establishes that to be an ATDS a system must have the capacity to generate and dial phone numbers randomly and sequentially and that the EZ-Texting system lacks that capacity. The plain language of the TCPA appears to support Hopele's argument, although the FCC Orders do not. See Ammons, —— F.Supp.3d at ——, 2018 WL 3134619, at *4 ("Based on what appears at first blush to be unambiguous statutory language, § 227(a)(1) seems to dictate that the essential feature of an ATDS is that it uses 'a random or sequential number generator.' "). But, "[a]s the [FCC] and federal courts have interpreted the term, autodialers include devices which automatically call numbers from a pre-programmed list, and 'predictive dialers,' which automatically call numbers from a list and automatically connect the calls with an available agent." Pozo, 2016 WL 7851415, at *3. Therefore, Hopele's argument "cannot be squared with the continuing validity

of the 2003 FCC Order." Swaney, 2018 WL 2316452, at *2 (rejecting defendant's argument that to be an ATDS the equipment must have capacity to store or produce numbers using a random or sequential number generator). Accordingly, the undersigned concludes that the definition of an ATDS, as interpreted by the FCC's 2003, 2008, and 2012 Orders " 'covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.' " Luna v. Shac, LLC, 122 F.Supp.3d 936, 940 (N.D. Cal. 2015) (quoting FCC 2012 Order, at 15399, n.5) (emphasis added). Therefore, "the primary consideration ... is whether human intervention is required at the point in time at which the number is dialed." Id. (quoting Wilcox v. Green Tree Servicing, LLC, 2015 WL 2092671, at *5 (M.D. Fla. May 5, 2015); Ammons, — F.Supp.3d at ——, 2018 WL 3134619, at *5; Reyes, 312 F.Supp.3d at 1319–22; Legg v. Voice Media Group, Inc., 20 F.Supp.3d 1370, 1374 (S.D. Fla. 2014) (Cohn, J.) (explaining that the "defining characteristic" of an ATDS is "capacity to dial numbers without human intervention.").

[9] The human intervention analysis is where Ramos' argument falters. Ramos argues that unless the human intervention occurs "at the point in time at which the number is dialed," see Strauss v. CBE Group, Inc., 173 F.Supp.3d 1302, 1309 (S.D. Fla. 2016), the equipment must be deemed an ATDS and that any level of human intervention prior to the point of actually dialing a number is immaterial. Clearly, compiling a list of numbers into a database does not remove a calling system from the definition of an ATDS. See Zeidel v. A & M (2015) LLC, 2017 WL 1178150, at *10 (N.D. Ill. Mar. 30, 2017) ("Courts have also rejected the argument that the amount of human intervention involved in merely entering a customer's telephone number[ ] into an electronic database removes the equipment from the definition of an ATDS.") (citations omitted). The FCC stated as much when it found that predictive dialers violate the TCPA. Thus, predictive dialers – those systems that use a pre-loaded list of phone numbers, calculate the optimal time to make a call, and make it at that time – fall within the definition of an ATDS. See Strauss, 173 F.Supp.3d 1302 (granting summary judgment for calls made by a predictive dialer); Ammons, — F.Supp.3d ——, 2018 WL 3134619 (granting summary judgment on the issue that predictive dialer is an ATDS); Reyes, 312 F.Supp.3d 1308 (granting partial summary judgment finding that predictive dialer is an ATDS as a matter of law).

[10] However, neither the case law nor the FCC Orders support Ramos' argument that a system is an ATDS unless the human intervention occurs at the exact moment that a text is sent. "What constitutes the amount of 'human intervention' required to take a device out of the category of an autodialer is a mixed question of fact and law." Herrick v. GoDaddy.com LLC, 312 F. Supp. 3d 792 (D. Ariz. 2018). The issue is to be determined on a case-by-case basis. Blow v. Bijora, Inc., 191 F.Supp.3d 780, 788-89 (N.D. Ill. 2016). And a survey of case law establishes that courts routinely determine as a matter of law the amount of human intervention necessary to establish whether a system is an ATDS.

In Jenkins, 2016 WL 4263937, the plaintiff received unsolicited marketing texts on behalf of a nightclub, Opera. She filed suit under the TCPA, and both parties moved for summary judgment. The court denied the plaintiff's motion but granted summary judgment on behalf of the defendants, finding "that human intervention discredits that a communication system is an ATDS." Id. at *7. Jenkins presented a factual scenario similar to that presented in the present case:

> It is undisputed that, to send promotional messages, an Opera employee had to: (i) navigate to a website; (ii) log into the Platform; (iii) determine the content of the text message; (iv) type the content of the text message into the Platform; (v) determine whether to send the test message immediately or to schedule a later date to send the message; (v) either click "send" to send the message immediately, or take an action to select a later date and time to send the message by using a drop-down calendar function. Opera also determined the telephone numbers to which text messages were sent by an employee choosing a particular list of numbers and uploading the list to mGage's Platform as a CVS file.

Id. at *5-6. The court noted that "direct human intervention [was] required to send each text message immediately or to select the time and date when, in the future, the text message will be sent." Id. at *6.

The Jenkins court relied on an earlier case, Luna, 122 F.Supp.3d 936, in which a California district court granted summary judgment for the defendant in a case involving the same EZ-Texing platform used by Hopele. The court there rejected the plaintiff's argument that the human intervention was limited to uploading telephone numbers into the system:

> Here, human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, including transferring of the telephone number into the CallFire database, drafting the message, determining the timing of the message, and clicking 'send' on the website to transmit the message to Plaintiff.

Id. at 940. The court specifically noted that the human intervention "was not limited to the act of uploading the telephone number to the CallFire database, as Plaintiff argues." Id. at 941. After finding specifically that "the subject text message was sent as a result of human intervention," the court granted summary judgment in favor of the defendant. Id. at 941-42.

Likewise, in Blow, 191 F.Supp.3d 780, the Illinois district court granted summary judgment in favor of the defendant on facts very similar to the facts in the present case:

> Every single phone number entered into the messaging system was keyed via human involvement in one of two ways: either an Akira employee (or agent) would key the number into the platform, or the customer herself would send her phone number to the platform....
>
> And the level of human involvement is not restricted to the keying of numbers into the software. Once the user inputs the number into the messaging platform, the user must manually draft the message that the platform will send. Then the user must specify whetyher to send the message immediately or at some specified time In short, the uncontested facts demonstrate that human involvement is required a nearly every step in the platform's text message transmission process.

Id. at 788. Notably, the Blow court distinguished the texting platform before it from a predictive dialer, and noted that a predictive "dialer itself, and not the user decides when to call." Id. (emphasis in original). In contrast, in the platform at issue – like the EZ-Texting platform used by Hopele – "the user is in full control as to when to send the message." Id. The court concluded that "[i]n short, the uncontested facts demonstrate that human involvement is required at nearly every step in the platform's text message transmission process." Id.

Finally, in a post-ACA decision, a district court in Arizona granted summary judgment in favor of a defendant, finding that "the 'level of human agency involved in transmitting the text' amounts to essential human intervention that precludes defining the 3Seventy Platform as an ATDS." Herrick, 312 F.Supp.3d at 803. The process involved in the texting platform in that case was, again, remarkably similar to the process of the EZ-Texting system used by Hopele:

> First, an employee of GoDaddy provided 3Seventy with a list of customer phone numbers via its FTP site, which 3Seventy then uploaded to the Platform. The employee then navigated to the website, logged onto 3Seventy's Platform, and selected the customer numbers it wished to send the text message. The employee then drafted the message and selected a time and date to send the message. Finally, the employee entered a "captcha" – a device designed to ensure that a human, not a robot, was authorizing the desired message. Only after the employee entered the captcha was the 3Seventy Platform able to send the message.

Id. at 802. The totality of these human-directed actions led the court to conclude that the 3Seventy system was not an ATDS.

In the present case, the EZ-Texting system required almost identical human-directed actions as in Jenkins, Luna,

Herrick, and Blow. The EZ-Texting system cannot send a text without a person physically inputting numbers, drafting a message, selecting recipients, choosing a date and time to send the message, and manually hitting a "send" button. [DE 63, ¶ 9-13]. Hopele's manager, Pentacost, manually curated the list of customers who he wished to receive the marketing texts, scrubbed out landlines, drafted the text message, chose the date and time he wanted the message sent, and hit the "send" button. [DE 63, ¶ 7]. If Hopele had not ultimately pressed "send' to authorize the EZ-Texting platform to send the text message, nothing would have occurred and no text message would have been sent. [DE 63, ¶ 13-18]. These facts are undisputed. The undersigned, therefore, concludes that the EZ-Texting system used by Hopele was not an ATDS.

The cases cited by Ramos are distinguishable in that the systems at issue in those cases did not require human intervention at the key steps in the process of making a call or sending a text message. Many of the cases cited by Ramos involved predictive dialers, which the FCC has expressly ruled fit the definition of an ATDS. See, e.g., Ammons, —— F.Supp.3d ——, 2018 WL 3134619 (summary judgment for plaintiff where predictive dialer dialed calls when it calculated that agents were available to take the calls); Reyes, 312 F.Supp.3d at 1311–12 (summary judgment for plaintiff on ATDS issue for calls made with a predictive dialer); Strauss, 173 F.Supp.3d 1302 (same); Lardner v. Diversified Consultants, Inc., 17 F.Supp.3d 1215 (S.D. Fla. 2014) (same); Sterk v. Path, 46 F.Supp.3d 813, 819 (N.D. Ill. 2014) ("The undisputed facts show that the equipment used by Path, which makes calls from a stored list without human intervention is comparable to the predictive dialers that have been found by the FCC to constitute an ATDS."); Cabrera v. Gov't Employees Ins. Co., 2014 WL 11881002 (S.D. Fla. Nov. 26, 2014) (denying defendant's motion for summary judgment for calls made by a LiveVox system previously held to be an ATDS).

Other cases cited by Ramos involved systems that lacked the level of human involvement required by the EZ-Texting system used by Hopele. For example, in Swaney v. Regions Bank, the court determined that the system was an ATDS where it automatically sent balance alerts to customers by "determin[ing] if any of the accounts [were] registered to receive account balance alerts and whether the balance met the customer's threshold for triggering an alert. If the criteria was met, a message template for the alert was applied." 2016 WL 11372119, at *9. The message was then automatically placed in a file to be picked up by an aggregator, then delivered to a wireless carrier who delivered it to the customer's mobile device. Id. The entire process was automated.

Similarly, in Zeidel, the court denied the defendant's motion for summary judgment and stated that "a reasonable jury could conclude that the automatic timing function of" the system is "analogous to a predictive dialer." 2017 WL 1178150, at *11. In that case, the plaintiff complained about receiving a welcome text message from a retailer after making a purchase at the retailer's store. Like a predictive dialer, the system itself determined when to send the message:

> Thus, it is undisputed that once Defendant's customers provided their contact information to an in-store sales associate and this information is entered into the electronic cash register, their contact information is 'automatically uploaded' into the customer database, 'automatically uploaded' into the Mozeo database, and them Mozeo immediately thereafter automatically sen[ds] a "welcome" message to the telephone number.

Id. at *9. Again, unlike the system that Hopele utilized in this case, there was no human involvement in inputting cell phone numbers, drafting the message, selecting recipients, choosing a date and time to send the message, or manually hitting a "send" button.

Finally, in Keim v. ADF Midatlantic LLC, 2015 WL 11713593, at *6 (S.D. Fla. Nov. 9, 2015), Judge Marra denied the defendant's motion to dismiss, concluding that the complaint alleged an ATDS when "the only 'human intervention' involved [was] when a person input[ ] a friend's phone number into the content of a text message to Songwhale, whose own equipment then automatically store[d] the phone number in its database and later automatically sen[t] the text message to those stored numbers en masse." Again, the level of human involvement in the entire process is what determines whether a system is an ATDS.

In contrast to the cases cited by Ramos, the undisputed facts establish that the EZ-Texting system could not send the text messages at issue without a significant amount of human involvement.

IV. CONCLUSION

For reasons set forth above, the undersigned concludes that there is no genuine issue of material fact to prevent the Court from determining as a matter of law that the EZ-Texting system utilized by Hopele does not meet the definition of an autodialer under the TCPA. Accordingly, the undersigned **RECOMMENDS** (1) that Hopele's Motion for Summary Judgment [DE 62] be **GRANTED**; (2) that Ramos' Motion for Summary Judgment [DE 68] be **DENIED**; (3) that Pandora's Motion for Summary Judgment [DE 19] be **DENIED AS MOOT**; (4) that Plaintiff's Motion for Class Certification [DE 61] be **DENIED AS MOOT**; and that the Defendant's respective Daubert motions [DE 83] and [DE 99] be **DENIED AS MOOT**; and that judgment be entered in favor of Defendants.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED in Chambers, Fort Lauderdale, Florida, this 16th day of August 2018.

All Citations

--- F.Supp.3d ----, 2018 WL 4568428

Footnotes

1 Plaintiff has failed to rebut Hopele's 36-paragraph Statement of Undisputed Facts [DE 63], which are supported by evidence in the record. Hopele's Statement of Undisputed Facts therefore, are deemed admitted. See Cargo Airport Servs., USA, LLC v. Transcarga Int'l Airways, C.A., Inc., 2017 WL 4898292, at *3 (S.D. Fla. Oct. 27, 2017) (Moreno, J.) (citing Pompano Helicopters, Inc. v. Westwood One, Inc., 2009 WL 1515276, at *1 (S.D. Fla. May 29, 2009) (deeming all facts in motion for summary judgment admitted where non-movant did not specifically respond, paragraph by paragraph, with corresponding numbers as required by Local Rule 56).

2 The parties dispute whether Hopele sent 1 or 2 text messages on October 19, 2017. They also dispute whether Hopele sent 15,785 or 31,570 text messages on that day. These disputes are not material to the issues raised in the Motions for Summary Judgment.

3 The parties raise other issues that are not implicated by the undersigned's findings in this Report. For example, Pandora's Motion for Summary Judgment focuses on the issue of its vicarious liability for the text messages sent by Hopele. The undersigned concludes that there are genuine issues of material fact as to whether Hopele acted as Pandora's agent. See West v. LQ Mgmt., LLC, 156 F.Supp.3d 1361, 1370 (S.D. Fla. 2015). However, in light of the undersigned's recommendation that summary judgment be granted for Defendants on the issue of Hopele's use of an ATDS, it is not necessary for the Court to rule on the issue of Pandora's vicarious liability.

In addition, Hopele argues that Plaintiff lacks standing because she has not sustained an injury in fact by her receipt of one (or two) text messages, as required by Spokeo, Inc. v. Robins, —— U.S. ——, 136 S.Ct. 1540, 1549, 194 L.Ed.2d 635 (2016). In Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015), the Eleventh Circuit held that a one-page fax advertisement was a cognizable, particularized, and personal injury under the TCPA sufficient to confer Article III standing. Even though Palm Beach Golf pre-dated Spokeo, Judge Gayles has ruled that Palm Beach Golf is binding on this Court and, thus, conferred TCPA standing upon a plaintiff who received one text message. Salcedo v. Hanna, 2017 WL 4226635, at *1 (S.D. Fla. Jun. 14, 2017) (certifying order finding standing under TCPA to the Eleventh Circuit for interlocutory appeal). The facts in Salcedo are identical to those in this case. The undersigned, moreover, concludes that Plaintiff has standing under the TCPA to pursue her claim.

4 A predictive dialer is "an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." Reyes, 312 F.Supp.3d at 1314 (quoting In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14093 (2003)).

5 Plaintiff's expert witness, Randall Snyder, has opined that the EZ-Texting system has the latent, or potential capability to function as an autodialer with the addition of "a few dozen lines of software code at most ...." [DE 83-1, p. 31]. Snyder also opines that the EZ-Texting system does not use human intervention to send texts. Hopele and Pandora have moved to exclude Snyder's testimony as unreliable and as improper legal conclusions. To the extent that Snyder's opinions are based upon the 2015 FCC Order or draw legal conclusions, they are disregarded. See Dominguez, 894 F.3d at 120 (affirming exclusion of Snyder's report).

6 Pandora has adopted Hopele's arguments on the issue of compliance with the TCPA [DE 94, n.2].

End of Document

John LUNA, Plaintiff,

v.

SHAC, LLC, dba Sapphire Gentlemen's Club; et al., Defendants.

Case No. 14–cv–00607–HRL

United States District Court,
N.D. California.

Signed August 19, 2015

Background: Cellular telephone user brought action against operator of gentlemen's club alleging the Telephone Consumer Protection Act (TCPA) was violated when he received promotional text message sent by third-party mobile marketing company to club's customers. Operator moved for summary judgment.

Holdings: The District Court, Howard R. Lloyd, United States Magistrate Judge, held that:

(1) fact that marketing company's web-based platform had ability to send text messages from preprogrammed lists did not disqualify it as automatic telephone dialing system (ATDS) under TCPA, but

(2) text message sent to user was sent as a result of human intervention, and therefore was not sent using an ATDS.

Motion granted.

1. Telecommunications ⚿1053

Fact that third-party mobile marketing company's web-based platform had ability to send text messages from preprogrammed lists, rather than randomly or sequentially, did not disqualify it as an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA), in cellular telephone user's claim that operator of gentlemen's club violated the TCPA when he had marketing company send him a promotional text message. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

2. Telecommunications ⚿901(1), 910

The Hobbs Act jurisdictionally divests district courts from ignoring Federal Communications Commission (FCC) rulings interpreting the Telephone Consumer Protection Act (TCPA); accordingly, a court must look not only to the statutory language in applying the definition of an automatic telephone dialing system (ATDS), but also to FCC rulings addressing the same. 28 U.S.C.A. § 2342; Communications Act of 1934 §§ 402, 227, 47 U.S.C.A. §§ 402(a), 227(a)(1).

3. Telecommunications ⚿1053

Text message sent to user of cellular telephone promoting a gentlemen's club was sent as a result of human intervention, and therefore was not sent using an automatic telephone dialing system (ATDS), as required to support user's claim that the operator of the club violated the Telephone Consumer Protection Act (TCPA) by having third-party mobile marketing company send him the text; club employee transferred telephone number into database on web-based platform provided by marketing company, drafted the message, determined timing of message, and clicked "send" on website to transmit message. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Abigail Ameri Zelenski, Michael Joe Jaurigue, David Zelenski, Jaurigue Law Group, Glendale, CA, Christine Marie Pham, Jaurigue Law Group, San Jose, CA, for Plaintiff.

Stephen M. Ullmer, Stephanie Danielle Ahmad, Greenberg Traurig LLP, San Francisco, CA, Mark Ernest Ferrario, Tyler Ryan Andrews, Greenberg Traurig, Las Vegas, NV, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 85

HOWARD R. LLOYD, United States Magistrate Judge

In February 2014, John Luna brought suit against Shac, LLC, dba Sapphire Gentlemen's Club, Club Texting, Inc. and CallFire, Inc. for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Shac, the sole remaining defendant, moves for summary judgment. Dkt. No. 85. Plaintiff filed an opposition and Shac filed a reply. Dkt. Nos. 96, 97. In addition, Plaintiff filed two notices of new authority.[1] Dkt. Nos. 98, 101. All parties have expressly consented to having all matters proceed before a magistrate judge. A hearing was held on June 23, 2015. Based on the moving and responding papers, as well as the arguments presented at the hearing, the Court grants the motion for summary judgment.

BACKGROUND

Shac operates the Sapphire Gentlemen's Club in Las Vegas, Nevada. Shac engaged CallFire, a third-party mobile marketing company, to provide a web-based platform (here, EXTexting.com) for sending promotional text messages to its customers. Andrews Decl., Exh. 1, at 19, 53–54; Exh. 2, at 68.

Sending text messages through EXTexting.com involved multiple steps. First, an employee of Shac would input telephone numbers into CallFire's web-based platform either by manually typing a phone number into the website, or by uploading or cutting and pasting an existing list of phone numbers into the website. *See id.*, Exh. 1, at 71. In addition, Shac's customers could add themselves to the platform by sending their own text messages to the system. *See* Exh. 1, at 69–72; Exh. 2, at 178. Next, the employee would log in to EXTexting.com to draft and type the message content. *Id.*, Exh. 1, at 20, 142. The employee would then designate the specific phone numbers to which the message would be sent, then click "send" on the website in order to transmit the message to Shac's customers. *Id.*, Exh. 1, at 20, 139–41; see also id., Exh. 2, at 179–81. The employee could either transmit the messages in real time or preschedule messages to be transmitted "[a]t some future date." Zelenski Decl., Exh. 1, at 186–88.

As a result of this process, an allegedly unwanted text message was sent to Plaintiff, a customer of Shac, who had provided Shac with his cell phone number.

The First Amended Complaint (the operative complaint) asserts one claim against Shac, Club Texting, and CallFire: violation of the TCPA. Club Texting has been voluntarily dismissed from this action. CallFire is no longer a defendant to this action, as Plaintiff accepted an offer of judgment and dismissed all claims against CallFire with prejudice. Dkt. No. 82. Shac is the one remaining defendant. Shac moves for summary judgment. Dkt. No. 85.

LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving

1. Plaintiff's request for judicial notice is granted. *See* Fed.R.Evid. 201; *Tovar v. Midland Credit Mgmt.*, No. 10–CV–2600 MMA (MDD), 2011 WL 1431988, at *2 (S.D.Cal. Apr. 13, 2011); *Michael v. New Century Fin. Servs.*, 65 F.Supp.3d 797, 803–04 (N.D.Cal. 2014).

party bears the initial burden of informing the court of the basis for the motion, and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to meet its burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000).

If the moving party meets its initial burden, the burden shifts to the non-moving party to produce evidence supporting its claims or defenses. *See Nissan Fire & Marine Ins. Co., Ltd.,* 210 F.3d at 1102. The non-moving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. *See id.* A genuine issue of fact is one that could reasonably be resolved in favor of either party. A dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248–49, 106 S.Ct. 2505.

"When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.' " *Devereaux v. Abbey,* 263 F.3d 1070, 1076 (9th Cir.2001) (quoting *Celotex Corp.,* 477 U.S. at 325, 106 S.Ct. 2548). Once the moving party meets this burden, the nonmoving party may not rest upon mere allegations or denials, but must present evidence sufficient to demonstrate that there is a genuine issue for trial. *Id.*

DISCUSSION

[1] First, Shac argues that it is entitled to summary judgment because the text message was not sent using an automatic telephone dialing system ("ATDS"). Under the TCPA, it is "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... (iii) to any telephone number assigned to a ... cellular telephone service ... or any service for which the called party is charged for the call." 47 U.S.C. § 227(b)(1). "The term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

Plaintiff and Shac dispute the definition of ATDS. Shac argues that because the definition of ATDS is "clear and unambiguous," the court's "inquiry begins with the statutory text, and ends there as well." *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 951 (9th Cir.2009) (internal quotation marks omitted). According to Shac, equipment must have the capacity to store or produce telephone numbers to be called using a random or sequential number generator in order to qualify as an ATDS. Plaintiff argues that Congress has expressly conferred authority on the Federal Communications Commission ("FCC") to issue interpretative rules pertaining to the TCPA, and the FCC has issued several regulations expanding the statutory definition of ATDS. The Court agrees with Plaintiff.

[2] The Hobbs Act, 28 U.S.C. § 2342(1), and the Federal Communica-

tions Act, 47 U.S.C. § 402(a), operate together to restrict district courts from invalidating certain actions by the FCC. The Federal Communications Act provides: "Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter ... shall be brought as provided by and in the manner prescribed in [the Hobbs Act]." 47 U.S.C. § 402(a). Under the Hobbs Act, "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. In other words, the Hobbs Act jurisdictionally divests district courts from ignoring FCC rulings interpreting the TCPA. Accordingly, this court must look not only to the statutory language in applying the definition of an ATDS, but also to FCC rulings addressing the same.

In 2003, the FCC noted that, "[i]n the past, telemarketers may have used dialing equipment to create and dial 10–digit telephone numbers arbitrarily," but that "the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective." 18 FCC Rcd. 14014, 14092 (2003). The FCC found it "clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Id.* The FCC concluded that "predictive dialers," which dial numbers from customer calling lists, "fall[ ] within the meaning and the statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." *Id.* at 14093.

In 2008, the FCC "affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers," and in 2012, the FCC again confirmed that the statute covered systems with the "capacity to store or produce and dial those numbers at random, in sequential order, or from a database of numbers." 23 FCC Rcd. 559, 566 (2008); 27 FCC Rcd. 15391, 15399 n.5 (2012). Accordingly, through these implementing regulations, the FCC has indicated that the definition of ATDS now includes "predictive dialers," which may dial numbers from preprogrammed lists rather than generate numbers randomly or sequentially. *See Glauser v. GroupMe, Inc.*, No. C 11–2584 PJH, 2015 WL 475111, at *5 (N.D.Cal. Feb. 4, 2015).

Shac argues that even if the court were to agree that the above-cited FCC regulations expand the definition of ATDS, this expanded definition encompasses only predictive dialers, not web-based text messaging platforms, like the one at issue here. However, this district has held that these FCC regulations are not limited to predictive dialers. *McKenna v. WhisperText*, No. 5:14–CV–00424–PSG, 2015 WL 428728, at *3 (N.D.Cal. Jan. 30, 2015); *Nunes v. Twitter, Inc.*, Case No. 14–CV–02843–VC, 2014 WL 6708465, at *1–2 (N.D.Cal. Nov. 26, 2014); *Fields v. Mobile Messengers Am., Inc.*, Case No. 12–C–05160–WHA, 2013 WL 6774076, at *3 (N.D.Cal. Dec. 23, 2013).

In addition, on June 18, 2015, the FCC voted on, and approved, FCC Chairman Tom Wheeler's omnibus proposal under the TCPA. Wheeler's "Fact Sheet" outlining the approved matters states, "as codified at 47 U.S.C. § 227(b)(2)," the "Telephone Consumer Protection Act explicitly empowers the Commission to enforce and interpret its consumer protection provisions," to "review questions related to the meaning of the TCPA's prohibitions," and "to prescribe regulations to implement the

statute." First Notice of New Authority, Exh. 1, at 2. The FCC voted to "affirm[ ]" the current definition of "autodialer" "ensur[ing] the robocallers cannot skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers." *Id.,* Exh. 2, at 2; Exh. 1, at 1. In the Declaratory Ruling and Order following the FCC vote on June 18, 2015, the FCC reiterated that "[i]n the 2003 TCPA Order, the Commission found that, in order to be considered an automatic telephone dialing system, the equipment need only have the capacity to store or produce telephone numbers. The Commission stated that, even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition." Second Notice of New Authority, Exh. 1 ¶ 12 (internal quotation marks omitted). "Internet-to-phone text messaging technology" is expressly included in the definition of "automatic telephone dialing system." *Id.,* Exh. 1 ¶¶ 111–16.

Accordingly, the fact that CallFire's system has the ability to send text messages from preprogrammed lists, rather than randomly or sequentially, does not disqualify it as an ATDS.

[3] Second, Shac argues that it is entitled to summary judgment because the text message was sent as a result of human intervention. As indicated at the hearing, the parties do not dispute the law governing what constitutes "human intervention," nor do they dispute the material facts as to what led up to Plaintiff receiving the text message. Rather, the parties dispute the application of the facts to the law. Shac argues that these undisputed facts constitute human intervention, while Plaintiff argues that they do not.

In its 2008 ruling, the FCC indicated that the defining characteristic of an autodialer is "the capacity to dial numbers without human intervention." 23 FCC Rcd. at 566. In 2012, the FCC further discussed the definition of "autodialer," explaining that it "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." 27 FCC Rcd. at 15399, n.5. Accordingly, the capacity to dial numbers without human intervention is required for TCPA liability. *Glauser,* 2015 WL 475111, at *6.

Here, human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, including transferring of the telephone number into the CallFire database, drafting the message, determining the timing of the message, and clicking "send" on the website to transmit the message to Plaintiff. Shai Cohen, Shac's person most knowledgeable, was involved in the process of sending Shac's text messages via the EZTexting website. Andrews Decl., Exh. 1, at 19. Cohen testified that he inputted telephone numbers into CallFire's web-based platform either by manually typing phone numbers into the website, or by uploading or cutting and pasting an existing list of phone numbers into the website. *See id.,* Exh. 1, at 71 ("Q: And who at Shac actually inputted the numbers one by one? A: I have. Q: And who at Shac did the exporting, to the extent exporting was used, input numbers? A: I have. Q: And that's also the case for uploading the numbers from a separate file? A: Yes."). Cohen drafted and typed the message content. *Id.,* Exh. 1, at 20 ("I would personally go into the website, log in, and type the message and send it off through their website."); *id.,* Exh. 1, at 142 ("I would upload the numbers into the system. Nothing here was done–nothing was automated. I personally created every one of these messages."). Cohen personally clicked "send" on the website in order to

transmit the messages to Shac's customers, including Plaintiff. *Id.,* Exh. 1, at 139–40 ("Q: . . . in order for the messages to be transmitted, you personally would have to log into the system and your own act of hitting 'send'? A: No, 100 percent. I would personally type and send each one of those messages. Q: Right. So the message couldn't go out unless you logged into the system? A: Correct. Q: And hit 'send'? A: Correct."); *see also id.,* Exh. 2, at 179–81 ("[I]f contacts are not uploaded to the website and the customer does not hit the submit button and say send out these text messages, nothing happens.").

This case is similar to *Glauser* and *McKenna v. WhisperText,* No. 5:14–CV–00424–PSG, 2015 WL 428728 (N.D.Cal. Jan. 30, 2015). In *Glauser,* the court found that "GroupMe obtained the telephone numbers of the newly added group members . . . through the actions of the group's creator" when the numbers were uploaded into the database. *Glauser,* 2015 WL 475111, at *6. The court in *Glauser* concluded that the text messages at issue "were sent to plaintiff as a direct response to the intervention of Mike L., the 'Poker' group creator." *Id.* In *McKenna,* the court found that "Whisper App can send SMS invitations only at the user's affirmative direction to recipients selected by the user." *McKenna,* 2015 WL 428728, at *3–4. Accordingly, the court in *McKenna* held that "under such circumstances, the action taken is with human intervention—disqualifying the equipment at issue as any kind of ATDS." *Id.* at *4.

Plaintiff asserts that *Glauser* and *McKenna* "ruled that the act of uploading customer telephone numbers to a database constitutes human intervention." Opp. at 16. Plaintiff argues that because these two cases "effectively eviscerate the FCC of its power to interpret the TCPA, they should be disregarded." *Id.* Plaintiff urges the court to instead follow several cases that Plaintiff argues have held the contrary: *Moore v. Dish Network, LLC,* 57 F.Supp.3d 639 (N.D.W.Va.2014); *Davis v. Diversified Consultants, Inc.,* 36 F.Supp.3d 217 (D.Mass.2014); *Sterk v. Path, Inc.,* 46 F.Supp.3d 813 (N.D.Ill. 2014); and *Griffith v. Consumer Portfolio Serv., Inc.,* 838 F.Supp.2d 723 (N.D.Ill. 2011).

Plaintiff's argument fails. As an initial matter, the court finds that human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, and was not limited to the act of uploading the telephone number to the CallFire database, as Plaintiff argues. As explained above, human intervention was involved in drafting the message, determining the timing of the message, and clicking "send" on the website to transmit the message to Plaintiff.

Moreover, all of the cases cited by Plaintiff were decided outside of this district, and are not binding on the court. They are also distinguishable. In *Davis,* the court found the predictive dialer in question to be an ATDS because the system's default setting was for "sequential dialing," and the court did not conduct a human intervention analysis. *Davis,* 36 F.Supp.3d at 225–26. In *Moore,* the court found the system to be an ATDS based on the fact that the only human involvement was typing a list of numbers into software, which then automatically transferred them to dialer hardware, which in turn automatically made calls. *Moore,* 57 F.Supp.3d at 654–55. In *Sterk* and *Griffith,* the automated dialing system at issue uploaded lists of numbers from individual users and required no human intervention by defendant. *Sterk v. Path, Inc.,* 46 F.Supp.3d at 819–20; *Griffith,* 838 F.Supp.2d at 727.

Accordingly, because the court finds that the subject text message was sent as

a result of human intervention, the court grants summary judgment in favor of Shac.

CONCLUSION

For the reasons stated above, Shac's motion for summary judgment is granted.

IT IS SO ORDERED.

Yahchaaroah LIGHTBOURNE, on behalf of himself and all others similarly situated, Plaintiff,

v.

PRINTROOM INC., et al., Defendants.

CASE NO. SACV 13–876–JLS (RNBx)

United States District Court, C.D. California.

Signed 08/14/2015

Background: College football player brought putative class action against university's exclusive licensee of student-athletes' names, images, and likenesses, and licensee's partner for online sale of photographs of student-athletes, asserting right of publicity claim and civil conspiracy claim. Partner filed motion for summary judgment.

Holding: The District Court, Josephine L. Staton, J., held that assuming that California law governed the right of publicity claim, student-athlete's consent to use and sale of his image precluded the claim.

Motion granted.

1. Torts ⚿395

An element of California's right of publicity statute and common law right of publicity tort is that the use of the plaintiff's image or likeness occur without the plaintiff's consent. Cal. Civ. Code § 3344(a).

2. Torts ⚿395

Assuming that student-athlete's common-law right of publicity claim was governed by California law, student-athlete's consent to use of his image or likeness, pursuant to student-athlete image authorization form in which he authorized university or its agents to use or sell photographs of student-athlete taken in connection with his participation in university's intercollegiate athletic team, precluded right of publicity claim against business partner of university's exclusive licensee of student-athletes' names, images, and likenesses, relating to sale of student-athlete's photograph through online store operated by licensee and business partner.

3. Contracts ⚿147(1)

Under California law, the goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time the contract was executed.

4. Contracts ⚿147(2)

Under California law, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.

5. Contracts ⚿147(2), 176(1)

Under California law, the objective intent of the contracting parties is ordinarily a legal question determined solely by reference to the contract's terms.

6. Torts ⚿395

Assuming that California law regarding right of publicity and contracts governed student-athlete's action, student-athlete's internal understanding of student-athlete image authorization form he executed, to extent that it differed from form's clear and unambiguous language, was irrelevant to determining whether student-athlete consented to sale of his image, precluding right of publicity claim against

No. 14-56834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN MARKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

CRUNCH SAN DIEGO, LLC,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* SIRIUS XM RADIO INC. IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure 26.1 and 29(c)(1), *Amicus Curiae* Sirius XM Radio Inc. states as follows: Sirius XM Holdings Inc. owns all of the outstanding capital stock of Sirius XM Radio Inc. Liberty Media Corporation beneficially owns more than 50 percent of the outstanding capital stock of Sirius XM Holdings Inc.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Sirius XM Radio Inc. provides satellite radio service. Sirius XM's vendors rely on dialing technology in order to communicate with Sirius XM's customers. Sirius XM faces putative class-action lawsuits, both in the Ninth Circuit and elsewhere, in which plaintiffs allege that its vendors have used automatic telephone dialing systems in violation of the Telephone Consumer Protection Act of 1991. This Court's resolution of this case could affect both Sirius XM's business practices and its defenses to the pending lawsuits.

Both parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than Sirius XM or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

SUMMARY OF ARGUMENT

In the 1980s, telemarketers began to use equipment that automatically generated and dialed thousands of random or sequential telephone numbers, often to deliver unwanted prerecorded messages. These aimless calls sometimes reached hospitals and police stations, distracting them from genuine emergencies. These calls similarly reached cellular phones, saddling recipients with pricey per-minute charges even where the recipients had no interest in the caller's message. Sequential dialers, in particular, made matters worse by overwhelming *all* of the telephone lines in a hospital, police station, or wireless network. They imperiled lives by tying up all of a hospital's pagers and blocked cellular access by saturating mobile facilities.

Congress responded in 1991 by enacting the Telephone Consumer Protection Act (TCPA or Act). The Act defines an "automatic telephone dialing system" (ATDS) as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). It prohibits using an ATDS to call emergency lines, patient rooms, and wireless numbers without the "prior express consent of the called party." *Id.* § 227(b)(1)(A). The plain terms of the ATDS definition—"using a random or sequential number generator"—show that the TCPA targets only random and sequential dialers, and interpreting the statute to

go further raises serious doubts about whether the ATDS restrictions comply with the First Amendment. Contrary to Appellant Marks' theory, the TCPA does not reach equipment that is capable only of dialing from a prepared list—such as a list of customers, a list of people who have expressed interest in a product, or a list of borrowers with unpaid debts.

Although Congress has spoken with clarity about the definition of ATDS, the Federal Communications Commission (alas) has not. The Commission has put forth contradictory interpretations of the functionalities of an ATDS, sometimes tracking the statutory ATDS definition, sometimes deviating from it. As if that were not bad enough, the Commission has also offered confused explanations of what it means for equipment to have the "capacity" to perform the tasks of an ATDS.

Exploiting ambiguities in the Commission's interpretations, plaintiffs such as Appellant Marks have launched class action lawsuits challenging legitimate dialing practices that Congress meant to leave unrestricted. Their attacks have hit technology companies that offer group-texting applications, ride-sharing companies that text customers that a car is on its way, banks that call people with unpaid debts, and more. The practices that these lawsuits challenge look nothing like the abusive dialing practices Congress meant to eliminate.

Even assuming for the sake of argument that this Court must accept the validity of the Commission's orders for purposes of this case, the Court should not countenance such efforts to expand the TCPA beyond its terms. A cardinal principle of administrative law instructs courts to interpret ambiguous regulations to conform to the Constitution and the governing statute. Here, that principle requires this Court to interpret the Commission's orders to track the statutory definition, not to rewrite that definition to include equipment that merely has the capacity to call from a list.

ARGUMENT

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The definition prompts two questions: what does it mean to have the capacity to perform the functions of an ATDS, and what exactly are those functions? This *amicus* brief concentrates on the latter question. As this brief explains, equipment constitutes an ATDS only if it has the capacity to use "a random or sequential number generator" to store or produce telephone numbers. Equipment does not become an ATDS merely because it can place automated calls from a list.

I. THE TCPA RESTRICTS ONLY RANDOM AND SEQUENTIAL DIALERS

Congress understood when it enacted the TCPA that random and sequential dialers cause distinctive problems. It therefore adopted a statute that restricts those—and only those—kinds of equipment. Contrary to Appellant Marks' claim, Congress never intended to restrict equipment that is incapable of dialing random and sequential numbers, but is instead capable merely of dialing numbers from a list.

A. Congress Understood that Random and Sequential Dialers Cause Unique Harms

At least as early as the 1960s, callers began experimenting with machines that could dial telephone numbers more efficiently than human beings could. *See* Memorandum Opinion and Order, *Unsolicited Telephone Calls*, 77 FCC 2d 1023, 1024 (1980). Such machines became widespread by the 1980s. A congressional hearing in 1989 revealed that more than 180,000 telemarketers used automated dialers "to call more than 7 million Americans" every day. *Telemarketing Practices: Hearing Before the Subcomm. on Telecommc'ns and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 1 (1989) (statement of Rep. Markey). Many of these automated dialers called telephone numbers "at random," *id.* at 3 (statement of Rep. Rinaldo), or dialed "whole blocks of numbers"

"sequentially," *id.* at 2 (statement of Rep. Markey), often only to leave a prerecorded message, *id.* at 3 (statement of Rep. Rinaldo).

Congress understood that such random and sequential dialers caused particular problems. By definition, they called telephone numbers indiscriminately. As a result, they often reached "lines reserved for [specialized] purposes," including lines belonging to emergency rooms, police stations, and fire departments. S. Rep. No. 102-178, at 2 (1991). For example, lawmakers heard about one 911 operator who received an automated call that began, "This is your lucky day." *Computerized Telephone Sales Calls and 900 Service: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 34 (1991) (statement of Chuck Whitehead). "The Coast Guard, national defense organizations, police, fire department, hospitals, doctors, you name it; [they were] all affected." *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong. 111 (1991) (statement of Michael J. Frawley).

Aimless dialing likewise led random and sequential dialers to reach places such as hospital wards and patient rooms. One "horror stor[y]" involved "the man in the hospital bed in the intensive care ward" who received an automated call "offering him a trip to Hawaii." *Id.* at 28 (statement of Rep. Unsoeld). Observers found it "sickening" that "a person can . . . be in a major trauma hospital receiving

care, and be harassed by this type of communication." *Computerized Telephone Sales Calls and 900 Service* 55 (statement of James M. Faircloth).

Indiscriminate dialing also hurt users of cell phones and pagers. These users paid charges—in the early 1990s, hefty charges—for calls they received. *See* First Report, *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd. 8844, tbls. 3–4 (1995) (60-minutes-per-month plan cost $63 in 1991). They were therefore saddled with the cost of random and sequential calls to their telephones, even though the caller dialed them without any basis for believing that they would be interested in the message. For example, one doctor who was "called on his beeper" with an offer of a "deal on diet pills" was "then charged $3 for the call." *Telemarketing/Privacy Issues* 28 (statement of Rep. Unsoeld). Separately, because people often used cell phones and pagers to receive specialized alerts, random and sequential calls to such devices caused false alarms. Calls to doctors' beepers prompted doctors to think that they were needed for emergencies. *Id.* at 111 (statement of Michael J. Frawley). Worse, calls to special pagers assigned to patients on organ-transplant waitlists misled patients into believing that organ matches had been found. *Id.*

Sequential dialing, in particular, made matters worse. Dialing whole blocks of numbers could overwhelm *all* of the telephone lines in a hospital or police station or fire department. H.R. Rep. No. 102-317, at 10 (1991); *see also* S. Rep.

No. 102-178, at 2 (similar). In one case, a dialer sequentially called telephones in a hospital in Watertown, New York, tying up "exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities" with a pitch for a contest in which participants could win a vacation. *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 43 (1991) (statement of Michael F. Jacobson). "Lives literally 'hung in the balance' while hospitals were unable to page doctors [or] to reach code blue teams," forced to "stand by, watching the dialer call each and every pager number, one by one, until the dialer ha[d] done its job and all the calls [were] completed." *Telemarketing Practices* 79 (statement of Steven S. Seltzer, President, Modern Communications Corporation). Cellular networks, too, were vulnerable to sequential dialing. Because cellular carriers "obtain[ed] large blocks of consecutive phone numbers for their subscribers," a sequential dialer running through such a group of numbers could "saturate mobile facilities, thereby blocking the provision of service to the public." *Telemarketing/Privacy Issues* 113 (statement of Michael J. Frawley). One carrier "had its system seized by autodialers three separate times for approximately 3 hours each time, during which time the service was totally disrupted to almost 1,000 customers." *Id.*

Telephone users were "especially frustrated" because there was "no way to prevent these calls." S. Rep. No. 102-178, at 1. Telephone users can normally avoid unwanted calls by leaving their numbers unlisted, but "[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially." *Id.* at 2

B. Congress Responded to These Problems by Enacting Restrictions Applicable Only to Random and Sequential Dialers

Congress responded to the unique problems posed by random and sequential dialers by enacting the TCPA's restrictions on ATDS equipment. Homing in on the technology responsible for these problems, Congress defined an ATDS as equipment that "has the capacity—(A) to store or produce telephone numbers to be called, *using a random or sequential number generator*; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). And further targeting the types of telephone lines that were vulnerable to these problems, Congress prohibited ATDS calls "to any emergency telephone line," "to the telephone line of any guest room or patient room" of a medical establishment, or "to any telephone line assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." *Id.* § 227(b)(1)(A).

Every applicable principle of statutory interpretation confirms that the ATDS provisions restrict *only* random and sequential dialers. Start with the text of

the ATDS definition, which requires equipment to be capable of performing three key tasks in order to constitute an ATDS. *First*, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot have the capacity to do anything "using a random or sequential number generator." *Id.* § 227(a)(1)(A). *Second*, the equipment must be able to use that random or sequential number generator in order to store or produce telephone numbers to be called. That is what it means to have the capacity "to store or produce telephone numbers . . . , using a random or sequential number generator." *Id.* *Third*, the equipment must be able to dial those telephone numbers. The terms of the definition—"dial *such* numbers," *id.* § 227(a)(1)(B) (emphasis added)—refer back to the "telephone numbers" that were stored or produced "using a random or sequential number generator," *id.* § 227(a)(1)(A).

The ATDS definition further requires the equipment to be capable of performing these functions *automatically*—without human intervention. For one thing, § 227(a)(1) defines "*automatic* telephone dialing system," and the Court "cannot forget that [it] ultimately [is] determining the meaning of [that] term" when parsing subsections 227(a)(1)(A) and 227(a)(1)(B). *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). Because something "automatic" can "wor[k] by itself with little or no direct human control," *The New Oxford American Dictionary* (1st ed. 2001), an "automatic" telephone dialing system must be able to perform the requisite

functions without human assistance. For another thing, § 227(a)(1) asks whether equipment "has the capacity" to perform the necessary functions. "Capacity" typically refers to what something can do on its own, not what it can do with outside help. Just as one would not say that someone has the capacity to lift a sofa if he needed a friend's help to do the lifting, so too one would not say that equipment has the capacity to produce numbers if it needed a human being's help to do the producing.

In short, the plain terms of the ATDS definition encompass only certain kinds of dialing technology. If Congress had wanted to restrict other kinds of technology, it could easily have defined an ATDS as any dialer that has the capacity "to dial thousands of telephone numbers in a short interval," "to dial telephone numbers from a database without human intervention," or "to dial telephone numbers with the assistance of a computer." Yet Congress chose not to do so.

The scope of the ATDS restrictions in § 227(b)(1) confirms the meaning of the ATDS definition in § 227(a)(1). Subsection 227(b)(1) prohibits ATDS calls to only specific types of phone lines, such as emergency telephone lines, patient rooms, and wireless numbers. § 227(b)(1)(A)(i)–(iii). This scope fits perfectly with the goal of tackling random and sequential dialing. As discussed, the evils of random or sequential dialing lay precisely in the likelihood of reaching these

specialized telephone lines. If Congress's goal were not to stamp out the peculiar problems caused by random and sequential dialing, but were instead (say) to protect consumers from all computer-dialed calls, the ATDS restrictions' scope would make no sense. If *that* were Congress's objective, why did it allow ATDS calls to residential landlines? Why not prohibit ATDS calls altogether?

The legislative history reinforces these conclusions. Committee hearings, committee reports, and floor debates were dominated by discussions of the peculiar harms of random and sequential dialing. *See supra* 5–9. If lawmakers had meant to prohibit *all* unwanted or computer-dialed calls, one would expect someone to have said so. Marks has not identified anyone who did.

Enlarging the ATDS definition beyond random and sequential dialers not only dishonors text, context, and legislative history, but also raises serious constitutional questions—in violation of the principle that courts should if possible interpret statutes to avoid constitutional doubts. *See Skilling v. United States*, 561 U.S. 358, 405–06 (2010). The First Amendment requires laws regulating the time, place, and manner of speech—such as the ATDS restrictions at issue here—to be "narrowly tailored" to serve the Government's goal. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Narrow tailoring in turn requires targeting "the exact source of the 'evil' [the Government] seeks to remedy." *Id.* at 801. Here, if a court were to expand the ATDS restrictions to encompass dialers that lack

random or sequential number generators, it would raise serious doubts about whether the statute is narrowly tailored to serve the goal of stopping the distinctive harms of random and sequential dialers. Separately, the First Amendment and Due Process Clause require laws that restrict speech to provide "sufficient notice of what is proscribed," so that "ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Here, the ATDS restrictions on their face refer only to random and sequential dialers. If a court were to expand the ATDS restrictions to encompass other kinds of dialers too, it would raise serious doubts about whether the statutory text provides fair notice that such dialers are prohibited.

C. Congress Did Not Restrict All Equipment Capable of Calling from a List

Even though the statute Congress enacted restricts only equipment that has the capacity to "us[e] a random or sequential number generator," Marks claims that a dialer "need *not* . . . use . . . a number generator to be an [ATDS]." Marks Br. 32 (emphasis added). He says instead that a dialer qualifies as an ATDS so long as it can automatically dial telephone numbers from "a list or database," even a list or database prepared "by a human." Marks Br. 13, 29.

That interpretation rewrites the TCPA. The Act says with unmistakable clarity that only equipment capable of "using a random or sequential number generator" qualifies as an ATDS. Marks' reading, under which equipment

qualifies as an ATDS even if it does not "us[e] a random or sequential number generator," crosses these critical words out of the statute. Marks' approach thus violates the "cardinal principle" that requires every interpreter "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Marks' reading also disregards the purposes of the ATDS provisions. As explained, Congress enacted the ATDS restrictions in order to tackle the problems caused by random and sequential dialing. Automated dialing from a handpicked list does not pose similar problems. Whereas random and sequential dialers can reach specialized lines such as 911, dialers that rely on prepared lists can reach only those whom callers deliberately choose to call. Nobody deliberately calls a police station or an intensive care ward or an organ-transplant patient's pager in order to hawk wares. Similarly, random and sequential dialers do not distinguish between people who care about the caller's message and people who do not. In contrast, organizations that prepare lists of people to call "ha[ve] an incentive to direct calls to those likely to be interested." 77 FCC 2d at 1037. For example, *amicus* Sirius XM's vendors call consumers who have already received subscriptions to Sirius XM's satellite radio service; they do not call everybody in the phone book. Finally, whereas sequential dialers knock out blocks of consecutive numbers—sometimes seizing entire cell phone networks—dialers that

rely on handpicked lists do not. Whatever the pros and cons of dialers capable of calling from a list, these dialers do not raise the concerns that led Congress to enact the TCPA's ATDS restrictions.

Marks' interpretation similarly disregards the TCPA's legislative history, which suggests that lawmakers were aware of the distinction between random and sequential dialing on the one hand and dialing from a prepared list on the other. For example, one witness testified at a hearing on an earlier bill: "There is . . . a sharp technological distinction between 'random' or 'sequential' number generation and 'programmable' number generation. . . . Programmable equipment enables a business to transmit a standard . . . message quickly to a large number of telephone subscribers . . . with whom the sender has a prior business relationship." *Telemarketing Practices* 40–41 (statement of Richard A. Barton). A law professor commenting on the same bill explained: "The definition of 'automatic telephone dialing system' . . . is quite limited: it only includes systems which dial numbers sequentially or at random. That definition does not include newer equipment which is capable of dialing numbers gleaned from a database." *Id.* at 71–72 (statement of Robert L. Ellis). State statutes brought to lawmakers' attention likewise distinguished between these abilities. *Compare, e.g.*, Fla. Stat. Ann. § 501.059(8)(a) (restricting all "automated system[s] for the selection or dialing of telephone numbers"), *with, e.g.*, Mass. Gen. Laws c. 159, § 19B (restricting only

systems capable of storing or producing telephone numbers "using a random or sequential number generator").

Lastly, reading the TCPA to restrict all equipment with the ability to dial from a prepared list leads to irrational and unconstitutional results. For example, common smartphone apps enable users to send text messages to groups of contacts. *See, e.g.*, http://groupme.com. Under Marks' theory, smartphones on which these apps have been installed would qualify as ATDS equipment, because these phones could "send . . . text message[s] automatically *en masse*." Marks Br. 41. For that matter, smartphones on which these apps have *not* been installed would also qualify as ATDS equipment, thanks to Marks' view that the "capacity" of equipment "includes its potential functionalities." Marks Br. 48. These results are absurd and would violate the First Amendment. Congress could not have intended to impose—and, under the First Amendment, had no authority to impose—$500 to $1500 in TCPA liability every time an ordinary consumer uses a smartphone (with or without a group-messaging app) to text a friend "Hello."

Marks' responses do not overcome these arguments. Marks begins by pointing out that "the focus [of the ATDS definition] is on the 'capacity' of the equipment used to make calls, . . . not [on] whether the equipment actually utilized such capacity." Marks Br. 29–30. True enough, but beside the point. The question at hand is, capacity to do what? The answer is, capacity to "store or

produce telephone numbers . . . *using a random or sequential number generator*." § 227(a)(1) (emphasis added). There is nothing in the definition of ATDS—nothing at all—suggesting that what counts is instead the capacity to automatically dial "numbers in a database," Marks Br. 30.

Equally mistaken is Marks' argument that, in the phrase "store or produce telephone numbers . . . using a random or sequential number generator," the number-generation requirement modifies only "produce," not "store." Marks Br. 30–31. On this theory, the mere capacity to store and dial telephone numbers makes equipment an ATDS. *Id.* But this reading leads to ridiculous results. Every phone with a contact list or a redial button has the capacity to store and dial telephone numbers. But Congress could not conceivably have intended—and the First Amendment would not have allowed it—to treat each such phone as an ATDS.

In addition, Marks' reading contradicts ordinary rules of grammar. If a modifier follows a series of parallel verbs and a shared object, it ordinarily applies to each verb in the list. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) (series-qualifier canon); *see, e.g.*, *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014). "To grow or pack wheat using unpaid labor" is (1) to grow wheat using unpaid labor or (2) to pack wheat using unpaid labor. In the same way, "to store or produce telephone numbers . . .

using a . . . number generator" is (1) to store numbers using a number generator or (2) to produce numbers using a number generator. Contrary to Marks' suggestion, "[i]t does . . . make sense to say that a system stores numbers using a number generator," Marks Br. 31. For example, if a telephone were programmed to store every number that a number generator spits out, the telephone would certainly store numbers "using" a number generator.

Finally, there is no force to Marks' argument that "[t]he TCPA is a remedial statute that should be interpreted broadly to protect consumers," Marks Br. 48. The "proposition that remedial statutes should be interpreted in a liberal manner" is "erro[neous]." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). "After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if [one] identified some subset of statutes as especially remedial, the [Supreme] Court has emphasized that no legislation pursues its purposes at all costs." *Id.* (internal quotation marks omitted). In any event, far from protecting the TCPA's intended beneficiaries, Marks' "broad" interpretation would harm consumers (and abridge the freedom of speech) by extending the ATDS restrictions to ordinary group-messaging apps and ordinary smartphones.

II. THE COMMISSION HAS MUDDIED THE TCPA'S MEANING, CREATING AN AVALANCHE OF TCPA LITIGATION

The TCPA's ATDS restriction, as just shown, "is clear and unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). The Federal Communications Commission's interpretations of that restriction, by contrast, are "hardly a model of clarity." *Dominguez v. Yahoo, Inc.*, — Fed. Appx. —, 2015 WL 6405811, at *2 (3d Cir. 2015). Seizing on the Commission's confusing orders, plaintiffs, including Appellant Marks, have filed class-action lawsuits against legitimate dialing practices that Congress never intended to restrict.

A. The Commission Has Interpreted the TCPA in a Confusing Way

The Commission's orders interpreting the TCPA are at best a jumble. *See id.* Most importantly, the Commission has set out conflicting tests for what functionalities render equipment an ATDS. For example, the Commission's most recent order interpreting the TCPA recognizes in many places that the ATDS definition requires the capacity to store or produce telephone numbers using a "random or sequential number generator." Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8018 (2015). In other places, however, the Order states that equipment need only be able "to store or produce telephone numbers." *Id.* at 7973. Elsewhere still, the Order implies that an ATDS need only be able to "store and dial telephone numbers." *Id.* at 7975.

The Order's positions on the significance of human intervention are, if anything, even more disorienting. One sentence of the Order states categorically that the "basic functions of an [ATDS]" include the capacity to "dial numbers without human intervention." *Id.* The very next sentence states that "[h]ow the human intervention element applies . . . is specific to each individual piece of equipment . . . and is therefore a case-by-case determination." *Id.* Just three paragraphs later, the Order "*reject[s]* [the] argument that the Commission should adopt a 'human intervention' test." *Id.* at 7976 (emphasis added).

The Commission's interpretation of the statutory term "capacity" magnifies the confusion caused by its understanding of the functionalities of an ATDS. On a correct reading of the statute, equipment has the "capacity" to perform the functions of an ATDS if it has the present ability to carry out those tasks. *See, e.g.*, *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wa. 2014); *De Los Santos v. Millward Brown, Inc.*, No. 13-80670, 2014 WL 2938605, at *6 (S.D. Fla. June 30, 2014). According to the Commission's 2015 Order, however, "the capacity of an [ATDS] is not limited to its current configuration but also includes its potential functionalities." 30 FCC Rcd. at 7974. But a potential-functionalities test has "no outer limit, for virtually every telephone in existence, given a team of sophisticated engineers working doggedly to modify it," could be reconfigured to perform the functions of an ATDS. *De Los Santos*, 2014 WL 2938605, at *6

(internal quotation marks and brackets omitted). The Order tries to solve this problem by ruling that "capacity" does not include potential modifications that are "too attenuated." 30 FCC Rcd. at 7975. But the Order does not explain how much attenuation is too much.

In addition, even with an ad hoc exception for attenuated modifications, a potential-functionalities test threatens to turn "each and every smartphone, tablet, VoIP phone, calling app, [or] texting app" into an ATDS. *Id.* at 8075 (dissenting statement of Commissioner Ajit Pai). After all, "[i]t's trivial to download an app, update software, or write a few lines of code that would modify a phone" to perform ATDS functions. *Id.* The Order tries to solve this problem by summoning down another *deus ex machina*: Even though the TCPA clearly refers to calling equipment's "capacity" rather than to its actual use, the Order suggests that smartphones are not ATDS equipment because "unwanted calls are [not] likely to result from consumers' typical use of smartphones." *Id.* at 7977 (majority opinion). The Order ominously promises, however, that the Commission "will continue to monitor . . . atypical uses of smartphones" and will "clarif[y]" whether smartphones constitute ATDS equipment "if necessary." *Id.* In the meantime, how the "typical use" test might apply outside the context of smartphones is anyone's guess.

B. Class-Action Plaintiffs and Lawyers Have Taken Advantage of Ambiguities in the Commission's Orders

Exploiting ambiguities in the Commission's interpretations of the TCPA, plaintiffs such as Appellant Marks have tried in case after case to convert the ATDS restrictions from a focused strike against random and sequential dialers into an undifferentiated broadside against all computer-assisted dialing technology.

Companies that offer group-texting applications face claims that their applications constitute ATDS technology. For example, one plaintiff brought a class-action lawsuit against the startup GroupMe after his friends used the GroupMe group text-messaging application to invite him to a poker game. *Glauser v. GroupMe, Inc.*, No. 11-2584, 2015 WL 475111, at *1 (N.D. Cal. Feb. 4, 2015). In another case, plaintiffs brought a class-action lawsuit against Google, claiming that its Disco group-texting service amounts to an ATDS. *Pimental v. Google, Inc.*, No. 11-2585, ECF No. 1 (N.D. Cal. May 27, 2011).

Car-ride companies similarly face lawsuits for sending automated text messages to consumers. One customer brought a class-action lawsuit against the Orange Cab Company, claiming that it had used an ATDS to send him a text message notifying him that the taxi he ordered had been dispatched. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014). Another class-action lawsuit claims that Lyft violated the TCPA's ATDS restrictions by offering an

"Invite Friends" feature on its mobile application. *Wright v. Lyft, Inc.*, No. 14-421, ECF No. 1 (W.D. Wash. Mar. 24, 2014).

Banks face lawsuits for calling borrowers who have stopped making payments. In one class-action lawsuit, plaintiffs claimed that Capital One was liable for between "$950 billion" and "$2.85 trillion" in statutory damages for automated calls to collect credit-card debts. *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015). In another class-action case, plaintiffs sought more than $3.5 billion from Bank of America for automated calls related to unpaid mortgages and credit cards. *Rose v. Bank of Am. Corp.*, No. 11-2390, ECF No. 1 (N.D. Cal. May 16, 2011).

Professional sports teams also face lawsuits from disgruntled fans. In one illustrative case, a fan at a Los Angeles Lakers basketball game sent a text message that he hoped would be displayed on the stadium's jumbotron. After the Lakers sent a text message confirming receipt of the fan's request, the fan sued the team, claiming that it had sent the return message by ATDS. *Emanuel v. Los Angeles Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013).

These lawsuits attack dialing practices that look nothing like the abuses that prompted the TCPA. Unlike random and sequential dialing, these dialing practices neither reach emergency lines nor traumatize vulnerable patients in hospital rooms nor threaten to bring down whole cell-phone networks. They instead reach people

to whom the caller's message is likely to be relevant: the ride-share company's message goes only to people waiting for a car, the bank's message goes only to people with unpaid debts, the sports team's message goes to fans in the arena, and so on.

III. THE COMMISSION'S ORDERS SHOULD BE INTERPRETED TO RESTRICT ONLY RANDOM AND SEQUENTIAL DIALERS

Amicus Sirius XM and others have challenged the Commission's 2015 Order in petitions for review now consolidated before the D.C. Circuit. *See ACA International v. FCC*, No. 15-1211 (D.C. Circ.). Among other matters, the petitions challenge the Order's conclusion that equipment's capacity includes its potential functionalities, its interpretation of the functions of an ATDS, and its failure to provide clear guidance to regulated parties.

In the meantime, Sirius XM agrees with Appellee Crunch San Diego, LLC that this Court should give no weight to the Commission's mazelike interpretations of the ATDS definition. *See* Crunch San Diego Br. 32–33. As Crunch San Diego explains, the Hobbs Act, 28 U.S.C. § 2342(1), does not require this Court to do otherwise. *Id.* at 32–33 n. 20.

Even if the Court were to accept the validity of the Commission's orders for purposes of this case, however, the correct result would remain the same. This Court has an obligation to interpret ambiguous regulations in a manner consistent with the Constitution and the governing statute. Here, that means the Court should

interpret the Commission's Order to restrict (like the statute) *only* equipment that has the capacity to use a random or sequential number generator to store or produce telephone numbers.

A. Courts Should Interpret Ambiguous Regulations to Conform to the Constitution and Federal Statutes

It is an elementary principle of administrative law that where "the meaning of [a regulation] is in doubt," the "principles of the Constitution" and the "intention of Congress" are both "relevant . . . in choosing between various constructions." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Just as a court should interpret unclear legislation to conform to the Constitution, so too a court should interpret unclear regulations to conform to the Constitution and governing statutes.

This principle remains operative even if the court interpreting the regulation lacks jurisdiction to review the regulation's validity. As *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007), makes clear, there is a difference between adopting a "permissible reading of the regulation . . . to bring it into harmony with the Court of Appeals' view of the statute" and "determin[ing] that the regulation . . . is invalid." Although a court of appeal may not "rewrite[e]" unambiguous regulations, it certainly may interpret ambiguous regulations to cohere with congressional intent, even where it lacks jurisdiction to review the regulation's validity. *Id.*

B. This Court Should Interpret the Commission's Orders to Restrict Only Random and Sequential Dialers

The foregoing principles require this Court to interpret the Commission's orders, if possible, to comport rather than clash with the First Amendment and the TCPA. That would be so even if the Court were to conclude that the Hobbs Act precludes it from rejecting the Commission's orders in full. Here, interpreting the orders consistently with the First Amendment and the TCPA means interpreting them to prohibit only equipment that has the capacity to use a random or sequential number generator in order to store or produce telephone numbers.

This reading finds support in the Commission's rulings. It is, after all, the interpretation the Commission's most recent Order most frequently embraces. *See, e.g.*, 30 FCC Rcd. at 7978 ("equipment [is] an autodialer if . . . [it has] the capacity to store or produce telephone numbers . . . using a random or sequential number generator"); *id.* at 8018 ("such equipment meets the first element of the autodialer definition because it has the capacity to store *or* produce telephone numbers to be called, using a random or sequential number generator"); *id.* ("Even assuming that the equipment does not actually use a random or sequential number generator, the capacity to do so would make it subject to the TCPA").

In addition, other judicial decisions support this understanding of the Commission's orders. For example, this Court has explained, after the Commission issued some of the orders on which Marks relies, that a system must

"have the capacity" to "call randomly or sequentially generated telephone numbers" in order to qualify as an ATDS. *Satterfield*, 569 F.3d at 951. More recently, the Third Circuit concluded that the Commission's orders, "[a]lthough hardly a model of clarity," "hold that an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated." *Dominguez*, 2015 WL 6405811, at *2.

C. Marks Misreads the Commission's Orders by Suggesting that They Restrict All Equipment Capable of Calling from a List

Marks misreads the Commission's orders to mean that the capacity to call from a list suffices to render equipment an ATDS. Isolated passages in the Commission's rulings have led some district courts to adopt such an erroneous reading. *See* Marks Br. 34. It should come as no surprise that orders as fuzzy as the ones at issue here contain conflicting passages or have led to conflicting court decisions. The question here is whether Marks' interpretation is the most appropriate reading of the Commission's orders. It is not.

Marks rests most of his hopes on the Commission's 2003 Order that predictive dialers—which use algorithms to predict times when a consumer will answer and an agent will be available to take the call—can qualify as ATDS equipment. *See* Marks Br. 29–37; Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003). That decision, however, does not go as far as Marks suggests. For

example, Marks suggests that the 2003 Order treats a dialer as an ATDS so long as it can store or produce and dial numbers "'at random, in sequential order, or *from a database of numbers*.'" Marks Br. 13 (quoting 18 FCC Rcd. at 14091). The quoted phrase, however, comes from the Commission's description of the functionalities of predictive dialers, not its interpretation of the functionalities of ATDS equipment: "*[A] predictive dialer* . . . has the capacity to store or produce and dial . . . numbers at random, in sequential order, or from a database of numbers." 18 FCC Rcd. at 14091 (emphasis added). The 2003 Order then concludes that *some* predictive dialers—those that have the capacity to store or produce numbers using a random or sequential number generator—qualify as ATDS equipment; it does not conclude that *all* predictive dialers do so. *See id.* at 14092 (equipment that otherwise qualifies as an ATDS is not "exclude[d]" from the statute "simply because" it "use[s] predictive dialing software"); *see also* 30 FCC Rcd. at 7972 n. 39 (neither the "name" of predictive dialer nor the function of predictive dialing "remove[s]" equipment that "has the requisite 'capacity'" "from the scope of the statutory autodialer definition"). In short, the 2003 Order does not rewrite the statutory phrase "using a random or sequential number generator" to mean "using a random or sequential number generator *or a database*." If anything, the 2003 Order's separate references to dialing "at random, in sequential order, or from a database of numbers" undercut Marks' theory, because these separate

references confirm that dialing from a database is not the same thing as dialing random or sequential numbers.

On the whole, Marks cannot show that the most appropriate reading of the Commission's orders covers all equipment with the capacity to dial from a prepared list. This Court should instead interpret the orders to track the only reasonable interpretation of the statute: equipment qualifies as an ATDS only if it has the capacity to use a random or sequential number generator to store or produce telephone numbers to be called.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: December 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,565 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: December 22, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 22, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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