

September 16, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Notice of Ex Parte – CG Docket No. 02-278**
ACA International

Dear Ms. Dortch:

On September 12, 2014, Monica Desai of Squire Patton Boggs (US) LLP, counsel to ACA International, held meetings with the staff of the Federal Communications Commission, as follows: (1) from the Office of General Counsel - Marcus Maher (Assistant General Counsel); Richard Welch (Deputy Division Chief and Deputy Associate General Counsel - Appellate); Laurel Bergold (Trial Attorney); and Richard Mallen (Attorney Advisor); (2) from the Consumer & Governmental Affairs Bureau - Mark Stone (Deputy Bureau Chief); Kristi Lemoine (Attorney Advisor, Consumer Policy Division); and Kurt Schroeder (Chief, Consumer Policy Division), who participated by phone; (3) Amy Bender (Legal Advisor to Commissioner O’Rielly); (4) Nicholas Degani (Legal Advisor to Commissioner Pai); and (5) Adonis Hoffman (Chief of Staff and Senior Legal Advisor to Commissioner Clyburn). On September 15, the undersigned met by phone with Valery Galasso (Special Advisor & Confidential Assistant to Commissioner Rosenworcel).

During the meetings, Ms. Desai reiterated ACA’s request that the Commission provide guidance interpreting the term “capacity” under the TCPA to mean present ability of a dialing system at the time the call is made. Specifically, the discussions focused on the recent decision and related Department of Justice (DoJ) memorandum in the *Millward Brown, Inc.* case,¹ as well as a recent court order where an Illinois judge requested intervention by the 7th Circuit Court of Appeals

¹ *Aja de los Santos v. Millward Brown, Inc.*, Order Denying Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint, 9:13-cv-80670-DPG (S.D. FL. June 29, 2014)(*Millward Brown, Inc. Order*); *Aja de los Santos v. Millward Brown, Inc.*, United States’ Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act, 9:13-cv-80670-DPG (S.D. FL. Jan. 31, 2014)(*DoJ Memorandum*). A copy of the *Millward Brown* case and related *DoJ Memorandum* was provided to CGB staff.

due to a lack of guidance from the FCC regarding how the term “capacity” should be interpreted under the TCPA.² In *Millward Brown*, the court agreed – consistent with ACA’s advocacy before the Commission³ and consistent with the DoJ memorandum referencing this point – that “capacity” for TCPA purposes must mean the present ability, rather than some hypothetical, future ability. Moreover, Ms. Desai reiterated that just because a predictive dialer can be an automatic telephone dialing system (ATDS) does not mean that a predictive dialer must be an ATDS under the TCPA.

(1) “Capacity” under the TCPA means “present ability.”

ACA emphasized during the meetings that Congress defined 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.”⁴ While Congress did not define the term “capacity,” the court in *Millward Brown, Inc.* recognized that the most reasonable interpretation of “capacity” under the TCPA is “present ability” at the time the call is made:

As other courts have held, the term “capacity” refers to “present, not potential, capacity” to produce and dial numbers. . . . Otherwise, the term autodialer would have no “outer limit,” for “[v]irtually every telephone in existence, given a team of sophisticated engineers working doggedly to modify it, could possibly store or produce numbers using a random or sequential number generator.”⁵

The DoJ supported this outcome in the memorandum it filed in this case, emphasizing that “[t]he overbreadth doctrine is not available where Defendant simply argues that section 227(b)(1)(A) could conceivably apply to calls made from smartphones and computers without providing any support for such an interpretation of the statute.”⁶ The DoJ supported that statement with a citation to a case finding it “unlikely that a run-of-the-mill smartphone, in the absence of additional modifications to achieve the requisite capacity, would qualify as an ATDS.”⁷ As the DoJ explained further, that conclusion was based on the finding that the “device in question had to have present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator.”⁸ Thus, both the court and the DoJ in *Millward Brown, Inc.* came to the same conclusion advocated by ACA – “capacity” for TCPA purposes must mean the “present ability” of a dialing system “at the time the call is made,” rather than some hypothetical, future ability.

² *Kevin Sterk v. Path, Inc.*, Order, 1:13-cv-02330 (N.D. Ill. E.D. Aug. 8, 2014)(*Sterk*). A copy of the *Sterk* Order was provided to CGB staff.

³ See, e.g., ACA International Notices of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (July 2, 2014 (July 2 ACA Ex Parte) and July 21, 2014).

⁴ 47 U.S.C. § 227(a)(1).

⁵ *Millward Brown, Inc. Order* at 12 (internal citations omitted).

⁶ *DoJ Memorandum* at 11.

⁷ *DoJ Memorandum* at 11, fn. 7 (citing *Hunt v. 21st Century Mortg. Co.*, 2:12-CV-2697-WMA, 2013 WL 52300061 (N.D. Ala. Sept. 17, 2013) at *4).

⁸ *Ibid.* (emphasis added).

Sterk. Just last month, a federal district court judge requested that the 7th Circuit Court of Appeals interpret the meaning of the term “capacity” under the TCPA.⁹ In that case, the “capacity” of certain dialing equipment was also at issue. The plaintiff asserted that the defendant’s equipment “automatically dial[ed] numbers from a stored list without human intervention,” and therefore it was not even necessary that the statutory elements of an ATDS be present in order to qualify the equipment as an ATDS under the TCPA.¹⁰

While the original district court judge in the case agreed with the plaintiff on this issue, the case was later reassigned to a new judge who questioned whether that ruling was correct, and supported the defendant’s request to seek guidance on this question in the form of an interlocutory appeal.¹¹ The judge also noted the lack of FCC guidance on this issue, despite the pendency of numerous petitions, and suggested that it would be helpful if the FCC ruled on this issue:

This “capacity” issue has been identified by other district courts, such as *Dominguez v. Yahoo!, Inc.*, 2014 WL 1096051 (E.D. Pa. 2014), *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F.Supp.2d 723 (N.D. Ill. 2011), and *Gragg v. Orange Cab Co., Inc.*, 2014 WL 494862 (W.D. Wash. 2014), with conflicting results. There are also several petitions pending before the FCC seeking clarification of its decisions. The question is being contested on multiple fronts. I note that it is possible that any contest over the interpretation of FCC rulings ought to occur only before the agency (and any appeals taken from agency action), but nevertheless, district courts are in fact facing this question repeatedly. There is conflict among the lower courts.”¹²

In recently filed comments to the FCC, Path, Inc. – the defendant in the *Sterk* case – highlighted many examples of abusive lawsuits, and urged the FCC to move forward with clarifying the term “capacity.”¹³ Path explained that one of the reasons abusive litigation has proliferated “is a perceived ambiguity as to the scope of the TCPA’s definition of ‘automatic telephone dialing system’” with plaintiffs arguing that “capacity” is not even actually required.¹⁴ Path noted the DoJ’s position that the TCPA’s definition of an ATDS must be interpreted narrowly: “[t]his concern with unconstitutional overbreadth recently led the United States to endorse a significantly narrower interpretation of the TCPA. In [the *Millward Brown, Inc.* case], the United States . . . in defending the constitutionality of the TCPA, sided with those courts that have adopted the more narrow

⁹ *Sterk* at 1.

¹⁰ *Sterk* at 1.

¹¹ *Id.* at 2, 4.

¹² *Id.* at 3.

¹³ Comments of Path, Inc. Regarding Milton H. Fried, Jr. and Richard Evans’ Petition for Expedited Declaratory Ruling at 7-9, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 8, 2014)(Path Comments).

¹⁴ Path Comments at 9-10 (noting that in *Sterk*, the plaintiff successfully argued to the district court that the FCC eliminated the statutory definition of an ATDS, taking FCC statements regarding predictive dialers out of context).

interpretation of ‘automatic telephone dialing system’ [that capacity must mean present ability, at the time the call is made].”¹⁵ Path explained the absurdity that inevitably results under plaintiffs’ overly broad interpretation of the ATDS definition, emphasizing that “[o]rdinary consumers would violate the TCPA every day, millions of times, by dialing wrong numbers, by accidentally dialing a number, and by calling businesses or people from whom they could not prove they had obtained prior express consent to call. That is an absurd result, one far removed from the specific abusive telemarketing practices Congress intended the TCPA to combat.”¹⁶

These cases demonstrate why FCC guidance is so desperately needed – courts across the country are racing to interpret a number of terms set forth by Congress in a statute whose interpretation falls squarely within the purview of the FCC, and are achieving inconsistent results in the process.

ACA Arguments before the Commission. As ACA has explained before, when Congress chooses not to define a term, its ordinary meaning typically applies,¹⁷ and “even under *Chevron’s* deferential framework, agencies must operate ‘within the bounds of reasonable interpretation.’”¹⁸ Reading “capacity” to mean “present ability” is the only reasonable, common sense interpretation of the statute for any number of reasons. The “present ability” interpretation is consistent with the plain language of the TCPA,¹⁹ dictionary definitions,²⁰ prior Commission rulemakings, the everyday

¹⁵ Path Comments at 5-6.

¹⁶ Path Comments at 18.

¹⁷ See, e.g., *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (U.S. 2011)(citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

¹⁸ *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2442 (2014)(“*Utility Air Regulatory Group*”).

¹⁹ For example, the statute begins with the present tense, i.e., “has” the capacity, which as ACA has noted previously, reflects that the statute is intended to apply only to equipment with current or present capacity. 47 U.S.C. § 227 (c)(1)(B); Petition for Rulemaking of ACA International at 10, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Jan. 31, 2014)(ACA Petition). If Congress wanted to describe “capacity” as meaning hypothetical future ability it could have indicated so by inserting “would have the” before “capacity” in that section of the statute.

²⁰ Dictionary definitions support present or current capabilities as the ordinary meaning of “capacity.” See Professional Association of Customer Engagement Petition for Expedited Declaratory Ruling or Expedited Rulemaking at 10-11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Oct. 18, 2013)(PACE Petition). See also Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/capacity>. Specifically, the Merriam-Webster Dictionary defines “capacity” as “the facility or power to produce, perform, or deploy.” *Id.* This definition implies present ability. The PACE Petition explains that capacity is defined as “the ability to do something,” or “the ability to do or produce,” both notions that fit only within the context of the present tense, rather than some future or hypothetical time.

meaning of the term, and the legislative history of the statute. Finally, there is overwhelming support in the record for the clarification ACA requests.²¹

(2) Just because a predictive dialer *can be* an ATDS, does not mean it *must be* an ATDS.

ACA also reiterated during the meeting its request that the FCC provide prompt and clear guidance regarding the Commission's treatment of predictive dialers within the context of the TCPA.²² Per the statute, an ATDS is "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."²³ As a result, any device—including a predictive dialer—that does not contain all of the statutory elements of an ATDS simply, by definition, is not an ATDS under the statute.²⁴ Further, the FCC cannot overlook or disregard the "clear and precise statutory definition provided by

²¹ See PACE Petition at 7-12; GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification at 14, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (Mar. 1, 2012); YouMail Petition for Declaratory Ruling at 11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition of YouMail, Inc. For Expedited Declaratory Ruling That YouMail's Service Does Not Violate the TCPA*, CG Docket No. 02-278 (Apr. 19, 2013); Petition of Glide Talk Ltd. for Expedited Declaratory Ruling at 9-13, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition of Glide Talk Ltd. for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Oct. 28, 2013); TextMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification at 7-12, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (Mar. 18, 2014).

²² ACA Petition at 8.

²³ 47 U.S.C. § 227(a)(1). See ACA Petition at 6 (explaining that "ATDS has a very specific definition under the TCPA"); accord Comments of ACA International at 10, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Mar. 24, 2014)(ACA Comments); Reply Comments of ACA International at 3, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Apr. 8, 2014); July 2 ACA Ex Parte at 2).

²⁴ See ACA Petition at 6 (noting that, "[p]ursuant to the statute, to be an ATDS under the TCPA, equipment must have the listed elements"); ACA Comments at 10 ("[T]he Commission must clarify that if a technology does not meet the explicit statutory definition of an ATDS under the TCPA, then it is not an ATDS under the TCPA."); ACA International Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (May 9, 2014)(stating that ACA has "emphasized the importance of the FCC clarifying the obvious – that the statutory elements of an ATDS must be met in order for a dialing system to be an ATDS under the TCPA"); July 2 ACA Ex Parte at 2 ("Fundamentally, the statutory elements of an ATDS must be met in order for equipment to be considered an ATDS under the statute.").

Congress.”²⁵ Numerous comments representing thousands of organizations also support this aspect of the ACA’s request.²⁶

ACA thus respectfully requests that the FCC provide the guidance petitioners, courts, and the general public requests, and confirm that capacity must mean present or current ability, and that equipment must have the statutory elements of an ATDS to be an ATDS under the statute.

Respectfully submitted,



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²⁵ July 2 ACA Ex Parte at 3 (citing *Utility Air Regulatory Group*, 134 S. Ct. at 2446).

²⁶ In addition to ACA, a number of other commenters in the proceeding support this clarification. *See, e.g.*, Comments filed in Support of Petition in CG Docket No. 02-278, by: American Bankers Association (“represents banks of all sizes and charters and is the voice for the nation’s \$14 trillion banking industry and its two million employees”) (Mar. 24, 2014); American Financial Services Association (over 350 members including consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers) (Mar. 24, 2014); Coalition of Higher Education Assistance Organizations (“a partnership of colleges, universities, and organizations promoting Federal Campus Based loan programs, student institutional and private loans, campus receivables, financial literacy, and other student financial services”) (Mar. 24, 2014); National Association of Industrial Bankers (members range from banks serving under-served segments of society such as taxi drivers and public service organizations, to large credit card and commercial finance companies) (Mar. 24, 2014); National Association of Retail Collection Attorneys (“more than 700 debt collection law firms and in-house legal counsel of creditors”) (Mar. 21, 2014); Professional Association for Customer Engagement (a non-profit trade organization dedicated to the advancement of customer engagement) (Mar. 24, 2014); Student Loan Servicing Alliance (SLSA) and SLSA Private Loan Committee (non-profit trade association of student loan servicers and organizations involved in financing, lending, servicing, and collecting private education loans) (Mar. 24, 2014).

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-80670-CV-MARRA

AJA DE LOS SANTOS,

Plaintiff,

v.

MILLWARD BROWN, INC.,

Defendant.

**ORDER DENYING DEFENDANT’S MOTION TO
DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT**

THIS CAUSE comes before the Court upon Defendant Millward Brown, Inc.’s Motion to Dismiss [ECF No. 28] Plaintiff Aja De Los Santos’ Second Amended Class Action Complaint [ECF No. 25] for violation of the Telephone Consumer Protect Act of 1991, 47 U.S.C. § 227 (“TCPA” or “the Act”). The United States has intervened to defend the constitutionality of the TCPA, and the parties have fully briefed Defendant’s motion. The Court has declined to hold a hearing.

I. BACKGROUND

In January 2013, Plaintiff received an unsolicited telephone call on her cellular phone. 2d Am. Comp. ¶ 20. When she answered it, she heard “dead air.” *Id.* ¶ 21. The caller identified himself on behalf of Defendant Millward Brown, and offered Plaintiff a gift card if she took a survey. *Id.* ¶ 22.

Millward Brown is a market research firm. *Id.* ¶ 6. Its current Chief Information Officer (“CIO”) was the former CIO at SPSS, Inc., an IBM, Inc. company. *Id.* ¶ 23. SPSS developed

the IBM SPSS Data Collection Dialer, “a cutting-edge automatic telephone dialing system (‘autodialer’) designed for large-scale market research organization.” *Id.* ¶ 23. The SPSS autodialer can generate numbers randomly and dial them. *Id.* ¶ 24.

Plaintiff alleges that Defendant autodialed her. *Id.* ¶ 25. Elsewhere, Plaintiff alleges that Defendant dialed her from a “bulk list” of telephone numbers. *Id.* ¶ 30. Plaintiff is the “sole subscriber, owner, possessor, and operator of” her cellular telephone. *Id.* ¶ 19.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To withstand a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

III. DISCUSSION

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, regulates the use of “automatic telephone dialing systems[s].” *See* 47 U.S.C. § 227(b)(1)(A) (prohibiting autodialing certain numbers). An automatic telephone dialing system, or an autodialer, is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, and . . . to dial such numbers.” 47 U.S.C. § 227(a)(1). Under the Act,

(1) It shall be unlawful . . .

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

(iii) to any telephone number 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.

47 U.S.C. § 227(b). The TCPA provides an injured “person or entity” injured by a violation of the Act a private right of action to recover statutory damages, trebled for willful or knowing violations, and to seek an injunction. § 227(b)(3). Plaintiff claims Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii), and seeks \$500 in statutory damages per call or \$1500 in treble damages per call, an injunction enjoining Defendant from violating the TCPA, and a declaration that Defendant uses an autodialer. Defendant moves to dismiss for Plaintiff’s lack of standing, failure to state a claim, and the TCPA’s unconstitutionality.¹

A. STANDING

Defendant moves to dismiss Plaintiff’s complaint for lack of standing, arguing that the TCPA requires a plaintiff to be charged for an incoming call to have standing to sue for a violation. The TCPA prohibits autodialing “with[out] the prior express consent of the called party . . . any telephone number assigned to a paging service, cellular telephone service,

¹ Plaintiff brings her complaint on behalf of a class similarly injured cellular phone users. *Id.* ¶ 29. Although Defendant, in its Motion to Dismiss, argues against class certification, this argument is misplaced. A motion to dismiss should not be used to challenge class certification. *See Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975) (finding trial court abused its discretion by “deciding against the class solely on the basis of the initial pleadings” as courts “should be loath to deny the justiciability of class actions without the benefit of the fullest possible factual background.”); *see generally* 7B Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1798 (3d. ed. 2010) (“Compliance with the Rule 23 prerequisites theoretically should not be tested by a motion to dismiss for failure to state a claim . . .”).

specialized mobile radio service, or other radio common carrier service, or any service *for which the called party is charged for the call.*” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Defendant argues that the phrase “for which the called party is charged for the call” modifies “any telephone number,” so that only the person or entity charged for the call has a right to be free from autodialing. According to Defendant, because Plaintiff has not alleged that she was charged for Defendant’s call, she suffered no injury: requirement for standing is an “injury-in-fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiff responds that she has indeed suffered an injury-in-fact. By receiving a call, her statutory right was violated: a statute “creat[es] legal rights, the invasion of which creates standing.” *Id.* at 579 (internal quotation marks and citation omitted).

The Court must decline Defendant’s proposed interpretation, as the Eleventh Circuit has determined that a defendant violates 47 U.S.C. § 227(b)(1)(A)(iii) by autodialing a cellular telephone service regardless if the called party is charged for the call. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014). In *Osorio*, the Eleventh Circuit explained that, by the rule of the last antecedent, the phrase “for which the called party is charged for the call” only modifies the term “any service,” and nothing else. *See Osorio*, 746 F.3d at 1257. Furthermore, it explained that to read the phrase “for which the called party is charged for the call” to modify all the preceding terms would render those terms superfluous, defeating the requirement that courts “give[] independent meaning to each [statutory] term.” *See id.* at 1258. Finally, because the TCPA empowers the Federal Communications Commission (FCC) to exempt “calls to a telephone number assigned to a cellular telephone service that are not charged to the called party,” 47 U.S.C. § 227(b)(2)(C), the TCPA must apply to cellular phones when the called party

is not charged for the call. Otherwise, Congress would have no need to authorize an exemption. *See id.* at 1258. Accordingly, the Eleventh Circuit held that the called party need not be charged for an incoming call to state a claim for a violation of 47 U.S.C. § 227(b)(1)(A)(iii). *See id.*

To have standing to pursue her TCPA claim, Plaintiff must allege that Defendant violated her “legally protected interest.” *Lujan*, 504 U.S. at 560. If a called party can state a claim for a violation of 47 U.S.C. § 227(b)(1)(A)(iii) without being charged for an incoming call, then that called party has a legally protected interest in being free from autodialed calls. Under 47 U.S.C. § 227(b)(1)(A)(iii), the term “called party” means the cellular telephone service “subscriber.” *See Osorio*, 746 F.3d at 1251 (citing *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012) (Easterbrook, J.)); *Breslow v. Wells Fargo Bank*, ___ F.3d ___, 2014 WL 2565984, at *1 (11th Cir. June 9, 2014) (“‘[C]alled party,’ for purposes of § 227(b)(1)(A)(iii), means the subscriber to the cell phone service.”) (citing *Osorio*, 746 F.3d at 1251)). In the present case, Plaintiff alleges that she was the “sole subscriber, owner, possessor, and operator of” her cellular telephone. 2d Am. Comp. ¶ 19. As the subscriber, Plaintiff was the called party. Therefore, because Defendant has invaded Plaintiff’s legally protected interest in being free from autodialed calls, Plaintiff has standing to sue.²

B. PLAUSIBILITY

To state a violation of 47 U.S.C. § 227(b)(1), Plaintiff must show that Defendant (1) “called a number,” (2) “assigned to a cellular telephone service,” (3) “using a an automatic dialing system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316,

² For standing, there must also be causality and redressability. *Lujan*, 504 U.S. at 560–61. Defendant does not argue, and the Court does not find, these elements to be wanting.

1319 (S.D. Fla. 2012) (Scola, J.). Defendant denies Plaintiff has shown element (3). According to Defendant, Plaintiff's factual allegations are not only insufficient, but also contradictory. Def.'s Mot. to Dismiss 8. Defendant argues that it is insufficient to allege only that Plaintiff heard "dead air" or that the former CIO of SPSS is now the CIO of Millward Brown. *Id.* at 8–9. Defendant argues that Plaintiff contradicts herself by simultaneously alleging that Defendant "randomly" dialed numbers, but also placed calls "to a bulk list" of numbers. *Id.* at 9.

To state a claim under the TCPA, Plaintiff need only to allege that Defendant used an autodialer. *See Buslepp v. B&B Entm't, LLC*, No. 12–60089–CIV, 2012 WL 1571410, at *1 (S.D. Fla. May 3, 2012) (Cohn, J.) (denying motion to dismiss because "the allegation that Defendant used [an autodialer] . . . is a factual allegation under *Twombly* and *Iqbal*"). Although Defendant dismisses Plaintiff's allegations as "naked, "conclusory," and "speculative," Plaintiff provides additional facts, such as hearing "dead air," a signature of autodialing. *See FCC, Consumer Guide: Unwanted Telephone Marketing Calls 2* (2013), <http://www.fcc.gov/cgb/consumerfacts/tcpa.pdf> ("The use of autodialers . . . often results in abandoned calls—hang-ups or 'dead air.'"). Plaintiff also alleges that she had no previous relationship with Defendant, nor any reason for Defendant to call her. *See Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) ("Read as a whole, the complaint contains sufficient facts to show that it is plausible that Defendants used [an autodialer] . . . The messages were advertisements written in an impersonal manner. [Plaintiff] had no other reason to be in contact with Defendants."). Due to the information disparity between the caller and the person called, circumstantial allegations of autodialing are sufficient to withstand a motion to dismiss. *See generally* Robert D. Brownstone, 1 Data Sec. and Privacy Law § 9:69 (2013) ("To balance

the plaintiff's difficulty in obtaining information about the equipment used to make a call prior to discovery . . . , a number of courts have held that plaintiffs can avoid dismissal by alleging facts about the circumstances surrounding the call sufficient to create a plausible inference that the call was made using an automatic telephone dialing system.”).

Nor is Plaintiff's complaint impermissibly contradictory. Not only may a complaint be contradictory, *see U.S. Specialty Ins. Co. v. Jet One Exp., Inc.*, No. 12-62537-Civ, 2013 WL 3451362 (S.D. Fla. July 9, 2013) (“[T]he Federal Rules tolerate, at least to some extent, inconsistent allegations, so their mere presence does not automatically demand dismissal for failure to state a claim.”) (citing *United Techs. Corp. v. Mazer*, 556 F. 3d 1260, 1273–74 (11th Cir. 2009) (reversing dismissal of what district the court considered were “inconsistent claims”)), but Plaintiff's allegations do not necessarily contradict themselves. In fact, Defendant could autodial numbers from a pre-generated list of numbers, thereby “randomly” placing calls “to a bulk list” of numbers. For these reasons, Plaintiff has stated a plausible claim for relief.

C. CONSTITUTIONALITY

Congress may regulate speech through “reasonable time, place, and manner regulations.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such regulations cannot suffer from “overbreadth,” *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), or “vaguensss.” *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012). Courts presume federal statutes are constitutional, and the challenger bears of the burden of showing otherwise. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

1. REASONABLE TIME, PLACE, OR MANNER RESTRICTION

The TCPA does not regulate content. Instead, it regulates context—the time, place, or manner of communication. Congress may restrict the “time, place, or manner” of protected speech if the restrictions (1) “are justified without reference to the content of the regulated speech,” (2) “are narrowly tailored to serve a significant governmental interest,” and (3) “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Amnesty Int’l, USA v. Battle*, 559 F.3d 1170, 1182 (11th Cir. 2009).

Defendant argues that the TCPA is not (2) narrowly tailored to serve a significant governmental interest. Def.’s Mot. to Dismiss 12. Defendant asserts that the government’s significant interest in prohibiting autodialing cellular phones was to prevent cellular phone users from incurring “unwanted charges.” *Id.* When Congress passed the TCPA, cellular phone plans charged users for incoming calls. Now, however, they do not. *Id.* at 14. Even if they did, Defendant explains, many cellular phones are used by business people who do not pay for their own plans. *Id.* Therefore, because cellular phone users no longer incur “unwanted charges,” the TCPA no longer serves a significant governmental interest. *Id.*

Defendant also argues that the TCPA law bans more calls than necessary to serve its interest: “The statute purportedly draws no distinction between calls initiated for marketing purposes, calls made for research, and calls made to reconnect with old friends.” *Id.* at 13. Furthermore, Defendant explains, the term “autodialer” includes “many, if not most, devices used by ordinary people to place ordinary calls.” *Id.* at 14. Under the TCPA, an “automatic telephone dialing system,” or an autodialer, is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, and . . .

to dial such numbers.” 47 U.S.C. § 227(a)(1). Today, though, almost all phones are autodialers. Any phone with advanced software, commonly known as a “smartphone,” or any computer connected to the internet, can be an autodialer. *Id.* All are “equipment” with “the capacity” to randomly or sequentially produce and dial numbers. *Id.* Therefore, Defendant concludes, the TCPA protects too many calls, from too many devices, to be narrowly tailored. *Id.* at 15.

a. NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST

To challenge a law for lack of narrow tailoring, a defendant must show that “the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover.” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). In this case, Defendant’s act that is the subject of this litigation is autodialing a cellular phone. To succeed on its claim for lack of narrow tailoring, Defendant must show that if the TCPA were narrowly tailored, it would not cover Defendant’s act. Defendant cannot make this showing.

Although Defendant argues that the TCPA broadly bans phone calls from friends’ cellular phones, or misdialed numbers from computers, Def.’s Mot. to Dismiss 14, Defendant does not argue that it was such a caller, nor does Plaintiff allege it was. Instead, Plaintiff alleges that Defendant autodialed her cellular phone to ask her to take a survey. Even if the TCPA were more narrowly tailored to allow phone calls from friends’ cellular phones or misdialed numbers from computers, the TCPA would still cover “the acts . . . that are the subject of the litigation . . .” *Fox*, 492 U.S. at 482,—that is, autodialing cellular phones to request participation in a survey.

Moreover, the TCPA does serve a significant governmental interest. To determine a statute's significant governmental interest, a court should look to its "text and history." *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991); *Flanigan's Enters., Inc. of Georgia v. Fulton County, Ga.*, 242 F. 3d 976, 985–86 (11th Cir. 2001). Reporting the TCPA to the Senate, the Committee on Commerce, Science, and Transportation explained that the general purpose of the TCPA was "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968, 1991 WL 211220 (Purpose of the Bill) (emphasis added). As to facilitating interstate commerce, the Committee explained as follows:

Residential and business subscribers believe[d] that these calls are an impediment to interstate commerce. In particular, they cite the following problems: . . . unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

Id. at 2 (Background and Needs: Consumer Complaints). Likewise, reporting the TCPA to the House, the Committee on Energy and Commerce explained that "customers who pay additional fees for cellular phones, pagers, or unlisted numbers are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems." H.R. Rep. No. 102-317, at 24 (1991).

To Defendant, these purposes, or this significant governmental interest, have been negated as a matter of fact by modern cellular payment plans and employer provided cellular phones. However, even if the Court assumed the facts of which Defendant requests it take

judicial notice,³ the TCPA could still prohibit Defendant's acts that are the subject of this litigation. Narrow tailoring does not require a regulation be the "least restrictive or least intrusive means of" serving the governmental interest. *Ward*, 491 U.S. at 2757. Rather, a regulation is narrowly tailored if the government interest "would be achieved less effectively absent the regulation." *Id.* at 2758 (internal quotation marks omitted). That Congress could tailor the TCPA to only prohibit autodialing cellular phones whose users are charged for incoming calls does not mean that it must. Even if the Court were grant Defendant's relevant requests for judicial notice, the TCPA would remain narrowly tailored.

2. OVERBREADTH

A law suffers from "overbreadth" if, in prohibiting unprotected speech, it "sweeps too broadly," prohibiting a "substantial amount" of protected speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1331 (11th Cir. 2001). According to Defendant, the TCPA is overbroad because the statutory term "automatic telephone dialing systems," or autodialers, applies to most smartphones and computers. Def.'s Mot. to Dismiss 13. By prohibiting phone calls from autodialers, Defendant

³ Specifically, Defendant requests the Court take notice of the following facts: "Under many cellphone plans currently offered by wireless carriers, including 'unlimited use' plans offered for a flat monthly fee, cellphone users incur no unwanted charges for in-coming calls," "Even those cellphone plans which are use-based generally involve the contractual pre-purchase of minutes in amounts that exceed the periodic needs of the individual subscribers," and "A substantial portion of cellphone users today are receiving calls on cellphones registered to and/or paid for by their corporate business or their employers' businesses." Def.'s Request for Judicial Notice ¶¶ 8–10 [DE 29].

However, the Court will not take judicial notice of these asserted facts. The Court cannot conclude that these asserted facts are "generally known within the trial court's territorial jurisdiction" or that they can be "accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b); *see Terms Applicable to AT&T National GSM Plans*, AT&T, <https://www.wireless.att.com/businesscenter/popups/general/explanation-rates-charges.jsp> (last visited May 15, 2014) ("You may be charged for both an incoming and an outgoing call when incoming calls are routed to voicemail, even if no message is left"); David Pogue, *Hurrahs and Harrumphs for T-Mobile*, N.Y. TIMES (April 4, 2013, 4:23 PM), <http://pogue.blogs.nytimes.com/2013/04/04/hurrahs-and-harrumphs-for-t-mobile/> ("As far as I know, the United States is one of the few countries where you pay for incoming and outgoing calls and texts.")

argues, the TCPA sweeps too broadly, prohibiting a substantial amount of constitutionally protected phone calls. *Id.* 12.⁴

Defendant premises its overbreadth challenge on legal conclusion that autodialers include many smartphones and computers, a conclusion this Court will not join. Under the TCPA, an autodialer is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, and . . . to dial such numbers.” 47 U.S.C. § 227(a)(1). As other courts have held, the term “capacity” refers to “present, not potential, capacity” to produce and dial numbers. *See e.g., Gragg v. Orange Cab Co., Inc.*, C12-0576RSL, 2014 WL 494862 (W.D. Wash. Feb. 7, 2014) Otherwise, the term autodialer would have no “outer limit,” for “[v]irtually every telephone in existence, given a team of sophisticated engineers working doggedly to modify it, could possibly store or produce numbers using a random or sequential number generator.” *Hunt v. 21st Mortgage Corp.*, 2:12-CV-2697, 2014 WL 4260275, at *5 (N.D. Ala. Feb. 4, 2014); *see also In re Jiffy Lube Int’l, Inc.*, 847 F. Supp. 2d 1253, 1261 (S.D. Cal. 2012) (rejecting an argument similar to Defendant’s because it “provides essentially no support for its assertion that use of an iPhone or BlackBerry could fall under the statute’s purview”). For this reason, even sophisticated computer systems are not necessarily autodialers. *See Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2014 WL 1096051, at *4 n.4 & *5 (E.D. Pa. Mar. 20, 2014) (granting summary judgment for the defendant because there was no evidence that the internet company Yahoo!’s computer system had the present capacity to randomly or sequentially generate numbers). If autodialers included smartphones, or if

⁴ Arguing that a law is not narrowly tailored, and arguing that it is overbroad—suffering from “overbreadth”—are similar. Defendant, and some courts, use the term interchangeably. The term, however, refers to two distinct constitutional challenges. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). Because Defendant does not distinguish between the challenges, the Court analyzes both.

autodialers included computers, then Defendant could argue for overbreadth. However, as of yet, no court, nor this one, will interpret the TCPA so broadly.

3. VAGUENESS

A statute is vague if it does not “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1271 (11th Cir. 2011) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). Defendant argues that the TCPA is vague because Defendant cannot know whether the autodialing cellular phones used by business employees are prohibited. Def.’s Mot. to Dismiss 16. Defendant explains that the employee’s business, not the employee, would be charged for the call. *Id.* at 17. Because the TCPA does not delineate which calls to business cellular phones are prohibited and which are not, Defendant concludes the Act is vague. *Id.* at 15.

Defendant premises its vagueness argument on the belief that the TCPA does not prohibit autodialing a business employee’s cellular phone. This belief is unfounded. In truth, the TCPA prohibits such calls, even if the business pays for it. As explained in the preceding discussion of Plaintiff’s standing, the TCPA prohibits autodialed calls to any cellular phones. As a result, numerous courts have held that a cellular phone user may assert a cause of action under the TCPA, even if he or she was not charged for the incoming call. *See e.g., Osorio*, 746 F.3d at 1258; *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013) (Scola, J.); *Buslepp v. Improv Miami, Inc.*, 2012 WL 1560408, at *2 (S.D.Fla. May 4, 2012) (Cohn, J.). Defendant also argues the TCPA must permit autodialing a business employee’s cellular phone, because in another subsection the TCPA specifically prohibits autodialing a

business “in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.” 47 U.S.C. § 227(b)(1)(D). According to Defendant, because the TCPA specifically prohibits these calls, it must permit all others. Def.’s Mot. to Dismiss 17. But, specifying which autodialed calls to businesses are prohibited is not inconsistent with prohibiting autodialed calls to cellular phones, whether they be business owned or not. The TCPA prohibits all autodialed calls to cellular phones, and prohibits some calls to business phones. A person of reasonable intelligence would read the Act, and know never to autodial a cellular phone, or, when calling a business phone, to never engage two lines simultaneously.

Finally, Defendant points to regulations implementing the Telemarketing and Consumer Fraud Abuse Prevention Act (TCFAPA), 15 U.S.C. § 1601–08, regulations which expressly exempt calls to businesses, *see* 16 C.F.R. 310.6(b)(7). Def.’s Mot. to Dismiss 18. Defendant asserts it is confused because, considering the FCC’s goal of consistency between the TCPA and TCFAPA, it cannot know whether calls to businesses are exempted or prohibited. “The statute thus fails to put business owners on adequate notice as to whether they could be in violation of its terms for calling a phone registered to a business.” *Id.* Again, this confusion is unwarranted. The TCPA does not prohibit autodialed calls to businesses, except in some, specified circumstances, and always prohibits autodialed calls to cellular phones, even business phones. The Court rejects Defendant’s vagueness argument.

IV. CONCLUSION

For the aforementioned reasons, it is hereby

ORDERED and **ADJUDGED** that:

1. Defendant Millward Brown, Inc's Motion to Dismiss [ECF No. 28] Plaintiff Aja De Los Santos' Second Amended Complaint [ECF No. 25] is **DENIED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 29th day of June, 2014.



KENNETH A. MARRA
United States District Judge

Copies provided to counsel of record

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:13-cv-080670-KAM

AJA DE LOS SANTOS, an individual, on
behalf of herself and all others similarly
situated,

Plaintiff,

v.

MILLWARD BROWN, INC., a Delaware
Corporation,

Defendant.

**UNITED STATES' MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY
OF THE TELEPHONE CONSUMER PROTECTION ACT**

INTRODUCTION

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”), prohibits the use of an automatic dialing system to call, without prior express consent, a number assigned to a cellular phone. *See* § 227(b)(1)(A). As numerous courts have recognized, the TCPA furthers the substantial government interest of protecting consumers from substantial costs and invasions of privacy. Defendant Millward Brown argues that this important consumer protection measure violates the First Amendment and, as applied to unsolicited automated calls to cellular phones owned by businesses and issued to their employees, is unconstitutionally vague in violation of the Fifth Amendment’s Due Process Clause.

Millward Brown’s constitutional claims are no more persuasive than those made in numerous unsuccessful challenges to the TCPA brought by previous litigants. Because the TCPA, including the restrictions on automated dialing systems at issue here, advances significant government interests in protecting consumers from intrusive and costly invasions of privacy, and does so in a way that is narrowly tailored and leaves open alternative means of communication, Defendant’s First Amendment claim must fail. The due process argument fares no better. Millward Brown contends that it is unclear whether the TCPA’s ban applies to unsolicited automated calls to cellular phones owned by businesses and issued to their employees. Plaintiff has not alleged that her cellular phone is owned by her employer, so the issue of whether the statute extends to such calls is not presented here. In any case, the statutory language unambiguously covers such calls. The TCPA prohibits “any call” to “any telephone number” assigned to a cellular phone service, *see id.*, § 227(b)(1)(A)(iii), and it permits a “person or entity” to bring an action under the statute, *see* 47 U.S.C. § 227(b)(3). These provisions afford Millward Brown a reasonable opportunity to know what is prohibited, which is all that due process requires.

STATUTORY AND PROCEDURAL BACKGROUND

The TCPA prohibits “any person within the United States . . . 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 or an artificial or prerecorded voice . . . to any telephone number 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” 47 U.S.C. § 227(b)(1)(A). The TCPA defines “automatic telephone dialing system” or “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 TCPA provides for a private right of action under which persons and entities may obtain injunctive or monetary relief for violations of the Act, including statutory damages of \$500 per violation. *Id.* § 227(b)(3). Statutory damages may be trebled if the violator is found to have acted willfully or knowingly. *Id.*

Plaintiff Aja De Los Santos brings this putative class action against Defendant, alleging violations of 47 U.S.C. § 227(b)(1)(A). Specifically Plaintiff alleges that Millward Brown used a computerized autodialer to contact her in January 2013, offering her a gift card if she agreed to take a customer survey regarding brand-name products. Pl’s. 2d Am. Compl. ¶¶ 22, 23, ECF No. 25. Plaintiff further alleges that she received multiple unsolicited automated calls from Millward Brown on her cell phone during this time period. *Id.* ¶¶ 19-20, 27-28. Plaintiff seeks damages for each of these calls and an injunction prohibiting Millward Brown from engaging in similar conduct in the future. *Id.* ¶ 42. In response, Millward Brown has filed a motion to dismiss, arguing, *inter alia*, that the TCPA’s ban on using an automated telephone dialing system or an artificial or prerecorded voice to a telephone number assigned to a cellular telephone service, 47 U.S.C. § 227(b)(1)(A), is overbroad in violation of the First Amendment and void for vagueness under the Fifth Amendment. *See* Def. Mot. to Dismiss Pl’s. 2d Am. Compl., ECF No. 28 (“Def. Mot.”). Plaintiff filed her opposition to defendant’s motion to dismiss on December 6, 2013. *See* Pl’s. Resp. in Opp. to Mot. to Dismiss, ECF No. 41. Defendant filed its reply in support of its motion to dismiss on December 20, 2013. *See* Def. Reply, ECF No. 45. On January 31, 2014, the United States filed its notice of intervention and this memorandum in defense of the constitutionality of the TCPA.

ARGUMENT

I. THE TCPA’S REGULATION OF AUTOMATED AND PRERECORDED CALLS IS A VALID TIME, PLACE, AND MANNER RESTRICTION

Millward Brown argues that because of changes in cellular phone technology and service plans, the TCPA’s restriction on unsolicited automated calls to cellular phones is no longer narrowly tailored to a substantial government interest. However, multiple courts have examined section 227(b)(1)(A) and its ban on unsolicited automated calls or prerecorded messages to

cellular phones, and all have found this restriction to be constitutionally permissible. *See, e.g., Wreyford v. Citizens for Transp. Mobility, Inc.*, Civ. A. No. 1:12-CV-2524-RLV, 2013 WL 3965244, at *2-3 (N.D. Ga. Aug. 1, 2013) (section 227(b)(1)(A) serves substantial government interest in reducing invasive, nuisance-inducing, and potentially costly calls to consumers and leaves open ample alternative channels of communication); *Strickler v. Bijora, Inc.*, No. 11 CV 3468, 2012 WL 5386089, at *5 (N.D. Ill. Oct. 30, 2012) (“In enacting the TCPA, Congress articulated a substantial interest in protecting consumers from the proliferation of intrusive, nuisance calls from commercial telemarketers.”); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011-12 (N.D. Ill. 2010) (concluding that TCPA’s restriction on use of automated dialers “is not excessive in proportion to the interest it serves.”) (internal quotation omitted).¹ At least one court has specifically rejected First Amendment overbreadth challenges raising the expanded use of smartphones and internet-based telephone services. *See In re Jiffy Lube Intern., Inc., Text Spam Litigation*, 847 F. Supp. 2d 1253, 1261-62 (S.D. Cal. 2012) (rejecting defendant’s overbreadth argument that the TCPA potentially improperly restricts individual use of smartphone or personal computers). As explained more fully below, the TCPA is a valid time, place and manner regulation of telephone communications. Defendant’s First Amendment challenge to the TCPA’s prohibition of unsolicited automated calls should therefore be rejected.

A. Section 227(b)(1)(A) is a Content-Neutral Time, Place, and Manner Restriction on Speech

Because section 227(b)(1)(A) regulates “any call,” regardless of its content, it is a content-neutral time, place, and manner restriction on speech. *See Ward v. Rock Against Racism*,

¹ In addition, multiple courts of appeals have upheld the constitutionality of similar types of restrictions on unsolicited automated calls and prerecorded messages to telephone subscribers, pointing to these same substantial government interests. *See, e.g., Maryland v. Universal Elections*, 729 F.3d 370, 376 (4th Cir. 2013) (TCPA’s content-neutral identification requirement for prerecorded messages furthers important government interests, including protecting recipients from invasions of privacy and does not burden substantially more speech than necessary to protect those interests); *Moser v. F.C.C.*, 46 F.3d 970, 972 (9th Cir. 1995) (concluding that the TCPA’s ban on unsolicited artificial and prerecorded messages to residential telephone subscribers is narrowly tailored to advance the government interest in protecting telephone subscribers from nuisance and invasion of privacy); *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1555 (8th Cir. 1995) (upholding the constitutionality of a similar Minnesota state law forbidding unsolicited automated calls).

491 U.S. 781, 791 (1989); *see also Moser*, 46 F.3d at 972 (analyzing § 227(b)(1)(B) of the TCPA, which prohibits “any telephone call to any residential line using an artificial or prerecorded voice”, as a content-neutral time, place, and manner restriction); *Wreyford*, 2013 WL 3965244, at *2-3 (same analysis applied to TCPA’s prohibition on unsolicited automated and prerecorded calls to cellular phones); *In re Jiffy Lube*, 847 F. Supp. 2d at 1261-62 (same); *Abbas v. Selling Source, LLC*, No. 09-cv-3413, 2009 WL 4884471, at *7 (N.D. Ill. Dec. 14, 2009) (same); *Strickler v. Bijora, Inc.*, No. 11 CV 3468, 2012 WL 5386089, at *5 (N.D. Ill. Oct. 30, 2012) (same).² The statute therefore must be upheld if it (1) serves a significant government interest, (2) is narrowly tailored to serve that interest, and (3) leaves open ample alternative channels for the communication of information. *Ward*, 491 U.S. at 791. As with any constitutional challenge to a federal statute, the TCPA is presumed constitutional, and Millward Brown bears the burden of establishing its unconstitutionality. *United States v. Morrison*, 529 U.S. 598, 607 (2000); *Town of Lockport, N.Y. v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 272–273 (1977).

B. Section 227(b)(1)(A) of the TCPA Serves the Substantial Government Interests In Protecting Users of Cellular Telephones and Other Devices From Invasions of Privacy, Nuisance, and Uninvited Costs

Congress passed the TCPA in order to address threats to consumer privacy, nuisance to call recipients, and potential costs of unsolicited calls made to cell phones and other communication devices. In doing so, Congress specifically addressed the rise of unsolicited

² Defendant argues that this case is governed by *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) as a “content-neutral restriction on non-misleading commercial speech.” Def. Mot. at 12. One district court followed that approach. *See Lozano*, 702 F. Supp. 2d at 1011. The TCPA, however, does not make a distinction between commercial and non-commercial speech. It therefore should be analyzed not under the commercial speech doctrine, but as a time, place, or manner restriction under *Ward*. *See Moser*, 46 F.3d at 973 (“Because nothing in the statute requires the Commission to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction.”); *see also Solantic, L.L.C. v. City of Neptune, Fla.*, 410 F.3d 1250, 1269 n. 15 (11th Cir. 2005) (“Because [the ordinance] does not regulate commercial speech as such, but rather applies without distinction to signs bearing commercial and noncommercial messages, the *Central Hudson* test has no application here.”). In any case, even if *Central Hudson* applied, that would not change the above analysis. *See Moser*, 46 F.3d at 973 (noting that the test for content-neutral time, place, and manner restrictions and that applied for commercial speech regulations are “essentially identical.”).

telemarketing using automatic dialing and artificial or prerecorded voice messages, methods which had made automated telemarketing campaigns cheaper, easier, and therefore far more prevalent. S. Rep. No. 102-178, at 1-2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969; H.R. Rep. No. 102-317, at 6 (1991) (noting that decreased communications costs coupled with computer-driven marketing tools “caused the frequency and number of unsolicited telemarketing calls [to] increase markedly”). Such telemarketing, Congress concluded, constituted an unwarranted invasion of consumer privacy and a nuisance. H.R. Rep. No. 102-317, at 2 (“Unrestricted telemarketing . . . can be an intrusive invasion of privacy [and m]any consumers are outraged [at] the proliferation of intrusive, nuisance calls to their homes from telemarketers.”); S. Rep. No. 102-178 at 7, *reprinted in* 1991 U.S.C.C.A.N. at 1976 (noting consumer complaints that telemarketing calls constitute “a nuisance and an invasion of privacy”).

As Defendant readily concedes, *see* Def. Mot. at 12, the government has a substantial interest in protecting telephone users from intrusions of privacy and from the particular nuisance associated with these devices. *See, e.g., Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1244-45 (10th Cir. 2004) (recognizing significant government interest in protecting the privacy of individuals from telemarketing campaigns); *Bland v. Fessler*, 88 F.3d 729, 732-33 (9th Cir. 1996) (“compared to door-to-door solicitors, the annoyance and disruption of ADADs [automatic dialing and announcing devices] is of a different order of magnitude. . . . [W]hile door-to-door solicitation involves a conversation between two people, ADADs involve a one-way onslaught of information.”); *Lozano*, 702 F. Supp. 2d at 1011 (“[T]he TCPA serves a significant government interest³ of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers.”).

In addition, there is a significant government interest in preventing unsolicited calls from imposing uninvited costs upon telephone subscribers. *See* S. Rep. No. 102-178 at 2, *reprinted in* 1991 U.S.C.C.A.N. at 1969 (noting that “unsolicited calls placed to . . . cellular . . . telephone numbers often impose a cost on the called party [as] cellular users must pay for each incoming call”); H.R. Rep. No. 102-317, at 24 (noting that “customers who pay additional fees for cellular

³ Although the *Lozano* court applied the standard for commercial speech as set forth *Central Hudson* in upholding the constitutionality of the TCPA, its analysis and conclusion should still apply in this case because the respective tests for time, place, and manner and commercial speech restrictions are substantially similar. *See supra* at 4 n.2.

phones . . . are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Final Rule, 68 Fed. Reg. 44144-01, ¶ 96 (July 25, 2003) (noting that the TCPA prohibits the use of certain technologies “from dialing . . . telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call” because “[s]uch practices were determined to . . . inappropriately shift marketing costs from sellers to consumers.”). This concern is also apparent from the statute itself. Section 227(b)(1)(A)(iii) includes not just cell phones but other services including “any service for which the called party is charged for the call.”

Courts, as well, have recognized this substantial government interest in protecting telephone users from uninvited costs as a justification for the government regulation of automated calls to cell phones. *See, e.g., Abbas*, 2009 WL 4884471, at *8 (concluding that the TCPA, specifically Section 227(b)(1)(A)’s restriction with respect to cell phones, advances the “substantial government interest” of protecting consumers from the “shifting [of] costs, pecuniary and otherwise, of telemarketing practices.”); *Lozano*, 702 F. Supp. 2d at 1008 (noting specific Congressional concerns that unsolicited calls placed to cellular numbers often impose costs on the called party); *Strickler*, 2012 WL 5386089, at *5 (same).⁴

Thus, the TCPA’s prohibition of unsolicited autodialed calls and prerecorded messages to cellular phones serves the substantial government interest in protecting individual privacy and

⁴ Millward Brown wrongly suggests that the substantial government interest in protecting consumers from nuisance and intrusion of privacy supports the TCPA’s regulation of prerecorded messages but not autodialers. *See* Def. Mot. at 12-13. As multiple courts have held, all three government interests (protecting consumers from nuisance, invasion of privacy, and uninvited costs) are served by restricting unsolicited calls employing either automatic dialers or prerecorded messages. *See, e.g., Lozano*, 702 F. Supp. 2d at 1011 (“[T]he TCPA serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers.”); *Abbas*, 2009 WL 4884471, at *8 (section 227(b)(1)(A) narrowly tailored to “government’s substantial interest in protecting the privacy of consumers, particularly from the nuisance of automated calls.”). Moreover, it does not matter whether an ATDS is used to connect a live call or send a text message, given that Congress’s primary concern was “regulat[ing] the use of an ATDS to communicate or try to get into communication with a person by a telephone,” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) and any unsolicited automated call to a cellular phone is aggravating and intrusive.

reducing the number of costly and intrusive calls to consumers. Whether the TCPA's prohibition is "narrowly tailored" must be evaluated with these governmental interests in mind.

C. Section 227(b)(1)(A) of the TCPA is Narrowly Tailored to These Substantial Government Interests

"[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 798–99 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The essence of narrow tailoring is to focus upon the source of the evils the government seeks to eliminate, without significantly restricting a substantial quantity of speech that does not create the same evils; and so long as the means chosen are not substantially broader than necessary to achieve the government's interests, a regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 520 U.S. 180, 216–18 (1997) (citing *Ward*, 491 U.S. at 799 n. 7, 800). If the legislature reasonably could have determined that the regulation in question is necessary to further its interests, a court must be loath to second-guess and should defer to that judgment. *Bd. of Trustees v. Fox*, 492 U.S. 469, 479–80 (1989); *Ward*, 491 U.S. at 800; *see generally Turner*, 520 U.S. at 218–19.

In this case, given the substantial government interests in addressing the effects of intrusive, irritating, and potentially costly calls to cell phone recipients, section 227(b)(1)(A) is sufficiently narrow. As discussed above, Congress was concerned with these overlapping substantial harms associated with unsolicited telemarketing calls, including, but not limited to, calls made to cell phones using an automated dialer or using artificial or prerecorded messages. Congress narrowly tailored the TCPA to that interest by prohibiting only (1) unsolicited calls, (2) made to telephone numbers assigned to one of the enumerated services in section 227(b)(1)(A)(iii), including cell phones, and (3) made from an automatic dialer and/or including an artificial or prerecorded voice. In choosing to regulate automated calls specifically, Congress acknowledged consumer frustration about the automated and prerecorded calls themselves, regardless of their content or how they were being initiated. *See Telephone Consumer Protection Act*, Pub. L. No. 102-243, § 2, ¶¶ 10, 13, 1991 Stat. 1462 (1991) (listing evidence compiled by and presented to Congress that consumers considered "***automated or prerecorded telephone calls***, regardless of the content or the initiator of the message, to be a nuisance and an invasion of

privacy” and that “evidence presented to the Congress indicates that *automated or prerecorded calls* are a nuisance and an invasion of privacy, regardless of the type of call”) (emphasis added).

Courts have consistently held that the restriction on unsolicited automated or prerecorded calls sent to cell phones in section 227(b)(1)(A) is narrowly tailored to the government’s substantial interests. *See Abbas*, 2009 WL 4884471, at *8 (“The court finds that the TCPA is narrowly tailored to advance government’s substantial interest in protecting the privacy of consumers, particularly from the nuisance of automated calls.”); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 842-43 (Az. Ct. App. 2005) (“[A]pplication of the TCPA’s restriction on autodialed calls to cellular telephones . . . is narrowly tailored to serve the significant and content-neutral governmental interest of protecting consumer privacy from unsolicited telemarketing calls.”); *see also Lozano*, 702 F. Supp. 2d at 1011-12 (rejecting defendant’s argument that section 227(b)(1)(A) of the TCPA was not narrowly tailored to the substantial government interest in reducing invasions of consumer privacy). All of the above-mentioned cases involve the use of automated dialers and confirm that the TCPA prohibition of autodialed calls to cell phones without express consent sufficiently serves the government interest in protecting cell phone users’ privacy while not burdening substantially more speech than necessary. *See Jiffy Lube*, 847 F. Supp. 2d at 1261-62. Courts have also addressed the use of automated dialers to connect voice calls or prerecorded messages (as opposed to text messages) and have concluded that these same privacy interests apply with equal force and that statute is narrowly tailored to serve such interests. *See Wreyford*, 2013 WL 3965244 at *2-3.

Although Millward Brown does not dispute that the TCPA was intended to serve significant government interests in protecting consumers from nuisance, invasions of privacy, and uninvited costs, it contends that the statute is not narrowly tailored to serve such interests because the autodialer definition “encompasses many, if not most devices used by ordinary people to place ordinary calls.” Def. Mot. at 14. This same argument was put forth and rejected in *Jiffy Lube*, where defendant argued that individual telephone users would be held liable under the TCPA for using their smartphones or personal computers. 847 F. Supp. 2d at 1261. The court in that case found that Jiffy Lube had “provide[d] essentially no support for its asserting that use of an iPhone or Black-Berry” could trigger liability under the statute. *Id.* at 1261-62. It therefore could not conclude that the use of personal electronic devices in the situations posed by defendant would be restricted by the TCPA, and defendant hence failed to “demonstrate[] that

the threatened overinclusiveness would be substantial.” *Id.* at 1262. *See also Lozano*, 702 F. Supp. 2d at 1011-12 (TCPA’s prohibition on use of equipment with certain capacities is not excessive in proportion to the government interest served—namely, reducing invasion of privacy for consumers—because it still allows for calls in which consumers have consented or calls not made to statutorily enumerated phone numbers).

Millward Brown’s challenge fails for the same reason. It has not provided any support for its contention that every smartphone, every computer, and every internet-based phone service falls within the TCPA restriction. Def. Mot. at 13. Millward Brown offers several hypotheticals to suggest that commonplace non-commercial speech, such as an unplanned call placed to a friend’s mobile phone, or a call made from a modern office VOIP telephone system to a misdialed number, would create TCPA liability. Here, however, the challenged applications of the statute and the ATDS definition are limited to calls made without the express prior consent of the called party and to numbers assigned to services listed in Section 227(b)(1)(A)(iii). As explained below, unsolicited calls to those numbers are well within the TCPA’s legitimate sweep of protecting phone users’ privacy and preventing uninvited costs.⁵

⁵ In defining ATDS in terms of the equipment’s “capacity,” Congress properly sought to avoid circumvention of the prohibition on unsolicited calls. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Final Rule, 68 Fed. Reg. 44144-01, ¶ 96 (July 25, 2003) (noting that the purpose of the definition of ATDS “is to ensure that the prohibition on autodialed calls not be circumvented”). Congress anticipated that advancements in technology would allow telemarketers to employ new and more sophisticated ways of auto-dialing large lists of numbers. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Final Rule, 68 Fed. Reg. 44144-01, ¶ 95 (July 25, 2003) (“It is 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.”); *see Joffe*, 121 P.3d at 839 (“Although the technology Acacia used to deliver the SMS messages to Joffe’s cellular telephone may not have existed in 1991 when the TCPA was enacted, the wording of the statute is not limited to 1991 technology.”). As the FCC has observed, technology has advanced to the point where some sophisticated dialing systems do not need to randomly or sequentially generate telephone numbers in order to make auto-dialed calls to large numbers of people. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Final Rule, 68 Fed. Reg. 44144-01, ¶ 95-96 (July 25, 2003). But the technology used to place the auto-dialed calls also likely has the capacity to generate random or sequential numbers, even if that capacity is not used. By regulating the “capacity” to store or produce randomly or sequentially generated numbers, Congress sought to advance its broad interest in reducing unsolicited calls while ensuring that the statute would likely apply to new technologies.

In making its narrow tailoring argument, Millward Brown attempts to rely upon the First Amendment overbreadth doctrine, *see* Def. Mot. at 12, 14, but does so in a cursory manner which glosses over the doctrine's central purpose. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). The doctrine allows a party, in the very limited circumstance of First Amendment litigation, to argue that a statute should be struck down not because it is unconstitutional as applied to that party, but because it "is so broad that it may inhibit the constitutionally protected speech of third parties." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (internal citations and quotation marks omitted). As the Supreme Court has made clear, the overbreadth doctrine is "strong medicine" that should be applied "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Furthermore, the overbreadth must "not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615 (emphasis added). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, there must be a "realistic danger" that the statute will "significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801; *see also Curves LLC, v. Spalding Cty.*, 685 F.3d 1284, 1291 (11th Cir. 2012). With these principles in mind, the Supreme Court and this Circuit have only invoked this exception in cases where a government restriction has made access to a forum for speech for third parties contingent upon issuance of a license or permit. *D.A. Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1269 (11th Cir. 2007) (citing *Horton v. City of Augustine*, 272 F.3d 1318, 1331-32 (11th Cir. 2001)).

Millward Brown has not shown why the overbreadth doctrine should apply here.⁶ *See* Def. Mot. at 14-15. Although Millward Brown posits in its reply brief that "virtually every call

⁶ If a court is going to consider whether the TCPA properly could apply to a call made from a typical consumer smartphone, it should be in the context of an as-applied challenge brought by a defendant in a suit seeking to impose liability for that kind of call. *See Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39-41 (1999) (reversing facial invalidation of statute on grounds that overbreadth doctrine is "strong medicine" and is "not casually employed" and instead remanding for as-applied challenge); *see also Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003) (emphasizing that overbreadth doctrine is "strong medicine," and where there were

made to a wireless phone violates the TCPA,” *see* Def. Reply at 6, it provides no further support for the proposition that the TCPA is actually “chill[ing] the expressive activity of others not before the court” or imposing prior restraints on protected activity. *D.A. Mortg.*, 486 F.3d at 1269-1270 (internal quotation omitted). A litigant bears the burden of demonstrating “from the text of [the law] and from actual fact,” that substantial overbreadth exists. *Hicks*, 539 U.S. at 122 (quoting *N.Y. State Club Ass'n, Inc.*, 487 U.S. at 14). The overbreadth doctrine is not available where Defendant simply argues that section 227(b)(1)(A) could conceivably apply to calls made from smartphones and computers without providing any support for such an interpretation of the statute.⁷ *See Connection Distributing Co. v. Holder*, 557 F.3d 321, 338 (6th Cir. 2009) (refusing to invalidate a law in its entirety on overbreadth grounds where record was barren about whether *any* third parties, much less a substantial number, would be affected by proposed application of statute). Moreover, even if Millward Brown could point to credible threats of the TCPA infringing on the First Amendment rights of third parties, the alleged effects of those applications would have to be “judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615; *see also Connection Distributing Co.*, 557 F.3d at 339-40 (plaintiff failed to meet its burden of demonstrating substantial overbreadth where other applications of the statute, aside from plaintiff’s hypothetical application, would not offend the First Amendment). In the end, Millward Brown has failed to identify a “realistic danger” that section 227(b)(1)(A) will chill First Amendment protected activity of others not before the court, much less a substantial amount of expressive activity in a way that exceeds the statute’s legitimate sweep. Accordingly, its overbreadth challenge must fail.

In addition, Millward Brown argues that section 227(b)(1)(A) is not narrowly tailored to support the substantial government interest in protecting consumers from uninvited costs associated with unsolicited calls. Millward Brown contends that cell phone plans offer more

constitutionally permissible applications, additional applications alleged to violate the First Amendment could still be remedied through as-applied litigation).

⁷ Indeed, a district court within this Circuit has recently stated that it is unlikely that a run-of-the-mill smartphone, in the absence of additional modifications to achieve the requisite capacity, would qualify as an ATDS. *See Hunt v. 21st Mortg. Co.*, 2:12-CV-2697-WMA, 2013 WL 52300061, at *4 (N.D. Ala. Sept. 17, 2013) (concluding that device in question had to have present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator).

minutes than are typically used by a consumer, that some cell phone providers offer unlimited minutes, and that some consumers use cell phones paid for by their employers. Def. Mot. at 14. However, many consumers do incur charges from unsolicited calls, not to mention other costs associated with incoming calls to their cellular phones, as courts have repeatedly recognized. *See Abbas*, 2009 WL 4884471, at *8 (concluding that Section 227(b)(1)(A)'s restriction with respect to cell phones advances the "substantial government interest" of protecting consumers from the "shifting [of] costs, pecuniary and otherwise, of telemarketing practices."); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012) (recipient of calls "is out of pocket the cost of the airtime minutes and has had to listen to a lot of useless voicemail"). A district court in the Eleventh Circuit has recently held that the TCPA provision at issue serves a substantial government interest in reducing potentially costly calls to consumers. *See Wreyford*, 2013 WL 3965244, at *3. And even where the recipient of the call suffers no financial cost, the invasion of individual privacy resulting from the receipt of an unsolicited autodialed call cannot be brushed aside. At least one court has observed that the ubiquity of cellular phones actually heightens the privacy interests underlying the TCPA. *Joffe*, 121 P.3d at 842 (noting that the cellular telephone has "permeated American life," such that it "commands our instant attention" and "demands to be answered"). Hence, notwithstanding Defendant's assertion that the terms of individual cell phone plans may vary, the restriction on unsolicited calls to cellular telephone numbers continues to serve the significant interest of protecting cell phone users from invasions of privacy and uninvited costs for incoming calls and is narrowly tailored to serve those interests.⁸

D. Ample Alternative Channels of Communication Exist

Finally, the TCPA leaves open multiple alternative avenues for entities to reach their target audiences other than unsolicited calls to cell phones. *See Wreyford*, 2013 WL 3965244, at *3 (other potential methods of communication include mailings, emails and door-to-door canvassing); *Abbas*, 2009 WL 4884471 at *8 ("Congress left open ample alternative channels through which telemarketers and other would-be automated callers can communicate."); *Joffe*,

⁸ Although cost-shifting was one of the concerns that prompted Congress to enact the TCPA, section 227(b)(1)(A) does not require that the recipient of the call be charged for the call. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *see infra* at 14-16 (addressing why autodialers may incur TCPA liability for unsolicited calls using these devices regardless of whether cell phone user/recipient of these calls paid for his or her cellular phone service).

121 P.3d at 842 (“Congress left open many alternative modes of communicating with consumers.”); *Van Bergen*, 59 F.3d at 1555-56 (telemarketers may still employ live telephone calls, door-to-door distribution of information, street corner leafleting, posters and signs, and bulk mailings).

Millward Brown contends that targeted mail, e-mail, and door-to-door canvassing are “woefully inadequate for the conduct of interactive market research” such as that conducted by Defendant. Def. Reply at 7. However, an entity, such as Millward Brown, may still employ an automatic dialing system to call the cellular phone of a person from whom it has received consent. *See Soppet*, 679 F.3d at 642 (addressing methods by which a company can verify cellular phone numbers and obtain consent from consumers before using an ATDS). Alternatively, Defendant could make live solicitation calls not using an automatic telephone dialing system or employ any other method that does not involve an ATDS. Although these various methods may not be as convenient as making unsolicited automated calls, Defendant’s preference for a particular cost- or time-effective channel of communication does not make all other avenues constitutionally inadequate. *See CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1282 (11th Cir.2006) (“The Constitution requires only that [the government] leave open *an* alternative channel of communication, not *the* alternative channel of communication [a particular speaker] desires.”); *see also Moser*, 46 F.3d at 975 (“That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice.”).

II. THE TCPA’S RESTRICTION ON UNSOLICITED AUTOMATED CALLS TO CELLULAR PHONES PROVIDES DEFENDANT WITH A REASONABLE OPPORTUNITY TO KNOW WHAT IS PROHIBITED

In reviewing a void for vagueness challenge, a court must determine whether the statute provides a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “The burden for this Court to strike a statute for vagueness is high.” *Kissinger v. Wells Fargo Bank, N.A.*, 888 F. Supp. 2d 1309, 1315 (S.D. Fla. 2012) (Marra, J.) (noting direction from the United States Supreme Court that “federal courts should interpret federal statutes to avoid serious doubt of their constitutionality.”). Indeed, to find a civil statute void for vagueness, the statute must be so “indefinite as ‘really to be no rule or standard at all.’” *Leib v. Hillsborough*

Cty. Pub. Transp. Comm'n, 558 F.3d 1301, 1310 (11th Cir. 2009) (quoting *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992)). Defendant does not provide a plausible basis for the court to conclude that section 227(b)(1)(A) is unconstitutionally vague.

Millward Brown claims that the TCPA is void for vagueness as applied to its calls because “it fails to give a person of ordinary intelligence adequate notice regarding . . . whether calls made by businesses to business-owned mobile telephone numbers (‘B2B’ calls) are encompassed in the statute’s proscription.” Def. Mot. at 16. Specifically, Defendant alleges that it is uncertain whether it could be found to violate the TCPA for calling a cellular phone registered to a business because—if the business pays for the employee’s cellular phone—the individual employee being called is not being charged for the call. *Id.* at 17.

As an initial matter, plaintiff here does not allege that she received calls to an employer-provided phone, *see* 2d Am. Compl. ¶ 19 (alleging Ms. De Los Santos is the sole subscriber, operator, and financially responsible for the cellular phone and service plan), so the issue of whether the statute extends to such calls is not presented here. In any event, Defendant’s purported inability to ascertain whether its unsolicited autodialed calls to business-paid cellular phone numbers may run afoul of the TCPA makes little sense given the plain language of the statute. The statute is clear on its face that a business may bring a cause of action against a caller who makes unsolicited calls using an automated dialer or prerecorded messages. *See* 47 U.S.C. § 227(b)(3) (those who may bring an action under the statute include “a person or entity”). Moreover, judicial opinions construing that language make abundantly clear that unsolicited autodialed calls placed to business-paid cellular phones are prohibited by the statute – in fact, this Court has ruled on this very issue. *See Cellco P’ship v. Plaza Resorts, Inc.*, No. 12-CV-81238, 2013 WL 5436553, at *6 (S.D. Fla. Sept. 27, 2013) (Marra, J.) (concluding that a TCPA cause of action may be brought where a business is the subscriber of a telephone service and provides the telephone to its employees for business purposes); *c.f. Covington & Burling v. Int’l Marketing & Research, Inc.*, Civ. A. No. 01-4360, 2003 WL 213848, at *8-9 (D.C. Super. Apr. 17, 2003) (permitting business to recover damages for company’s repeated sending of unsolicited faxes in violation of the TCPA).⁹

⁹ Defendant’s reply brief points out that another district court has held that a corporate plaintiff lacked prudential standing to bring TCPA claims. *See Cellco P’ship v. Wilcrest Health Care Mgmt.*, No. 09-3534 (MLC), 2012 WL 1638056, at *8-9 (D.N.J. May 8, 2012). However, even

In addition, there is no merit to Defendant's assertion that the statutory language is vague as to whether it can be held liable if the call recipient does not pay for the cellular phone service. The statute prohibits "any call" placed with an automatic dialer and without prior express consent "to *any telephone number* 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." 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). The restriction on unsolicited calls where a "called party is charged for the call" is a separate category from the broader prohibition on unsolicited calls to any telephone number assigned to a cellular telephone service. Hence, the plain language prohibits unsolicited calls using these devices regardless of who pays for the cellular service if the telephone number is for a cellular telephone service. *See Cellco P'ship*, 2013 WL 5436553, at *5 (concluding that the primary user of the telephone, regardless of whether he or she paid for the service, has a cause of action when a violation of the statute occurs); *Manno v. Healthcare Revenue Recovery Grp.*, 289 F.R.D. 674, 682-83 (S.D. Fla. 2013) (rejecting argument that plaintiff could not bring TCPA action because phone was registered under his wife's name and/or paid by his wife); *Buslepp v. Improv Miami, Inc.*, No. 12-60171-CIV, 2012 WL 1560408, at *2 (S.D. Fla. May 4, 2012) ("Because Plaintiff uses a cellular telephone service, he need not separately allege that he was charged for the call."); *see also Page v. Regions Bank*, 917 F. Supp. 2d 1214, 1217-18 (N.D. Ala. 2012) (regular user and carrier of cell phone had standing to bring TCPA claim); *Abbas*, 2009 WL 4884471, at *3 ("[T]he TCPA does not require that a party called via a number assigned to a cellular telephone service must be charged to make that call actionable."). Thus, based on the statutory language alone, Defendant's due process challenge should fail. "To state a void-for-vagueness claim, the language of the ordinance itself must be vague[.]" *Diversified Numismatics, Inc. v. City of Orlando, Fla.*, 949 F.2d 382, 387 (11th Cir. 1991).

Notwithstanding the plain language of the statute, Defendant contends the separate, more limited coverage of the FTC's Telemarketing Sales Rule ("TSR"), and the FCC's stated goal of maximizing consistency with this rule, create uncertainty regarding the scope of TCPA. Defendant's citation to a FTC rulemaking with respect to a different statute not at issue in this

where another court has interpreted a statute differently, that disagreement does not make a statute unconstitutionally vague. *See Kissinger*, 888 F. Supp. 2d at 1315 (refusing to conclude that statute was void for vagueness based on differing interpretations of a statute by different courts).

case, *see* Def. Mot. at 17-18 (addressing the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 1601-1608), is not persuasive, especially in light of Defendant's failure to address the above-mentioned case law delineating the scope of the subsection of the TCPA at issue in this case. In the end, section 227(b)(1)(A) provides Millward Brown with a "reasonable opportunity to know what is prohibited" including "explicit standards," *see Grayned*, 408 U.S. at 108, regarding what telephone numbers may not be called without prior consent and who may bring claims under the TCPA. Accordingly, Millward Brown's due process challenge must also fail.

CONCLUSION

For the above reasons, the Court should uphold the constitutionality of the TCPA.

January 31, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, I electronically filed the foregoing pleading with the Clerk of Court using the ECF system, which will send notification of such filing to counsel of record.

/s/ Bradley H. Cohen

BRADLEY H. COHEN

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KEVIN STERK, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

PATH, INC.,

Defendant.

No. 13 CV 2330

Judge Manish S. Shah

ORDER

Defendant's motion for certification under 28 U.S.C. § 1292(b) [124] is granted.

STATEMENT

Kevin Sterk filed this putative class action against Path, Inc., alleging that defendant sent text messages to consumers without their prior express consent using an automatic telephone dialing system, in violation of the Telephone Consumer Protection Act. 47 U.S.C. § 227. The parties conducted limited discovery on the issue of whether Path used an "automatic telephone dialing system" as defined by law. Ultimately, the parties concluded that there were no material factual disputes and filed cross-motions for summary judgment.

Path argued that its equipment did not have 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 statutory definition of automatic telephone dialing system). Sterk countered that an automatic telephone dialing system includes equipment that "automatically dials numbers from a stored list without human intervention," relying on final FCC orders implementing the TCPA. *E.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091–92 (2003). Sterk argued that Path's equipment, even though it did not have the capacity to store or produce numbers using a random or sequential number generator, automatically dialed numbers from a stored list without human intervention, and therefore was covered equipment under the statute and its implementing regulations. The court (Judge Der-Yeghiayan, presiding) agreed with Sterk, granted

his motion for summary judgment, and denied Path's motion for summary judgment. [122].

Within two weeks, Path filed a motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). While that motion was being briefed by the parties, this case was reassigned to me. As I explain below, I conclude that each element of § 1292(b) has been met. Whether equipment that does not have the capacity to store or produce numbers using a random or sequential number generator, but does have the capacity to dial numbers from a stored list automatically without human intervention, is an "automatic telephone dialing system" is a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation, and Path timely made its request.

Controlling Question of Law. Throughout this litigation, the parties have agreed that the definition of an automatic telephone dialing system was critical to the merits of Sterk's claim. If Path's equipment was not such a system, Sterk has no case. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). If the court's ruling on summary judgment were reversed, this case would be over.¹ If the court's ruling were affirmed, the parties will necessarily engage in class certification discovery, along with additional discovery (including of third parties) over the nature of Path's equipment and potential factual issues surrounding "human intervention" or lack thereof in the case. The course of the litigation depends on the interpretation of automatic telephone dialing system.

The FCC has said that the capacity to dial numbers without human intervention is the basic function of an autodialer. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 (2008). Sterk argues that the FCC's statement is its holding, and binds the district courts. *See CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 447-48 (7th Cir. 2010). Path argues that the statute requires a different capacity, the capacity to store or produce numbers using a number generator, and it would not be inconsistent with the FCC's decisions to require this capacity *in addition to* the dialing-without-human-intervention concept adopted by the agency. This debate, resolved at summary judgment in favor of Sterk and against Path, is a legal question.

¹ Sterk argues that there is an alternative theory of liability that would not be resolved by an appeal at this time, namely, whether Path's text messages constituted artificial or prerecorded voices. *See* 27 U.S.C. § 227(b)(1)(A). But this separate statutory basis for a TCPA violation was never mentioned in Sterk's complaint, and it is too late for Sterk to assert such a claim in this litigation.

The question is controlling and legal, but it is also obscure and narrow. An appellate decision here has little prospect of general application beyond this arcane area of law. I have considered whether this is the kind of “abstract legal question” the court of appeals has identified as the object of § 1292(b), and I find that it is. This case is about “the meaning of a statutory or constitutional provision, regulation, or common law doctrine.” *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000). The summary judgment decision was an act of interpretation, not merely the application of legal provisions. See *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 625 (7th Cir. 2010). There is a factual record, but these summary judgment motions were not fact-dependent. The interpretation of the Telephone Consumer Protection Act together with the FCC’s implementing regulations does not present a factual contest, and the summary judgment record in this case is rather slim.

Contestable. Plaintiff’s main objection to certification is that the question is not contestable. In Sterk’s view, the FCC’s language—dialing stored numbers without human intervention—is all that is required for a system to fall under the TCPA, and there can be no contest about that because *CE Design*, 606 F.3d 443, and the Hobbs Act, 28 U.S.C. § 2342, preclude any challenge to the validity of the FCC’s interpretation. But plaintiff’s argument about the FCC’s decisions is incomplete. In describing the dialing-without-human-intervention concept, the FCC has “emphasized that [the statutory] definition covers any equipment that has the specified *capacity to generate numbers and dial them without human intervention....*” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15399 n.5 (2012) (emphasis added). While this court has no jurisdiction to question the validity of the FCC’s rulings, Path’s argument is consistent with the FCC’s 2012 decision. There is room to debate the meaning of the FCC decisions and what kind of number-generation capacity is required under the statute.

This “capacity” issue has been identified by other district courts, such as *Dominguez v. Yahoo!, Inc.*, 2014 WL 1096051 (E.D. Pa. 2014), *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F.Supp.2d 723 (N.D. Ill. 2011), and *Gragg v. Orange Cab Co., Inc.*, 2014 WL 494862 (W.D. Wash. 2014), with conflicting results. There are also several petitions pending before the FCC seeking clarification of its decisions. The question is being contested on multiple fronts. I note that it is possible that any contest over the interpretation of FCC rulings ought to occur only before the agency (and any appeals taken from agency action), but nevertheless, district courts are in fact facing this question repeatedly. There is conflict among the lower courts.

In another TCPA case, involving a different statutory element but also relating to FCC orders, a court found that there was substantial ground for a difference of opinion where one party’s interpretation was plausible and the Seventh Circuit had not yet addressed the question. *Thrasher-Lyon v. CCS*

Commercial, LLC, 2012 WL 5389722 *3 (N.D. Ill. 2012). So too here, and I find *Thrasher-Lyon's* approach to the contestability issue persuasive.

Materially Advance the Litigation. An immediate appeal may materially advance the resolution of the case. See *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012). There are no other grounds for relief pleaded by Sterk (see footnote 1, above). If Path's interpretation prevails, the case will be over, and will prevent costly litigation over class certification. That prospect is sufficient to satisfy this element of § 1292(b). *Id.*

Finally, Path's motion was timely, filed within two weeks of the order it seeks to appeal.

Path's motion is granted. Path has ten days from the entry of this order to petition the court of appeals to accept its appeal. A status hearing in this case is set for October 2, 2014, and the parties can address the prospect of staying proceedings in the district court at that time.

ENTER:



Manish S. Shah
United States District Judge

Date: 8/8/14