American Financial Services Association Law Committee Meeting
Emerging Issues Committee Report
October 22, 2018

1. Convenience Fees
    (a) South Carolina
    (b) Other

2. TCPA Update
    (a) No Unilateral Revocation of Consent When Part of Bargained-For Agreement:
    (b) Definition of ATDS
    (c) FCC Updates

3. FinTech Updates

    - New York Department of Financial Services lawsuit against OCC (Sept. 14, 2018).
    - Complaint alleges policy-based flaws and lack of statutory authority, including inconsistency with bank regulation.
    - Alleges the business of banking requires deposit-taking activity.

4. "Unconscionability" of Interest Rates

5. Brief Overview of CA Privacy Act and GDPR Update

6. Non-brick and mortar dealer models

    - State law governing dealers and credit sales.
    - Evolving models using a one-state company-based framework to multi-state consumer-based framework.

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TCPA Update

1. No Unilateral Revocation of Consent When Part of Bargained-For Agreement:
    a. Few v. Receivables Performance Mgmt., 2018 WL 3772863 (N.D. Alabama 2018) – held that contractual consent to be contacted using an automatic telephone dialing system cannot be unilaterally revoked.
2. Positive Developments in Definition of an ATDS:
    a. Gary v. TrueBlue, Inc., Dist. Court, 2018 WL 3647046 (ED Michigan 2018) – held that TrueBlue's dialer system was not an ATDS and that dialers calling from a list do not qualify as an ATDS under the TCPA unless they generate numbers randomly or sequentially.
    b. Pinkus v. Sirius XM Radio, 319 F.Supp.3d 927 (ND Ill. July 26, 2018) – held that having random or sequential number generation is a "defining characteristic" of an ATDS under the TCPA and therefore predictive dialers do not meet the definition of an ATDS.
    c. King v. Time Warner Cable, 894 F.3d 473 (2d Cir. June 29, 2018) – held that the "term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."
    d. Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. June 26, 2018) – held that "capacity" under the TCPA must be looked at as present capacity and not a latent or potential capacity, and therefore an ATDS must have the present ability to randomly or sequentially generate numbers and dial them.
3. Negative Developments in Definition of an ATDS:
    a. Marks v. Crunch San Diego LLC, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) – held that "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically."
4. FCC Updates:
    a. October 3, 2018 – In light of *Marks*, FCC issued a new public notice seeking further comment on what constitutes an "ATDS."
    b. May 3, 2018 – Industry trade groups petitioned FCC for declaratory ruling seeking narrow interpretation of an ATDS.
    c. March 22, 2018 – FCC Second Notice of Proposed Rulemaking re Reassigned Number Database and Possible Safe Harbor Approach. Comments were due and submitted by June 7th.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Plaintiff,

Civil Action No. 18-cv-8377

-- against --

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

JOSEPH M. OTTING, in his official capacity as U.S. Comptroller of the Currency,

Defendants.
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. By this action, plaintiff MARIA T. VULLO ("Plaintiff"), in her official capacity as Superintendent of the New York State Department of Financial Services ("DFS"), challenges the decision of the Office of the Comptroller of the Currency ("OCC") made on July 31, 2018, to immediately begin accepting applications from, and grant special-purpose national bank charters to, a boundless class of undefined and so-called "financial technology" ("fintech") companies, including companies that do not accept deposits ("Fintech Charter Decision"). These newly forged institutions will seek to provide financial services in connection with an unidentified and sweeping array of commercial ventures never before authorized or regulated by the OCC.

2. The Fintech Charter Decision is lawless, ill-conceived, and destabilizing of financial markets that are properly and most effectively regulated by New York State. It also

puts New York financial consumers – and often the most vulnerable ones – at great risk of exploitation by federally-chartered entities improperly insulated from New York law. The OCC's reckless folly should be stopped.

3. Specifically, because the OCC seeks to imbue its special purpose charter with vast preemptive powers over state law, the Fintech Charter Decision creates serious threats to the well-being of New York consumers and businesses alike. The risks include:

- weakening regulatory controls on usury, payday loans, and other predatory lending practices;
- consolidating multiple non-depository business lines under a single federal charter thus creating even more institutions that are "too big to fail;"
- creating an unlevel and unfair playing field to the detriment of New York's strong community banking system that complies with New York law and serves New York's communities throughout the State; and
- creating competitive advantages for large, well-capitalized "fintech" firms, which can overwhelm smaller market players and thereby stunt rather than foster innovation in financial products and services.

4. These and other weighty policy flaws make the Fintech Charter Decision unsustainable as a practical matter. But the OCC's action is legally indefensible because it grossly exceeds the agency's statutory authority. The argument is self-evident. The OCC has determined that national "banks" holding fintech charters will not, and cannot, accept deposits. That proviso violates a fundamental premise of federal banking law. Since 1863, when Congress first enacted the National Bank Act ("NBA") (originally denominated the National Currency Act), the operations of federally chartered banks have been confined solely to the "business of

banking." Yet even the most cursory reading of the NBA's language, history, and purpose reveals that Congress clearly intended the "business of banking" necessarily to include deposit taking. Accordingly, the Fintech Charter Decision does not concern the "business of banking" and is therefore beyond the OCC's jurisdiction to implement.

5. Moreover, the lack of congressional authorization for the Fintech Charter Decision indisputably deprives preemptive effect to the OCC's actions. There is no quarrel that *only* the clearly expressed "purpose of Congress" decides whether federal law displaces state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citations omitted). Here, the congressional silence as to whether the NBA preempts the states' time-honored regulation of non-depository financial service companies is deafening.

6. Still, the OCC has tried to justify the Fintech Charter Decision as an important means of supporting "responsible innovation in the federal banking system." (*See infra* ¶ 40, Exhibit L at 2). Similarly, in issuing the Fintech Charter Decision, the current Comptroller of the Currency, Joseph M. Otting, has extolled the purported benefits of the Fintech Charter Decision as providing "more choices to consumers and businesses, and creat[ing] greater opportunity for companies that want to provide banking services in America." (*See infra* ¶ 39, Exhibit Kat 1). But even if these claims had merit, which they do not, they could not validate the OCC's action. "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that

Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotation marks omitted).

7. Nor is this the first time that the OCC has exceeded its statutory authority by impermissibly redefining the "business of banking." Indeed, federal courts have already twice struck down the agency's administrative efforts to authorize national banks that do not accept deposits. *See Independent Bankers Ass'n of America v. Conover*, 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529 at *32, Fed. Banking L. Rep. (CCH) P86, 178 (M.D. Fla. Feb. 15, 1985); *Nat'l State Bank v. Smith,* No. 76-1479 (D. N.J. Sept. 16, 1977), *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979).

8. In the same way, federal courts have repeatedly checked the OCC's unlawful efforts to authorize national banks to sell insurance products in derogation of the NBA's limitations on the "business of banking." *See, e.g., Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (crop insurance); *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) (title insurance); *Saxon v. Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968) (automobile, home, casualty, and liability insurance). The OCC has even tried unsuccessfully to authorize a national bank to operate a travel agency under the NBA, only to be judicially halted. *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972).

9. The need for the Fintech Charter Decision to meet the identical fate is even more compelling because of the unavoidable and drastic consequences that it will have for New York State, its residents, and its businesses.

10. New York is a global financial center and, as a result, DFS is effectively a global financial regulator. In addition to the 229 state and international banks licensed by New York,

with assets of approximately $2.5 **trillion**, DFS also supervises approximately 600 non-bank financial services firms, with assets of approximately $1 trillion. These non-depository institutions include licensed lenders, real estate lenders, mortgage servicers, sales and premium finance companies, pre-paid card issuers, money transmitters, virtual currency businesses, check cashers, and budget planners. DFS also regulates approximately 1400 insurance companies operating within New York. In all DFS supervises approximately $7 trillion in total assets of entities across banking, insurance, and other financial services.

11. Such companies provide the financial infrastructure for much of the daily life of New York residents and businesses, and New York law has expertly regulated the integrity of those markets. But under the Fintech Charter Decision, many of those same companies could become federally-chartered "banks," purportedly immune through federal preemption rules from New York's heighted financial safety and soundness controls (such as strict capital standards, liquidity requirements, surety bond obligations, and industry-wide insurance fund commitments) as well as the state's strong consumer protection laws (such as tough anti-usury laws, interest-rate caps, and prohibitions on pay-day lending schemes).

12. Recent history graphically illustrates how excessive federal preemption of state law governing mortgage lenders and servicers was a root cause of the global financial collapse. The Fintech Charter Decision presents many similar perils. It gives unscrupulous financial firms another way to skirt local oversight by the states in which they do business and impact consumers. There has been a dramatic rise in small dollar loans to consumers at high interest rates, which loans are then securituzed and sold. Permitting lenders engaged in such conduct to evade state regulation and laws creates great risk similar to what was seen in the 2008 financial crisis.

13. Thus, even if it were legal – which it clearly is not – the OCC's plan to charter special purpose, non-depository institutions is simply not worth the risk. In short, financial centers like New York, which have developed comprehensive and well-functioning regulatory bodies, should not needlessly bear the harmful brunt of an overreaching federal agency.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act), and 28 U.S.C. § 2201 (Declaratory Judgment Act).

15. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

16. Plaintiff is the Superintendent of DFS. DFS is the New York governmental agency statutorily charged with the "enforcement of the [state's] insurance, banking and financial services laws." N.Y. Fin. Serv. L § 102. In forming DFS in 2011, the legislature declared that one of the purposes for consolidating the departments of insurance and banking was "to provide for the effective and efficient enforcement of the banking and insurance laws." N.Y. Fin. Serv. L § 102(c). DFS is headquartered at One State Street Plaza, New York, NY 10004.

17. As the Superintendent of DFS, Plaintiff is responsible for supervising "the business of, and the persons providing, financial products and services, including any persons subject to the provisions of the insurance law and the banking law." N.Y. Fin. Serv. L. § 201(a). In carrying out this supervisory function, the legislature directed the Superintendent to "take such actions as the superintendent believes necessary to: … (2) ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services; … (4) protect

users of financial products and services from financially impaired or insolvent providers of such services." N.Y. Fin. Serv. L. § 201(b).

18. Plaintiff possesses "the rights, powers, and duties in connection with financial services and protection in this state, expressed or reasonably implied by [the financial services law] or any other applicable law of this state." N.Y. Fin. Serv. L. § 202(a). Plaintiff has broad authority under the Financial Services Law, the Banking Law, and the Insurance Law to enforce the laws of the state including the power to take "such actions as the superintendent deems necessary to educate and protect users of financial products and services." N.Y. Fin. Serv. L. § 301(c)(1).

19. Defendant Office of the Comptroller of the Currency is a bureau of the United States Department of the Treasury and functions as the primary supervisor of federally chartered national banks. Its offices are located at 400 7th Street S.W., Washington, DC 20219.

20. Defendant JOSEPH M. OTTING is the current United States Comptroller of the Currency. Mr. Otting was nominated by President Trump for this office on June 5, 2017, and was confirmed by the United States Senate on November 27, 2017. Prior to the appointment of Mr. Otting, Kenneth Noreika, was the Acting Comptroller of the Currency. Thomas J. Curry, who served in the position from April 9, 2012 until May 5, 2017, was the last individual before Mr. Otting to be confirmed by the United States Senate to serve as the Comptroller of the Currency. The OCC is a bureau within the United States Treasury Department that "is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction." 12 U.S.C. § 101(a). As Comptroller, Defendant JOSEPH M. OTTING is the "chief officer" of the OCC. 12 U.S.C. § 101(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

21. In relevant part, Chapter 12, section 24 of the United States Code enables the OCC to charter national banking associations by granting them "all such incidental powers as shall be necessary to carry on the *business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . ." 12 U.S.C. § 24 (Seventh) (emphasis added).

22. The "Business of Banking" Clause in § 24 (Seventh) ("BOB Clause") has been an anchor provision of the NBA since that statute was first enacted in 1863. It is long-settled that the historical phrase "business of banking" and its essential meaning define the scope of financial activities in which a national bank charted by the OCC may or must engage. From the earliest days of the NBA, banks were understood to be "of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation." *Bank of Savings v. Field*, 70 U.S. 495, 512 (1865). The Supreme Court emphasized that it "is an important part of the business of banking to receive deposits." *Bank of the Republic v. Millard*, 77 U.S. 152, 155 (1869). Indeed, the Court noted that, "[s]trictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution," underscoring that "[o]riginally the business of banking consisted only in receiving deposits." *Oulton v. Savings Institution*, 84 U.S. 109, 118 (1877).

23. The NBA's language, history, structure, judicial construction, and relationship to other key federal banking statutes make plain that – at a minimum – the BOB Clause requires that OCC-chartered banks receive deposits. In short, "the National Bank Act authorizes national banks to receive deposits without qualification or limitation." *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 376 (1954).

24. The OCC has promulgated regulations for the organization of national banks. *See* 12 C.F.R. § 5.20. In 2003, the OCC amended its regulations to create, *for the first time in nearly 140 years*, a new category of nationally chartered institutions described as "special purpose" banks. *See* 68 Fed. Reg. 70122-01 (Dec. 17, 2003). To date, the OCC has never applied this rule to non-depository institutions now subject to the OCC Fintech Decision. According to the amended rule, an OCC-chartered firm could "be a special purpose bank that limits its activities to fiduciary activities *or to any other activities within the business of banking*." 12 C.F.R. § 5.20(e)(1)(i) (emphasis added). The amended regulation further provides that a "special purpose bank that conducts activities other than fiduciary activities must conduct *at least one* of the following core banking functions: Receiving deposits, paying checks, *or* lending money." *Id.* (emphasis added).

25. Under the OCC's Fintech Charter Decision, the OCC now seeks to utilize 12 C.F.R. § 5.20(e) – in stark violation of the BOB Clause and the clear intent of Congress – *to empower itself* to charter non-depository institutions. If validated by the courts, this agency sleight-of-hand, practiced on the barest of administrative records, *see* 68 FR 70122-01 (Dec. 17, 2003), plus a "whitepaper" and a manual (discussed below), would upend almost one and a half centuries of established federal banking law and displace a nation of 50 state financial regulators that annually supervise hundreds of billions of dollars in non-bank transactions. There is absolutely no evidence that Congress ever intended, much less expressly authorized, any such seismic shift in the allocation of established regulatory responsibility. For over 150 years, there has been dual authority, split between the federal and state governments, but the business of non-depository, non-bank institutions has been entirely regulated by the states.

26. In fact, before the Fintech Charter Decision, the OCC had never sought to charter a "special purpose bank" under the authority of 12 C.F.R. § 5.20(e). The OCC's fourteen-year reluctance has been warranted. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks and citations omitted).

27. That "measure of skepticism" should grow exponentially when any such new-found power also claims to preempt states from regulating financial actors over which they have previously exercised 150 years of nearly exclusive jurisdiction.

THE OCC's CONSIDERATION OF FINTECH CHARTERS

28. Although the Fintech Charter Decision was issued on July 31, 2018, its origins date back to March 2016, when the OCC published a white paper entitled, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective.* (available at https://www.occ.gov/publications/ publications-by-type/other-publications-reports/pub-responsible-innovation-banking -system-occ-perspective.pdf) (annexed hereto as Exhibit A). The publication identifies the impact of fast-paced developments in financial services technology as a much needed subject of regulatory inquiry.

29. Six months later, the OCC first publicly stated that it was "considering whether a special-purpose charter could be an entity for the delivery of banking services in new ways." Proposed Rulemaking, *Receiverships for Uninsured National Banks*, 81 Fed. Reg. 62,835, 62,837 (Sept. 13, 2016).

30. Soon thereafter, in December 2016, the OCC published another white paper, this one entitled, *Exploring Special Purpose National Bank Charters for Fintech Companies*

("Fintech White Paper") (available at https://www.occ.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf) (annexed hereto as Exhibit B). The Fintech White Paper asks "whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company" and concludes that "it may be in the public interest to do so." Fintech White Paper at 2. The agency expressly roots its sole authority for chartering a fintech company in 12 C.F.R. § 5.20(e), *see id.* at 3 & n. 4, and insists that such institutions would be immune to state law and visitorial authority "in the same way and to the same extent" as "a full-service national bank," Fintech White Paper at 5.

31. The OCC received numerous comments to the Fintech White Paper strongly opposing the agency's fintech charter proposal. Just a few of the officials and institutions that objected to the Fintech White Paper include:

- The New York State Department of Financial Services (a true and correct copy of the letter from the Hon. Maria T. Vullo to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit C);
- The Conference of State Banking Supervisors (a true and correct copy of the letter from John W. Ryan, Esq. to the Hon. Thomas J. Curry, dated January 13, 2017, is annexed hereto as Exhibit D);
- The Independent Community Bankers of America (a true and correct copy of the letter from Christopher Cole, Esq. and James Kendrick to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit E);
- U.S. Senators Sherrod Brown (Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs) and Jeffrey A. Merkley (a true and correct copy of

the letter from the Hon. Sherrod Brown and the Hon. Jeffrey A. Merkley to the Hon. Thomas J. Curry, dated January 9, 2017, is annexed hereto as Exhibit F); and

- The Illinois Department of Financial and Professional Regulation (a true and correct copy of the letter from the Hon. Bryan A. Schneider to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit G).

32. These objections collectively set forth, in great detail, numerous regulatory gaps, threats to consumer protection, and risks to the safety and soundness of the financial services industry created by the OCC's fintech charter proposal. Moreover, each one of these objections specifically challenged the OCC's statutory authority to grant a fintech charter. As summarized by Senators Brown and Merkley:

> Because many of these [fintech] firms do not intend to accept deposits, it is far from clear whether the OCC has the authority to grant national bank charters to them. Congress has given the OCC a very narrowly-defined authority to charter only three special-purpose national banks (bankers' banks, credit card banks, and trust banks) that do not accept deposits. . . . An alternatively chartered firm that does not take deposits by offering transactions or savings accounts, and therefore does not encourage the fundamental banking act of building wealth by encouraging savings, should not be able to refer to itself as a "bank."

Exhibit F at 2-3.

33. The Independent Community Bankers of America ("ICBA") – a nationwide association of nearly 6000 state and *federally* chartered banks of all sizes – echoed these concerns:

> ICBA does not believe that the OCC has the necessary authority for establishing a special purpose national bank charter that engages exclusively in non-depository core banking functions. . . . [T]here is no explicit authority under the National Bank Act to charter a fintech company as a special purpose bank. . . . Congress needs to consider all the policy implications of a fintech charter, including the scope of such a charter and how the business of banking should be defined under federal law.

Exhibit E at 2. In response to the OCC's July 2018 announcement that it is proceeding with the Fintech Charter Decision, ICBA stated:

> ICBA remains concerned that instituting a special-purpose national bank charter for fintech firms would create an unlevel regulatory playing field. The Office of the Comptroller of the Currency should procure explicit statutory authority from Congress before it issues fintech charters.

Independent Community Bankers of America, Press Release *ICBA Statement on Treasury, OCC Regulatory Announcements* (Aug. 1, 2018) *available at* https://www.icba.org/news/press-releases/2018/08/01/icba-statement-on-treasury-occ-regulatory-announcements.

34. In March 2017, while the OCC was still under the direction of Comptroller Thomas J. Curry, the OCC responded to the comments that it received on the Fintech White Paper. *See OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Fintech Companies* ("Summary of Comments") (available at www.occ.treas.gov/topics/bank-operations/innovation/summary-explanatory-statement-fintech-charters.pdf) (annexed hereto as Exhibit H).

35. The Summary of Comments did not address many of the objections raised to the OCC fintech charter. The Summary states the agency's position that: (1) it would be in the public interest for the OCC to grant fintech charters; (2) that entities granted such charters would not take deposits; and (3) 12 C.F.R. § 5.20(e), on its own, gave the OCC the necessary chartering authority. *See* Summary of Comments at 2, 3, 14-15.

36. On March 15, 2017, the agency issued a draft supplement to the Comptroller's Licensing Manual, entitled *Evaluating Charter Applications from Financial Technology Companies* ("Draft Manual Supplement") (available at

http://www.occ.treas.gov/publications/publictions-by-type/;icensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.) (annexed hereto as Exhibit I).

37. On April 14, 2017, DFS sent an additional letter to the prior OCC Comptroller further opposing the publication of the Draft Manual Supplement and the OCC's issuance of a special purpose national bank charter to non-depository institutions (a true and correct copy of the letter from the Hon. Maria T. Vullo to the Hon. Thomas J. Curry, dated April 14, 2017, is annexed hereto as Exhibit J).

38. Between March 15, 2017 and July 31, 2018, the OCC was allegedly evaluating whether non-depository fintech companies – *i.e.*, those companies engaged in only paying checks and/or lending money but not taking deposits – should be chartered by the OCC as special purpose national banks. According to the OCC, a final decision was not made until July 31, 2018.

39. On July 31, 2018, the OCC announced the Fintech Charter Decision in a Press Release titled "OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies" (a true and correct copy of the OCC's July 31, 2018 Press Release is annexed hereto as Exhibit K). According to the July 31 Press Release, the OCC "today announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking." Id. Lest there was any prior doubt, there now is no doubt that the OCC's July 31, 2018 announcement constitute's the agency's final decision to proceed with the unlawful Fintech Charter.

40. In addition to the Press Release, the OCC also published on July 31, 2018, a "Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters" ("OCC Fintech Policy Statement") and the "Comptroller's Licensing Manual Supplement:

Considering Charter Applications from Financial Technology Companies" ("Final Manual Supplement") that implemented the Fintech Charter Decision. (A true and correct copy of the OCC Fintech Policy Statement is annexed hereto as Exhibit L and a true and correct copy of the Final Manual Supplement is annexed hereto as Exhibit M.)

41. The OCC Fintech Policy Statement states that the OCC will immediately accept applications from a broad range of Fintech businesses including those that do not accept deposits: "It is the policy of the Office of the Comptroller of the Currency (OCC) to consider applications for national bank charters from companies conducting the business of banking, provided they meet the requirements and standards for obtaining a charter. This policy includes considering applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking <u>but do not take deposits</u>." Ex. L at 1 (emphasis added).

42. The focal point of the Fintech Charter Decision is on the federal licensure -- and concomitant but unprecedented state law preemption -- for <u>non-depository</u> fintech companies that seek licensure as a "special purpose national bank." Indeed, the entire Final Manual Supplement is devoted to providing the OCC's rules for "consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation." Ex M at 2. After the Fintech Charter Decision was issued, the OCC immediately invited interested parties including Fintech startup companies to come to the OCC's office in New York to discuss, among other items, the new special purpose national bank charter.

THE FINTECH CHARTER DECISION WILL SEVERELY UNDERMINE
NEW YORK'S ABILITY TO PROTECT ITS FINANCIAL MARKETS AND CONSUMERS

43. The economic fallout in New York from the Fintech Charter Decision will be destructive. Because the OCC has set the bar for fintech-charter eligibility so low, *i.e.*, firms that are merely "engaged in paying checks or lending money," Manual Supplement at 5, the full scope of regulatory disruption is difficult to ascertain. Most non-depository financial service firms that are presently subject to New York regulatory oversight and state-law enforcement proceedings are, however, in some form, "engaged in paying checks or lending money." *Id.* And because the OCC maintains that "[s]tate law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank," Fintech White Paper at 5, federal preemption claims will surely proliferate among fintech charter-holders in response to New York misconduct charges.

44. Nevertheless, two examples of concrete harm to New York's financial market stability and consumer protection controls – which are directly attributable to the Fintech Charter decision – are readily identifiable. To start, as regulated by Plaintiff, New York law imposes bonding requirements, liquidity and capitalization standards, and payment obligations to the New York State Transmission of Money Insurance Fund upon state-licensed money transmitters in order to protect consumers against loss in the event that such an institution fails.

45. Under the Fintech Charter Decision, New York-licensed money transmitters using technologically innovative operating platforms could qualify for an OCC special purpose charter and thereby escape New York's regulatory requirements. Yet, "a fintech company with a special purpose national charter that does not take deposits . . . is not insured by the Federal Deposit Insurance Corporation." Fintech White Paper at 2. The Fintech Charter Decision therefore strips customers of non-depository money transmitters of critical financial protections otherwise

guaranteed by New York law. This result is especially troubling when you consider that a disproportionate number of consumers who use money transmitters are the most economically vulnerable.

46. Similarly, the Fintech Charter Decision effectively negates New York's strict interest-rate caps and anti-usury laws. Federal law provides that a bank chartered under the NBA "may take, receive, reserve, and charge on any loan . . . or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. Consequently, under the Fintech Charter decision, marketplace lenders that use the Internet can now gouge New York borrowers by receiving an OCC special purpose charter and locating in any number of other states that authorize interest rates considered usurious in New York. *See* Exhibit C at 5 ("Giving federal bank charters to online lenders would create a race to the bottom where online lenders could set up shop in a state with lax consumer protection rules and flood more consumer protective states with dangerous, high interest loans.").

47. This perverse regulatory outcome – which Congress plainly did not authorize – could realistically lead in New York to the proliferation of prohibited payday lending by out-of-state OCC chartered entities seeking to import their usurious trade into the state to exploit financially vulnerable consumers. These platforms charge exorbitant interest rates that trap consumers in a cycle of high-interest borrowing that they can never repay, leading to the sort of economic and social devastation like that seen in the recent foreclosure crisis.

48. In New York, payday and other high-interest, small-dollar lending is illegal under both state civil and criminal usury statutes. New York has aggressively enforced the state's usury laws to stop predatory loans in the state. Some lenders have attempted to skirt New York's prohibition on payday lending by offering usurious loans to New Yorkers over the internet, often

by affiliation with federally chartered or federally recognized institutions. New York's usury laws apply to online payday lenders when those loans are offered or made in New York. Moreover, the courts have agreed with the DFS position when payday lenders have attempted to stop DFS from taking any action to protect New York consumers from payday lenders. DFS has led in successfully fighting these practices through effective regulation and should not be forced by the Fintech Charter Decision to capitulate now.

49. The Fintech Charter Decision would exempt its new fintech chartered entities from existing federal standards of safety and soundness, liquidity and capitalization. New York has for years regulated non-depository institutions including those using financial technology and has clear laws addressing their safety and soundness. DFS has dedicated staff that specializes in licensing, supervising and examining non-depository institutions. These specialized examiners have extensive experience examining the unique compliance challenges presented by these institutions and have the tools needed to supervise these entities, including training and examination protocols that are tailored to non-depository institutions. DFS has been examining and supervising these entities for decades and has brought enforcement actions against those that have Bank Secrecy Act and Anti-Money Laundering ("BSA-AML") deficiencies. DFS has also issued transaction monitoring regulations that apply to its nonbank regulated entities that establish specific regulatory requirements for their BSA-AML programs.

50. Finally, the OCC's actions will also injure DFS in a directly quantifiable way. Pursuant to statute, DFS operating expenses are funded by assessments levied by the agency upon New York State licensed financial institutions. *See, e.g.*, N.Y. Fin. Serv. L § 206(a) ("Persons regulated under the banking law shall be assessed by the superintendent for the operating expenses of the department that are solely attributable to regulating persons under the

banking law in such proportions as the superintendent shall deem just and reasonable."). For example, as of December 31, 2016, $13.5 million of DFS annual assessments for 2016-17 were collected from New York State licensed financial services firms, such as money transmitters and check cashers. For that same period, $13.1 million of DFS annual assessments were collected from New York State licensed mortgage banks and servicers. Other DFS-licensed non-depository institutions are similarly assessed.

51. The negative fiscal implications of the Fintech Charter Decision for DFS are thus immediately obvious. Every non-depository financial firm that receives an OCC special purpose charter in place of a New York license to operate in the state deprives DFS of crucial resources that are necessary to fund the agency's regulatory function. Regardless of intent, the OCC's actions pose an insidious threat to the health of New York's regulatory environment that seeks to protect New York's markets and consumers.

DFS's PRIOR RELATED CIVIL ACTION AGAINST THE OCC

52. On May 12, 2017, Plaintiff Maria T. Vullo commenced a similar action in this Court against the OCC and then Acting Comptroller Noreika. See *Vullo v. Office of the Comptroller of the Currency et al*., Case No. 17-cv-3574-NRB (S.D.N.Y.). This related case was assigned to the Honorable Naomi Reice Buchwald, United States District Judge, and, like the present action, also sought a declaratory judgment that the OCC's issuance of a license to a non-depository "fintech" company was illegal under the National Bank Act, and an injunction preventing the OCC and then acting Comptroller Noreika from issuing a special purpose charter pursuant to 12 C.F.R. § 5.20(e)(1).

53. On August 18, 2017, the Defendants OCC and Acting Comptroller filed a motion to dismiss on ripeness and other grounds. At the oral argument on the motion to dismiss held on

November 29, 2017, counsel for Defendants OCC and Acting Comptroller admitted that litigation over the validity of the OCC's Fintech Charter actions would become ripe at the moment that the OCC decided to go ahead and accept charter applications:

> THE COURT: I don't see any point in going through this a second round. At some point we ought to get clarity. Maybe [the OCC's] arguments are good now, but at some point they are going to evaporate. I mean, they have to evaporate at some point, if you decide to go ahead. If you never go ahead, they are happy, I'm happy; I don't know how you feel, but in any event, we are done. ***But if the comptroller says, we have decided to go ahead and we will accept applications, would that not be the perfect time to decide the merits*** before the fintech companies spend all of the money, time and effort to put in applications? They may decide to go ahead, but at least at that moment they are on notice that it's possible that a court is going to say you have just wasted your time.
>
> MR. CONNOLLY: ***Correct***.

Transcript of November 29, 2017 Oral Argument, Case No. 1.17-cv-03574-NRB, Docket Entry No. 27 at 12:7 - 20, annexed hereto as Exhibit N (emphasis supplied).

54. On December 12, 2017, the Court granted the Defendant's motion only to the extent that it determined that the prior action was not yet ripe, and thus determined that it lacked jurisdiction and declined to rule on the motion's other grounds. The prior related case was then dismissed without prejudice. Mem. and Order, Case No. 1.17-cv-03574-NRB, Docket Entry No. 30 at 26-27 (Dec. 12, 2017).

CLAIMS FOR RELIEF

COUNT I

THE FINTECH CHARTER DECISION EXCEEDS THE OCC'S AUTHORITY UNDER THE NBA

55. Plaintiff repeats and re-alleges paragraphs 1-54 of the complaint as if fully set forth here.

56. The NBA empowers the OCC to charter national banks that engage in the "business of banking," which at a minimum requires taking deposits unless Congress has expressly authorized otherwise.

57. The Fintech Charter Decision purports to authorize the establishment of special purpose, non-depository banks for which there is no express congressional authorization.

58. The Fintech Charter Decision therefore exceeds the OCC's statutory authority, and the Court should declare it unlawful, set it aside, and enjoin Defendants from taking any further actions to implement its provisions.

COUNT II

12 C.F.R. § 5.20(e)(1) IS NULL AND VOID BECAUSE IT EXCEEDS THE OCC'S AUTHORITY UNDER THE NBA

59. Plaintiff repeats and re-alleges paragraphs 1-58 of the complaint as if fully set forth here.

60. In promulgating 12 C.F.R. § 5.20(e)(1), the OCC improperly defined the "business of banking" to include non-depository institutions.

61. The definition included in 12 C.F.R. § 5.20(e)(1) lacks any express congressional authorization.

62. The OCC therefore exceeded its statutory authority in approving the rule, and the Court should declare 12 C.F.R. § 5.20(e)(1) unlawful, set it aside, and enjoin Defendants from taking any further actions to implement its provisions.

COUNT III

THE FINTECH CHARTER DECISION VIOLATES
THE TENTH AMENDMENT TO THE U.S. CONSITUTION

63. Plaintiff repeats and re-alleges paragraphs 1-62 of the complaint as if fully set forth here.

64. The Tenth Amendment to the U.S. Constitution provides that each state retains those sovereign powers not expressly delegated under the U.S. Constitution to the federal government. The police power to regulate financial services and products delivered within a state's own geographical jurisdiction is among a state's most fundamental sovereign powers.

65. Federal law preempts state law under the Supremacy Clause of the U.S. Constitution, provided only that Congress has clearly expressed its intent to do so.

66. The Fintech Charter Decision conflicts with state law insofar as it claims to insulate OCC-chartered non-depository institutions from state regulation.

67. Because Congress did not authorize the OCC to charter fintech companies that provide non-depository financial services, it did not intend to preempt state regulation of such entities.

68. Accordingly, the Fintech Charter Decision violates the U.S. Constitution and the Court should declare it null and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment and order:

69. Declaring that the Fintech Charter Decision exceeds the OCC's statutory authority under the NBA because it creates federal special-purpose charters for non-depository financial service providers.

70. Declaring 12 C.F.R. § 5.20(e)(1) null and void because its promulgation exceeded the OCC's statutory authority under the NBA.

71. Declaring the Fintech Charter Decision null and void because it violates the Tenth Amendment of the U.S. Constitution.

72. Permanently enjoining Defendants from implementing the Fintech Charter Decision and issuing any other special purpose charter pursuant to 12 C.F.R. § 5.20(e)(1).

73. Awarding such other and further relief as the Court deems just and proper.

Date: September 14, 2018

Respectfully submitted,

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Marks v. Crunch San Diego, LLC, 9th Cir.(Cal.), September 20, 2018

894 F.3d 116
United States Court of Appeals, Third Circuit.

Bill H. DOMINGUEZ, ON BEHALF OF HIMSELF and All Others Similarly Situated, Appellant
v.
YAHOO, INC.

No. 17-1243
|
Submitted under Third Circuit LAR 34.1(a) on October 2, 2017
|
Opinion filed: June 26, 2018

Synopsis

Background: Consumer brought putative class action against Internet company, alleging violations of Telephone Consumer Protection Act (TCPA). The United States District Court for the Eastern District of Pennsylvania, Michael M. Baylson, J., 8 F.Supp.3d 637, entered summary judgment for company. Consumer appealed. The Court of Appeals, Ambro, Circuit Judge, 629 Fed.Appx. 369, vacated and remanded. On remand, the United States District Court for the Eastern District of Pennsylvania, No. 2-13-cv-01887, Baylson, J., 2017 WL 390267, again entered summary judgment for company, and also excluded consumer's expert reports. Consumer appealed.

Holdings: The Court of Appeals, Roth, Circuit Judge, held that:

[1] District Court did not abuse its discretion by excluding consumer's expert reports, and

[2] consumer failed to establish that company's text messaging system was "automatic telephone dialing system" (ATDS) within meaning of TCPA.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Exclude Expert Report or Testimony; Motion for Summary Judgment.

West Headnotes (2)

[1] Evidence
Matters involving scientific or other special knowledge in general

District Court did not abuse its discretion by excluding consumer's expert reports in his putative class action against Internet company, alleging violations of Telephone Consumer Protection Act (TCPA), as reports were irrelevant to inquiry as to whether company's text message system had capacity to randomly or sequentially generate telephone numbers as an "autodialer"; reports focused on latent or potential capacity to "autodial" numbers, and all reports were founded on generalized hypotheticals that did not help in resolution of inquiry. Communications Act of 1934 § 227, 47 U.S.C.A. § 227; Fed. R. Evid. 702.

6 Cases that cite this headnote

[2] Telecommunications
Illegal or improper purposes

Consumer failed to establish that Internet company's text messaging system was "automatic telephone dialing system" (ATDS) within meaning of Telephone Consumer Protection Act (TCPA), absent any evidence that the system had capacity to generate random or sequential telephone numbers and dial those numbers, as opposed to sending messages only to numbers individually and manually inputted into its system by a user. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(a)(1), (b)(1)(A).

6 Cases that cite this headnote

On Appeal from the United States District Court for the Eastern District of Pennsylvania, District Judge: Honorable Michael M. Baylson (D. C. Civil Action No. 2-13-cv-01887)

Attorneys and Law Firms

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Before: SHWARTZ and ROTH*, Circuit Judges and PAPPERT, District Judge

OPINION

ROTH, Circuit Judge

***117** Appellant Bill Dominguez sued Yahoo!, Inc., alleging that Yahoo violated the Telephone Consumer Protection Act (TCPA)[1] by sending him thousands of unsolicited text messages. Dominguez now returns to this Court for the second time appealing the District Court's grant of summary judgment in favor of Yahoo. For the reasons stated below, we will affirm.

I.

The facts underlying this case are set forth at length in our prior opinion,[2] and we provide only a brief recapitulation here. Dominguez purchased a cell phone with a reassigned telephone number. The prior owner of the number had subscribed to Yahoo's Email SMS Service, through which a user would receive a text message each time an email was sent to the user's Yahoo email account. Because the prior owner of the number never canceled the subscription, Dominguez received a text message from Yahoo every time the prior owner received an email. In an attempt to turn off the notifications, Dominguez pursued various courses of action, all of which proved unsuccessful. Ultimately, Dominguez received approximately 27,800 text messages from Yahoo over the course of 17 months.

Dominguez then filed a putative class action alleging that Yahoo had violated the TCPA. Under the TCPA, it is unlawful to make or send a non-emergency call or text message "using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service."[3] Thus, Dominguez's lawsuit has always depended upon his assertion that Yahoo's Email SMS Service was an "automatic telephone dialing system," *i.e.*, an autodialer. The TCPA defines an autodialer 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 ***118** numbers."[4]

The District Court first granted summary judgment in favor of Yahoo in 2014 after concluding that the undisputed evidence demonstrated that the Email SMS Service did not have the capacity to store or produce telephone numbers using a random or sequential number generator.[5] In 2015, while Dominguez's appeal of that decision was pending, the FCC issued a declaratory ruling and order (the 2015 Declaratory Ruling), which concluded that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities."[6] In other words, a device could qualify as an autodialer under the TCPA if it had the *latent or potential capacity* to store or produce telephone numbers using a random or sequential number generator, and to dial those numbers. In light of this intervening ruling from the FCC, we vacated the District Court's judgment and remanded the case for further consideration.[7] On remand, Dominguez amended his complaint to allege that the Email SMS Service "ha[d] the potential capacity to place autodialed calls."[8] Yahoo again moved for summary judgment, and both parties submitted expert reports addressing the Email SMS Service's latent or potential capacity.

The District Court granted Yahoo's motion to exclude Dominguez's expert reports and once again granted summary judgment in favor of Yahoo.[9] As relevant

to the present appeal, the court concluded that (1) the 2015 Declaratory Ruling should not apply in this case under principles of retroactivity, (2) under the applicable "present capacity" standard, the Email SMS Service did not qualify as an autodialer, (3) in the alternative, even if the 2015 Declaratory Ruling were applicable in this case, Dominguez had not presented any evidence that the Email SMS Service had the latent or potential capacity to generate random numbers because Dominguez's expert reports did not satisfy the standard for admissibility under *Daubert*, and (4) even if Dominguez's expert reports were admissible, Dominguez had failed to provide evidence that the Email SMS Service was capable of both generating random and sequential numbers and dialing those numbers. Dominguez appealed.

While this appeal was pending, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *ACA International v. FCC*,[10] a case involving consolidated challenges to the FCC's 2015 Declaratory Ruling. The D.C. Circuit held that the FCC had exceeded its authority by interpreting the term "capacity" to include any latent or potential capacity and described the FCC's approach as "utterly unreasonable in the breadth of its regulatory [in]clusion."[11] In particular, the D.C. Circuit took issue with the fact that "a straightforward reading of the [FCC's] ruling invites the conclusion that all smartphones ***119** are autodialers."[12] This was so because, as the FCC had conceded, any ordinary smartphone could achieve autodialer functionality by simply downloading a random-number-generating app.[13] The D.C. Circuit therefore set aside the FCC's 2015 Declaratory Ruling.[14]

II.[15]

The decision in *ACA International* has narrowed the scope of this appeal.[16] In light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling. Dominguez can no longer rely on his argument that the Email SMS Service had the latent or potential capacity to function as autodialer. The only remaining question, then, is whether Dominguez provided evidence to show that the Email SMS Service had the present capacity to function as autodialer.

Three of Dominguez's expert reports offer nothing to help resolve the present capacity question. Both the Krishnamurthy Report and the Christensen Report focus on latent or potential capacity. The Krishnamurthy Report proposes five possible ways in which the Email SMS Service could be modified to generate random or sequential numbers.[17] All of these proposed modifications would require several months of work to implement.[18] The Christensen Report is similarly speculative. Christensen opines that "[i]t *would have been* quite easy for one of normal skill in software programming to configure an application to cause mobile messages to be sent based on integration of off-the-shelf, commonly available random number generator programs," and concludes that "the equipment and systems that Yahoo relied upon ... *had the latent capacity* to generate random and/or sequential ten digit numbers."[19] A third report, by Jeffrey Hansen, does not use the term "latent capacity" but presents similar analysis. The Hansen Report begins with the generalized assertion that "all computers can generate random or sequential numbers."[20] The report then proposes six computer code commands, which, Hansen asserts, could be written into Yahoo's operating system in order to generate wireless numbers randomly or sequentially.[21]

[1] In his supplemental filings, Dominguez argues that, under *ACA International*, certain limited modifications may nevertheless ***120** fall within the scope of present capacity. He emphasizes the D.C. Circuit's comment that "[v]irtually any understanding of 'capacity' thus contemplates some future functioning state, along with some modifying act to bring that state about."[22] Though that may be true, it does not follow that the Krishnamurthy, Christensen, or Hansen Reports create a triable factual issue regarding the present capacity of the Email SMS Service. The reports are founded upon the exact type of hypothesizing that is foreclosed by *ACA International*.[23] The District Court was therefore correct to exclude the Krishnamurthy, Christensen, and Hansen Reports, as they are irrelevant to the present capacity inquiry.[24]

Dominguez's final expert report, the supplemental declaration of Randall Snyder, also falls short of the admissibility standard. Snyder purports to address

present, not just latent, capacity, repeatedly opining that "Yahoo's Email SMS Service system had the ability to generate random numbers and, in fact, did generate random numbers."[25] This opinion, however, is supported by little more than the same type of overbroad, generalized assertions found in the Hansen Report. Specifically, Snyder opines that "[t]he ability to generate random numbers is a fundamental function inherent in information technology computer systems employing the most common operating systems, security protocols and encryption."[26] Snyder goes on to explain the role that random number generators play in various commonly available computer operating systems, such as Microsoft Windows, Apple Mac OS, and UNIX, and posits that "it is a straightforward and very basic algorithm to use the available random number generation functions to generate ten-digit telephone numbers."[27] Notably absent, however, is any explanation of how the Email SMS System actually did or could generate random telephone numbers to dial. In that regard, the Snyder Supplemental Declaration is hardly less speculative than the expert reports of Krishnamurthy, Christensen, or Hansen—and raises the same concerns about the ***121** TCPA's breadth that the D.C. Circuit addressed in *ACA International*. Because it does not shed light on the key factual question actually at issue in this case—whether the Email SMS System functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers—the Snyder Supplemental Declaration, like the other expert reports, lacks fit or relevance and was therefore properly excluded.[28]

[2] Ultimately, Dominguez cannot point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers. On the contrary, the record indicates that the Email SMS Service sent messages only to numbers that had been individually and manually inputted into its system by a user.[29] There can be little doubt that Dominguez suffered great annoyance as a result of the unwanted text messages. But those messages were sent precisely because the prior owner of Dominguez's telephone number had affirmatively opted to receive them, not because of random number generation. The TCPA's prohibition on autodialers is therefore not the proper means of redress.

III.

For the above reasons, we will affirm the District Court's orders excluding Dominguez's expert reports and granting summary judgment in favor of Yahoo.

All Citations

894 F.3d 116

Footnotes

* Honorable Gerald J. Pappert, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1 47 U.S.C. § 227.

2 *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369 (3d Cir. 2015).

3 47 U.S.C. § 227(b)(1)(A)(iii). Although the text of the statute refers only to "calls," we have held that, under the TCPA, that term encompasses text messages. *See, e.g.*, *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013).

4 47 U.S.C. § 227(a)(1).

5 *Dominguez v. Yahoo!, Inc.*, 8 F.Supp.3d 637, 643-44 (E.D. Pa. 2014).

6 In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2015 Declaratory Ruling), 30 FCC Rcd. 7991, 7974 ¶ 16 (2015).

7 *Dominguez*, 629 F. App'x at 373.

8 App. at 116 (Am. Compl.).

9 *Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2017 WL 390267, at *1 (E.D. Pa. Jan. 27, 2017).

10 885 F.3d 687 (D.C. Cir. 2018).

11 *Id*. at 699 (internal quotation marks omitted) (alteration in original).

12 *Id*.

13 *Id*. at 696-97.

14 *Id*. at 692.

15 The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a grant of summary judgment, and make all inferences in favor of the nonmoving party. *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 62 (3d Cir. 2013). We review a District Court's decision to exclude expert testimony for an abuse of discretion. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). This means that "[w]e will not interfere with the district court's decision 'unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " *Id*. (quoting *In re TMI Litig.*, 193 F.3d 613, 666 (3d Cir. 1999)).

16 Dominguez and Yahoo have both submitted letters under Rule 28(j) explaining their understanding of the impact of *ACA International* on this appeal.

17 *See* App. at 306 (Krishnamurthy Report).

18 *See* App. at 304, 321 (Krishnamurthy Report).

19 App. at 1163, 1165 (Christensen Report) (emphasis added).

20 App. at 372 (Hansen Report).

21 App. at 373 (Hansen Report).

22 Rule 28(j) Letter from James A. Francis, Appellant's Counsel, to Patricia Dodszuweit, Clerk of Court, 3d Cir. (Mar. 28, 2018) (quoting *ACA Int'l*, 885 F.3d at 696).

23 *ACA Int'l*, 885 F.3d at 696. The D.C. Circuit noted that a correct understanding of "capacity" focuses "on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?" *Id*. The types of modifications discussed by the Krishnamurthy and Christensen Reports—involving several months of work and the integration of unnamed external programs or applications—can hardly be characterized as the "simple flipping of a switch" and are far closer to a full reconstruction of the Email SMS System. Although the modification proposed in the Hansen Report appears simpler in comparison, the addition of a short sequence of code to *any computer operating system* bears a striking similarity to the downloading of an app onto *any smartphone*—the modification that was at issue in *ACA International*. *See id*. at 696-98.

24 *Cf., e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("Rule 702 further requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue. ... Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."). Although the District Court, not having the guidance of *ACA International*, focused its analysis primarily on reliability, we may affirm on any basis supported in the record. *See, e.g.*, *Fairview Twp. v. EPA*, 773 F.2d 517, 525 n.15 (3d Cir. 1985).

25 App. at 977 (Snyder Supp. Decl.); *see also id*. at 978.

26 App. at 974 (Snyder Supp. Decl.).

27 App. at 976 (Snyder Supp. Decl.).

28 *See, e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743 (3d Cir. 1994) ("[A]dmissibility depends in part on the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case." (internal quotation marks omitted)); *see also supra* note 24.

29 *See* App. at 248-49 (Decl. of Gareth Shue).

End of Document

2018 WL 3772863
Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama, Eastern Division.

Tina FEW, Plaintiff,
v.
RECEIVABLES PERFORMANCE MANAGEMENT, Defendant.

CIVIL ACTION NO. 1:17-CV-2038-KOB
|
Signed 08/09/2018

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MEMORANDUM OPINION

KARON OWEN BOWDRE, CHIEF UNITED STATES DISTRICT JUDGE

***1** Plaintiff Tina Few asserts that Defendant Receivables Performance Management violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by contacting her at least 184 times using an automated dialing machine in an attempt to collect a debt for satellite television and internet services. This matter is before the court on Receivables's amended motion for summary judgment (doc. 14).

Receivables moves for summary judgment arguing, in part, that Ms. Few's claim must fail because she consented to receiving the debt-collection calls on her cell phone. Ms. Few responds that she revoked her consent before receiving many of the calls. Receivables, however, replies that Ms. Few offered her consent as part of a contractual agreement.

The court agrees with Receivables's position; Ms. Few could not unilaterally revoke her consent to receive debt-collection calls because she agreed to provide that consent as part of a bargained-for exchange. The court will GRANT Receivables's amended motion for summary judgment (doc. 14).

STANDARD OF REVIEW

Summary judgment is an integral part of the Federal Rules of Civil Procedure. Summary judgment allows a trial court to decide cases when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. When a district court reviews a motion for summary judgment, it must determine two things: (1) whether any genuine issues of material fact exist; and if not, (2) whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56). The moving party can meet this burden by offering evidence showing no dispute of material fact. *Id.* at 322-23.

Once the moving party meets its burden of showing the district court that no genuine issues of material fact exist, the burden then shifts to the non-moving party "to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In reviewing the evidence submitted, the court must "view the evidence presented through the prism of the substantive evidentiary burden," to determine whether the nonmoving party presented sufficient evidence on which a jury could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Cottle v. Storer Commc'n, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). And, the court must view all evidence and inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999).

FACTS

***2** Plaintiff Tina Few and DISH, a satellite communications firm, agreed to a contract to provide Ms. Few with DISH's television and high-speed internet services. As part of the contract, Ms. Few provided DISH with a telephone number ending in 0268 and authorized DISH "and/or any debt collection agency and/or debt collection attorney hired by DISH," to contact her at that number "to recover any unpaid portion of [her] obligation to DISH, through an automated or predictive dialing system or prerecorded messaging system[.]" (Doc. 6-3 at 9; Doc. 6-3 at 15). Ms. Few signed the document immediately above this language.

In April 2017, DISH provided Defendant Receivables Performance Management, a debt-collections firm, with the 0268 phone number for the purpose of recovering an alleged debt on the account. On April 27, 2017, Ms. Few answered a call from Receivables and informed the caller that she no longer wished to receive calls from Receivables. Receivables nevertheless continued calling, ultimately placing, in Ms. Few's estimation, "in excess of 184 telephone calls and text messages." (Doc. 1 at 3 ¶ 12). [1]

DISCUSSION

Ms. Few asserts that Receivable's phone calls and text messages violated the TCPA. The TCPA forbids any person to make a call "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). But calls made "with the prior express consent of the called party" are not prohibited. *Id.*

In this case, Ms. Few contends that, although she may have initially provided DISH—and, by extension, Receivables, which acted as DISH's agent for the purpose of debt collection—with consent to call the 0268 number, she revoked that consent orally on April 27, 2017. Receivables, however, responds that Ms. Few could not unilaterally revoke her prior and express consent because she made it as part of a bargained-for exchange. The court agrees.

Courts should evaluate the revocation of consent under § 227(b)(1)(A) by considering "the common law concept of consent." *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014). These common law concepts allow the unilateral revocation of consent, but only "in the absence of any contractual restriction to the contrary[.]" *See id.* And Ms. Few does not dispute that she contractually agreed to allow Receivables to make the phone calls at issue.

The Eleventh Circuit has not spoken further on how a contractual agreement bears on revocation of consent under § 227(b)(1)(A). But the Second Circuit, applying the same common-law concepts of consent to § 227(b)(1)(A), has persuasively reasoned that a party who grants consent to be contacted within an otherwise-valid contractual provision cannot thereafter unilaterally revoke her consent. *Reyes v. Lincoln Automotive Fin. Servs.*, 861 F.3d 51, 56-57 (2d Cir. 2017). The Second Circuit stated: "We agree with the district court that the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent, and we decline to read such a provision into the act.... It is black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of a counterparty." *Id.*; *accord Kinmon v. J.P. King Auction Co., Inc.*, 276 So. 2d 569, 571 (Ala. 1973) ("Unilateral grumbling cannot modify a bilateral contract."). Ms. Few gave prior express consent to Receivables to make the calls and, because she offered that consent as part of a bargained-for exchange and not merely gratuitously, she was unable to unilaterally revoke that consent. Receivables's phone calls to Ms. Few, therefore, did not violate the TCPA. *See* 47 U.S.C. § 227(b)(1)(A).

***3** Ms. Few asserts that the call records provided by Receivables "suggest that [it] contacted her on another line [that] was not included in" the contract with DISH. (Doc. 18 at 9). Yet Ms. Few fails to support her assertion with any citation and this court, having reviewed the call records, cannot identify any "suggestion" that Receivables made any calls to a phone number other than the 0268 number, which Ms. Few provided to DISH to use for debt-collection purposes as part of her agreement to receive DISH's services. [2]

Finally, Ms. Few observes that she did not have the opportunity for full discovery before Receivables filed

the motion for summary judgment now before the court. True, but the Federal Rules of Civil Procedure provide that a party may file a motion for summary judgment at any time until 30 days after the close of discovery. *See* Fed. R. Civ. P. 56(b). And the court sees little merit in forcing Receivables to bear the costs of discovery given that Ms. Few does not dispute the existence of the contract that precludes her claims under the TCPA. So even taking Ms. Few's view of the facts as true, including her allegation that Receivables used an automated dialer and her description of the April 27, 2017, attempted revocation of consent, Ms. Few's TCPA claims fail as a matter of law. *See* 47 U.S.C. § 227(b)(1)(A).

The court will GRANT Receivables's motion for summary judgment and will ENTER SUMMARY JUDGMENT in Receivables's favor on Ms. Few's TCPA claims.

DONE and **ORDERED** this 9th day of August, 2018.

All Citations

Slip Copy, 2018 WL 3772863

Footnotes

1 The parties contest whether Receivables used an automatic telephone dialing system or an artificial or prerecorded voice in making the calls. The court finds these disputes immaterial in light of its conclusion that the 184 calls fell within § 227(b)(1)(A)'s exception for calls made with the prior express consent of the called party.

2 Furthermore, in her complaint, Ms. Few alleges only that Receivables made calls to the 0268 number. (Doc. 1 ¶ 19).

End of Document

2018 WL 4931980
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

KEVIN A. GARY, Plaintiff,
v.
TRUEBLUE, INC., ET AL., Defendants.

Case No. 17-cv-10544
|
10/11/2018

HON. GERSHWIN A. DRAIN, United States District Court Judge

OPINION AND ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT [#49]

I. INTRODUCTION

***1** Plaintiff Kevin Gary initiated this action against Defendants TrueBlue, Inc. (d/b/a People Ready, Inc. and Labor Ready, Inc.) on February 17, 2017. Dkt. No. 1. In his Complaint, Plaintiff alleged Defendants used prohibited equipment to send him over one-thousand text messages, in violation of 47 U.S.C. § 227(b)(1)(A)(iii), otherwise known as the Telephone Consumer Protection Act ("TCPA"). *Id.* at pp. 6-7 (Pg. ID 6-7).

On June 21, 2018, Defendants filed a Motion for Summary Judgment. Dkt. No. 38. With leave from the Court, Defendants filed a Second Motion for Summary Judgment on August 28, 2018. Dkt. No. 49. Plaintiff filed a Response on September 4, 2018. Dkt. No. 50. Defendants filed a Reply on September 18, 2018. Dkt. No. 52. The Court heard oral argument on October 10, 2018. Dkt. No.

54.
Present before the Court is Defendants' Second Motion for Summary Judgment [#49]. For the reasons set forth below, the Court will GRANT Defendants' Motion.

II. BACKGROUND

People Ready, the successor entity of Labor Ready, is a staffing company that helps place unemployed blue-collar workers with job opportunities in the local community. Dkt. 49-1, p. 2 (Pg. ID 744). Traditionally, workers would arrive at the labor hall around 5:00 a.m. each morning to see whether there was any work available, and jobs would be assigned on a first-come, first-served basis. *Id.* at p. 3 (Pg. ID 745). Today, People Ready uses a messaging platform called WorkAlert to inform workers about potential jobs via text message. *Id.* Hence, workers no longer need to come into the office to learn about job opportunities. *Id.*

If a People Ready branch employee opts to use WorkAlert to fill an open position, the first step in placing a worker with a customer is for the employee to manually open the WorkAlert web browser application on their desktop computer and enter their log-in credentials. *Id.* at p. 4 (Pg. ID 746). Next, the branch employee is directed to the "work search" screen, where they must input criteria to search for potential workers. *Id.* at pp. 4-5 (Pg. ID 746-47). The branch employee then hits the "search" button, which returns a list of potential workers to whom the branch employee can consider sending a text message. *Id.* at p. 5 (Pg. ID 747). Once the branch employee is satisfied with the pool of potential workers, the employee will manually compose a text message that will go out to the workers who have opted into the WorkAlert program. *Id.*

According to Defendants' Director of Platform Solutions -- Cindi Knutson -- there is no way to send a text message through the WorkAlert system without the several steps of human intervention described above. *Id.* at p. 6 (Pg. ID 748). Even more, WorkAlert lacks the capability to randomly or sequentially text potential workers. *Id.*

Plaintiff applied to join Labor Ready on July 7, 2011. Dkt. No. 49-2, p. 6-7 (Pg. ID 754-55). When he did so, Plaintiff completed and signed an application form that contained a provision entitled, "Consent for Telephone Contact." *Id.* at p. 7 (Pg. ID 755). That provision stated, "I give Labor Ready my express permission and consent to call my phone number that I provided on my employment application for the sole purpose of alerting me to new job opportunities at Labor Ready." *Id.*

***2** Since joining Labor Ready, Plaintiff asserts he has received over 5,600 text messages from Defendants through the WorkAlert system. Dkt. No. 50, p. 7 (Pg. ID 945). Plaintiff further asserts that on several occasions he revoked his consent to continue receiving those text messages. *Id.* In fact, on September 17, 2016, February 23, 2017, and February 26, 2017, Plaintiff texted the WorkAlert system, "Please don't contact me anymore." *See* Dkt. No. 50-4. In addition, Plaintiff has two documents from Defendants' branch employee -- Kristina Bellizzi -- dated February 22, 2017, indicating a request that Plaintiff be opted out of receiving messages through the WorkAlert system. *See* Dkt. No. 50-8. Despite this, Plaintiff has continued to receive text messages from WorkAlert. *See* Dkt. No. 50-5, pp. 29-51 (Pg. ID 1002-24); Dkt. No. 50-6. At the same time, it appears that Plaintiff opted back in to receiving text messages and continued to accept jobs via WorkAlert. *See id.*

Through the discovery process, Plaintiff learned that Defendants' WorkAlert system acts in conjunction with a third-party aggregator called mBlox. Dkt. No. 50, p. 7 (Pg. ID 945). According to Defendants, "Text messages leave Work Alert, go to mBlox (SMS provider) and are then sent to each worker's wireless carrier to be delivered to the individual's cell phone." Dkt. No. 50-9, p. 2 (Pg. ID 1072). Plaintiff now claims that mBlox is a fully-automated-text-messaging system regulated by the TCPA. *See* Dkt. No. 50, p. 7 (Pg. ID 945). And because Defendants' WorkAlert system acts in conjunction with mBlox, Plaintiff suggests Defendants' text messages violate section 227(b)(1)(A)(iii) of the TCPA. *See id.*

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) empowers a court to grant summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1968). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Mere allegations or denials in the non-movant's pleadings will not suffice, nor will a mere scintilla of evidence supporting the non-moving party. *Id.* at 248, 252. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *Id.* at 252.

IV. DISCUSSION

A. The Telephone Consumer Protection Act

Congress enacted the TCPA in response to consumer complaints about unwanted calls and text messages from telemarketers. *ACA Int'l v. FCC*, 885 F.3d 687, 691 (D.C. Cir. 2018). The TCPA, in relevant part, prohibits any person from using an automatic telephone dialing system to make a call or send a text message to another person without that person's consent. *See* 42 U.S.C. § 227(b)(1)(A)(iii); *Keating v. Peterson's Nelnet, LLC*, 615 Fed. Appx. 365, 370 (6th Cir. 2015). Under the Act, an automatic telephone dialing system is defined as equipment with the "capacity" (1) to store or produce telephone numbers to be called, using a random or sequential number generator, and (2) to dial such numbers. 42 U.S.C. § 227(a)(1).

Congress delegated authority to the Federal Communications Commission ("FCC") to prescribe regulations enforcing the TCPA. *See* 42 U.S.C. § 227(b)(2). Since then, the FCC has issued a series of orders and rulings. *See e.g.*, *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014 (F.C.C. July 3, 2003); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559 (F.C.C. Jan. 4, 2008); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (F.C.C. July 20, 2015) (hereinafter "2015 Ruling").

***3** Relevant to the case at hand, the FCC's 2015 Ruling sought to clarify two open questions: (1) what did it mean for a telephone system to have the "capacity" to perform the autodial functions enumerated in section 227(a)(1) of the TCPA; and (2) what did those functions entail? *See* 2015 Ruling, 30 FCC Rcd. at 7974-75. First, the FCC determined that the term "capacity" referred not only to a system's present capabilities, but also to its "potential functionalities." 2015 Ruling, 30 FCC Rcd. at 7974. Second, the FCC noted that dialing equipment could store or produce, and dial random or sequential numbers, and that this included calling from a set list. *Id.* at 7971-72. Further, the FCC reaffirmed that a basic

function of an autodialer is having the ability to dial thousands of numbers in a short period of time without human intervention. *Id.* at 7975. But the FCC failed to clarify whether a system that did require human intervention could still qualify as an automatic telephone dialing system. *See id.*

Faced with confusion, the D.C. Circuit recently set aside the above portions of the FCC's decision. *See ACA Int'l*, 885 F.3d at 692; 28 U.S.C. § 2342(1) ("The court of appeals...has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of – all final orders of the Federal Communications Commission."). The D.C. Circuit held:

> The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the "capacity" to perform the necessary functions. We must therefore set aside the Commission's treatment of those matters.

ACA International, 885 F.3d at 703.

In *ACA International*, eleven petitions for review of the FCC's 2015 Ruling were consolidated in the D.C. Circuit. Sixth Circuit case law suggests that this makes the D.C. Circuit's decision to set aside the 2015 Ruling binding on this Court. Indeed, in *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, the Sixth Circuit recognized that once the Multidistrict Litigation Panel assigned petitions challenging an FCC rule to the D.C. Circuit, that court became the sole forum for addressing the validity of the rule. *See* 863 F.3d 460, 467 (6th Cir. 2017) (citing *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008)). The same should hold true here.

In short, because of the D.C. Circuit's holding in *ACA International*, this Court need not defer to the FCC's understanding of the capacity and functions of an autodialer under the TCPA. *See Keyes v. Ocwen Loan Servicing, LLC*, 2018 WL 3914707, at *6 (E.D. Mich. Aug. 16, 2018) (holding this Court need not defer to the FCC's declarations regarding the capacity and functions of an automatic telephone dialing system). Since the *ACA International* decision, there has been no Sixth Circuit case law interpreting the definition of an autodialer. Therefore, the Court must look to the plain language of the statute to resolve the pending motion. *See Marshall v. CBE Grp., Inc.*, 2018 WL 1567852, at *5 (D. Nev. Mar. 30, 2018) (holding in light of the *ACA International* decision, the court will not stray from the statutory language of the TCPA).

B. Defendants' Motion for Summary Judgment

Here, Defendants have moved for summary judgment raising four arguments. Dkt. No. 49. First, Defendants argue summary judgment is warranted because the TCPA does not prohibit the texting of employee-benefitting job offers. *See* Dkt. No. 49, p. 19 (Pg. ID 734). Second, Defendants argue its WorkAlert system is not an automatic telephone dialing system as defined by the plain language of the TCPA. *See id.* at p. 21 (Pg. ID 736). Third, Defendants argue WorkAlert is not an automatic telephone dialing system under the FCC's now vacated understanding of the TCPA because the system requires several steps of human intervention to send text messages. *See id.* at p. 24 (Pg. ID 739). Finally, Defendants argue Plaintiff consented to its text messages, thus establishing a complete defense. *See id.* at p. 26 (Pg. ID 741).

***4** Here, the Court agrees that Defendants' WorkAlert system does not qualify as an automatic telephone dialing system under the plain language of the TCPA. Accordingly, Defendants are entitled to summary judgment.

> 1. Defendants are Entitled to Summary Judgment because there is no Evidence that its WorkAlert System is an Automatic Telephone Dialing System as Defined by the TCPA.

Through the discovery process, Plaintiff learned, "Text messages leave Work Alert, go to mBlox (SMS provider) and are then sent to each worker's wireless carrier to be delivered to the individual's cell phone." *See* Dkt. No. 50-9. Hence, Plaintiff no longer asserts Defendants' WorkAlert system by itself qualifies as an automatic telephone dialing system. *See* Dkt. No. 50, p. 7 (Pg. ID. 945). Instead, he argues Defendants combine its system with a third-party aggregator -- mBlox -- whose equipment is fully automated. *See id.* This combination, Plaintiff

suggests, makes Defendants liable under the TCPA. *See id.* In support, Plaintiff cites to the FCC's 2015 Ruling where the Commission held, "parties cannot circumvent the TCPA by dividing ownership of dialing equipment." *See id.* at p. 10 (Pg. ID 948); 2015 Ruling, 30 FCC Rcd. at 7977.[1] But despite this ruling, Plaintiff fails to demonstrate that WorkAlert, when combined with mBlox, has the capacity to randomly or sequentially dial or text phone numbers.

a. There is no Evidence that WorkAlert and/or mBlox can Store or Produce Numbers to be Called, Using a Random or Sequential Number Generator.

To qualify as an automated telephone dialing system under the TCPA, a piece of equipment must have the capacity to (1) store or produce telephone numbers to be called, using a random or sequential number generator, and (2) dial such numbers. 42 U.S.C. § 227(a)(1).

Here, Defendants presented an affidavit from its Director of Platform Solutions stating WorkAlert lacks the capability to randomly or sequentially dial or text potential workers. *See* Dkt. 49-1, p. 6 (Pg. ID 748). Still, Plaintiff claims Defendants' third-party aggregate, mBlox, has this capacity because mBlox uses programs such as "Java API, XML, and SMPP servers." *See* Dkt. No. 50, p. 9 (Pg. ID 947). However, Plaintiff's evidence in support of this claim is lacking.

Plaintiff first offers a document titled, "Technical Specifications." Dkt. No. 50-10, p. 2 (Pg. ID 1074). The document, among other things, contains the following text box:

> Feature: Supported: Additional Information: API Options √ Java API, XML, or SMPP

Id. Plaintiff contends that this document shows mBlox uses Java API, XML, and SMPP. Dkt. No. 50, p. 9 (Pg. ID 947).

Next, Plaintiff attempts -- unsuccessfully -- to explain Java API and SMPP through a series of documents he obtained from the Internet. For example, Plaintiff offers an excerpt of an article from dzone.com titled, "Random Number Generation in Java." Dkt. No. 50-12. Plaintiff provides no additional commentary on this article, and therefore, asks the Court to make the inferential leap that this document proves mBlox can randomly generate and text phone numbers.

In addition, Plaintiff offers a document from quora.com titled, "How do SMPP server works?" Dkt. No. 50-11, p. 3 (Pg. ID 1081). Remarkably, this document comes from an Internet forum where, it appears, anyone with an Internet connection can log on and answer posted questions. *See id.* Plaintiff provides no information about who these individuals on the forum are or the basis for their knowledge. Moreover, Plaintiff specifically directs the Court's attention to a user's answer that reads: "SMPP is an application layer protocol, [w]hich is used in telecom industry to message transfer." However, even if true, this in no way demonstrates that mBlox has the capacity to randomly or sequentially dial or text phone numbers.

***5** As Defendants correctly note, Plaintiff had the opportunity to add mBlox as a co-defendant, conduct discovery to see how mBlox interacts with Defendants' WorkAlert system, and even obtain evidence directly from mBlox to see how these Java API and SMPP programs operate within its system. *See* Dkt. No. 52, p. 6 (Pg. ID 1098). Plaintiff did none of these things. In contrast, Defendants have presented evidence that WorkAlert lacks the capability to randomly or sequentially dial or send text messages. *See* Dkt. 49-1, p. 6 (Pg. ID 748). Hence, even viewing all the evidence in a light most favorable to Plaintiff, no reasonable juror could decide in Plaintiff's favor on this issue.

b. WorkAlert and/or mBlox are not Automatic Telephone Dialing Systems Irrespective of Whether they have Automated Functions.

In a now vacated portion of its 2015 Ruling, the FCC reaffirmed that basic functions of an autodialer are to "dial numbers without human intervention" and "dial thousands of numbers in a short period of time." 2015 Ruling, 30 FCC Rcd. at 7975. Keying on this language, Plaintiff raises three arguments.

First, Plaintiff argues that WorkAlert can operate without human intervention because its third-party aggregate, mBlox, allegedly uses a program called "Auto Retry" that resends undelivered text messages for up to a

seventy-two-hour period. Dkt. No. 50, p. 9 (Pg. ID 947). Second, Plaintiff argues WorkAlert and/or mBlox can operate without human intervention because he received text messages about job opportunities when Defendants' branch office was closed. *Id.* Finally, Plaintiff argues WorkAlert and/or mBlox can operate without human intervention because he has received immediate responses from the system in less than a second. *See* Dkt. No. 50, p. 15 (Pg. ID 953). Specifically, Plaintiff references two occasions where he received automated opt-out messages from WorkAlert. *See* Dkt. No. 50-7.

With respect to this last argument, the Court has already held that automatic opt-out text messages are generally not actionable under the TCPA. *See* Dkt. No. 45, p. 21 (Pg. ID 697) (citing 2015 Ruling, 30 FCC Rcd. at 8015). Indeed:

> A one-time text sent in response to a consumer's request for information does not violate the TCPA or the Commission's rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information.

2015 Ruling, 30 FCC Rcd. at 8016. But more to the point, the plain language of the TCPA does not prohibit the use of devices with automated functions. *See* 42 U.S.C. § 227(a)(1). Instead, the statute requires a showing that the system has the capacity to randomly or sequentially dial or text phone numbers. *See id.* Here, Plaintiff has not made such a showing.

> c. That WorkAlert and/or mBlox Operate via a Web Browser does not make these Systems Automatic Telephone Dialing Systems Under the TCPA.

The *ACA International* did not set aside the FCC's 2015 Ruling in its entirety. In one portion of the Ruling that remains good authority today, the FCC stated: "The equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier's web portal is an 'automatic telephone dialing system' as defined in the TCPA." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8018 (F.C.C. July 20, 2015). The FCC reasoned, "the equipment used to send these messages...must necessarily store, or at least have the capacity to store, large volumes of numbers to be called." *Id.* Further, "Even assuming that the equipment does not actually use a random or sequential number generator, the capacity to do so would make it subject to the TCPA." *Id.* at 8019.

***6** From this, Plaintiff argues that because WorkAlert sends messages through a web browser, this is a categorical violation of the TCPA. *See* Dkt. No. 50, p. 13-14 (Pg. ID 951-52). The Court will disagree. While there is no Sixth Circuit case law addressing this issue, the Northern District of Illinois squarely rejected this argument in *Blow v. Bijora, Inc.* 191 F. Supp. 3d 780, 788-89 (N.D. Ill. 2016).

At issue in *Blow* was whether the defendant violated the TCPA by using a software-based messaging transmission platform to send its customers text messages. *Id.* at 782-83. There, it was undisputed that sending a text through the messaging platform required multiple steps of human intervention. *See id.* at 783. For example, the defendant's employees had to manually log in to the system, enter the phone number(s), and draft the text message. *Id.* Still, the plaintiff argued that the FCC's 2015 Ruling established automatic liability under the TCPA for any person using an Internet-to-phone messaging platform. *Id.* at 788. The district court disagreed. *Id.* at 788-89.

The district court emphasized, "While the 2015 FCC Order expanded the definition of an ATDS, the Order did not make a blanket proclamation that all internet-to-phone platforms are autodialers categorically. Instead, the FCC explicitly stated that whether a particular piece of equipment was an ATDS was a 'case-by-case determination.' " *Id.* Ultimately, the district court concluded that the defendant did not violate the TCPA because there was no evidence that the messaging platform had the capacity to store or generate numbers -- whether randomly, sequentially, or from a defined list -- on its own, and without human intervention. *Id.* at 789. This Court finds *Blow* persuasive.

Here, like in *Blow*, there is no evidence in the record that WorkAlert and/or mBlox has the capacity to randomly or sequentially text numbers, as required by the plain language of the TCPA. *See id.* To the contrary, Defendants' Director of Platform Solutions explicitly stated that WorkAlert lacks this capability. *See* Dkt. No. 49-1, p. 6 (Pg. ID 748). Hence, Defendants' use of these web-based messaging platforms does not automatically violate the statute.

This conclusion is consistent with the overall framework of the *ACA International* decision. 885 F.3d 387. Indeed, it appears that the FCC's 2015 Ruling presumed Internet-to-text messaging platforms could be automatic telephone dialing systems under the TCPA because they have the potential "capacity" to use a random or sequential number generator. *See* 2015 Ruling, 30 FCC Rcd. at 8018-19. But in *ACA International*, the D.C. Circuit explicitly set aside the FCC's expansive definition of the term "capacity." 885 F.3d at 703. Instead, the D.C. Circuit emphasized:

> the question whether equipment has the "capacity" to perform functions of an ATDS ultimately turns less on labels such as "present" and "potential" and more on considerations such as how much is required to enable the device to function as an autodialer.

Id. at 696. Here, there is simply no evidence in the record demonstrating WorkAlert and/or mBlox either has or could have this capacity.

Moreover, it is unclear that WorkAlert and/or mBlox are even the type of Internet-to-phone text messaging platforms contemplated by the FCC's 2015 Ruling. *See* 2015 Ruling, 30 FCC Rcd. at 8018-19 (finding the equipment at issue stores and produces the wireless telephone numbers to be called, and it does so using random or sequential number generators to populate potential domain name addresses); *Derby v. AOL, Inc.*, 2015 WL 5316403, at *5 (N.D. Cal. Sept. 11, 2015) (holding such a system involves messages that originate as electronic mail (e-mail) and are sent to a combination of the recipient's unique telephone number and the wireless provider's domain name). Here, there is simply no evidence in the record showing WorkAlert and/or mBlox can operate in this manner. Accordingly, Defendants are entitled to summary judgment.

***7** 2. Because there is no Evidence that Defendants' WorkAlert System or its Third-Party Aggregate are Automatic Telephone Dialing Systems Under the TCPA, Defendants' Remaining Arguments are Immaterial.

Defendants raised a total of four arguments in support of its summary judgment motion. The Court agreed that WorkAlert and/or mBlox are not automatic telephone dialing systems as defined by the plain language of the TCPA. Hence, it is not necessary to reach the merits of Defendants' remaining arguments.

V. CONCLUSION

For the reasons discussed herein, the Court will GRANT Defendants' Second Motion for Summary Judgment [#49].

IT IS SO ORDERED.

Dated: October 11, 2018
s/Gershwin A. Drain

HON. GERSHWIN A. DRAIN

United States District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, October 11, 2018, by electronic and/or ordinary mail.
s/Teresa McGovern

Case Manager Generalist

All Citations

Slip Copy, 2018 WL 4931980

Footnotes

1 This portion of the FCC's 2015 Ruling was not set aside in *ACA International*.

End of Document

2018 WL 3647046
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

Kevin A. GARY, Plaintiff,
v.
TRUEBLUE, INC., Defendant.

Case No. 17-cv-10544
|
Signed 08/01/2018

Attorneys and Law Firms

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ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [20] AND GRANTING DEFENDANT'S MOTION TO COMPEL DEPOSITION TESTIMONY OF PLAINTIFF [34]

GERSHWIN A. DRAIN, United States District Judge

I. INTRODUCTION

***1** On February 21, 2017, Plaintiff Kevin A. Gary filed suit against Defendant TrueBlue, Inc., d/b/a People Ready, Inc., d/b/a Labor Ready, Inc., alleging that Defendant used an automatic telephone dialing system ("ATDS") to send him thousands of text messages without his consent in negligent or willful and knowing violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Dkt. No. 1, pg. 2 (Pg. ID 2).

Plaintiff filed a summary judgment motion on April 14, 2018, more than a month before the May 21, 2018 discovery cutoff date. Dkt. No. 20. Defendant moved to extend the time to respond to Plaintiff's summary judgment motion, citing the need to depose Plaintiff. Dkt. No. 25, pg. 2 (Pg. ID 246). Notwithstanding its Motion to Extend Response Time, Defendant responded to Plaintiff's summary judgment motion on May 7, 2018. Dkt. No. 30. And on May 8, 2018, the Court granted Defendant's motion to extend the deadline to respond. Dkt. No. 31.

Plaintiff sat for a deposition on May 11, 2018. *See* Dkt. No. 34, pg. 3 (Pg. ID 428). The deposition was unsatisfactory to the Defendant, as it moved on June 6, 2018 to compel deposition testimony from Plaintiff. [1] *See id.* In that motion, Defendant also requested attorney fees and sanctions. *See id.* On June 8, 2018, Plaintiff responded to the motion to compel. Dkt. No. 35. As of this writing, the Defendant has not submitted a reply in support of its motion to compel, and the time to do so has expired.

Presently before the Court is Plaintiff's Motion for Summary Judgment [20]. The motion is fully briefed. Also before the Court is Defendant's Motion to Compel Deposition Testimony of Plaintiff and for Attorney's Fees and Sanctions [34]. That motion is sufficiently briefed. The Court heard both motions on Tuesday, July 17, 2018 at 2:00 p.m. During that hearing, the Court DENIED Plaintiff's Motion for Summary Judgment [20], GRANTED Defendant's Motion to Compel Deposition Testimony [34], and DENIED Defendant's request for attorney's fees and sanctions [34]. In this Opinion and Order, the Court will outline its reasoning for those decisions.

II. FACTUAL BACKGROUND

Plaintiff applied to join Labor Ready on July 7, 2011. Dkt. No. 30, pg. 7 (Pg. ID 311). Labor Ready, the predecessor to People Ready, is a staffing company that connects workers with short-term jobs. *Id.* at pg. 3 (Pg. ID 307). Seeking such employment opportunities, Plaintiff completed and signed the Labor Ready application form. Dkt. No. 30-3, pg. 1 (Pg. ID 335). The application form contained a provision entitled "Consent for Telephone Contact." *Id.* at pg. 2 (Pg. ID 336). That provision provided "express permission and consent" to Labor Ready to contact the applicant at the telephone number listed on the application, in order to alert them of potential job assignments. *Id.*

In addition to traditional in-person placement through its local branches, People Ready (and before it, Labor Ready) utilizes a text messaging platform, WorkAlert, as a method of connecting workers with job assignments. Defendant describes in detail the steps by which potential

workers are alerted to new jobs through WorkAlert. Dkt. No. 30-1, pgs. 3–5 (Pg. ID 329–331). Branch employees search the People Ready database for workers in a specific geographic area with the requisite skills for a particular job. *Id.* at pg. 4 (Pg. ID 330). Branch employees can refine their search using several parameters, including whether a worker has checked in with the branch or accepted a job within the last thirty days. *Id.* Employees can manually include or exclude specific persons from the resulting pool of potential workers. *Id.*

***2** Once the desired group of workers is finalized, a branch employee then composes a text message that will be sent to the pool. *Id.* Defendant maintains that there are no "form" or pre-written text messages for this process; rather, an employee personally drafts each text message. *Id.* The messages contain only the information relevant to a specific employment opportunity. *See* Dkt. No. 30-4. Once a message is complete, a branch employee clicks "send" and the message is sent to a group of potential workers. *Id.* Defendant alleges that the WorkAlert system limits the total number of people that can be texted at a single time, but the Defendant has not specified that number. *Id.*

In her declaration in support of Defendant's Opposition to Summary Judgment, Cindi Knutson, the Director of Platform Solutions for TrueBlue, Inc., states that the WorkAlert system cannot send text messages without the above-described human direction, nor is it capable of randomly or sequentially dialing or texting workers. Dkt. No. 30-1, pg. 5 (Pg. ID 331). Defendant also maintains that there is no technology that could be added to the WorkAlert system that would allow it to text groups of workers automatically or without human intervention. *Id.*

Plaintiff asserts that the WorkAlert system has the capacity to send text messages without human intervention and to independently dial numbers from a set list. Dkt. No. 21, pgs. 13–14 (Pg. ID 85–86). He references occasions on which he would text the system and receive a reply instantaneously. *Id.* at pg. 8 (Pg. ID 80); *see, e.g.*, Dkt. No. 30-4, pg. 1 (Pg. ID 337, lns. 2–3). Plaintiff claims that the WorkAlert system dials a fixed set of numbers through the "Smart Group" and "Fixed Group" features. Dkt. No. 33, pgs. 9–10 (Pg. ID 391–392). Smart groups allow branch employees to save specific search parameters to easily search for workers that fit certain criteria. Dkt. No. 33-3, pg. 2 (Pg. ID 407). Fixed groups save a specific list of workers, and the list remains the same until manually changed. Dkt. No. 21-9, pg. 7 (Pg. ID 209).

Plaintiff concedes that he signed the application which included the "express consent" provision. Dkt. No. 33, pg. 12 (Pg. ID 394). He explains that he needed work, so he signed the application and accepted jobs through WorkAlert when he could. *Id.* Plaintiff maintains, however, that the text messages from WorkAlert became "overburdening," leading him to attempt to revoke his consent. Dkt. No. 34, pg. 26 (Pg. ID 451).

He alleges that the original written consent secured through his signature on the Labor Ready application from July 2011 expired in 2013. Dkt. No. 33, pg. 13 (Pg. ID 395). Plaintiff also asserts that he attempted to revoke his consent in person at local branches, by calling branches and by replying to WorkAlert. Dkt. No. 21, pgs. 6–7 (Pg. ID 78–79). Plaintiff provides an excerpt from the text message log between himself and WorkAlert to show the instances where he replied to the system, asking not to be contacted. *Id.* at pg. 29 (Pg. ID 134, lns. 1883–1884); *see, e.g.*, Dkt. No. 21-5, pg. 28 (Pg. ID 133, lns. 1858, 1862). He offers a screenshot of what appears to be his profile in the WorkAlert system, displaying a notification that, on February 22, 2017, he revoked his consent by changing his "Best Time to Call" to "Do Not Contact." Dkt. No. 21-8, pg. 2 (Pg. ID 201).

Plaintiff continued to receive text messages, despite his alleged efforts to opt out of WorkAlert. Dkt. No. 21, pg. 7 (Pg. ID 79). He states that WorkAlert sent him at least 4,940 texts without his consent. Dkt. No. 33, pg.14 (Pg. ID 396); *see* Dkt. No. 21-5, pgs. 2–51 (Pg. ID 107–156).

***3** Defendant disputes Plaintiff's assertions regarding revocation of consent. Defendant points to a text message log between the WorkAlert system and Plaintiff to highlight at least eight occasions on which Plaintiff opted into the WorkAlert system by texting "yes" or "start." Dkt. No. 30, pg. 12 (Pg. ID 316); *see* Dkt. No. 30-4; pgs. 1–30 (Pg. ID 337–366; lns. 2, 842–46, 1,236–37; 3,218–19, 4,008-09; 5,209; 5,232). On several of these occasions, Plaintiff texted "start" immediately after opting out of the WorkAlert system. *Id.* Defendant also asserts that the Plaintiff manifested his consent by accepting hundreds of job offers through WorkAlert. Dkt. No. 30, pgs. 7–11 (Pg. ID 311–315); *see* Dkt. No. 30-5, pgs. 1–10 (Pg. ID 367–376).

Plaintiff claims that all but one of the texts sent from his phone to the WorkAlert system with the messages "yes" or "start" were sent, not by him, but by People Ready's branch employees. Dkt. No. 21, pgs. 6, 9 (Pg. ID 78, 81); *see* Dkt. No. 34, pgs. 39, 54–55, 58 (Pg. ID 464, 479–480, 483). During his deposition, Plaintiff vehemently maintained that when he visited local branches to inquire about work, branch employees requested his phone and then opted into the WorkAlert system, without his consent. *See, e.g.*, Dkt. No. 34, pgs. 39, 54–55 (Pg. ID 464, 479–480). When confronted with an opt in message that was sent after 11 p.m., Plaintiff conceded that he sent that message, but he still attributed the other opt in messages to branch employees. *Id.* at pg. 58 (Pg. ID 483).

Plaintiff also disputes that his acceptance of job offers through WorkAlert is a manifestation of his consent to receive text alerts. According to Plaintiff, he had no choice but to accept job offers through the WorkAlert system. He needed to work, and he claims that Defendant's employees routinely discouraged him from inquiring about job opportunities at the local branches, whether in person or through phone calls. Dkt. No. 21, pg. 3 (Pg. ID 75). According to Plaintiff, he consistently attempted to secure work through these alternative methods, and was strongly discouraged from doing so. *Id.* at pgs. 2–3 (Pg. ID 74–75). Throughout his deposition, Plaintiff repeated that the only way to get a job with the Defendant is through WorkAlert. *See, e.g.*, Dkt. No. 34, pgs. 51, 55–56 (Pg. ID 476, 480–481).

Finally, Plaintiff notes that WorkAlert's "welcome" messages state that the system will send sixty messages a month to the user. Dkt. No. 33, pg. 13 (Pg. ID 395); Dkt. No. 21-7, pg. 2 (Pg. ID 198); *see, e.g.*, Dkt. No. 30-4, pg. 1 (Page ID 337, ln. 3). Yet Plaintiff received hundreds of messages per month. Dkt. No. 33, pg. 13 (Pg. ID 395); *see generally* Dkt. No. 30-4, pg. 1 (Pg. ID 337).

Defendant denies that its policy or employees prevent workers from seeking employment through means other than the WorkAlert system. Dkt. No. 30, pg. 11 (Pg. ID 315). Defendant claims that Plaintiff continued to secure job offers, even after he had opted out of WorkAlert (and was therefore not receiving text notifications). *Id.*; *see also* Dkt. No. 30-5, pg. 1 (Pg. ID 367). Defendant denies sending Plaintiff 5,600 text messages. Dkt. No. 30, pg. 12 (Pg. ID 316).

With respect to damages, Plaintiff claims that the texts he received used up the minutes in his phone plan and violated his privacy. Dkt. No. 21, pgs. 2–3 (Pg. ID 74–75); *see* Dkt. No. 21-12, pgs. 2–5 (Pg. ID 221–224). He also alleges that, because he repeatedly revoked his consent, Defendant's violations of the TCPA were willful and knowing, entitling him to treble damages under the statute. Dkt. No. 21, pg. 3 (Pg. ID 75). Defendant challenges the evidence presented by Plaintiff with regard to his cell phone plan as unidentifiable and impossible to authenticate or understand. Dkt. No. 30, pgs. 2, 18 (Pg. ID 306, 322).

III. LEGAL STANDARD

***4** Federal Rule of Civil Procedure 56(c) empowers a court to grant summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1968). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Mere allegations or denials in the non-movant's pleadings will not suffice, nor will a mere scintilla of evidence which supports the non-moving party. *Id.* at 248, 252, 106 S.Ct. 2505. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *Id.* at 252, 106 S.Ct. 2505.

IV. DISCUSSION

Plaintiff brought this suit asserting violations of the TCPA, and moved for summary judgment on his claim on April 14, 2018. Dkt. No. 20. Additionally, the Defendant has moved to compel the Plaintiff to sit for a deposition. Dkt. No. 34.

For the reasons that follow, the Court will deny Plaintiff's Motion for Summary Judgment, and will grant Defendant's Motion to Compel. Dkt. Nos. 20, 34. The

Court will first address Plaintiff's summary judgment motion.

A. Plaintiff's Motion for Summary Judgment [20]

Plaintiff alleges that Defendant sent thousands of text messages to his cellular phone in violation of the TCPA, 47 U.S.C. § 227. But the Court concludes that reasonable jurors could disagree about whether the Defendant violated the TCPA, and therefore, the Court will deny Plaintiff's summary judgment motion.

To state a TCPA claim for calls made to a cellular phone, [2] a plaintiff must establish that: (1) a call was placed to a cellular or wireless phone, (2) by using an automatic dialing system or by leaving an artificial or pre-recorded message, and (3) without prior consent of the recipient-plaintiff. *Duchene v. OnStar, LLC*, No. 15-13337, 2016 U.S. Dist. LEXIS 97129, 2016 WL 3997031 (E.D. Mich. July 26, 2016) (citing 47 U.S.C. § 227(b)(1)(A)). The Act authorizes a private right of action and plaintiffs may recover at least $500 in damages for each call made (or text message sent) in violation of the statute, and up to treble damages for each "willful or knowing" violation. 47 U.S.C. § 227(b)(3).

Plaintiff alleges that the WorkAlert system qualifies as an autodialer; that consent to contact him on his cell phone—initially provided on his Labor Ready application—expired in 2013; that he later attempted to revoke his consent on numerous occasions; and that Defendant violated the TCPA knowingly and willfully, entitling Plaintiff to treble damages.

As recent developments in courts' construction of the TCPA impact this litigation, the Court will discuss these developments before addressing the merits of Plaintiff's claim.

1. State of the TCPA

Congress enacted the TCPA in 1991 based on findings that the "use of the telephone to market goods and services to the home and other businesses" had become "pervasive due to the increased use of cost-effective telemarketing techniques." 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394. "Many consumers," Congress determined, "[were] outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." *Id.* § 2(6)–(7).

The TCPA delegates authority to the Federal Communications Commission ("FCC") to "prescribe regulations to implement the requirements of this subsection." *Id.* at § 227(b)(2). The Hobbs Act, 28 U.S.C. § 2342(1), and the Federal Communications Act, 47 U. S. C. § 402(a), operate together to vest jurisdiction to enjoin, set aside, annul or suspend FCC regulations exclusively in the United States Court of Appeals (excluding the Court of Appeals for the Federal Circuit). *Luna v. Shac*, 122 F.Supp.3d 936, 938–939 (N.D. Cal. 2015). Thus, "the Hobbs Act jurisdictionally divests district courts from ignoring FCC rulings interpreting the TCPA." *Id.*

***5** Since the TCPA was enacted in 1991, the FCC has issued a series of orders and rulings prescribing regulations in furtherance of the Act. *See, e.g.*, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673 (June 26, 2003) [hereinafter *2003 Order*]; *In re Rules Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd 559 (F.C.C. Dec. 28, 2007) [hereinafter *2008 Ruling*]. Some of these orders are contentious or vague, and thus, successive orders have reiterated, confirmed, or clarified previous FCC orders and decisions. *See, e.g.*, 2008 Ruling, 23 FCC Rcd 559.

In March of 2018, the D.C. Court of Appeals vacated parts of the FCC's 2015 order. *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Most relevant to the instant case, the court set aside the FCC's broad understanding of the term "capacity" (as that word is used in the definition of an autodialer in 47 U.S.C. § 227(a)(1)), as well as the order's descriptions of the functions a device must perform to qualify as an autodialer. *Id.* at 703. The *ACA Int'l* decision is indicative of the unsettled and contradictory nature of the FCC's orders and the case law on these issues.

The D.C. Circuit ruling is binding in the Ninth Circuit, and Sixth Circuit authority suggests that it is binding on this Court as well. First, the Ninth Circuit held that, when challenges to agency regulations in more than one federal court of appeals are consolidated and assigned to a single circuit court, the resulting decision is binding outside of that circuit. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008). And in *ACA Int'l*, eleven petitions for review of the 2015 FCC Order were

consolidated in the D.C. Circuit Court of Appeals. *See Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, 2018 WL 2229131, 2018 U.S. Dist. LEXIS 83744 (D. Ariz. May 14, 2018).[3] District courts in the Ninth Circuit, of course, have followed *ACA Int'l*. *See Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, 2018 U.S. Dist. LEXIS 55223 (D. Nev. Mar. 30, 2018) ("[T]he D.C. Circuit's decision is binding on the Court...."); *see also Herrick,* 2018 WL 2229131, at *7, 2018 U.S. Dist. LEXIS 83744, at *17 ("[T]his Court will not defer to any of the FCC's 'pertinent pronouncements' regarding the first required function of an ATDS.").

No Sixth Circuit case has a holding analogous to *Peck*. Yet the Sixth Circuit has cited *Peck* as persuasive authority, noting that its "result makes sense in light of the procedural mechanism Congress has provided for challenging agency rules." *Sandusky Wellness Ctr., Ltd. Liab. Co. v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017). In *Sandusky*, the Sixth Circuit held that another FCC regulation (the Solicited Fax Rule) was no longer valid because it had been struck down by the D.C. Circuit. *Id.*

This suggests that *ACA Int'l*, which set aside the FCC's clarifications of the types of equipment that qualify as an ATDS, renders those aspects of the 2015 FCC Order invalid and not binding on this Court. Pursuant to *Sandusky*, the Sixth Circuit has likely adopted the logic set out in *Peck*.

But the Court need not decide whether *ACA Int'l* is binding here, as the Plaintiff will not prevail under any potentially applicable TCPA standard. First, under *ACA Int'l*, the Plaintiff has not proved that all reasonable persons would conclude that the Defendant has violated the TCPA. And second, Plaintiff has failed to make this showing under the now-vacated FCC orders, which offer Plaintiff the most expansive and favorable construction of the TCPA. Therefore, the Court will deny Plaintiff's summary judgment motion.

2. Merits of Plaintiff's TCPA Claim

***6** Plaintiff alleges that Defendant violated the TCPA by using an ATDS to text his cellphone without his consent. Plaintiff claims that the WorkAlert system Defendant uses to contact potential workers like Plaintiff is an ATDS. He also asserts that Defendant lacked consent to contact him because the written consent from his Labor Ready application expired in 2013. Alternatively, Plaintiff argues that he repeatedly revoked his consent to be contacted. Plaintiff alleges that Defendant's violations were knowing and willful, entitling Plaintiff to treble damages. The Court disagrees and will therefore deny Plaintiff's summary judgment motion.

Because the threshold issue is whether the WorkAlert system is an autodialer, the Court will first discuss that issue.

a) WorkAlert as an ATDS

The TCPA defines an ATDS as equipment which "has the capacity (1) to store or produce telephone numbers to be called, using a random or sequential number generator; and (2) to dial such numbers." 47 U.S.C. § 227(a)(1)(A)–(B). In 2008, 2012, and 2015, the FCC issued orders stating that an ATDS may include equipment that automatically dials numbers from a stored list without human intervention, even when the equipment lacks the capacity to store or produce telephone numbers using a random or sequential number generator. *See Sterk v. Path, Inc.*, 46 F.Supp.3d 813, 818 (N.D. Ill. 2014). The FCC has emphasized the importance of human intervention (or lack thereof) in determining whether equipment is an autodialer. *See, e.g.*, 2003 FCC LEXIS 3673, at *205 (F.C.C. June 26, 2003). As discussed below, the D.C. Circuit Court of Appeals has vacated these regulations. *ACA Int'l*, 885 F.3d 687.

Plaintiff argues that WorkAlert is an ATDS because WorkAlert can both (1) dial numbers from a set list (through the "smart" or "fixed" group functions) and (2) reply to text messages instantaneously without human intervention. Yet the Court finds that Plaintiff fails to establish that these characteristics make the system an ATDS as a matter of law.

b) Dialing from a Set List

Plaintiff asserts that when a branch employee sends a text message to a group of potential workers using a "fixed group," WorkAlert is dialing a set list of numbers in violation of the TCPA. *See* 30 FCC Rcd 7961, 7974

(F.C.C. July 10, 2015). When a branch employee runs a search of the worker database to find persons who fit criteria relevant to a particular job assignment, the employee can save the resulting list of workers in a fixed group. Dkt. No. 21-9, pg. 7 (Pg. ID 209). When another job opportunity requires the same criteria, the branch employee can simply pull up the fixed group instead of running a new search. *Id.*

Plaintiff claims that when WorkAlert sends a text message using a fixed group, it is dialing from a set list of numbers, thus making it an autodialer pursuant to the FCC's 2003 and 2015 orders. Dkt. No. 33, pg. 9 (Pg. ID 391). The Court finds that this argument lacks merit.

To begin, the relevant portion of the 2015 FCC Order was vacated in *ACA Int'l*, and so that order no longer binds this Court. *See ACA Int'l*, 885 F.3d at 703 ("[T]he Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisonmaking."). Specifically, the *ACA Int'l* court found that the FCC 2015 order supported two competing interpretations of an autodialer. *Id.* On the one hand, the 2015 order indicated that to qualify as an ATDS, a device must be able to generate and dial random or sequential numbers. *Id.* at 702.

On the other hand, the order reaffirmed the Commission's previous rulings, which supported a conflicting position: that a device can be considered an autodialer even if it can only dial numbers from an externally supplied list. *Id.* The D.C. Circuit held that "the Commission cannot ... espouse both competing interpretations in the same order." *Id.* at 703. Applying *ACA Int'l*, the FCC's rulings—including the ATDS definition which covered equipment that can only dial numbers from a set list—are no longer valid. *See Sandusky*, 863 F.3d 460.

***7** Because the *ACA Int'l* decision vacated the FCC's orders regarding the definition of an ATDS, the Court must examine the statutory language. *See Marshall,* 2018 WL 1567852, at *5, 2018 U.S. Dist. LEXIS 55223, at *12 ("[T]he Court will not stray from the statute's language...."); *see also Herrick,* 2018 WL 2229131, at *8, 2018 U.S. Dist. LEXIS 83744, at *19 (noting and adhering to the "more limited" statutory definition of an ATDS).

The Act defines an ATDS as "equipment which has the capacity—to store or produce numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227. The statute never mentions a capacity to dial from a set list. Plaintiff does not allege that WorkAlert has the capacity to store or produce numbers using a number generator, [4] and nothing in the record could support such a claim. Therefore, adhering to the plain language of the TCPA and viewing the facts in the light most favorable to the Defendant, the Court finds that WorkAlert does not qualify as an ATDS as a matter of law.

But even if the Court were to follow the FCC's now-vacated and broad classification of an ATDS, Plaintiff fails to show that WorkAlert is an ATDS as a matter of law. An autodialer, as defined by the relevant FCC orders, must have the capacity to dial from a set list without human intervention: "the Commission has also long held that the basic functions of an autodialer are to dial numbers without human intervention...." 30 FCC Rcd 7961, 7975 (F.C.C. July 10, 2015) (internal quotation marks omitted); *see also Glauser v. GroupMe, Inc.,* 2015 WL 475111, at *6, 2015 U.S. Dist. LEXIS 14001, at *17 (N.D. Cal. Feb. 4, 2015) (citing FCC's 2008 and 2012 TCPA orders and concluding that "while the capacity for random/sequential dialing is not required for TCPA liability, the capacity to dial numbers without human intervention is required."). Plaintiff offers no evidence that WorkAlert sends job offer text messages without human intervention.

Conversely, Defendant provides evidence that WorkAlert requires multiple steps of human intervention to send a job notification text. Dkt. No. 30-1, pgs. 3–5 (Pg. ID 329–331). Even when using a fixed group, branch employees must manually edit the list of workers to fit a particular job assignment, craft an outgoing text message, and then click certain keys to send a message. *Id.* This level of human judgment and intervention precludes a system from falling under the definition of an ATDS. *See, e.g.*, *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075, 2017 U.S. Dist. LEXIS 35658 (E.D. Mich. Feb. 7, 2017) (holding equipment that cannot dial numbers without agents initiating the call is not an autodialer); *see also Marshall,* 2018 WL 1567852, at *7, 2018 U.S. Dist. LEXIS 55223, at *17–18 (collecting cases).

Viewing the evidence in the light most favorable to the Defendant, the record does not demonstrate that the

WorkAlert system is an ATDS as a matter of law because it sends text messages to a set list. To the contrary, Defendant has provided evidence that the texts WorkAlert sends to potential workers require human intervention, preventing the system from qualifying as an ATDS.

c) Automated Text Messages

***8** Plaintiff argues that the WorkAlert system qualifies as an ATDS because it can automatically send texts in response to certain action words sent to the system, like "start," "help," or "stop." Dkt. No. 33, pg. 11 (Pg. ID 393). The text message log between Plaintiff and WorkAlert contains examples of these automated responses; WorkAlert's reply arrives within a second of its receipt of a message with a trigger word.[5] *See, e.g.*, Dkt. No. 30-4, pg. 1 (Pg. ID. 337). According to the Plaintiff, these automated texts prove that WorkAlert has the capacity to send messages without human intervention and so qualifies as an ATDS.

Although WorkAlert sends automatic responses when a user opts in, opts out, or asks for help, reasonable jurors could disagree on whether that qualifies the system as an ATDS. The statutory definition of an ATDS contains the word "automatic." However, that definition also requires that the equipment "store or produce numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1). Plaintiff provides no evidence that WorkAlert has that capacity.

The FCC has stressed the importance of human intervention in evaluating whether a system is an autodialer, but the Commission has eschewed a per se "human intervention test." 30 FCC Rcd 7961, 7976 (F.C.C. July 10, 2015). Instead, the FCC promotes a "case-by-case determination" which considers "how the equipment functions and depends on human intervention." *Id.* at 7975. In a 2012 declaratory ruling, the FCC could have decided whether automated opt out text messages qualify a sending system as an ATDS. *In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 15391, 15393 (F.C.C. Nov. 29, 2012). Yet the FCC declined to rule on that issue and decided the matter on other grounds. *Id.* at 15398 (holding that consumer had provided express consent to receive the messages).

Here, the disputed texts confirm a user's opt into or opt out of WorkAlert, and such messages are generally not actionable under the TCPA. Indeed, "a one-time text message sent immediately after a consumer's request for the text does not violate the TCPA and our rules." 30 FCC Rcd 7961, 8015 (2015). When considering an opt out confirmation text, courts have held that the text was not actionable under the TCPA because the plaintiff's own text precipitated the confirmation message. *See Derby v. AOL, Inc.*, No. 15-cv-00452-RMW, 2015 WL 3477658, at *6–7, 2015 U.S. Dist. LEXIS 70719 at *20 (N.D. Cal. June 1, 2015). The FCC permits these types of confirmation messages as good public policy because the consumer initiates the text exchange and the messages relay information that the consumer has requested. *See* 30 FCC Rcd 7961 at 8015–8016 (2015).

Viewing the facts and making all reasonable inferences in favor of the Defendant, the Court concludes that Plaintiff has not shown that all reasonable people would conclude that the automated confirmation texts establish the WorkAlert system as an autodialer. Thus, Plaintiff is not entitled to summary judgment.

3. Prior Express Consent

The Court will deny Plaintiff's Motion for Summary Judgment because Plaintiff fails to establish that the WorkAlert system is an ATDS as a matter of law. Whether a device is an ATDS is the threshold issue for establishing this TCPA claim. Therefore, the Court will analyze the element of consent operating under the assumption that WorkAlert is an ATDS.

Because there is also a genuine dispute of material fact as to whether Plaintiff provided his consent to be texted through WorkAlert, the Court will deny summary judgment on that basis as well.

a) Plaintiff's LaborReady Application

***9** To violate the TCPA, an autodialed call must be made without the prior express consent of the consumer. 47 U.S.C. § 227(b)(1)(A). The seller bears the burden of demonstrating that it obtained unambiguous consent. 27 FCC Rcd 1830, 1844 (F.C.C. Feb. 15, 2012) ("2012 Order").

Plaintiff concedes that, in 2011, when he signed up for Labor Ready, he provided his express written consent to be contacted on his telephone by signing a Labor Ready application that contained a "Consent to be Contacted" provision. Dkt. No. 33, pgs. 12–13 (Pg. ID 394–395). However, Plaintiff argues that this consent expired in 2013, after the FCC revised its regulations pertaining to "express written consent" for telemarketing calls. *See* 27 FCC Rcd at 1844 (2012). The changes to consent requirements in the 2012 Order applied only to telemarketing calls, not informational calls or other calls made for noncommercial purposes. *Id.* at 1841. Consent for informational calls may be obtained orally or in writing, and it need not conform to the 2012 Order's revised standards. *Id.* Because a genuine dispute exists as to whether Defendant's employment opportunity texts constitute telemarketing, Plaintiff is not entitled to summary judgment.

In 2012, the FCC revised its rules regarding prior express consent for telemarketing calls. The Commission held that to secure valid consent, "telemarketers must tell consumers the telemarketing will be done with autodialer equipment and that consent is not a condition of purchase." 30 FCC Rcd 7961, 8012–8013 (F.C.C. July 10, 2015) (explaining 2012 Order). The Commission also held that, after October 16, 2013, companies could not rely on *prior* express written consent if it did not conform to the new standards. *Id.* at 8014.

In 2015, however, the Commission acknowledged that the 2012 Order was ambiguous as to the validity of consent obtained before this rule change. *Id.* So the Commission held that companies could rely on "old" consent for eighty-nine days following the July 10, 2015 release of that ruling. *Id.* at 8015. The 2011 Labor Ready application that Plaintiff signed did not comply with the rule change; it did not advise Plaintiff that he would be contacted by an ATDS. Dkt. No. 30-3, pg. 2 (Pg. ID 336). Thus, if Defendant's texts are telemarketing, Plaintiff's written consent expired eighty-nine days after July 10, 2015.

The Court, however, agrees with the Defendant that the employment opportunity texts it sent to Plaintiff do not qualify as telemarketing as a matter of law. Dkt. No. 30, pg. 13 (Pg. ID 317). Defendant also persuasively argues that applying the TCPA to these communications would go against both common sense and the purpose of the TCPA. *Id.* at pg. 14 (Pg. ID 318).

The TCPA defines the term "telephone solicitation" as a call made for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. 47 U.S.C. § 227(a)(4). The FCC commented on what constitutes an advertisement in a 2003 Order:

> The TCPA's definition does not require a sale to be made during the call in order for the message to be considered an advertisement. Offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute "advertising the commercial availability or quality of any property, goods, or services."

***10** 2003 FCC LEXIS 3673, at *224 (F.C.C. June 26, 2003).

Here, Defendant's texts inform potential workers about employment opportunities. They do not advertise a product. However, the text messages are sent for a commercial purpose. Defendant's business and profits are derived from workers receiving these messages and accepting jobs through the messages. A genuine dispute of material fact exists as to whether Defendant's messages constitute telemarketing. Thus, the Court cannot hold as a matter of law that the Defendant is subject to the FCC's 2012 rule revisions regarding prior express consent. Consequently, the Court also cannot conclude that the consent Plaintiff provided in his 2011 Labor Ready application is invalid. Therefore, the Court will deny Plaintiff's summary judgment motion.

b) Revocation of Consent

According to the Plaintiff, even if the consent provided in the 2011 application did not expire, he repeatedly revoked consent to be contacted through WorkAlert. Dkt. No. 21, pgs. 6–7 (Pg. ID 78–79). Plaintiff always provided his consent again after revoking it, the Defendant contends. The Court finds that the Defendant's argument has merit, and therefore, that a genuine dispute of material fact exists on this issue as well.

A consumer may revoke consent "at any time and through any reasonable means" including orally or in writing. 30

FCC Rcd 7961, 7989, 7990, 7996 (F.C.C. July 10, 2015); *see also ACA Int'l*, 885 F.3d at 692.

Plaintiff claims that he revoked consent in text messages, phone calls, and in person at local branches. Dkt. No. 21, pgs. 6–7 (Pg. ID 78–79). The text message log between Plaintiff and WorkAlert contains at least six instances of the Plaintiff revoking consent through a text message to WorkAlert. Dkt. No. 30-4, pgs. 11, 16 (Pg. ID 347, 352). Plaintiff also submitted what appears to be a screenshot of his profile in WorkAlert, showing that he requested to not be contacted. Dkt. No. 21-8, pg. 2 (Pg. ID 201). Plaintiff testified that he called and visited local branches to revoke his consent to be contacted through WorkAlert. Dkt. No. 34, pg. 40 (Pg. ID 465).

Defendant does not dispute that Plaintiff revoked his consent on several occasions. Dkt. No. 30, pgs. 9–10 (Pg. ID 313–314). However, Defendant responds that Plaintiff always "opted back into" the WorkAlert system after revoking his consent. *Id.* The text message log supports this contention. Several interactions follow the same basic form: an opt out text message from Plaintiff, an automated text from WorkAlert confirming the opt out, a "start" message from Plaintiff, and an automated text from WorkAlert confirming the reactivation of the system. Dkt. No. 30-4, pg. 16 (Pg. ID 352). At least once, a "start" message from Plaintiff immediately followed a message from WorkAlert confirming his opt out. *Id.*

Plaintiff claims that he did not send the messages from his phone opting back into WorkAlert. Both in his motion and his deposition, Plaintiff maintained that those opt in messages were sent by Defendant's employees at local branches. Dkt. No. 21, pg. 6 (Pg. ID 78); *see, e.g.*, Dkt. No. 34, pg. 51 (Pg. ID 476). According to Plaintiff, he would go into the local branches to ask Defendant's employees how he might opt out of WorkAlert but still inquire about job opportunities. *Id.* The employees would then take his phone and opt him back into the WorkAlert system, Plaintiff says. *Id.* Plaintiff alleges that Defendant's employees sent all but one of the "opt in" text messages reflected in the log. Dkt. No. 34, pg. 58 (Pg. ID 483). Defendant denies these allegations, asserting that such actions are against Defendant's policies. Dkt. No. 30, pg. 12 (Pg. ID 316); *see also* Dkt. No. 21-9, pg. 3 (Pg. ID 205).

***11** The Court concludes that Plaintiff revoked his consent several times, but there is a genuine dispute regarding whether Plaintiff subsequently consented to receiving notifications through WorkAlert. Accordingly, the Plaintiff is not entitled to summary judgment.

c) Consent Valid for Only Sixty Messages a Month

Plaintiff argues that his consent was limited to sixty messages per month, regardless of whether he had consented to receiving text message notifications about job opportunities through WorkAlert. Dkt. No. 33, pg. 14 (Pg. ID 396). Defendant argues that Plaintiff continually manifested his consent by accepting job offers through WorkAlert. Because Plaintiff has not shown that all reasonable persons would conclude that his consent was limited to sixty messages a month, the Court will deny his motion for summary judgment.

Plaintiff points to the "welcome" message from WorkAlert to support the argument that his consent extended to only sixty messages per month. *Id.* When users opt into WorkAlert, they receive an automated welcome message in confirmation. That message reads, in relevant part: "60 msg/mo msg and data rates may apply." Dkt. No. 30-4, pg. 1 (Pg. ID 337). Plaintiff argues that this phrase outlines the scope of his consent, and any messages he received over that limit were outside of his consent, and thus violations of the TCPA.

Defendant acknowledges that it sent Plaintiff hundreds of text messages a month. *See id.* Yet it disputes the assertion that Plaintiff's consent was limited to sixty messages a month. Defendant argues that Plaintiff repeatedly provided his consent to receive job offers via text message, by accepting and working jobs. Dkt. No. 30, pg. 16 (Pg. ID 320). To support its contention, Defendant convincingly points to *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338 (6th Cir. 2016).

The court in *Baisden* held that there is no one way to provide consent for debt collection calls, and based its holding on a 2015 FCC order. *Id.* at 343. The 2015 order stated that, for non-telemarketing calls, there is no specific method by which a caller must obtain prior express consent, and the scope of that consent is contingent on the facts of each situation. 30 FCC Rcd. 7961, 7990 (2015). Thus, for *Baisden* to apply to the instant case, the messages the Defendant sent must not constitute telemarketing. As

discussed above, there is a genuine dispute of material fact on this issue.

If Defendant's text messages constitute telemarketing, the stringent consent requirements outlined in the 2012 FCC Order apply. Those rules require telemarketers to unambiguously describe the calls that the consumer is consenting to receive. *See* 27 FCC Rcd 1830, 1844 (2012). If Defendant's text messages are not a form of telemarketing, the more lenient consent provisions outlined in *Baisden* may apply. Because a reasonable person could conclude that the Defendant's text messages are not telemarketing, the Court will deny Plaintiff's summary judgment motion.

4. Damages

Plaintiff asserts that he is entitled to treble damages because Defendant knowingly and willfully violated the TCPA. Dkt. No. 21, pg. 15 (Pg. ID 87). The TCPA provides treble damages for knowing and willful violations of its terms. 47 U.S.C. § 227(b)(3). However, "a willful or knowing violation of the TCPA requires that Plaintiff has to [prove] that Defendant was made aware of/notified that Plaintiff did not consent to calls from Defendant." *Duchene v. OnStar, LLC*, No. 15-13337, 2016 WL 3997031, at *7, 2016 U.S. Dist. LEXIS 97129 at *19 (E.D. Mich. July 26, 2016). Because there is a genuine dispute of material fact regarding whether Plaintiff consented to receive text messages from Defendant, the Plaintiff is not entitled to summary judgment.

B. Defendant's Motion to Compel and Attorney's Fees [34]

***12** Defendant filed a Motion to Compel Plaintiff's Deposition Testimony and requested attorney's fees to be incurred if it re-deposes Plaintiff, as the Plaintiff was purportedly uncooperative during his deposition. Dkt. No. 34, pg. 3 (Pg. ID 428). The Court finds good cause for granting Defendant's Motion to Compel Plaintiff's Deposition Testimony. The Court, however, will reject Defendant's request for attorney's fees.

During his deposition, Plaintiff refused to authenticate his signature and to answer entire categories of pedestrian questions, including questions about his background. Dkt. No. 34, pg. 18 (Pg. ID 443). He would not disclose the names of Defendant's employees who allegedly informed him that he was not allowed at a branch office. *Id.* at pg. 45 (Pg. ID 470). Plaintiff also evasively answered questions about basic facts regarding his claim, including if he had permitted Defendant's employees to opt him into WorkAlert and whether he believed that he had been contacted by automated message. Dkt. No. 34, pgs. 50, 55 (Pg. ID 475, 480).

Plaintiff's testimony is critical in this case. *See* Dkt. No. 31, pg. 2 (Pg. ID 379). Therefore, the Court will grant the Motion to Compel Plaintiff's Deposition Testimony. Dkt. No. 34.

Defendant requests that the Court impose on Plaintiff the fees associated with a second deposition. Plaintiff is *pro se*, but Defendant argues that he has experience with litigation. *Id.* at pg. 7 (Pg. ID 432). Although this may be true, this was Plaintiff's first deposition and he may not understand the rules of discovery. *See id.* at pg. 16 (Pg. ID 441). Thus, the Court determines that there is not good cause to grant Defendant's request for attorney's fees and sanctions. Accordingly, the Court will deny Defendant's request for attorney's fees and sanctions.

V. CONCLUSION

The Plaintiff has moved for summary judgment in this matter. Dkt. No. 20. Additionally, the Defendant has requested that the Court compel the Plaintiff's deposition testimony and has asked for attorney fees and costs associated with any later deposition. Dkt. No. 34. While on the record, and for the reasons discussed herein, the Court DENIED Plaintiff's Motion for Summary Judgment [20], GRANTED Defendant's Motion to Compel Plaintiff's Deposition Testimony [34], and rejected Defendant's request for attorney's fees and sanctions [34].

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 3647046

Footnotes

1 Defendant then moved for summary judgment on June 21, 2018. Dkt. No. 38. The Court has held this motion in abeyance. Dkt. No. 39.

2 Text messages are considered "calls" under the TCPA. *See In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 15391, 15392 (2012).

3 The petitions originated in the Seventh Circuit and the D.C. Circuit. *See id.*

4 The 2015 FCC Order interpreted "capacity" to include a device's potential functionalities, and the D.C. Circuit vacated this interpretation as unreasonably expansive. *See ACA Int'l*, 885 F.3d at 700. Therefore, to determine whether WorkAlert meets the definition of an ATDS, this Court will consider only the functions that WorkAlert is currently able to perform.

5 The Defendant refers to this confirmation text as an "automatic opt out response." Dkt. No. 30, pg. 10 (Pg. ID 314).

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Declined to Follow by Ramos v. Hopele of Fort Lauderdale, LLC, S.D.Fla., September 20, 2018

894 F.3d 473
United States Court of Appeals, Second Circuit.

Araceli KING, Plaintiff-Appellee,
v.
TIME WARNER CABLE INC., Defendant-Appellant.

Docket No. 15-2474-cv
|
August Term, 2016
|
Argued: January 25, 2017
|
Decided: June 29, 2018

Synopsis
Background: Customer brought action against national cable telecommunications company, alleging that company placed automated or prerecorded calls to her cellular telephone without her consent, in violation of the Telephone Consumer Protection Act (TCPA). The United States District Court for the Southern District of New York, Alvin K. Hellerstein, J., 113 F.Supp.3d 718, entered partial summary judgment for customer. Company appealed.

[Holding:] The Court of Appeals, Gerald E. Lynch, Circuit Judge, held that term "capacity," in TCPA definition of a qualifying automatic telephone dialing system (ATDS), referred to a device's current ability to randomly or sequentially generate telephone numbers, absent any modifications to the device's hardware or software.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (5)

[1] **Federal Courts**
Summary judgment

The district court's order granting a motion for summary judgment in part is reviewed de novo by the Court of Appeals. Fed. R. Civ. P. 56.

Cases that cite this headnote

[2] **Statutes**
Language

Every exercise in statutory construction must begin with the words of the text.

1 Cases that cite this headnote

[3] **Statutes**
Design, structure, or scheme
Statutes
Context

When engaged in statutory construction, words to be interpreted are not considered in isolation; rather, the court looks to the statutory scheme as a whole and place the particular provision within the context of that statute.

2 Cases that cite this headnote

[4] **Statutes**
Purpose and intent;determination thereof
Statutes
Design, structure, or scheme
Statutes
Plain, literal, or clear meaning; ambiguity

When engaging in statutory construction, if resorting to the plain text alone fails to resolve the question of construction, the court tests the competing interpretations against both the statutory structure and the legislative purpose and history of the statute.

1 Cases that cite this headnote

[5] **Telecommunications**
Advertising, canvassing and soliciting; telemarketing

Term "capacity," in Telephone Consumer Protection Act's (TCPA) definition of a qualifying automatic telephone dialing system (ATDS), referred to a device's current ability to randomly or sequentially generate telephone numbers, absent any modifications to the device's hardware or software; definition did not include every phone or computer that could be turned into an ATDS if properly reprogrammed, but did include devices whose "autodialing" features could be activated by the equivalent of the simple flipping of a switch. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(a)(1), (b)(1)(A).

5 Cases that cite this headnote

Attorneys and Law Firms

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Matthew A. Brill (Matthew T. Murchison and Alexandra P. Shechtel, on the brief), Latham & Watkins LLP, Washington, DC, for Defendant-Appellant.

Before: Winter, Cabranes, and Lynch, Circuit Judges.

Opinion

Gerard E. Lynch, Circuit Judge:

***474** Defendant-appellant Time Warner Cable Inc. ("Time Warner") appeals a decision by the district court (Alvin K. Hellerstein, *J.*) granting partial summary judgment in favor of the plaintiff-appellee Araceli King on her claim that Time Warner knowingly or willfully violated the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, by using an "automatic telephone dialing system" to call King's cell phone 153 times without her consent. The district court's interpretation of the statute relied primarily on a Declaratory Ruling and Order issued by the Federal Communications Commission ("FCC") in 2015 that has since been invalidated by the D.C. Circuit. *See ACA Int'l v. FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018). We now conclude that the district court's analysis was based on an incorrect interpretation of the statutory text. Accordingly, the district court's ruling in favor of King is VACATED and the matter is REMANDED for further proceedings consistent with this opinion.

BACKGROUND

I. The Telephone Consumer Protection Act

In the interest of reducing the volume of unwanted telemarketing calls, the Telephone Consumer Protection Act, in relevant part, makes it "unlawful ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service, ... unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii); *see also ACA Int'l*, 885 F.3d at 692–93. The statute defines an "automatic telephone dialing system" ("ATDS" or "autodialer") 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." 42 U.S.C. § 227(a)(1). Aggrieved parties may bring suit to recover a minimum of $500 per violation, which sum can be trebled at the court's discretion "[i]f the court finds that the defendant willfully or knowingly violated" the statute. *Id.* § 227(b)(3).

The FCC has the authority to promulgate regulations implementing the TCPA. *Id.* § 227(b)(2); *see also id.* § 201(b) (authorizing the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter"). In 2015, the FCC issued a Declaratory Ruling and Order that, among other things, attempted to clarify the TCPA's requirement that, to qualify as an autodialer under the statute, a device must have the "capacity" to dial random and sequential numbers. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7973–74 (2015) [hereinafter "2015 Order"]. The Commission asserted that an expansive interpretation of the term "capacity" was consistent with both Congress's intent that the TCPA have a broad protective reach, and with the Commission's previous orders. *Id.* Accordingly, the FCC "declined to define a device's 'capacity' in a manner confined to its 'present capacity.' Instead, the agency construed a device's 'capacity' to encompass its 'potential functionalities' with modifications such as

software changes." *ACA Int'l*, 885 F.3d at 693–94, quoting 2015 Order at 7974, 7976.

II. Factual Background for King's TCPA Claims

King contends that Time Warner violated the TCPA by making numerous calls to ***475** her cell phone using an autodialer after she had withdrawn her consent for it to do so.[1] During the period at issue in this lawsuit, King was a Time Warner customer. When signing up to receive services from Time Warner, King was required to agree to the company's terms of service, which included, in relevant part, granting the company permission to "call any number you provide to us (or that we issue to you) for any purpose," provided, however, that a customer could request to be placed on a "do not call" list so as not to receive any further calls "for marketing purposes," and that request would be honored. App. at 243. The terms of service agreement also specified that Time Warner "may use automated dialing systems or artificial or recorded voices to call" its customers. *Id.*

Time Warner uses an "interactive voice response" calling system to, among other things, contact customers with overdue accounts. The system automatically references Time Warner's billing records to determine which customers are more than 30 days late on their payments, and then dials the number associated with those accounts. If a person answers the call, the system is programmed not to call that number again until the following day (and it will stop altogether if the customer's account becomes current). If the call is not answered, the system is programmed to leave a voicemail and attempt to call back two more times that day. Time Warner admits that its system has "the capacity to store numbers" and dial them, App. at 222, but asserts that it "does not have the capacity to make random or sequentially generated calls," *id.* at 221.

Beginning on July 3, 2013, Time Warner's system began making calls to a cell phone number belonging to King in an effort to collect on an overdue account. Unfortunately, King was not the customer Time Warner was seeking; instead, her phone number had erroneously been associated with the account of another, apparently delinquent, customer. King claims that, on October 3, 2013, after she had received ten calls from the system, she asked Time Warner to stop calling her number regarding the other customer's account. But the calls continued unabated through January 7, 2014, when King again called Time Warner in another unsuccessful attempt to stop the calls, and beyond.[2] In total, Time Warner's system called King 163 times between July 2013 and August 2014.

In March 2014, King filed the instant suit, claiming that Time Warner's calls violated the TCPA. The parties cross-moved for summary judgment. Time Warner interpreted the term "capacity" in the TCPA's definition of an autodialer to mean that a device was "capable at the time of use" of performing the functions of an autodialer. App. at 265; *see also id.* at 266 ***476** (referring to a system's "present capacity"). Accordingly, it argued that, in the absence of any evidence that its system had the present ability to perform the requisite functions, its system could not qualify as an autodialer under the statute. The district court disagreed, because it adopted a broader understanding of the term "capacity." Relying on a press release announcing the FCC's 2015 Order, which was not formally issued until a few days after the court's ruling, the district court determined that the TCPA's definition of an autodialer included "any technology with the *capacity* to dial random or sequential numbers," such as "robo-callers," and concluded that Time Warner's system met that "low bar." *Id.* at 282 (emphasis in original). The court thus rejected as irrelevant Time Warner's contention that there was no evidence that its system "*actually* dialed King's number randomly or from a list," and did not investigate whether Time Warner's system had the current ability to perform the functions of an autodialer. *Id.* (emphasis in original).

The court also concluded that although King's assent to the company's terms of service constituted blanket consent to receive calls from an autodialer, she effectively withdrew that consent on October 3, 2013. Accordingly, the court granted summary judgment to Time Warner as to the ten calls made before King withdrew her consent, and granted summary judgment to King as to the 153 calls made thereafter. The court further held that, because Time Warner had knowingly violated the statute, treble damages were warranted for each of the violating calls.

Time Warner filed the instant appeal.

III. *The D.C. Circuit's Invalidation of the FCC's 2015 Order*

While Time Warner's appeal was being briefed to this court, the United States Court of Appeals for the District of Columbia Circuit heard a challenge to the FCC's 2015 Order.[3] In *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), that court decided in relevant part that the FCC's definition of "capacity" in the 2015 Order, which included a device's "potential functionalities" after modification, *id.* at 693–94, would allow the statute to extend well past what Congress intended, and that the 2015 Order therefore failed "the requirement of reasoned decisionmaking," *id.* at 703.

DISCUSSION

[1] The district court's order granting in part King's motion for summary judgment is reviewed *de novo*. *See Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 54 (2d Cir. 2017), as amended Aug. 21, 2017. As noted above, in concluding that Time Warner's calls to King violated the TCPA, the district court relied on the FCC's 2015 Order, which broadly construed the term "capacity" and thus extended the TCPA to reach any device that could be modified by ***477** software changes to perform the functions of an autodialer. In the wake of *ACA International*, which invalidated that Order and thereby removed any deference we might owe to the views the FCC expressed in it, we must decide independently whether the district court's broad understanding of the "capacity" a device must have in order to qualify as an ATDS under the TCPA is a supportable interpretation of the statute. We conclude that it is not. Although we are not bound by the D.C. Circuit's interpretation of the statute, we are persuaded by its demonstration that interpreting "capacity" to include a device's "potential functionalities" after some modifications extends the statute too far. Instead, we agree with the D.C. Circuit that the term "capacity" is best understood to refer to the functions a device is currently able to perform, whether or not those functions were actually in use for the offending call, rather than to devices that would have that ability only after modifications.

I. "Capacity"

As discussed above, to qualify as an ATDS under the TCPA, a device must have the "capacity" to perform the functions of an autodialer. 47 U.S.C. § 227(a)(1)(A). Time Warner contends that "capacity" should be interpreted to mean a device's "present ability," rather than its potential capabilities after some unspecified software modifications. Appellant's Br. at 30 (emphasis omitted). King endorses the 2015 Order's determination that any device that could, if appropriately modified, perform autodialer functions should be construed to have that capacity. *See* Appellee's Br. at 22–23.

[2] **[3]** **[4]** "Every exercise in statutory construction must begin with the words of the text." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003). The words to be interpreted are not considered in isolation; rather, we "look[ ] to the statutory scheme as a whole and plac[e] the particular provision within the context of that statute." *Id.* "If resorting to the plain text alone fails to resolve the question, we test the competing interpretations against both the statutory structure of the [TCPA] and the legislative purpose and history of [§ 227(a)(1)]." *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1, 6 (2d Cir. 2017).

A. *The "Plain Meaning" of "Capacity"*

Definitions of the word "capacity" from dictionaries contemporaneous with the passage of the TCPA do little to definitively rule in or rule out Time Warner's proposed interpretation.[4] Some of those definitions invoke an abstract sense of potential—i.e., the capacity of mankind to make world-changing inventions, or the capacity of one person for "greatness." Others aim at something more concrete and immediate—for instance, when one is looking to hire an employee with the capacity to perform certain engineering tasks, qualified applicants presumably will not include people who don't yet have an engineering degree (even ***478** those who may get one eventually), but may include degreed engineers who require additional instruction to get up to speed.

Common sense suggests that legislation, which typically targets present social problems, would be aimed at devices that have the "capacity," in that narrower sense, to cause the problem that is the subject of legislative concern, rather than addressing itself to the hazily defined universe of things that have only a theoretical potential to do so. That is so not least because a broader sweep is unnecessary to effect the legislators' protective purpose: in the context of the TCPA, for instance, devices with only the theoretical potential to perform the functions of an autodialer must necessarily obtain that actual ability

before they pose a concrete risk of causing the problems which the statute was enacted to prevent. Based on the plain meaning of the statutory text, therefore, we are inclined to adopt a narrower definition of "capacity" than the one the FCC endorsed in its 2015 Order.

B. *The D.C. Circuit's Opinion*

In *ACA International*, the D.C. Circuit rejected the FCC's broad interpretation of "capacity" as inconsistent with the legislative purposes behind the TCPA, and concluded, as do we, that a narrower definition would be appropriate. It first determined that Congress did not intend the statute to reach as far as the FCC's interpretation would permit. Defining "capacity" to include "features that can be added ... through software changes or updates," as the FCC's 2015 Order did, 2015 Order at 7974 n.63, would extend the TCPA to reach to every smartphone that could be programmed to make automatic calls through a simple app download, with the result that every unwanted call to a cell phone from such a device could subject the caller to a $500 minimum statutory penalty—regardless of whether an autodialer feature was ever actually downloaded, let alone used, *ACA Int'l*, 885 F.3d at 697. As the D.C. Circuit pointed out, that outcome "would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers." *Id.* at 698. It therefore rejected the FCC's interpretation as an impermissible expansion of the statute's intended reach. *Id.* at 699. We agree that the consequences of the FCC's (and, by extension, King's) interpretation effectively disqualify it as a plausible reading of the statutory language.

In reaching that conclusion, however, the D.C. Circuit did not unequivocally adopt the view of the petitioners in that case (and of Time Warner here) that the term "capacity" was clearly limited to a device's "present ability." It observed that "[v]irtually any understanding of 'capacity' ... contemplates some future functioning state, along with some modifying act to bring that state about." *Id.* at 696. That analysis seems consistent with Congress's decision not to define a qualifying autodialer in terms of whether its autodialing functions were, in fact, in use during the offending call. But rejecting a narrow focus on the present "use" of the device is not an invitation to expand the statute's reach to the limits of a device's technological potential. Instead, the D.C. Circuit proposed:

> whether equipment has the 'capacity' to perform the functions of an ATDS ultimately turns less on labels such as 'present' and 'potential' and more on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially ***479** a top-to-bottom reconstruction of the equipment?

Id.

Although the D.C. Circuit was deciding only whether the FCC's specific interpretation was a reasonable one, rather than announcing what that court itself deemed to be the *best* interpretation of the statute, its analysis informs our understanding of the statutory text. We view the D.C. Circuit's discussion as correctly drawing a distinction between a device that currently has features that enable it to perform the functions of an autodialer —whether or not those features are actually in use during the offending call—and a device that can perform those functions only if additional features are added. We find that distinction persuasive; accordingly, we would conclude that the former category of devices falls within the definition of an ATDS, and the latter does not. [5] *See Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, 2018 WL 2229131, at *6 (D. Ariz. May 14, 2018) (concluding that *ACA International*'s reasoning directs courts to determine " 'how much' would be required to enable such capacity"); *Gragg v. Orange Cab Co.*, 995 F.Supp.2d 1189, 1196 (W.D. Wash. 2014) (in a case predating the 2015 Order, rejecting the argument that "a system that has to be reprogrammed or have new software installed in order to perform the functions of an ATDS [is] an ATDS").

C. *Legislative History of "Capacity"*

Finally, the TCPA's ambiguous legislative history regarding the use of the term "capacity" does not cast doubt on the interpretation of the term we derive from the statute's text and purpose. Admittedly, that history does not unequivocally support our narrower interpretation, but neither does it clearly foreclose it. Indeed, it is somewhat supportive of our reading to the extent that

Congress expressed concerns about the statute's potential for overreach if a broader definition was used.

The House Committee on Energy and Commerce, which was responsible for reviewing and presenting in the first instance the bill that would become the TCPA, certainly recognized that the term "capacity" had some potential for expansiveness, and, indeed, seems to have selected the word partially on that basis. During the Committee's hearings, industry representatives expressed concern that the term "capacity" would allow the statute to reach too broadly and specifically advocated for the definition of an ATDS to focus instead on the actual "use" of a device. *See Telemarketing Practices: Hearing before the Subcomm. on Telecomms. & Finance of the H. Comm. on Energy & Commerce on H.R. 628, H.R. 2131, & H.R. 2184*, 101st Cong. 110–11 (1989) (letter from Tracy Mullin, Senior Vice President of Gov't Affairs, Nat'l Retail Merchs. Ass'n); *see also Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Finance of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, 102d Cong. 107 (1991) (statement of Richard A. Barton, Senior Vice President for Gov't Affairs, Direct Mktg. Ass'n.). The Committee's report rejected that option, observing that the proposed definition of an ATDS included both "equipment which is designed or intended to be used to deliver automatically dialed prerecorded messages" and "equipment which has the 'capability' ***480** to be used in such manner."[6] H. Rep. No. 101-633, at 6 (1990).

The legislative history thus confirms what the language of the statute makes clear in any event: that the TCPA applies to calls from a device that *can* perform the functions of an autodialer, regardless of whether it has actually done so in a particular case.[7] The history is less clear, however, about the issue here: whether a device should be regarded as having the capacity to perform such functions only if it has the present ability to do so, or should be so regarded if the device *could* gain that ability if it were modified, such as by changes to its software.

The House Committee's Report acknowledged concerns that the definition of an ATDS could potentially be read broadly to "cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages." H. Rep. No. 101-633, at 6. But instead of responding to those concerns by explicitly narrowing the definition, the Committee asserted that, even if such a broad reading prevailed, the statute would not regulate an unduly expansive category of equipment in any event, because the bill placed restrictions only on the "active 'use' [of an ATDS] to deliver automatically dialed *prerecorded* telephone solicitations without live operator intervention." *Id.* at 6–7 (emphasis added).

The Committee's proposed solution was incomplete. The Committee apparently failed to consider that even the version of the bill then under consideration also prohibited the use of an ATDS "to make unsolicited calls ... to any number assigned to a paging or cellular telephone service," apparently regardless of whether the call involved the use of a prerecorded voice. *Id.* at 11–12. The enacted version of the statute exacerbated that problem: it retains largely the same definition of an ATDS,[8] but now restricts—as separate categories—calls made to cell phones without prior consent using *either* "any automatic telephone dialing system *or* an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A) (emphasis added). Nevertheless, the Committee's effort to suggest that the statute's reach would be limited in response to concerns of overbreadth, rather than endorsing the broader view, suggests that Congress was troubled by the possibility that the TCPA could be read to restrict calls from every device that could somehow be converted into an autodialer.

***481** The legislative history thus provides no definitive assistance in resolving the issue before us, and it certainly tells us nothing that would foreclose what we view as the best interpretation of the term "capacity" in the context of this statute, which we believe is a narrower one focusing on a device's current functions.

* * *

[5] In sum, we conclude that the term "capacity" in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software. That definition does not include every smartphone or computer that might be turned into an autodialer if properly reprogrammed, but does include devices whose autodialing features can be activated, as the D.C. Circuit suggested, by the equivalent of "the simple flipping of a switch." *ACA Int'l*, 885 F.3d at 696. Within those bounds, however, courts may need to investigate, on a case-by-case basis, how much is needed to activate a device's

autodialing potential in order to determine whether it violates the TCPA.

Applying those principles in the present case, we conclude that the district court's grant of partial summary judgment relied on an incorrect interpretation of the statute that was in turn premised on deference to an FCC Order that is no longer valid. The record does not permit us to conclude, as a matter of law, that Time Warner's system has the requisite "capacity," as we understand it, to meet the definition of an autodialer regulated by the TCPA. Nor does it permit us to conclude the opposite. On the present record, we do not know whether Time Warner's system had the ability to perform the functions of an ATDS when it made the calls to King, nor what kinds of modifications might be required to permit it to do so. Accordingly, the matter is remanded to the district court to take up those questions in the first instance.

II. Other Issues

The parties have raised several additional arguments that were not resolved by the prior district court order and that the court may need to consider on remand. First, Time Warner argues that the district court's reading of the statute would render its "random or sequential number generator" clause superfluous. The district court's ruling does not address that question. To the contrary, the district court stated that "[w]hether [Time Warner] *actually* dialed King's number randomly or from a list is irrelevant" because its system had the "*capacity* to dial random or sequential numbers," under the FCC's expanded definition of that term. App. at 304 (emphasis in original, internal quotation marks omitted). In *ACA International*, the D.C. Circuit noted that "the role of the phrase, 'using a random or sequential number generator,' has generated substantial questions over the years," which the FCC's 2015 Order failed to conclusively resolve. 885 F.3d at 701. To the extent that applying the narrower definition of "capacity" that we adopt today necessitates that those complicated questions be answered in the present case, we leave it to the district court to address them in the first instance.

Second, Time Warner argues that the district court improperly relied on a "human involvement" standard that is not reflected in the statute. Appellant's Br. at 27. We note that the FCC expressly declined to adopt such a standard in its 2015 Order. *See* 2015 Order at 7976. And it is unclear whether the district court intended to present the lack of human involvement in Time Warner's calls to King as an alternative basis for its ruling because it cites no authority for reading that standard into ***482** the statute. Given those uncertainties, we venture no opinion on whether that lack of human involvement is a consideration relevant to King's claims.

In light of the technological complexities inherent in the application of the statute to different types of devices, software programs, and "systems," and the lack of clarity in the record as to the precise mechanisms constituting the Time Warner system that produced the calls to King, it seems prudent to limit our pronouncements in this case. Accordingly, we hold only that the district court decision was in error because (1) that decision was, understandably, based on deference to an administrative interpretation of the statute that has now been invalidated, and (2) when we consider the meaning of the statute independently, without an administrative interpretation to defer to, the best interpretation of the statutory language is the one suggested by the D.C. Circuit's discussion in *ACA International*: in the TCPA's definition of an autodialer, a device's "capacity" refers to its current functions absent additional modifications, regardless of whether those functions were in use during the offending call. We leave it to the district court in the first instance to develop the factual record in this case and to apply the appropriate standard to the facts that emerge.

CONCLUSION

For the reasons stated above, the judgment of the district court is VACATED, and the matter is REMANDED for further proceedings consistent with this opinion.

All Citations

894 F.3d 473

Footnotes

1 Because the district court granted summary judgment in King's favor on the issue raised in this appeal, we must consider whether, drawing all reasonable inferences in Time Warner's favor, the record shows that there is no genuine dispute as to any material fact and that King is entitled to judgment as a matter of law. *See Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 54 (2d Cir. 2017), as amended Aug. 21, 2017; Fed. R. Civ. P. 56(a). Accordingly, we state the facts here in the light most favorable to Time Warner.

2 When opposing King's motion for summary judgment below, Time Warner disputed that King had made the October 3 and January 7 calls because it had no record of either exchange in its files. The district court determined that the absence of a record in Time Warner's files was insufficient to create a question of fact and therefore concluded that there was no material dispute that King had effectively withdrawn her consent to receive automated calls from Time Warner on October 3. Time Warner does not challenge that holding on appeal.

3 Under the Hobbs Act, the courts of appeals "ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders" of the FCC that are reviewable under 47 U.S.C. § 402(a). 28 U.S.C. § 2342(1). When agency regulations are challenged in more than one court of appeals, as they were in the present case, 28 U.S.C. § 2112 requires that the multidistrict litigation panel consolidate the petitions and assign them to a single circuit. Challenges to the 2015 Order were assigned to the D.C. Circuit, which thereby became "the sole forum for addressing ... the validity of the FCC's" order. *GTE S., Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999); *see also MCI Telecomms. Corp. v. U.S. W. Commc'ns*, 204 F.3d 1262, 1267 (9th Cir. 2000). After hearing argument in this case, we held the appeal in abeyance pending resolution of the challenges to the validity of the FCC's 2015 Order.

4 The 1993 edition of *Webster's New World Dictionary* offers "the ability to contain, absorb, or receive and hold" (first definition), and "the ability or qualifications (*for*, or *to* do, something)" (fourth definition, emphasis in original), both of which seem to refer to a *present* ability to do those things; however, it also includes a definition more consistent with the FCC's proposed interpretation: "the quality of being adapted (*for* something) ...; capability; potentiality" (sixth definition, emphasis in original). The 1991 edition of the *Oxford English Dictionary* offers a similarly ambiguous selection, including the "[a]bility to receive or contain" (first definition); "[t]he power, ability, or faculty for anything in particular" (sixth definition); and "[t]he quality or condition of admitting or being open to action ...; capability; possibility" (seventh definition).

5 The Third Circuit recently reached essentially the same conclusion in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 2018 WL 3118056 (3d Cir. June 26, 2018), holding that, following the D.C. Circuit's ruling in *ACA International*, in order for his TCPA claim to survive, the plaintiff in that case had to demonstrate that the defendant's equipment "had the present capacity to function as an autodialer." Slip op. at 475; *see also id.* at 9 n.23.

6 The House version of the bill under consideration in the Report, like the statute ultimately enacted, used the word "capacity" rather than "capability." H. Rep. No. 101-633, at 11. It appears that the Committee used the latter word inadvertently in the passage quoted in the text.

7 In the same vein, in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), the Ninth Circuit recognized that the definition of an ATDS in the enacted version of the TCPA swept more broadly than a device's present use precisely because the statute used the term "capacity": to be a qualifying ATDS, that court explained, "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Id.* at 951; *see also In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F.Supp.2d 1253, 1261 (S.D. Cal. 2012) (describing *Satterfield* as "confirm[ing] that the statute creates liability based solely on a machine's capacity rather than on whether the capacity is utilized").

8 In addition to having the capacity to store or produce certain numbers and dial them, the House bill also required a qualifying ATDS to have the capacity "to deliver, without initial live operator intervention, a prerecorded voice message to the number dialed, with or without manual assistance." H. Rep. No. 101-633, at 11. The third requirement was omitted from the enacted version of the statute. *See* 47 U.S.C. § 227(a)(1).

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2018 WL 4495553
United States Court of Appeals, Ninth Circuit.

Jordan MARKS, individually and on behalf of all others similarly situated, Plaintiff-Appellant,
v.
CRUNCH SAN DIEGO, LLC, Defendant-Appellee.

No. 14-56834
|
Argued and Submitted December 6, 2016
|
Submission Vacated December 14, 2016
|
Resubmitted September 13, 2018 Pasadena, California
|
Filed September 20, 2018

Synopsis

Background: Gym patron brought putative class action against gym operator alleging violations of the Telephone Consumer Protection Act (TCPA) based on operator's alleged use of an automatic telephone dialing system (ATDS) to send unwanted text messages to gym patron's cellular telephone. The United States District Court for the Southern District of California, No. 3:14-cv-00348-BAS-BLM, Cynthia A. Bashant, J., 55 F.Supp.3d 1288, granted summary judgment to operator and, 2014 WL 6632810, denied patron's motion for reconsideration. Patron appealed.

Holdings: The Court of Appeals, Ikuta, Circuit Judge, held that:

[1] an automatic dialing function subject to TCPA is not limited to devices with the capacity to call numbers produced by a random or sequential number generator, and

[2] genuine issue of fact existed as to whether the platform was an automatic telephone dialing system subject to TCPA.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Reconsideration.

West Headnotes (11)

[1] **Administrative Law and Procedure**
Proceedings for Adoption

An agency's reconsideration of a rule in a new rulemaking constitutes a reopening when the original rule is 'reinstated' so as to have renewed effect.

Cases that cite this headnote

[2] **Federal Courts**
Summary judgment

Federal Courts
Summary judgment

Court of Appeals reviews a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party in order to determine whether there are any genuine issues of material fact.

Cases that cite this headnote

[3] **Statutes**
Plain language;plain, ordinary, common, or literal meaning

If the statutory text is plain and unambiguous, the court must apply the statute according to its terms.

Cases that cite this headnote

[4] **Statutes**
Purpose and intent;determination thereof

Statutes
Plain, literal, or clear meaning; ambiguity

If the language of a statute is ambiguous, the court may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent.

Cases that cite this headnote

[5] **Statutes**
Context
Statutes
Statutory scheme in general

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

Cases that cite this headnote

[6] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning
Statutes
Design, structure, or scheme

In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

Cases that cite this headnote

[7] **Telecommunications**
Advertising, canvassing and soliciting; telemarketing

An "automatic telephone dialing system," within the meaning of the Telephone Consumer Protection Act (TCPA), is not limited to devices with the capacity to call numbers produced by a random or sequential number generator, but instead refers to equipment which has the capacity to store numbers to be called or to produce numbers to be called, using a random or sequential number generator, and to dial such numbers. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[8] **Telecommunications**
Illegal or improper purposes

Web-based marketing platform, which was designed to send promotional text messages to a list of stored telephone numbers, dialed numbers automatically, and therefore it had the automatic dialing function necessary to qualify as an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA), even though humans, rather than machines, were needed to add phone numbers to the platform. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[9] **Telecommunications**
Advertising, canvassing and soliciting; telemarketing

A device could qualify as an "automatic telephone dialing system," within the meaning of the Telephone Consumer Protection Act (TCPA), if it was not fully automatic and required human intervention to operate, since the TCPA targeted equipment that could engage in automatic dialing, rather than equipment that operated without any human oversight or control. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[10] **Federal Civil Procedure**
Consumer protection and unfair trade practices, cases involving

Genuine issue of material fact as to whether web-based marketing platform designed to send promotional text messages to a list of stored list of telephone numbers as part of scheduled marketing campaigns was an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA) precluded summary judgment in gym patron's action alleging gym operator violated the Act by using the platform to send unwanted text messages to gym patron's cellular telephone. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

[11] Federal Courts
Reversal or Vacation of Judgment in General

Court of Appeals would vacate district court's dismissal of gym operator's motion to exclude declaration of gym patron's expert witness, after Court of Appeals vacated district court's grant of summary judgment to operator, in patron's suit alleging operator violated Telephone Consumer Protection Act (TCPA) by sending unwanted text messages to patron's cell phone; district court had concluded that operator's motion to exclude was moot because expert's declaration stated that web-based marketing platform operator had used to send promotional text messages called numbers from a stored list, but district court ruled that the platform did not employ a random or sequential number generator, and so was not covered by the TCPA. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of California, Cynthia A. Bashant, District Judge, Presiding, D.C. No. 3:14-cv-00348-BAS-BLM.

Before: Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

OPINION

IKUTA, Circuit Judge:

Jordan Marks appeals the grant of summary judgment to Crunch Fitness on his claim that three text messages he received from Crunch violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court held that the automatic text messaging system that had sent the messages was not an automatic telephone dialing system (ATDS) under the TCPA, because it lacked the present or potential capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." *Id.* § 227(a)(1). In light of the D.C. Circuit's recent opinion in *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018) (which was decided after the district court ruled), and based on our own review of the TCPA, we conclude that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator. Therefore, we reverse the district court's grant of summary judgment.

I

A

By the early 1990s, telemarketing was in its golden age. Telemarketing sales had "skyrocketed to over $435 million in 1990," which was a "fourfold increase since 1984." 137 Cong. Rec. S16,971 (daily ed. June 27, 1991) (statement of Rep. Pressler). "This marketing success ha[d] created an industry in which over 300,000 telemarketing solicitors call[ed] more than 18 million

Americans every day." *Id.* In part, this was due to the advent of machines that "automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message." S. Rep. No. 102-178, at 2 (1991). Advertisers found these autodialers highly efficient because they could "ensure that a company's message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention." H.R. Rep. No. 102-317, at 6 (1991). At that time, a single autodialer could cause as many as 1,000 phones to ring and then deliver a prerecorded message to each. *Id.* at 10.

***2** The dark side of this success story caught Congress's attention. As Senator Fritz Hollings complained, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Recipients deemed that "automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4. Among other reasons, "[t]hese automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party" and deprive customers of "the ability to slam the telephone down on a live human being." *Id.* at 4 & n.3 (citation omitted). Congress also noted surveys wherein consumers responded that the two most annoying things were (1) "[p]hone calls from people selling things" and (2) "phone calls from a computer trying to sell something." H.R. Rep. No. 102-317, at 9.

The volume of automated telemarketing calls was not only an annoyance but also posed dangers to public safety. S. Rep. No. 102-177, at 20 (1991). "Due to advances in autodialer technology," the machines could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers. *Id.* This resulted in calls hitting hospitals and emergency care providers "and sequentially delivering a recorded message to all telephone lines." *Id.* And because some autodialers would "not release [the line] until the prerecorded message is played, even when the called party hangs up," H.R. Rep. No. 102-317, at 10, there was a danger that the autodialers could "seize" emergency or medical assistance telephone lines, rendering them inoperable, and "dangerously preventing those lines from being utilized to receive calls from those needing emergency services," H.R. Rep. No. 101-633, at 3 (1990). Representative Marge Roukema noted that it was "not just calls to doctors' offices or police and fire stations that pose a public health hazard." 137 Cong. Rec. H35,305 (daily ed. Nov. 26, 1991) (statement of Rep. Roukema). She recounted "the sheer terror" of a New York mother who, when she tried to call an ambulance for her injured child, "picked up her phone only to find it occupied by a computer call that would not disconnect." *Id.* at 35,305–06.

In light of these and other concerns, Senator Hollings introduced a bill to amend the Communications Act of 1934, in order 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. No. 102-178, at 1. This bill became the Telephone Consumer Protection Act of 1991.

As originally enacted, the TCPA placed restrictions on the use of automated telephone equipment, including automatic telephone dialing systems and telephone facsimile machines. The statute defined "automatic telephone dialing systems" (ATDS) as follows:

> (1) The term 'automatic telephone dialing system' means equipment which has the capacity—
>
> > (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
> >
> > (B) to dial such numbers.

Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395. This language established Congress's intent to regulate equipment that is "automatic," and that has "the capacity" to function in two specified ways: "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial" those telephone numbers. Although the TCPA has been amended several times since its original enactment, Congress has never revised the definition of an ATDS. Therefore, Congress's decision to regulate only those devices which have the aforementioned functions,

capacity, and ability to function automatically remains unchanged.

***3** The TCPA prohibited the use of an ATDS 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 emergency telephone lines, hospital rooms or other health care facilities, and paging and cellular telephones. 47 U.S.C. § 227(b)(1)(A) (1991). It also prohibited the use of an ATDS "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." *Id.* § 227(b)(1)(D).

As required by the TCPA, *id.* § 227(b)(2), in 1992 the FCC promulgated rules to implement the statute. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8753 (1992). The FCC did not elaborate on the functions of an ATDS and its definition merely tracked the statutory definition. *Id.* at 8755 n.6, 8792. [1]

B

It was not until ten years later that the FCC realized that "the telemarketing industry ha[d] undergone significant changes in the technologies and methods used to contact consumers," and such marketplace changes warranted modifications to the existing rules. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,017 (2003) (*2003 Order*). In particular, the FCC was concerned about the proliferating use of the predictive dialer, which is "an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *Id.* at 14,022 n.31. Unlike the automated telemarketing devices prevalent in the early 1990s, which dialed a random or sequential block of numbers, predictive dialers generally automatically dialed a list of numbers that had been preprogrammed and stored in the dialer, or were downloaded from a computer database. *Id.* at 14,090.

In order to determine whether the TCPA applied to this new technology, the FCC had to assess whether the predictive dialer qualified as an ATDS. This required consideration of the statutory definition: whether the equipment was "automatic" and whether it had the capacity to function in the two relevant ways.

In a series of rulings, from 2003 to 2015, the FCC determined that predictive dialers and other new technology qualified as an ATDS, even if they did not generally generate or store random or sequential numbers. In its 2003 ruling, the FCC reasoned that a predictive dialer may have the "capacity" to dial random and sequential numbers, even if it was not currently being used for such a purpose. *Id.* at 14,091. The FCC acknowledged the telemarketing industry's argument that predictive dialers do not fall within the statutory definition of ATDS because they "do not dial numbers 'randomly or sequentially,' " but nevertheless concluded that predictive dialers' "hardware, when paired with certain software, ha[d] the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* at 14,090–91. In its later 2015 order, the FCC went even further, and determined that a device could have the requisite capacity if it had any potential to be configured for that purpose. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 (2015) (*2015 Declaratory Ruling*) (holding that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities").

***4** Second, the FCC suggested that a device could qualify as an ATDS even if it entirely lacked the capacity to dial numbers randomly or sequentially. Thus in its 2012 ruling, the FCC stated that the definition of an ATDS "covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15,391, 15,392 n.5 (2012) (*2012 Declaratory Ruling*). The FCC's subsequent 2015 ruling, however, made the contrary suggestion that a device would not meet the definition of an ATDS unless it had the capacity to dial random or sequential numbers. *See 2015 Declaratory Ruling*, 30 FCC Rcd. at 7971–72 ("We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.").

The FCC relied on policy and legislative history to support its application of the definition of ATDS to new technology. The FCC reasoned that "through the TCPA, Congress was attempting to alleviate a particular problem —an increasing number of automated and prerecorded calls to certain categories of numbers," and therefore Congress intended for any device that had the basic function of being automatic, i.e., had "the *capacity* to dial numbers without human intervention," *2003 Order*, 18 FCC Rcd. at 14,092, to be regulated under the TCPA.[2] Further, the FCC thought that it was clear "that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Id.* Accordingly, the FCC concluded that an interpretation of the statutory definition of ATDS which excluded new technology that could automatically dial thousands of numbers merely because it "relies on a given set of numbers would lead to an unintended result" and fail to effectuate the purpose of the statutory requirement. *Id.*

C

After the FCC's 2015 ruling, a large number of regulated entities challenged the FCC's definition of an ATDS in the D.C. and Seventh Circuits, and the petitions were consolidated in the D.C. Circuit. *See* Consolidation Order, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211). Among other things, petitioners had sought clarification from the FCC on how the TCPA applied to new technologies, including cloud-based dialing options and smartphone apps. *2015 Declaratory Ruling*, 30 FCC Rcd. at 7970. In challenging the 2015 order, petitioners argued that they had not received the clarification they sought, asserting specifically that the FCC erred in concluding that equipment that merely had the potential future capacity to function as an autodialer, taking into account possible upgrades or modifications, met the statutory definition of ATDS. *ACA Int'l*, 885 F.3d at 696. They also challenged the FCC's conclusion that equipment qualifies as an ATDS so long as it can automatically dial from a list of numbers, even if it does not have the capacity to store or produce random or sequential numbers. *Id.* at 694.

[1] The D.C. Circuit first asked whether it had jurisdiction to consider all of the FCC's rulings on this issue, including those that predated the 2015 order. Although normally all challenges to an FCC rule must be made within 60 days after its entry, 28 U.S.C. § 2344, a petition for a rulemaking may reopen consideration of prior rulemakings, *see Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 151–52 (D.C. Cir. 1990). "An agency's reconsideration of a rule in a new rulemaking constitutes a reopening when the original rule is 'reinstated' so as to have renewed effect." *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) (quoting *Pub. Citizen*, 901 F.2d at 152). The D.C. Circuit concluded that the parties' 2015 rulemaking petition to the FCC reopened consideration of the definition of ATDS established in the FCC's 2003 order, as well as its subsequent rulings. *ACA Int'l*, 885 F.3d at 701.

***5** On the merits, the D.C. Circuit invalidated the FCC's interpretation of the two key questions raised by the statutory definition of an ATDS, namely: "(i) when does a device have the 'capacity' to perform the two enumerated functions; and (ii) what precisely are those functions?" *Id.* at 695.

Turning first to the FCC's interpretation of "capacity," the D.C. Circuit concluded it was overbroad. According to the court, the "straightforward understanding of the Commission's ruling is that all smartphones qualify as autodialers because they have the inherent 'capacity' to gain ATDS functionality by downloading an app." *Id.* at 700. Because "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact," *id.* at 698, the D.C. Circuit concluded that the FCC's interpretation "is an unreasonably, and impermissibly, expansive one," *id.* at 700.

Turning to the second issue, the D.C. Circuit concluded that the FCC's explanation of the functions of an ATDS was inadequate. The court explained that "[a] basic question raised by the statutory definition is whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed," or whether it would be "enough if the device can call from a database of telephone numbers generated elsewhere." *Id.* at 701. The FCC had stated that a device qualified as an ATDS *only if* it could generate random or sequential numbers to be dialed, but also indicated that a device which could only dial numbers from a stored list also qualified as an ATDS. *Id.* at 701–02. While "[i]t might be permissible for

the Commission to adopt either interpretation," the D.C. Circuit held that "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order." *Id.* at 703. The D.C. Circuit also noted that the 2015 ruling lacked clarity on whether an autodialer must dial numbers without human intervention. Although the FCC indicated that "the 'basic function[ ]' of an autodialer is to 'dial numbers without human intervention,' " it declined a request to clarify that a dialer must have such a feature. *Id.* (alteration in original) (quoting *2015 Declaratory Ruling*, 30 FCC Rcd. at 7975). Because "[t]he order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions," the court "set aside the Commission's treatment of those matters." *Id.*

II

We now turn to the facts of this case. The device at issue in this appeal is called the Textmunication system, which is a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers.[3] Phone numbers are captured and stored in one of three ways: An operator of the Textmunication system may manually enter a phone number into the system; a current or potential customer may respond to a marketing campaign with a text (which automatically provides the customer's phone number); or a customer may provide a phone number by filling out a consent form on a Textmunication client's website. A client of Textmunication can then design a marketing campaign that, for example, offers customers free passes and personal training sessions, provides appointment reminders and class updates, or sends birthday greetings, and the Textmunication system will automatically send the desired messages to the stored phone numbers at a time scheduled by the client.

***6** Crunch Fitness communicates with its prospective and current gym members by sending text messages through this Textmunication system. When Crunch wants to send a text message to its current or prospective customers, a Crunch employee logs into the Textmunication system, selects the recipient phone numbers, generates the content of the message, and selects the date and time for the message to be sent. The Textmunication system will then automatically send the text messages to the selected phone numbers at the appointed time.

Jordan Marks signed up for a gym membership with Crunch Fitness in 2012. After joining the gym, Marks received three text messages from Crunch over a period of eleven months. Marks's phone carrier charged him incoming tolls for each of these text messages. In February 2014, Marks filed a putative class action complaint against Crunch, alleging violations of § 227(b) of the TCPA. He claimed that Crunch "negligently contact[ed] [him] on [his] cellular telephone, in violation of the [TCPA], thereby invading [his] privacy." Marks alleged that the text messages were sent using an ATDS which has "the capacity to send text messages to cellular telephone numbers from a list of telephone numbers automatically and without human intervention."

The district court granted summary judgment in favor of Crunch on the ground that the Textmunication system did not qualify as an ATDS because it presently lacked a random or sequential number generator, and did not have the potential capacity to add such a feature. Because it defined an ATDS as necessarily including a random or sequential number generator, the court did not consider the declaration of Marks's expert witness, Jeffrey Hansen, stating that the Textmunication system called numbers from a stored list. The court therefore denied Crunch's motion to exclude Hansen's testimony as moot. Marks timely appealed. We vacated submission of Marks's appeal pending the issuance of *ACA International*.

III

A

After *ACA International* was issued, we ordered supplemental briefing to address the impact of the D.C. Circuit's opinion on this case. Under the Hobbs Act, an appellate court "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the [FCC] made reviewable by [47 U.S.C § 402(a)]," 28 U.S.C. § 2342, so long as the appeal is timely, meaning that it was brought within sixty days from when the FCC releases the final order to the public, *see* 28 U.S.C. § 2344.[4] Here,

various parties timely challenged the FCC's 2015 order in both the Seventh and D.C. Circuits; these challenges were consolidated and assigned to the D.C. Circuit, which then became "the sole forum for addressing ... the validity of the FCC's" order. *MCI Telecomms. Corp. v. U.S. W. Commc'ns*, 204 F.3d 1262, 1267 (9th Cir. 2000) (quoting *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999)). Because the D.C. Circuit exercised its authority to set aside the FCC's interpretations of the definition of an ATDS in the 2015 order, 28 U.S.C. § 2342, and any prior FCC rules that were reinstated by the 2015 order, *see Biggerstaff*, 511 F.3d at 185 (quoting *Pub. Citizen*, 901 F.2d at 152), we conclude that the FCC's prior orders on that issue are no longer binding on us. *See King v. Time Warner Cable Inc.*, 894 F.3d 473, 476–77 (2d Cir. 2018) (holding that *ACA International* "invalidated that [FCC 2015 Declaratory Ruling] and thereby removed any deference we might owe to the views the FCC expressed in it"); *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (holding that in light of the D.C. Circuit's holding, the court was free to interpret the statutory definition of an autodialer as it had prior to the issuance of the FCC's 2015 order).

***7** **[2]** We review a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party in order to determine whether there are any genuine issues of material fact. *Thomas v. Ponder*, 611 F.3d 1144, 1149–50 (9th Cir. 2010). The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

B

Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains. *See* 47 U.S.C. § 227(a). [5] Accordingly, we must begin anew to consider the definition of ATDS under the TCPA.

[3] **[4]** **[5]** **[6]** We "begin [our analysis] with the plain language of the statute." *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1170 n.1 (9th Cir. 2017) (alteration in original) (quoting *Negusie v. Holder*, 555 U.S. 511, 542, 129 S.Ct. 1159, 173 L.Ed.2d 20 (2009)). "If the 'statutory text is plain and unambiguous[,]' we 'must apply the statute according to its terms.' " *Id.* (alteration in original) (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009)). If the language of a statute is ambiguous, "we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009) (quoting *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)). "It is also 'a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)). "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988); *see also United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.").

As the D.C. Circuit noted, the definition of ATDS "naturally raises two questions: (i) when does a device have the 'capacity' to perform the two enumerated functions; and (ii) what precisely are those functions?" *ACA Int'l*, 885 F.3d at 695. We start by addressing the second question regarding functions. The TCPA defines 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 question is whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator or if a device can be an ATDS if it merely dials numbers from a stored list. We must also determine to what extent the device must function without human intervention in order to qualify as an ATDS.

***8** Marks and Crunch offer competing interpretations of the language of § 227(a)(1)(A), but both parties fail to make sense of the statutory language without reading additional words into the statute.

Marks points out that a number generator is not a storage device; a device could not use "a random or sequential number generator" to store telephone numbers. Therefore, Marks asserts, it does not make sense to read

"store" in subdivision (A) as applying to "telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). Instead, Marks contends that we should read the definition as providing that an ATDS is "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." In other words, a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them.

Crunch, in turn, argues that due to the placement of the comma in the statute, the phrase "using a random or sequential number generator" modifies both "store" and "produce." Therefore, Crunch argues that the best reading of the statute defines an ATDS as "equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." As such, to qualify as an ATDS, according to Crunch, a device must store telephone numbers that have been produced using a random or sequential number generator.

After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face.[6] The D.C. Circuit apparently agreed, stating that "[i]t might be permissible" for the FCC to adopt an interpretation that a device had to generate random or sequential numbers in order to be an ATDS, or that a device could be an ATDS if it was limited to dialing numbers from a stored list. *ACA Int'l*, 885 F.3d at 702–03. We therefore turn to other aids in statutory interpretation.

C

Because the statutory language is ambiguous, we look at the context and the structure of the statutory scheme. The structure and context of the TCPA as originally enacted indicate that Congress intended to regulate devices that make automatic calls. Although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.

This conclusion is supported by provisions in the TCPA allowing an ATDS to call selected numbers. For instance, the TCPA permitted use of autodialers for a call "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A) (1991). To take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers.[7] Congress's 2015 amendment to the TCPA provides additional information about Congress's views on the scope of the definition of ATDS. After the FCC issued its 2015 order, Congress added language to § 227(b)(1)(A)(iii), exempting the use of an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (codified at 47 U.S.C. § 227(b)(1)(A)(iii)). Like the exception allowing the use of an autodialer to make calls "with the prior express consent of the called party," this debt collection exception demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an ATDS but is exempted from the TCPA's strictures. Moreover, in amending this section, Congress left the definition of ATDS untouched, even though the FCC's prior orders interpreted this definition to include devices that could dial numbers from a stored list. We "presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation." *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002). Because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

***9** **[7]** Despite the ambiguity of the statutory definition of ATDS, reading the definition "in [its] context and with a view to [its] place in the overall statutory scheme," *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, 120 S.Ct. 1291, we conclude that the statutory definition of ATDS is not limited to devices with the capacity to call numbers

produced by a "random or sequential number generator," but also includes devices with the capacity to dial stored numbers automatically. Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers. [8]

[8] **[9]** We also reject Crunch's argument that a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever. By referring to the relevant device as an "*automatic* telephone *dialing* system," Congress made clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control. 47 U.S.C. § 227(a)(1) (emphasis added); *see ACA Int'l*, 885 F.3d at 703 (" '[A]uto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers."). Common sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions. Congress was clearly aware that, at the very least, a human has to flip the switch on an ATDS. *See The Automated Telephone Consumer Protection Act of 1991, Hearing Before the Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 15 (1991) (statement of Robert Bulmash, President, Private Citizen, Inc.) (describing a pitch for autodialers in a telemarketing magazine as stating: "You come home from work[, and] turn on the machine, just like turning on a radio."). Crunch does not dispute that the Textmunication system dials numbers automatically, and therefore it has the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform.

D

[10] **[11]** Because we read § 227(a)(1) to provide that the term "automatic telephone dialing system" means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically (even if the system must be turned on or triggered by a person), we conclude there is a genuine issue of material fact as to whether the Textmunication system is an ATDS. The evidence in the record shows that the Textmunication system stores numbers and dials them automatically to send text messages to a stored list of phone numbers as part of scheduled campaigns. This is sufficient to survive summary judgment. [9] Because the district court did not have the benefit of *ACA International* or our construction of the definition of ATDS, we vacate the district court's ruling and remand it for further proceedings. [10] Each party shall bear its own costs on appeal.

***10 VACATED AND REMANDED.**

All Citations

--- F.3d ----, 2018 WL 4495553, 18 Cal. Daily Op. Serv. 9509, 2018 Daily Journal D.A.R. 9564

Footnotes

1 As originally promulgated, 47 C.F.R. § 64.1200(f)(1) (1992) provided:

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean 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.

The same definition is in force today.

2 In the 2003 order, the FCC also confirmed that the TCPA applied to both voice calls and "text calls to wireless numbers" including short message service (SMS) calls, which "provide[ ] the ability for users to send and receive text messages to and from mobile handsets with maximum message length ranging from 120 to 500 characters." *2003 Order*, 18 FCC Rcd. at 14,115 & n.606 (citation omitted).

3 We have concluded that the TCPA applies to text messages because it is "a form of communication used primarily between telephones." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953–54 (9th Cir. 2009).

4 An appellate court lacks authority to consider a challenge to an FCC order that is brought after sixty days from the date when the FCC releases the final order to the public. *See* 28 U.S.C. § 2344; *see also U.S. W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (stating that "[p]roperly promulgated FCC regulations currently in effect must be presumed valid" for purposes of a case not brought pursuant to a petition under the Hobbs Act).

5 Although the FCC had promulgated a regulation defining ATDS, the "regulation does little more than restate the terms of the statute itself," and "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006).

6 Our statement in *Satterfield* that "the statutory text is clear and unambiguous" referred to only one aspect of the text: whether a device had the "*capacity* 'to store or produce telephone numbers ....' " 569 F.3d at 951 (emphasis in original).

7 Other provisions in the statute prohibited calls to specified numbers. For instance, the statute authorized the FCC to establish and use a national database "to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations" and who could not be called by telemarketers. *Id.* § 227(c)(3). It likewise prohibited calls to emergency telephone lines, *id.* § 227(b)(1)(A)(i), patient rooms in hospitals or other health care facilities, *id.* § 227(b)(1)(A)(ii), and paging services and cellular phones, *id.* § 227(b)(1)(A)(iii). In order to comply with such restrictions, an ATDS could either dial a list of permitted numbers (as allowed for autodialed calls made with the prior express consent of the called party) or block prohibited numbers when calling a sequence of random or sequential numbers. In either case, these provisions indicate Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list.

8 Therefore, we decline to follow the Third Circuit's unreasoned assumption that a device must be able to generate random or sequential numbers in order to qualify as an ATDS. *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 120 (3d Cir. 2018) (stating, without explanation, that the plaintiff's claims against Yahoo failed because he "cannot point to any evidence that creates a genuine dispute of fact as to whether [Yahoo's device] had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"). In making this assumption, the Third Circuit failed to resolve the linguistic problem it identified in an unpublished opinion in the same case, where it acknowledged that "it is unclear how a number can be *stored* (as opposed to *produced*) using 'a random or sequential number generator.' " *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015). Because the Third Circuit merely avoided the interpretive questions raised by the statutory definition of ATDS, its published opinion is unpersuasive.

9 Because we vacate the district court's decision on this ground, we decline the reach the question whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so. *Cf. Meyer v. Portfolio Recovery Assocs. LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *Satterfield*, 569 F.3d at 951.

10 We also vacate the district court's dismissal of Crunch's motion to exclude Hansen's declaration as moot. The district court based its ruling on its conclusion that there was no dispute of material fact as to whether the Textmunication system was an ATDS, and Hansen's declaration could not help create one. To the extent Hansen's declaration addresses whether the Textmunication system calls automatically from a stored list, it is relevant to the question whether the system qualifies as an ATDS.

We **DENY** Marks's motion for judicial notice of two newspaper articles. We "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Because Marks has not pointed to any judicially noticeable facts in these articles, we decline to take judicial notice.

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319 F.Supp.3d 927
United States District Court,
N.D. Illinois, Eastern Division.

Binyamin PINKUS, Plaintiff,
v.
SIRIUS XM RADIO, INC.,
Defendant/Third-Party Plaintiff,
v.
The Results Companies LLC, Career Horizons, Inc. d/b/a TeleServices Direct, and iPacesetters LLC, Third-Party Defendants.

16 C 10858
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Signed 7/26/2018

Synopsis

Background: Consumer filed suit against satellite radio provider, claiming violations of Telephone Consumer Protection Act (TCPA) by causing over 100 calls to be placed to consumer's cellular telephone allegedly using automated telephone dialing system (ATDS) and by using prerecorded voice messages on those calls. Provider brought third-party indemnification claims against telemarketing companies that made calls on provider's behalf. Provider moved for partial judgment on pleadings.

[Holding:] The District Court, Gary Feinerman, J., held that calls to consumer by predictive dialers were not made using ATDS.

Motion granted.

Procedural Posture(s): Motion for Partial Judgment on the Pleadings.

West Headnotes (11)

[1] Federal Civil Procedure
Matters deemed admitted

On a motion for partial judgment on the pleadings, district court assumes the truth of the operative complaint's well-pleaded factual allegations, though not its legal conclusions. Fed. R. Civ. P. 12(c).

Cases that cite this headnote

[2] Federal Civil Procedure
Matters considered

On a motion for partial judgment on the pleadings, district court must consider documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice, along with additional facts set forth in plaintiff's brief opposing dismissal, so long as those additional facts are consistent with the pleadings. Fed. R. Civ. P. 12(c).

Cases that cite this headnote

[3] Federal Civil Procedure
Determination of Motion

On a motion for partial judgment on the pleadings, the facts are set forth by the district court as favorably to plaintiff as those materials allow. Fed. R. Civ. P. 12(c).

Cases that cite this headnote

[4] Federal Civil Procedure
Determination of Motion

In setting forth the facts on a motion for partial judgment on the pleadings, district court does not vouch for their accuracy. Fed. R. Civ. P. 12(c).

Cases that cite this headnote

[5] Telecommunications
Powers and duties

The Federal Communications Commission (FCC) has the authority to promulgate regulations implementing the Telephone Consumer Protection Act (TCPA). Communications Act of 1934 § 227, 47 U.S.C.A. § 227.

Cases that cite this headnote

[6] **Telecommunications**
Jurisdiction

The Federal Communications Commission's (FCC) order and two subsequently declaratory rulings, determining and reaffirming that predictive dialers satisfied the definition of automated telephone dialing system (ATDS) in the Telephone Consumer Protection Act (TCPA) even if they did not have the capacity to generate telephone numbers randomly or sequentially and then to dial them, were "final orders" of the FCC, within the meaning of the Hobbs Act, and thus, absent a direct appeal, district courts were bound to follow those orders. 28 U.S.C.A. § 2342(1); Communications Act of 1934 § 227, 47 U.S.C.A. §§ 227(a)(1), 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200.

2 Cases that cite this headnote

[7] **Statutes**
Language

Statutes
Plain language;plain, ordinary, common, or literal meaning

When interpreting a statute, district court must begin with its text and assume that the ordinary meaning of that language accurately expresses the legislative purpose.

Cases that cite this headnote

[8] **Statutes**
Language

Statutes
Context

When interpreting a statute, district court begins with the language of the statute itself, attending to the specific context in which that language is used.

Cases that cite this headnote

[9] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

Statutes
Superfluousness

When interpreting a statute, district court must accord words and phrases their ordinary meanings and avoid rendering them meaningless, redundant, or superfluous.

Cases that cite this headnote

[10] **Telecommunications**
Advertising, canvassing and soliciting; telemarketing

Equipment qualifies as an "automated telephone dialing system" (ATDS), within the meaning of the Telephone Consumer Protection Act (TCPA), only if it has the capacity to function by generating random or sequential telephone numbers and dialing those numbers. Communications Act of 1934 § 227, 47 U.S.C.A. §§ 227(a)(1), 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200.

1 Cases that cite this headnote

[11] **Telecommunications**
Illegal or improper purposes

Over 100 calls to consumer's cellular telephone that were made by telemarketers using predictive dialers on behalf of satellite radio provider were not made using "automated telephone dialing system" (ATDS), within meaning of Telephone Consumer Protection Act (TCPA), prohibiting calls to any cellular telephone, except for emergency purposes or made with prior express consent of called party, using any ATDS defined as equipment having capacity to store or produce telephone numbers to be called, using random or sequential number generator, and to dial such numbers, but excluding predictive dialers lacking capacity to generate numbers randomly or sequentially, where consumer was not called with device that had capacity to store or produce numbers that were randomly

or sequentially generated. Communications Act of 1934 § 227, 47 U.S.C.A. §§ 227(a)(1), 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200.

2 Cases that cite this headnote

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MEMORANDUM OPINION AND ORDER

Gary Feinerman, United States District Judge

Binyamin Pinkus alleges that Sirius XM Radio, Inc. violated the Telephone Consumer ***929** Protection Act ("TCPA"), 47 U.S.C. § 227, by causing over one hundred calls to be placed to his cell phone using an automated telephone dialing system ("ATDS" or "autodialer"), and also by using prerecorded voice messages on those calls. Doc. 105. Sirius brought third-party claims against several telemarketing service providers, Doc. 8, three of which remain in the case, Docs. 73, 103 (voluntarily dismissing two providers); Docs. 81-82 (reported at 255 F.Supp.3d 747 (N.D. Ill. 2017)) (dismissing one provider for *forum non conveniens*). The case was partially stayed for some time pending the D.C. Circuit's resolution of *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), which reviewed a 2015 Federal Communication Commission ("FCC") order addressing the features that equipment must have to qualify as an ATDS under the TCPA. Doc. 73. After *ACA International* was issued, Pinkus was given leave to and did file an amended complaint. Docs. 104, 105. Sirius now moves under Civil Rule 12(c) for partial judgment on the pleadings, contending that Pinkus has not alleged facts sufficient to make it plausible that an ATDS was used to make the calls he received. Doc. 108. The motion is granted.

Background

[1] [2] [3] [4] As on a Rule 12(b)(6) motion, the court on a Rule 12(c) motion assumes the truth of the operative complaint's well-pleaded factual allegations, though not its legal conclusions. *See St. John v. Cach, LLC*, 822 F.3d 388, 389 (7th Cir. 2016); *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014). The court must also consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Pinkus's brief opposing dismissal, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013) (internal quotation marks omitted); *see also N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998). The facts are set forth as favorably to Pinkus as those materials allow. *See Pierce v. Zoetis, Inc.*, 818 F.3d 274, 277 (7th Cir. 2016). In setting forth the facts at this stage, the court does not vouch for their accuracy. *See Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 384 (7th Cir. 2010).

A. Statutory and Regulatory Landscape

[5] As relevant here, the TCPA prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] ... to any telephone number assigned to a ... cellular telephone service ...." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1). The FCC has the authority to promulgate regulations implementing the TCPA. *See ACA Int'l*, 885 F.3d at 693. Regulations that the FCC promulgated in 1992 adopted, without elaboration, the

statutory definition of ATDS. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("1992 Order"), 7 FCC Rcd. 8752, 8792 App'x B (1992) (amending 47 C.F.R. § 64.1200).

New FCC regulations promulgated in 2003 interpreted the term ATDS to include a "predictive dialer," meaning "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales ***930** agent will be available to take calls." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2003 Order"), 18 FCC Rcd. 14014, 14091-93 ¶¶ 131-133 (2003). As the Commission explained, a predictive dialer consists of "hardware" that, "when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* at 14091 ¶ 131. Telemarketers using predictive dialing software "program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call." *Ibid.* Thus, the Commission noted, "[t]he principal feature of predictive dialing software is a timing function, not number storage or generation." *Ibid.*

The 2003 Order observed that, "[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily." *Id.* at 14092 ¶ 132. The Commission came to believe, however, that "to exclude ... equipment that use[s] predictive dialing software from the definition of [ATDS] simply because it relies on a given set of numbers"—rather than generating the numbers itself—"would lead to an unintended result." *Id.* at 14092 ¶ 133. According to the Commission, Congress could not have intended for it to be "permissible" to make calls to "wireless numbers ... when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages." *Ibid.*

To support its position, the FCC stated that the TCPA's definition of ATDS "contemplates autodialing equipment that *either* stores *or* produces numbers," and also that it encompasses all "equipment" with the " '*capacity* to store or produce telephone numbers.' " *Id.* at 14092 ¶ 132 (first two emphases added) (quoting 47 U.S.C. § 227(a)(1)). By enacting this broad definition of ATDS, the FCC added, "Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Ibid.* As the FCC saw it, Congress's primary purpose in enacting the TPCA was "to alleviate a particular problem—an increasing number of automated and prerecorded calls to certain categories of numbers." *Id.* at 14092 ¶ 133. This purpose was significant, the FCC asserted, because "the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective" than the past practice of "us[ing] dialing equipment to create and dial 10-digit telephone numbers arbitrarily." *Id.* at 14092 ¶ 132. For these reasons, the FCC concluded that "a predictive dialer falls within the meaning and statutory definition of [ATDS] and the intent of Congress." *Id.* at 14093 ¶ 133.

Five years later, in 2008, the FCC affirmed the 2003 Order in this respect. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2008 Declaratory Ruling"), 23 FCC Rcd. 559, 566 ¶ 12 (2008). The Commission noted that the 2003 Order "found that, based on the statutory definition of [ATDS], the TCPA's legislative history, and current industry practice and technology, a predictive dialer falls within the meaning and definition of autodialer and the intent of Congress." *Id.* at 566 ¶ 13. Although a party to the 2008 proceeding urged the FCC to find that a "predictive dialer meets the definition of autodialer *only* when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists," *id.* at 566 ¶ 12 (emphasis added), the Commission disagreed, stating that nothing presented ***931** by the party "warrant[ed] reconsideration of [the 2003] findings." *Id.* at 567 ¶ 14.

The FCC in 2015 again reaffirmed the 2003 Order's ruling "that predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer.' " *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2015 Declaratory Ruling"), 30 FCC Rcd. 7961, 7972 ¶ 10 (2015). The reason, the Commission stated, was that it found "troubling that predictive dialers, like dialers that utilize random or sequential numbers instead of a list of numbers, retain the capacity to dial thousands of numbers in a short period of time." *Id.* at 7973 ¶ 14. According to the Commission, the TCPA's "unqualified use of the term 'capacity,' " which encompasses "equipment that lacks the 'present ability' to dial randomly or sequentially" but that can be configured to do so, necessarily means that the definition

of an ATDS covers *all* predictive dialers, even those that simply dial numbers from customer telephone lists without randomly or sequentially generating the numbers. *Id.* at 7974 ¶ 15; *see also id.* at 7971-72 ¶ 10; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15391, 15392 ¶ 2 n.5 (2012) ("The Commission has emphasized that [the] definition [of ATDS] covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.").

B. Pinkus's Allegations

Pinkus claims that Sirius violated the TCPA by, among other things, by causing over one hundred calls to be placed to his cell phone using an ATDS. Doc. 105 at ¶¶ 9-23. He alleges that the calls were placed "using 'predictive dialing' technology, which automatically places calls without human intervention until the called party answers the call, at which time such automatic dialer attempts to connect the called party." *Id.* at ¶ 18; *see also id.* at ¶ 19 (alleging further that no customer service representative was on the line when he answered the calls, and that he would experience a delay after answering until a representative began speaking). As Pinkus acknowledged at the hearing on this motion, Doc. 125, this claim rests on the premise that, as the FCC ruled in the 2003 Order and reaffirmed in the 2008 and 2015 Declaratory Rulings, a predictive dialer qualifies as an ATDS under the TCPA even if it lacks the capacity to generate randomly or sequentially telephone numbers to be dialed.

Discussion

As discussed in detail below, *ACA International* invalidated the 2015 Declaratory Ruling's interpretation of the statutory term ATDS. Sirius contends that, in so doing, *ACA International* necessarily invalidated the FCC's materially identical interpretation of the term ATDS in the 2003 Order and the 2008 Declaratory Ruling, and therefore that this court must interpret the term as an original matter without regard to the Commission's findings in all three rulemakings that predictive dialers categorically qualify as ATDSs. Doc. 109 at 12-13. That exercise, Sirius submits, results in the conclusion that only a predictive dialer with the capacity to "generate and [then] dial random or sequential telephone numbers," *id.* at 14-15—and not the kind of predictive dialers that the complaint alleges were used to call Pinkus, which have only the more limited capacity to dial numbers from customer telephone lists—qualifies as an ATDS. Pinkus, by contrast, contends that *ACA International* left undisturbed the 2003 Order and 2008 Declaratory Ruling, and ***932** therefore that it remains the law that *all* predictive dialers qualify as ATDSs. Doc. 114 at 19-20.

[6] Under the Hobbs Act, "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the [FCC]." 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a) (making § 2342(1) applicable to FCC regulations promulgated under the TCPA). There is no dispute here that the 2003 Order, the 2008 Declaratory Ruling, and the 2015 Declaratory Ruling are final orders within the meaning of § 2342(1), and thus that "absent a direct appeal," district courts "are bound to follow [them]." *Blow v. Bijora*, 855 F.3d 793, 802 (7th Cir. 2017) (citing *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 448-50 (7th Cir. 2010)).

ACA International consolidated several Hobbs Act petitions for review of the 2015 Declaratory Ruling. *See ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir.), Dkt. 07/24/2015 (consolidating petitions); *Prof'l Assoc. for Customer Engagement, Inc. v. FCC*, No. 15-2489 (7th Cir.), Dkt. 7 (transferring case); *see also Herrick v. GoDaddy.com LLC*, 312 F.Supp.3d 792, 797 n.5, 2018 WL 2229131, at *5 n.5 (D. Ariz. May 14, 2018) (summarizing the procedural posture). The parties do not dispute that this court is bound by *ACA International*, Doc. 109 at 13; Doc. 114 at 18; Doc. 119 at 6-7, as "that court became the 'sole forum for addressing ... the validity of the FCC's rule[ ],' " *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017) (alterations in original) (quoting *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008)), once the Judicial Panel on Multidistrict Litigation assigned the petitions to the D.C. Circuit under 28 U.S.C. § 2112(a)(3), *see ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir.), Dkt. 07/24/2015. *See CE Design*, 606 F.3d at 450 (observing that granting the court of appeals exclusive jurisdiction to review FCC rules "serves a number of valid goals: It promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency

review, and allows uniform nationwide interpretation of the federal statute by the centralized expert agency created by Congress to enforce the TCPA") (internal quotation marks omitted); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (similar).

Accordingly, the court must first assess *ACA International*'s scope. For the reasons stated below, *ACA International* invalidated not only the 2015 Declaratory Ruling's interpretation of the statutory term ATDS, but also the 2008 Declaratory Ruling's and 2003 Order's interpretation of that term. It follows that this court must interpret the term as an original matter and decide whether it encompasses the predictive dialers that Pinkus alleges were used to place the calls to his cell phone. For the reasons stated below, it does not.

I. *ACA International*'s Scope

The D.C. Circuit in *ACA International* reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the FCC's interpretation in the 2015 Declaratory Ruling of the statutory term ATDS. 885 F.3d at 700, 703. At the outset of its analysis, the court observed that the TCPA's definition of ATDS—"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)—"naturally raises two questions: (i) when does a device have the 'capacity' to perform the two enumerated functions; and (ii) what precisely are those functions?" 885 F.3d at 695.

***933** As to the first question, *ACA International* rejected the FCC's "expansive interpretation" of the term "capacity." 885 F.3d at 696. Observing with disapproval that the 2015 Declaratory Ruling had "the apparent effect of" deeming "any and all smartphones" to be ATDSs, the court held that the FCC's interpretation gave "the statute's restrictions on auto-dialer calls ... an eye-popping sweep." *Id.* at 696-97. The fundamental problem, the court explained, was that the Commission's "ruling states that equipment's 'functional capacity' includes 'features that can be added ... through software changes or updates.' " *Id.* at 696 (ellipses in original) (quoting 30 FCC Rcd. at 7974 ¶ 16). The consequence of that reading—that "all smartphones ... meet the statutory definition of an autodialer"—was unacceptable because it risked turning every call made or text sent from a smartphone "without advance consent" into a violation of federal law. *Id.* at 697.

As for the second and, for purposes of this suit, more crucial question, the D.C. Circuit rejected the FCC's understanding of the functions that equipment must have to qualify as an ATDS. Specifically, the D.C. Circuit overturned the FCC's decision in the 2015 Declaratory Ruling to "reaffirm[ ] ... the notion that a device can be considered an autodialer even if it has no capacity itself to generate random or sequential numbers (and instead can only dial from an externally supplied set of numbers)." *Id.* at 702; *see* 2015 Declaratory Ruling, 30 FCC Rcd. at 7971-72 ¶ 10 ("We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, *including when the caller is calling a set list of consumers*.") (emphasis added). The court did so, not because it affirmatively concluded that the FCC's understanding of ATDSs was wrong, but rather due to fatal inconsistencies in the FCC's reasoning.

As the court explained, the 2015 Declaratory Ruling at certain points appeared to require that, to qualify as an ATDS, a device must be able to "*generate* and then dial 'random or sequential numbers.' " *ACA Int'l*, 885 F.3d at 702 (quoting 30 FCC Rcd. at 7972 ¶ 10). That requirement, the court noted, was implicit in the FCC's distinction "between use of equipment to 'dial random or sequential numbers' and use of equipment to 'call[ ] a set list of consumers.' " *Ibid.* (alteration in original) (quoting 30 FCC Rcd. at 7972 ¶ 10). "Anytime phone numbers are dialed from a set list," the court added, "the database of numbers must be called in *some* order— either in a random or some other sequence. As a result, the ruling's reference to 'dialing random or sequential numbers' cannot simply mean dialing from a set list of numbers in random or other sequential order." *Ibid.* If the FCC intended the reference to "dialing random or sequential numbers" to mean that, the court observed, there would have been no reason for the agency to distinguish " 'dialing random or sequential numbers' " and " 'dialing a set list of numbers' " as distinct activities. *Ibid.* (quoting 30 FCC Rcd. at 7973 ¶¶ 13, 14). "It follows," the court concluded, that the 2015 Declaratory Ruling's "reference to 'dialing random or sequential numbers' means generating those numbers and then dialing them." *Ibid.*

At the same time, the D.C. Circuit observed that the 2015 Declaratory Ruling at other points "suggest[ed] a

competing view: that equipment can meet the statutory definition even if it lacks [the] capacity" to generate and then dial random or sequential numbers. *Ibid.* In support, the court pointed specifically to the FCC's decision ***934** to "reaffirm[ ] its 2003 ruling insofar as that order had found predictive dialers to qualify as ATDSs." *Ibid.* In the 2003 Order, *ACA International* explained, "the Commission had made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS." *Ibid.* Thus, "[b]y reaffirming that conclusion in its 2015 ruling, the Commission supported the notion that a device can be considered an autodialer even if it has no capacity itself to generate random or sequential numbers (and instead can only dial from an externally supplied set of numbers)." *Ibid.*

Given the 2015 Declaratory Ruling's dissonant understandings of ATDS—one providing that "a device qualif[ies] as an ATDS only if it can generate random or sequential numbers to be dialed," and the other that "it [can] so qualify even if it lacks that capacity"—*ACA International* held that the Commission's "lack of clarity about which functions qualify a device as an autodialer" rendered unreasonable its ruling that predictive dialers categorically qualify as ATDSs. *Id.* at 702-03. Although "[i]t might be permissible for the Commission to adopt either interpretation" of the term ATDS, the D.C. Circuit observed, "the Commission [could not], consistent with reasoned decisionmaking, espouse both competing interpretations in the same order." *Id.* at 703.

The key question here is whether the *ACA International* invalidated only the 2015 Declaratory Ruling's understanding of ATDS, as Pinkus contends, or also the understanding set forth in the 2003 Order and 2008 Declaratory Ruling, as Sirius contends. As a formal matter, *ACA International* addressed only the 2015 Declaratory Ruling, as the deadline for challenging the 2003 Order and 2008 Declaratory Ruling had long passed by the time the petition for review in *ACA International* was filed. *See id.* at 702-03 (referencing only the "2015 ruling" in holding that the FCC had given "no clear answer" to the question whether "a device [can] qualify as an ATDS only if it can generate random or sequential numbers to be dialed"). It is for that reason that most district courts considering the question have held that *ACA International* vacated only the 2015 Declaratory Ruling—and therefore that courts remain bound by the FCC's rulings in the 2003 Order and 2008 Declaratory Ruling that a predictive dialer need not have the capacity to "generate random or sequential numbers to be dialed," *ACA Int'l*, 885 F.3d at 702, to qualify as an ATDS. *See Pieterson v. Wells Fargo Bank, N.A.*, 2018 WL 3241069, at *3 (N.D. Cal. July 2, 2018) ("*ACA Int'l* vacated the 2015 Declaratory Ruling but it did not clearly intend to disturb the FCC's 2003 and 2008 orders."); *Ammons v. Ally Fin., Inc.*, —— F.Supp.3d ——, ——, 2018 WL 3134619, at *6 (M.D. Tenn. June 27, 2018) ("In the wake of *ACA International*, this Court joins the growing number of other courts that continue to rely on the interpretation of § 227(a)(1) set forth in prior FCC rulings."); *McMillion v. Rash Curtis & Assocs.*, 2018 WL 3023449, at *3 (N.D. Cal. June 18, 2018) ("*ACA International* invalidated only the 2015 FCC Order—the court discusses but does not rule on the validity of the 2003 FCC Order or the 2008 FCC Order."); *Maddox v. CBE Grp., Inc.*, 2018 WL 2327037, at *4 (N.D. Ga. May 22, 2018) ("Given the *ACA Int'l* decision, the Court relies on the FCC's 2003 interpretation of § 227(a)(1) to determine if Defendant's system qualifies as an ATDS."); *Swaney v. Regions Bank*, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018) ("In *ACA International*, the D.C. Circuit invalidated certain portions of the 2015 FCC Order, but not the portion of the Order reaffirming ***935** the FCC's 2003 determination that, 'while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS.' ") (quoting *ACA Int'l*, 885 F.3d at 702); *Reyes v. BCA Fin. Servs., Inc.*, 312 F.Supp.3d 1308, 1320–21, 2018 WL 2220417, at *11 (S.D. Fla. May 14, 2018) ("[N]owhere in the D.C. Circuit's opinion are the prior FCC orders overruled. Indeed, that would have been impossible given that the time to appeal those orders had long passed.").

This court respectfully takes a different view, holding that *ACA International* necessarily invalidated the 2003 Order and 2008 Declaratory Ruling insofar as they provide, as did the 2015 Declaratory Ruling, that a predictive dialer qualifies as an ATDS even if it does not have the capacity to generate phone numbers randomly or sequentially and then to dial them. As *ACA International* points out, the 2003 Order "observed that, '[i]n the past, telemarketers may have used dialing equipment to *create and dial* 10-digit telephone numbers arbitrarily,' " but that "the industry had 'progressed to the point where' it had become 'far more cost effective' instead to 'us[e] lists of numbers.' " 885 F.3d at 702 (alterations in original) (quoting 18 FCC

Rcd. at 14092 ¶ 132). Even in 2003, the D.C. Circuit noted, the Commission "suggested it saw a difference between calling from a list of numbers, on one hand, and 'creating and dialing' a random or arbitrary list of numbers, on the other hand." *Ibid.*; *see* 2003 Order, 18 FCC Rcd. at 14091 ¶ 131 (noting that a "predictive dialer" consists of "hardware" that, "when paired with certain software, has the capacity to store or produce numbers and dial those numbers *at random, in sequential order, or from a database of numbers*") (emphasis added); *ibid.* (noting that "[t]he principal feature of predictive dialing software is a timing function, not number storage or generation"). But, the D.C. Circuit observed, the 2003 Order—just like the 2015 Declaratory Ruling—elsewhere "made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS." 885 F.3d at 702 (citing 18 FCC Rcd. at 14091 ¶ 131 n.432, 14093 ¶ 133).

ACA International's concern that the FCC in the 2015 Declaratory Ruling "fail[ed] to satisfy the requirement of reasoned decisionmaking" due to the agency's "lack of clarity about which functions qualify a device as an autodialer" thus applies with equal force to the 2003 Order. *Id.* at 703. That same concern applies as well to the 2008 Declaratory Ruling, which simply "affirm[ed]" the understanding of ATDS articulated in the 2003 Order. 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 12; *see also id.* at 566-67 ¶ 14 ("ACA raises no new information about predictive dialers that warrants reconsideration of [the 2003 Order's] findings."). It necessarily follows that *ACA International* invalidates not only the 2015 Declaratory Ruling's understanding that all predictive dialers qualify as ATDSs, but also the 2003 Order and 2008 Declaratory Ruling to the extent they express the same understanding. *See Sessions v. Barclays Bank Del.*, 317 F.Supp.3d 1208,1212–13, 2018 WL 3134439, at *4 (N.D. Ga. June 25, 2018) ("Contrary to the pronouncement of the *Reyes* court, the D.C. Circuit clearly held that it invalidated *all* of the FCC's pronouncements as to the definition of 'capacit' as well as its descriptions of the statutory functions necessary to be an ATDS."); *Herrick*, 312 F.Supp.3d at 799, 2018 WL 2229131, at *7 (same).

Though no confirmation is necessary, the point is confirmed by another aspect of *ACA International*. In defending the 2015 Declaratory Ruling before the D.C. ***936** Circuit, the FCC argued as a "threshold matter" that the court did not have "jurisdiction to entertain petitioners' challenge concerning the functions a device must be able to perform" to qualify as an ATDS. *ACA Int'l*, 885 F.3d at 701. The reason given by the FCC was "that the issue [had been] resolved in prior agency orders," namely the 2003 Order and the 2008 Declaratory Ruling: "According to the Commission, because there was no timely appeal from those previous orders, it [was] too late now to raise a challenge by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones." *Ibid. ACA International* rejected that argument, holding that it was not barred from reviewing the FCC's "pertinent pronouncements" given that the FCC's "prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *Ibid.*

Pinkus's submission that the D.C. Circuit invalidated the 2015 Declaratory Ruling but left intact the 2003 Order and the 2008 Declaratory Ruling cannot be reconciled with this aspect of *ACA International*. As noted, the infirmity in the FCC's reasoning that *ACA International* identified in invalidating the 2015 Declaratory Ruling—that the agency reasoned at some points that a device qualifies as an ATDS only if it can generate random or sequential numbers to be dialed, and at other points that a device can so qualify even if it lacks that capacity—is equally present in the FCC's two earlier "pronouncements." *Ibid.* In rejecting the FCC's threshold argument that this issue was off limits because it had been resolved in the 2003 Order and 2008 Declaratory Ruling, the D.C. Circuit necessarily determined that the 2015 Declaratory Ruling was inextricably intertwined with the 2003 Order and the 2008 Declaratory Ruling insofar as they, too, addressed the capacities a predictive dialer must have to qualify as an ATDS.

Accordingly, the court is not obligated under the Hobbs Act, as it would have been prior to *ACA International*, to conclude that *all* predictive dialers—regardless of whether they have the capacity to "*generate* and then dial random or sequential numbers," *ACA Int'l*, 885 F.3d at 702 (internal quotation marks omitted)—qualify as ATDSs simply because the FCC so held in TCPA rulemakings. *See Peck*, 535 F.3d at 1057 ("In the absence of an agency interpretation of the statute, we examine section 332(c)(3)(A) as we would any other statute.").

II. The Extent to Which Predictive Dialers Qualify as ATDSs under the TCPA

With the D.C. Circuit having invalidated the FCC's ruling that the statutory term ATDS includes all predictive dialers, this court must address the issue as an original matter and then decide whether Pinkus has alleged that the calls placed to him were made using an ATDS. *See Sessions*, 317 F.Supp.3d at 1212, 2018 WL 3134439, at *4 ("The Court now turns to whether Plaintiff sufficiently alleged that Defendant used an ATDS as defined by the TCPA."); *Herrick*, 312 F.Supp.3d at 799, 2018 WL 2229131, at *7 (same).

Although it invalidated the FCC's rulings, *ACA International* did not itself articulate a definitive view of which functions characterize an ATDS. *See* 885 F.3d at 703 (noting that "[i]t might be permissible" for the FCC to conclude *either* that a device can "qualify as an ATDS only if it can generate random or sequential numbers to be dialed" *or* that it can "so qualify even if lacks that capacity"). Pinkus's sole argument on that issue is that a "predictive dialer" as the 2003 Order described it—"hardware" ***937** that, "when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers," 18 FCC Rcd. at 14091 ¶ 131—qualifies as an ATDS. Doc. 114 at 6, 19-20, 26. Given this, the parties' dispute can be reduced to the question whether a predictive dialing device that calls telephone numbers from a stored list of numbers—rather than having generated those numbers either randomly or sequentially—satisfies the statutory definition of ATDS.

[7] **[8]** **[9]** "When interpreting a statute," the court "must begin with its text and assume that the ordinary meaning of that language accurately expresses the legislative purpose." *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 791 (7th Cir. 2017) (alteration and internal quotation marks omitted); *see also Coleman v. Labor & Indus. Review Comm'n of Wis.*, 860 F.3d 461, 473 (7th Cir. 2017) ("We give statutes their plain meaning ...."). Accordingly, the court begins with " 'the language [of the statute] itself,' " attending to " 'the specific context in which that language is used.' " *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (brackets in original) (quoting *McNeill v. United States*, 563 U.S. 816, 819, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011)). The court must "accord words and phrases their ordinary meanings and avoid rendering them meaningless, redundant, or superfluous." *Ibid.*

As noted, the TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). According to Pinkus, the placement of the adverbial phrase "using a random or sequential number generator" indicates that it modifies only the verb "produce" and not the verb "store." Doc. 114 at 20-21. On that reading, and given the disjunctive "or" separating "store" and "produce," a device's having the "capacity to produce telephone numbers to be called, using a random or sequential number generator" (and then to dial those numbers) is only *one* possible way a device can qualify as an ATDS. *Id.* at 21. Another way is for the device to simply have the "capacity ... to store and dial numbers." *Ibid.* Because any predictive dialer has the latter capacity—specifically, in Pinkus's view, the capacity to store numbers from a "pre-determined list," *id.* at 22—Pinkus argues that Sirius's Rule 12(c) motion must be denied because the operative complaint alleges that the devices that were used to call him were predictive dialers. Doc. 105 at ¶¶ 10, 18-19.

Pinkus's reading of the statute would be convincing if subsection (a)(1)(A) were rearranged to read: "to store or, *using a random or sequential number generator*, to produce telephone numbers to be called." Rearranging the text in that manner would make it clear that "using a random or sequential number generator" modified only "produce" and not "store." But it is an unconvincing reading of the statute that Congress in fact drafted, with the adverbial phrase following both verbs. Understanding why requires some explanation.

Like "produce," "store" is a transitive verb, and so requires an object. *See Merriam-Webster* (2018), https://www.merriam-webster.com/dictionary/store; *Oxford English Dictionary* (2018), http://www.oed.com/view/Entry/190929?rskey=pdyROA&result=2#eid. And the object of the verbs "store" and "produce" is "telephone numbers to be called." As a result, despite the disjunctive "or" linking "store" and "produce," "store" is not a grammatical orphan, rather, like "produce," it is tied ***938** to the object, "telephone numbers to be called." The TCPA thus defines as an ATDS a device that has the capacity "[1] to store or produce [2] telephone numbers to be called" and then "to dial such numbers." 47 U.S.C. § 227(a)(1).

But what kinds of numbers? Given its placement immediately after "telephone numbers to be called," the phrase "using a random or sequential number generator" is best read to modify "telephone numbers to be called," describing a quality of the numbers an ATDS must have the capacity to store or produce. Had Congress meant "using a random or sequential number generator" to modify the verbs "store" and "produce," Congress would have placed the phrase immediately after those verbs and before "telephone numbers to be called"—with subsection (a)(1)(A) reading, "to store or produce, *using a random or sequential number generator*, telephone numbers to be called." Indeed, it would be odd to read the phrase "using a random or sequential number generator" as modifying "store" and "produce." The comma separating "using a random or sequential number generator" from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only "produce" and not "store," *see Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) ("[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.") (brackets and internal quotation marks omitted) (citing decisions from the Second, Third, Eleventh, and Federal Circuits), and yet it is hard to see how a number generator could be used to "store" telephone numbers.

Because the phrase "using a random or sequential number generator" refers to the kinds of "telephone numbers to be called" that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place. True, the statute does not use the verb "generate." But the phrase "using a random or sequential number generator" indicates that a number generator must be used to do *something* relevant to the "telephone numbers to be called"—most naturally, either to generate the numbers themselves, or to generate the order in which they will be called.

The latter possibility is highly unlikely for at least two reasons. For one, as *ACA International* recognized, numbers must necessarily "be called in *some* order—either in a random or some other sequence." 885 F.3d at 702. As a result, were the phrase "using a random or sequential number generator" understood to refer to how numbers are called rather than to how they are generated, it would be superfluous, as it would simply encompass the universe of possible orders in which numbers could be dialed. For another, if "using a random or sequential number generator" referred to the order in which numbers are dialed and not the process of generating them, the phrase would have followed, rather than preceded, "dial such numbers" in section (a)(1)(B). That is, the statute would have read: "to store or produce telephone numbers to be called; and to dial such numbers, *using a random or sequential number generator*"—which it does not.

[10] So, the phrase "using a random or sequential number generator" necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers, either randomly or sequentially, and then to dial those numbers. *See* ***939** *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015) (holding that " 'random or sequential' number generation ... refers to the numbers themselves rather than the manner in which they are dialed"). This interpretation finds support in the FCC's pre-2003 understanding of the statutory term ATDS. The 1992 Order expressed the view that "[t]he prohibitions of § 227(b)(1)"—which, as noted, make it unlawful to use an ATDS under certain conditions—"clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion." 7 FCC Rcd. 8752, 8776 ¶ 47. And in a follow-on 1995 ruling, the Commission described "calls dialed to numbers generated randomly or in sequence" as "autodialed." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400 ¶ 19 (1995). The FCC's pre-2003 understanding of § 227(a)(1) thus reinforces what its plain text shows—that equipment qualifies as an ATDS only if it has the capacity to "function ... by generating random or sequential telephone numbers and dialing those numbers." *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018).

Pinkus's other arguments fail to persuade. He contends that if subsection (a)(1) excludes from its ambit predictive dialers that do not have the capacity to generate numbers randomly or sequentially, "it would be impossible for any caller to have a meaningful consent policy," as the statute requires. Doc. 114 at 24. The reason, he contends, is that a marketer using an ATDS could never know in advance whether any given number generated by the equipment and then dialed was linked to a cellphone user who had

not given consent to receive calls. *Ibid.* Pinkus similarly contends that the TCPA provision allowing for treble damages in the event of a "willful violation," 47 U.S.C. § 227(b)(3), would be rendered inoperative if subsection (a)(1) excluded predictive dialers because prospective defendants relying on the whims of the ATDS's number-generating capacity could never know that they were undertaking prohibited conduct until they had actually done so. Doc. 114 at 25-26. But Pinkus's hypothetical is unnecessarily wooden, as it is possible to imagine a device that both has the capacity to generate numbers randomly or sequentially and can be programmed to avoid dialing certain numbers, including numbers that belong to customers who have not consented to receive calls from a particular marketer. Whether a marketer has violated the TCPA thus need not be a matter of coincidence; rather, violations would result from a marketer's failure (deliberate or otherwise) to program the device correctly.

[11] Pinkus next contends that the TCPA's exemption for calls made to collect government debt, *see* 47 U.S.C. § 227(b)(1)(A)(iii), would be nonsensical if subsection (a)(1) excluded predictive dialers, because debt collectors target particular numbers they believe are likely to belong to debtors who owe the federal government, rather than generate and call phone numbers at random. Doc. 114 at 25. That may well be true. But it does not change the fact that the best reading of 47 U.S.C. § 227(a)(1) requires that an ATDS have the capacity to generate numbers randomly or sequentially and then to dial them, even if that capacity is not deployed for practical reasons. And that defining characteristic of an ATDS defeats Pinkus's claim, for he concedes that his complaint does not plausibly allege that he was called with a device that has the capacity to store or produce numbers that have been randomly or sequentially generated. *See Dominguez*, 894 F.3d at 121 (granting summary judgment where ***940** the plaintiff could not "point to any evidence that ... [the device at issue] had the present capacity to function as an autodialer by generating random or sequential telephone numbers and then dialing those numbers").

Conclusion

Sirius's partial motion for judgment on the pleadings is granted. Pinkus's claim that Sirius caused him to be called with an ATDS is dismissed. Pinkus may proceed with his claim— which the motion does not address, Doc. 109 at 7 n.1—that Sirius violated the TCPA by causing him to be called using a prerecorded voice. Doc. 105 at ¶¶ 3, 10, 13, 23.

All Citations

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