No. 19-1738

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALI GADELHAK, individually and on behalf of all others similarly situated,	
Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois (Case No. 1:17-cv-01559)
v.	
AT&T Services, Inc.	Honorable Edmond E. Chang
Defendant-Appellee.	

PLAINTIFF-APPELLANT'S BRIEF

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1738

Short Caption: Gadelhak v. AT&T Services, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Ali Gadelhak

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Timothy J. Sostrin Date: July 1, 2019

Attorney's Printed Name: Timothy J. Sostrin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Keith J. Keogh Date: July 1, 2019

Attorney's Printed Name: Keith J. Keogh

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C § 1331, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This case is a civil action arising under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227.

The basis for this court' jurisdiction is 28 U.S.C. §1291, which provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." The district court entered its Memorandum Opinion and Order ((Doc. 86) and resultant Judgment (Doc. 87) on March 29, 2019. Plaintiff-Appellant Ali Gadelhak (Gadelhak) filed a Notice of Appeal on April 19, 2019 (Doc. 90), within the 30 days provided by Federal Rule of Appellate Procedure 4(a)(1)(A).

This appeal is from a final order or judgment that disposes of all parties' claims.

Issues Presented for Review

The sole issue on appeal is whether the district court erred in granting summary judgment to Defendant-Appellant AT&T Services, Inc. (AT&T) on the grounds that its automated text message survey system did not constitute an Automatic Telephone Dialing System as defined by the TCPA.

Statement of the Case

In 2016, AT&T's Market Research Organization created a computer program (TACRFT) to automatically send text message surveys to cellular telephone numbers stored in the account records of AT&T's affiliates. SA 34, ¶ 5; SA 3. AT&T programmed TACRFT to include an advertisement for AT&T's smartphone app at the end of each survey. SA 3. TACRFT sends approximately seven million text messages per month. SA 41, ¶ 28.

The TCPA prohibits the use of an "automatic telephone dialing system" (ATDS) to place voice calls and text messages to cellular telephone numbers without prior express consent. 47 U.S.C. § 227(b)(1)(A).[1] The issue in this case is whether TACRFT is an ATDS, which the TCPA defines as "equipment which has the capacity - (A) to

[1] "A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of §227(b)(1)(A)(iii)." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016); *see also In re Rules & Regulations Implementing the Telephone Consumer Protection Act* of 1991, 18 FCC Rcd. 14014, 14115, ¶ 165 (July 3, 2003) ("2003 Order"). In fact, because text messages are automatically displayed on the recipients' phone, they are even more intrusive than voice calls, which may or may not provide a message, because the caller automatically achieves the purpose of delivering the text message when it is displayed.

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).

This Court ruled that a similar text messaging system qualifies as an ATDS in *Blow v. Bijora*, where it relied on nearly fifteen years' worth of FCC Orders interpreting the ATDS definition. 855 F.3d 793, 800-03 (7th Cir. 2017). The district court's opinion in this case is premised on the notion that *Blow* is not controlling because every single one of the FCC's orders was invalidated by the D.C. Circuit's opinion in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) and are therefore entitled to no deference whatsoever.[2] For the reasons stated below, the premise is incorrect. *ACA International* did not invalidate all of the FCC's Orders.

[2] *See 2003 Order,* 18 FCC Rcd. at 14090-93; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 566 (January 4, 2008) ("2008 Order"); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, 27 FCC Rcd. 15391, 15392, n. 5 (November 29, 2012) ("2012 Order"); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2015 Declaratory Ruling), 30 FCC Rcd. 7961, 7972 ¶ 10 (2015).

Furthermore, TACRFT qualifies as an ATDS based on the plain language of the statute alone. The Ninth Circuit examined this exact issue in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) and found a substantively similar text messaging system to be an ATDS based on the plain language of the TCPA. Summary judgment was therefore improper regardless of the validity of the FCC's orders.

I. Gadelhak's Receipt of the TACRFT Messages

Gadelhak is not a customer of AT&T or any of its affiliates. SA 3. His telephone number is on the national do-not-call list. SA 43, ¶ 39. Nevertheless, on July 15, 2016, Gadelhak received the following TACRFT text message:

> Valued Customer, gracias por llamar a AT&T. En breve recibira unos mensajes para opinar acerca de su llamada.

Doc. 66-9 at p. 22-24; SA 19. Gadelhak did not respond. *Id.*

Approximately fifteen minutes later, TACRFT sent another message:

> Cuan probable recomendaria los servicios de AT&T a un amigo o familiar en una escala del 10 al 1? 10 (definitivamente) al 1 (no recomendaria)

Id. Gadelhak responded "Who is this," and within one second, TACRFT replied:

> Gracias. Cuan satisfecho esta con el rnanejo general de la llamada por Catherine Miche en escala del 10 al 1? 10 = muy satisfecho a 1 = muy insatisfecho

Id. Gadelhak responded "Please tell me who this is. I do not speak Spanish" and, again, within one second, TACRFT replied:

> Gracias. Cuantas veces tuvo que contactor AT&T para resolver su solicitud? 1. Uno 2. Mas de uno 3. Todavia no se ha resuelto

Id. Gadelhak responded "Stop sending me messages" and less than one second later, TACRFT replied:

> Recivido: usted a optado no completar la encuesta hoy. Conteste "STOP ALL" para optar no recibir mas information o contactos de AT&T. Gracias.

Id. It is undisputed that Gadelhak was not an AT&T customer. SA 43, ¶ 38. AT&T repeatedly testified that it does not know how it obtained Gadelhak's telephone number, how it documented that number in its records, or what specific events triggered TACRFT to send the survey messages to Gadelhak's number. Doc. 66-4 (Taylor Dep.) at p. 4 (51:7-19); Doc. 66-5 (Abel Dep.) at p. 6 (33:8-19); Doc. 66-6 (Barret Dep.) at pp. 3-8 (22:2 – 23:21, 27:2-5, 29:2 – 31:10).

II. The TACRFT System Automatically Generates Telephone Numbers to Be Called

It is undisputed that computer software, not any human being, automatically generates a list of telephone numbers to receive the TACRFT messages from various telephones numbers stored in account records. SA 4. This process works as follows. First, computer software running in the systems of AT&T's affiliates (DirecTV, Uverse, and AT&T Mobility) flag accounts whenever a customer service interaction occurs. SA 35, ¶ 6; SA 3. The same software then generates a list of phone numbers called the "Gross Sample List" by compiling every phone number associated with those flagged accounts, regardless of whether those phone numbers were ever involved in any customer service interaction. SA 3; SA 35-36, ¶¶ 7-8. The software then sends the Gross Sample List to computers running in the Market Research Organization. *Id.*

The Market Research Organization's computers narrow the list by automatically identifying which of the telephone numbers contained in the list are assigned to cellular telephone service and removing any non-cellular numbers. SA 36, ¶ 10; SA 4. What happens if the resulting

list contains multiple cellular telephone numbers for the same account is disputed.

The manager of the TACRFT program (Kerry Lyon) testified that when the list contained multiple cellular telephone numbers for the same account, the software would *choose* one of those numbers to receive the survey text. When asked *which number* the software would choose, Mr. Lyon testified "it could be randomized, I'd have to look at the code." Doc. 66-8 at p. 59 (143:2-19).

After Gadelhak cited this testimony in the briefing on summary judgment, AT&T filed a new declaration from Mr. Lyon and a reply brief stating that Mr. Lyon "has since confirmed that *the code used to generate numbers for the surveys* will select the *first eligible* number, not a random number." SA 37, ¶ 11, citing Doc. 74-3 at ¶ 5 (emphasis added). But AT&T never explains what "the first eligible number" means or how that differs from a "random" number. Whether "first eligible number" means the first number numerically, the first number chronologically based on the date it was recorded on the account, the first number chronologically based on the time it was added to the gross sample list, or some other concept of "first" is unclear and at a

minimum raises a question of fact. It is nevertheless undisputed that (1) the software generates the list of numbers to be dialed and (2) the software *can* do so by randomly selecting numbers from the Gross Sample List.

Once this process is complete, AT&T's software automatically sends the resulting list of telephone numbers to AT&T's vendor, Message Broadcast, for dialing where the number is automatically dialed without any human involvement. SA 37, ¶ 12; SA 4.

III. The TACRFT System Automatically Dials Stored Telephone Numbers

Message Broadcast stores the resulting list of telephone numbers to be called in a computer database called the "Reporting Database." SA 37, ¶ 13. The Reporting Database also contains pre-programmed text messages that AT&T previously drafted for use in the surveys including a closing message advertising the MyAT&T app. Doc. 66-8 at pp. 63-66; SA 37-38, ¶¶ 14-16; SA 4.

In order to send the TACRFT messages, Message Broadcast's computer system pulls both the telephone numbers to be called and the appropriate pre-scripted messages that correspond to those telephone numbers from the Reporting Database and packages them together

with an originating "Short Code," which serves as the sender's address. SA 38, ¶ 18. Message Broadcast's computer system then automatically, and without human intervention, sends those message packets to AT&T's External Message Gateway aggregator platform or "SMS Aggregator" for delivery to the recipients. SA 39, ¶ 19.

AT&T's SMS Aggregator software performs several automated tasks: it determines whether the recipient telephone numbers are valid, it identifies the carrier networks servicing the recipient telephone numbers so that they can be delivered, and it manages and throttles the automated text message transmission rate to ensure that the automated text messages do not overload the carriers' systems, thus controlling the timing at which the survey text messages are delivered to the recipients. SA 39, ¶ 20.

It is undisputed that the SMS Aggregator platform sends the survey text messages automatically and without human intervention. SA 39-41, ¶¶ 22-27. In addition to the initial messages, the computer system "reads" any responses to the survey text message via an automated process called "natural language processing," and determines how to respond. SA 40, ¶ 24. If the computer determines

that it has received a response, it automatically replies with a new text message within a fraction of a second. SA 40, ¶ 25.

IV. Summary Judgment

On July 23, 2018, AT&T moved for summary judgment, contending solely that TACRFT is not an ATDS as defined by the TCPA. Docs. 50-52. Gadelhak filed a response and cross-motion for partial summary judgment on the same issue. Docs. 66-67. The parties filed replies (Docs. 73, 74, 78) and supplemental authorities. Doc. 79, 81, 83, 84, 85.

On March 29, 2019, the district court granted AT&T's motion and denied Gadelhak's cross-motion. Doc. 86. The district court began by acknowledging that the FCC's 2003 Order interprets the ATDS definition to cover list-based dialing systems that rely on a given set of numbers. *Id.* at p. 6, citing 2003 Order, 18 FCC Rcd. at 14091-93 ¶¶ 131-133. The district court noted that the FCC "affirmed this interpretation" in a 2008 declaratory ruling and affirmed it again in a 2015 declaratory ruling. SA 7-8, citing *2008 Order*, 23 FCC Rcd. at 566-67 ¶¶ 13-14; *2015 Order*, 30 FCC Rcd. at 7972 ¶ 10.

The district court held, however, that the D.C. Circuit's opinion in

ACA International invalidated all of the FCC's prior orders on this issue, including the 2012 Order that *ACA* never even mentioned. In doing so, it rejected Gadelhak's argument that *ACA International* was limited to the 2015 order alone. SA 9-11. Finding that it was "unburdened by the Commission's definitions," the district court proceeded to determine whether the TACRFT system is an ATDS by analyzing the statute alone. SA 12.

The district court held that the ATDS definition "does not cover systems that dial from preset lists," (SA 14) and instead applies only to systems that "*generate* numbers randomly or sequentially" (SA 17) (original emphasis). In doing so, the district court noted that its interpretation conflicted with the Ninth Circuit's ruling in *Marks*, with which it "respectfully disagrees." SA 13.

Having interpreted the ATDS definition, the district court proceeded to hold that TACRFT does not qualify as an ATDS. SA 17. The court found that "there is no genuine dispute that AT&T's system cannot *generate* telephone numbers randomly or sequentially" and thus entered judgment for AT&T. *Id.* (original emphasis).

Summary of the Argument

The district court's interpretation of the ATDS definition conflicts with the statutory text, the legislative history, and the congressional purpose, all of which support the regulation of list-based dialing systems that automatically dial stored telephone numbers, regardless of how those telephone numbers are "generated." *See Marks*, 904 F.3d at 1052.

Even assuming, *arguendo*, that the ATDS definition only applies to systems with the capacity to use a random or sequential number generator, such systems need not generate telephone numbers *out of thin air*. Dialing systems that generate random or sequential telephone numbers for dialing *from a database* qualify as ATDSs.

AT&T's TACRFT system satisfies either interpretation. It is undisputed that TACRFT automatically dials stored telephone numbers without human intervention. Moreover, it is undisputed that TACRFT automatically generates telephone numbers for dialing from the records of AT&T's affiliates. In this automated process, computer code selects random telephone numbers to receive the survey messages, thereby utilizing a random or sequential number generator.

Moreover, the FCC's repeated orders confirming the statute's application to list-based dialing systems are still valid and binding under the Hobbs Act. This Court has already relied on those FCC orders to hold that a similar automated text message system was an ATDS in *Blow*, 855 F.3d at 800-02. The Court should reach the same result in this case because the FCC's prior orders remain valid after *ACA Int'l*.

Argument

Congress enacted the TCPA in 1991, placing "restrictions on the use of automated telephone equipment" because "evidence compiled by Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." 47 U.S.C. §227(b); 105 Stat. 2394, Pub. L. No. 102-243, § 2(10) (Dec. 20, 1991); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012).

The proliferation of automated telephone calls, however, has only gotten worse. "[D]espite the Commission's efforts . . . TCPA complaints as a whole [we]re the largest category of informal complaints" the FCC received in 2015. *2015 Order*, 30 FCC Rcd. at 7969, ¶ 5; *see also id.* at 7964, ¶ 1 ("Month after month, unwanted robocalls and texts, both telemarketing and informational, top the list of consumer complaints received.")

In 2016, the Federal Trade Commission received 5,340,234 complaints about telemarketing calls; in 2017, the number of

complaints increased to 7,157,370. National Do Not Call Registry Data Book FY 2017, Federal Trade Commission, at p. 6.

Strict enforcement of the TCPA is necessary to prevent automated calls from spiraling out of control. However, the district court's opinion in this case threatens to exacerbate the problem. AT&T's TACRFT system is a fully automated behemoth, sending out millions of text messages per month without any human intervention whatsoever. SA 41, ¶ 28.

In *Blow*, this Court relied on nearly fifteen years of FCC orders in confirming that a similar automated text messaging platform was an ATDS under the statute. 855 F.3d at 802. If these automated systems suddenly no longer qualify as ATDSs, text message spam will only get worse. Indeed, under the interpretation of the statute espoused by AT&T and accepted by the district court here, telemarketers will be able to send unlimited text message spam with impunity because no modern dialing system will be covered under the TCPA.

The TCPA must be interpreted to protect consumers and not the callers it was meant to stop. As the Fourth Circuit recently held in rejecting a different argument that would render the TCPA toothless,

"the TCPA was enacted to solve a problem. Simply put, people felt almost helpless in the face of repeated and unwanted telemarketing calls . . . It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer v. Dish Network, L.L.C.*, 2019 U.S. App. LEXIS 16111, *40 (4th Cir. 2019).

I. Standard of Review

This Court's "review of a district court's grant of summary judgment is *de novo* and all reasonable inferences are drawn in favor of the nonmovant." *United States v. Z Inv. Props., LLC*, 921 F.3d 696, 699 (7th Cir. 2019), citing *Valenti v. Lawson*, 889 F.3d 427, 429 (7th Cir. 2018).

II. The Plain Language of the ATDS Definition Applies to Systems that Automatically Dial Stored Telephone Numbers, Regardless of How Those Numbers Were Produced

Automated text messaging systems like AT&T's don't just unleash massive amounts of spam, they cannot adequately address the questions and concerns of the consumers on the receiving end because

there is no human being in control. This Court described the problem well in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012):

> "A human being who called Cell Number would realize that Customer was no longer the subscriber. But predictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped by their true master. Meanwhile Bystander is out of pocket the cost of the airtime minutes and has had to listen to a lot of useless voicemail."

Id. at 639 (affirming district court's decision in a TCPA claim where the caller used a predictive dialer to automatically dial numbers from a list).

Much like the enchanted buckets analogized in *Soppet*, AT&T's automated system failed to address Gadelhak's questions and kept sending more spam. Doc. 66-9 at p. 22; Doc. 52-2. These unwanted automated communications are exactly what the TCPA was created to prevent.

The TCPA provides: "It shall be unlawful for any person . . . 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 [ATDS] . . . to any telephone number assigned to . . . cellular telephone service." 47

U.S.C. § 227(b)(1)(A)(iii). It 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) (emphasis added).

The Ninth Circuit recently analyzed this statutory language in *Marks*, 904 F.3d 1041 and found a text messaging system far less automated than the one AT&T uses in this case to be an ATDS. The Ninth Circuit's interpretation not only adheres to the plain language, text, and structure of the Act, but also vindicates the public interest by advancing the purpose of the Act.

The facts in *Crunch* were set forth in the underlying district court opinion as follows:

> "Crunch uses a third-party web-based platform administrated by Textmunication to send promotional text messages to its members' and prospective customers' cell phones. The phone numbers are inputted into the platform by one of three methods: (1) when Crunch or another authorized person manually uploads a phone number onto the platform; (2) when an individual responds to a Crunch marketing campaign via text message (a "call to action"); and (3) when an individual manually inputs the phone number on a consent form through Crunch's website that interfaces with Textmunication's platform. Users of the platform, including Crunch, select the desired phone numbers, generate a message to be sent, select the date the message will be sent, and then the platform sends the text messages to those phone numbers on that date. The system then stores these numbers in

> case the user wants to notify the prospective customer or member of a later offer. On the specified date the platform sends the message to a Short Messaging Service ('SMS') gateway aggregator that then transmits the message directly to the cell phone carrier."

Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288, 1289 (S.D. Cal. 2014) (internal citations omitted).

When interpreting the ATDS definition, the Ninth Circuit found that the presence of the disjunctive "or," indicates that an ATDS need not have the capacity to *produce* telephone numbers at all. A system that *stores* telephone numbers to be called and *automatically* dials those numbers is an ATDS considering the plain language of the statute alone. *Marks*, 904 F.3d at 1052. Numerous other courts are in accord. *Duguid v. Facebook, Inc.*, 2019 U.S. App. LEXIS 17675, *8 (9th Cir. 2019); *Espejo v. Santander Consumer United States, Inc.*, 2019 U.S. Dist. LEXIS 98445, *22 (N.D. Ill. 2019); *Gonzalez v. Hosopo Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019); *Adams v. Ocwen Loan Servicing, LLC*, 366 F.Supp.3d 1350, 1355 (S.D. Fla. 2018); *Heard v. Nationstar Mortg. LLC*, 2018 U.S. Dist. LEXIS 143175, *15-18 (N.D. Ala. 2018).

As these cases hold, the use of a "random or sequential number generator" is not a necessary element of an ATDS because that phrase only modifies the verb "produce," not the verb "store." *See Duguid*, 2019

U.S. App. LEXIS 17675 at *8; *Gonzalez*, 371 F. Supp.3d at 34. This reading derives naturally from two semantic considerations. First, it makes no sense to *store* telephone numbers using a random or sequential number *generator*; storage and generation are functionally distinct processes. *See* Doc. 66-10 at p. 3 (Snyder Dep. at 171:2-6);[3] *see also Gonzalez*, 371 F. Supp.3d at 34 ("it is unclear how an ATDS—or indeed anything—could 'store' numbers 'using' a number generator.").

Second, if the phrase modified both "store" and "produce," then, in fact, "the word 'store' serves no purpose, and is rendered superfluous." *Gonzalez*, 371 F. Supp.3d at 34. The reason being that if a number is somehow "stored" using a random or sequential number *generator*, then it must logically also have been *produced* using a random or sequential number generator as well. *See Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 372 n.1 (3rd Cir. 2015) ("it is unclear how a number can be stored (*as opposed to produced*) using a 'random or sequential number generator.'") (emphasis added). There would be no reason to put the

[3] Mr. Snyder is Gadelhak's expert witness on SMS technology. *See* Doc. 66-3.

words "store or" in the definition if it only applied to equipment that produced (i.e. generated) numbers in the first place.

Reading the phrase "using a random or sequential number generator" to modify only the verb "produce" adheres to the "cardinal principle" of statutory interpretation to "give effect, if possible, to every clause and word of a statute[.]" *Williams v. Taylor*, 529 U.S. 362, 404, (2000); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

The district court's alternative reading of the definition does not survive scrutiny. Relying on *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 935 (N.D. Ill. 2018), the district court held:

> "the phrase 'using a random or sequential number generator' modifies neither 'store' nor 'produce,' but instead actually modifies 'telephone numbers to be called.' This is evidenced by the phrase's position immediately after 'telephone numbers to be called.' Put another way, the most sensible reading of the provision is that the phrase 'using a random or sequential number generator 'describes a required characteristic of the *numbers* to be dialed by an ATDS – that is, *what* generates the numbers.

SA 13 (original emphasis).

Yet the phrase "using a random or sequential number generator" begins with the verb "using" and therefore refers to an *action*, i.e., something *done by using* a random or sequential number generator.

That is why courts across the country have debated whether the phrase modifies the *verb* "store" or the *verb* "produce" or both. The district court, and the *Pinkus* case on which it relies, however, read the phrase as modifying a *noun* – "telephone numbers." This does not make grammatical sense. "Telephone numbers" are inert objects; they do not do anything, much less *using* a random or sequential number generator.

Pinkus itself acknowledged the problem with its reading when it noted that "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'" *Pinkus*, 318 F.Supp.3d at 938 (emphasis added). *Pinkus* attempts to answer this self-imposed conundrum by holding that the "something" it must do is *generate numbers*. *Id.* (the phrase "necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers[.]") But this reasoning merely addresses what a number generator does; it does not resolve the question whether an ATDS must always use one, and it does nothing to save the word "store" from redundancy.

Although the district court rejected the argument that its reading rendered "store" superfluous, its reasoning is flawed. The district court held:

> "the word ['store']'s presence in the provision ensures that *systems that generate numbers* randomly or sequentially, but then store the numbers for a period of time before dialing them later after a person has intervened to initiate the calls, are still covered by the statutory definition of ATDS. All in all, none of Gadelhak's arguments are persuasive; instead, the numbers stored by an ATDS *must have been generated* using a random or sequential number generator.

SA 16 (emphasis added).

Yet the word "store" does no work even on the face of the district court's hypothetical. The hypothetical system had already itself generated numbers randomly or sequentially before it ever stored them. And under the district court's view, *that* is the only thing that matters. *Id.* ("the numbers stored by an ATDS *must have been generated* using a random or sequential number generator.") (emphasis added). This view makes "storage" inherently superfluous because it *always* requires the numbers called to have been produced using a random or sequential number generator. The district court's interpretation is therefore improper as a matter of statutory construction. *Williams*, 529 U.S. at 404; *Menasche*, 348 U.S. at 538-539.

It also runs afoul of the Fourth Circuit's recent admonishment to not impede "…Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer,* 2019 U.S. App. LEXIS 16111 at *40.

III. Statutory Exceptions to Liability for ATDS Calls Confirm the Regulation of List-Based Dialing Systems

Beyond the plain language of the ATDS definition, § 227(b)(1)(A) provides two exceptions to liability for ATDS calls that only make sense if list-based autodialers are ATDSs in the first place.[4] First, there is no liability for ATDS calls made with "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). A consent defense for ATDS calls serves little purpose if the only systems regulated by the ATDS provision are those that dial telephone numbers generated out of thin air. Users of those systems could only ever establish a consent defense

[4] When interpreting 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." *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 734 (7th Cir. 1991), quoting *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988).

through sheer dumb luck because they are, by definition, calling completely arbitrary telephone numbers. The only conceivable way for callers using automated systems to ensure they call telephone numbers with consent is to *use a targeted list* of telephone numbers believed to have consent. And, of course, if they do that, then they are not using an ATDS (as the district court sees it) in the first place, and thus have no need for a consent defense. *See Marks*, 904 F.3d at 1052 ("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.")

Second, there is similarly no liability for ATDS calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Debt collectors do not go about their business by calling random telephone numbers; they call specific telephone numbers using list-based systems. *See 2008 Order*, 23 FCC Rcd. at 566, ¶ 12 ("ACA states that debt collectors use predictive dialers to call specific numbers provided by established customers"). It makes little sense to provide an exemption to the ATDS prohibition for debt collection calls on behalf of the government if such calls are not even regulated in the

first place. Thus, "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." *Marks*, 904 F.3d at 1052.

The district court held that these exceptions to liability "do lead one to question whether calls dialed from a predetermined list are covered," but ultimately ruled that they "can co-exist with a definition of ATDS that does not cover calls to a preset list." SA 15. The sole reason for the district court's conclusion is that these exceptions to liability "also appl[y] to calls made with an artificial or prerecorded voice-not just those made using an ATDS." SA 14. However this reasoning does not actually answer the question, which is not why Congress would have created these exceptions to liability for *any* violation of the statute, but why it would have made them *applicable to ATDS calls* if such calls do not qualify as ATDS calls in the first place.

The government debt collector exemption has additional significance. Congress amended the statute to add the exemption on November 2, 2015. *See* Bipartisan Budget Act of 2015, 114 Bill Tracking H.R. 1314. At that time, the statute's application to list-based dialing

systems had been well established for over *twelve years* and was binding under the Hobbs Act. *See 2003 Order*, 18 FCC Rcd. at ¶ 12 . Moreover, the Courts of Appeals had consistently confirmed the FCC's interpretation of the statute. *See e.g., Soppet*, 679 F.3d at 638-39; *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 110, 114 (11th Cir. 2014); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

Congress thus knew that the statute applied to list-based dialing systems used by the government's debt collectors and so enacted the amendment specifically "to authorize the use of automated telephone equipment to call cellular telephones for the purpose of collecting debts owed to the U.S. government." Bipartisan Budget Act of 2015, 114 Bill Tracking H.R. 1314.[5] By amending the statute to add the exemption, Congress ratified a "consistent judicial construction" of the statute. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a

[5] Notice that Congress did not state it was enacting the amendment to authorize the use of "artificial or prerecorded voices" to call cellular telephones for the purposes of collecting debts owed to the U.S. government.

consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language."); *see also Marks*, 904 F.3d at 1052 ("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.")

The amendment at issue here is akin to the amendment addressed in *Tex. Dep't of Hous. & Cmty. Affairs. v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). The issue in that case was whether the Fair Housing Act allowed for "disparate-impact" claims. *Id.* at 2513. As is the case here, Congress amended the statute to create certain *exemptions from liability* for disparate-impact claims when disparate-impact liability had already been well established in the lower courts. *Id.* at 2519. The Supreme Court ruled that, through this amendment, "Congress ratified disparate-impact liability." *Id.* at 2521. In addition, the Court held that because the amendment created exemptions to disparate-impact liability, it "would be superfluous if Congress had assumed that disparate-impact liability did not exist" *Id.* at 2520. Thus, the Court was compelled to construe the statute as

imposing general disparate-liability "in order to avoid a reading which renders some words altogether redundant" *Id.*

The same is true here. Congress's amendment creating an exception to ATDS liability for government debt collectors only makes sense if Congress understood the statute to impose liability on the list-based dialing systems in the first place. Congress ratified that well-established interpretation of the act when in enacted the amendment.

The district court rejected this ratification argument because "[t]he D.C. Circuit's review of the 2015 Declaratory Ruling was already pending at the time of Congress's amendment. As a result, there was no 'consistent judicial construction' at the time of the amendment, precluding any conclusions about Congress's approval of the Commission's interpretation of the statute." SA 15 (internal citation omittied), citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 350-51 (2005).

Yet the mere fact that *ACA Int'l* was *pending* (without a decision) at the time of the congressional amendment did not erase the FCC's prior orders and did not erase the consistent judicial construction adopted by the federal courts of appeals. Neither *Jama*, nor any other

authority, holds that the mere existence of a lawsuit challenging a judicial construction is enough to create such an inconsistency. Of course, *ACA Int'l* ultimately did not even adopt a contrary judicial construction of the ATDS definition in any case. Instead, it held that both interpretations of the definition were likely permissible. *ACA Int'l*, 885 F.3d at 703. This shows precisely why the mere pendency of a lawsuit does not create an inconsistent judicial construction.

IV. The Legislative History Confirms the Regulation of List-Based Dialing Systems

To the extent the Court determines that the statutory text is ambiguous, it may consider the legislative history "to the extent it sheds a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 527 (7th Cir. 2016), quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The legislative history here shows that Congress's concerns about ATDSs were not limited to random or sequential number generation.

First, Congress was concerned about the sheer number of nuisance calls unleashed upon the public by automated dialing systems. *See Automated Telephone Consumer Protection Act*, 102 S. Rpt. 178

(October 8, 1991) ("The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective … "the machines are used by more than 180,000 solicitors to call more than 7 million Americans every day" and have "the capacity to dial as many of 1,000 telephone numbers each day."); *see also Telephone Advertising Consumer Rights Act*, 102 S. Rept. 177 (October 8, 1991) ("Many firms use these machines even when using 'live' persons to deliver the message to a potential customer. These machines reduce the amount of time that each person must spend dialing numbers and waiting for the call to be answered. For instance, a telemarketer may only employ three persons for every six automatic dialers because of the high proportion of calls that are never answered.")

Systems that dial or text stored lists of telephone numbers such as the TACRFT system at issue here are no less capable of placing thousands of calls per day than systems dialing random or sequential numbers. SA 41, ¶ 28 (the TACRFT system sends *seven million* survey text messages per month)

Second, Congress was concerned that a burgeoning consumer data market was resulting in *targeted* calls placed to "lists which are [] bought or sold without restriction . . ." Bills to Amend the Communications Act of 1934: Hearing before the Subcomm. on Telecommc'ns and Fin. Of the House Comm. On Energy and Commerce, 102 Cong. 9, 2 (1991) (statement of Rep. Markey); *see also id.* ("[T]he reason for the proliferation of such unsolicited advertising over our Nation's telecommunications network is that companies can now target their marketing . . . the reason why these unsolicited telemarketers can target individual homes is simple; corporate America has your number.")

Congress further recognized that telemarketers were pairing these lists with automated dialers:

> "While some telemarketing businesses still rely on telephone directories, printed lists of prospective customers, and manual operations, the number of such businesses is dwindling. Today, computers assist an estimated 82 percent of America's businesses conducting telemarketing campaigns. And computer assistance goes far beyond dialing the telephone number of the prospective customer and transferring the call to the next available telemarketing service representative. The entire sales to service marketing function has been automated. Modern telemarketing software organizes information on current and prospective clients into databases designed to support businesses in every aspect of

> telephone sales-all with the objective of bringing the company's product or service to the customer most likely to purchase it."

House Report 102-317, 1st Sess. pp. 7-8 (emphasis added). Indeed, Congress was well aware that list-based predictive dialers were commonly used even in 1991. S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing before the Subcomm. on Commc'ns of the Senate Comm. On Commerce, Sci., & Transp. 102d Cong. 43, 16 (July 24, 1991) ("between 30 to 40 percent of the national telemarketing firms are using them this year.") (Stmt. Of Robert S. Bulmash).

That is why Congress drafted the ATDS provision to cover systems that *store* telephone numbers to be called rather than limiting its scope strictly to systems that use random or sequential number generators. And that is why industry actors using list-based dialers *opposed* the regulation of ATDSs. *See Telemarketing Practices: Hearing Before the Subcomm. On Telecommc'ns & Fin. Of the House Comm. On Energy and Commerce*, 101st Cong. 1, 104 (1989) ("H.R. 628 does not recognize the legitimate uses of this automatic dialing equipment . . . Bell Atlantic uses automatic dialing devices in its normal business

operations (e.g. to follow up on customer satisfaction of repair and installation services)") (comments of Bell Atlantic); *id.* at 111 ("the legislation could be interpreted to cover machines that are programmed to dial, on a sequential basis, designated groups of customers (e.g. all numbers on a 'prescreened' list).") (comments of the National Retail Merchants Association); *id.* at 115 ("these systems are currently being used by some school districts to notify parents when children are absent. Some retailers use them to notify customers of order status and some health services use them to remind patients of appointments. These and other applications would be hindered by the proposed legislation[.]") (Comments of Nynex).

Despite industry's concerns that the ATDS provision would regulate even targeted communications to one's own customers, Congress declined to create any exemption and confirmed that such calls would require prior express consent. *See Automated Telephone Consumer Protection Act*, 102 S. Rpt. 178 (October 8, 1991) ("The Committee believes that such automated calls only should be permitted if the called party gives his or her consent to the use of these machines.")

V. The FCC's Orders Interpreting the ATDS Definition Support This Interpretation of the Statute

For all of the reasons stated above, statutory analysis is alone sufficient to confirm the TCPA's regulation of systems that automatically dial stored lists of telephone numbers. However, the Court need not conduct this analysis in a vacuum. Congress gave the FCC the authority to "prescribe regulations to implement" the TCPA. 47 U.S.C. § 227 (b)(2); *see also id.* § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

The FCC has repeatedly set forth *Marks*'s interpretation of ATDS for nearly fifteen years. In 2002, the FCC issued a Notice of Proposed Rulemaking requesting comment on: "whether Congress intended the definition of 'automatic telephone dialing system' to be broad enough to include any equipment that dials numbers automatically, either by producing 10-digit telephone numbers arbitrarily or generating them from a database of existing telephone numbers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459, 17474, ¶ 24 (2002) (emphasis added). After considering comments from industry and consumers, the FCC issued a

rulemaking answering the question in the affirmative. *2003 Order*, 18 FCC Rcd. at 14092-93.

The Commission began with the statutory text, noting that "the statutory definition contemplates autodialing equipment that *either* stores *or* produces numbers," and thus would encompass autodialers dialing from a list. *Id.* at 14092, ¶ 132 (emphasis added). The Commission then looked to the legislative history, and found "the legislative history also suggests 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." *Id.* at ¶ 133. The Commission held that to exclude a list-based autodialer from the ATDS definition "simply because it relies on a given set of numbers would lead to an unintended result." *Id.* It concluded that "We believe the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented." *Id.*

The FCC has since repeatedly affirmed that list-based autodialers are ATDSs. In 2008, the Commission considered a petition for declaratory ruling filed by the debt collection industry association

ACA International, who argued that the Commission erred in its 2003 Order and sought a ruling that an autodialer qualifies as an ATDS "only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." *2008 Order*, 23 FCC Rcd. at 566, ¶ 12. The FCC rejected the request and affirmed its prior order, reiterating that the exclusion of list-based autodialers "would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls." *Id.* at ¶ 14.

The Commission reiterated the same ATDS interpretation again in 2012. *2012 Order*, 27 FCC Rcd. at 15392, n. 5 ("the scope of th[e] definition encompasses 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.")

In 2015, the Commission issued an omnibus order addressing "21 separate requests for clarification or other action regarding the TCPA[.]" *2015 Order*, 30 FCC Rcd. at 7964, ¶ 2. With respect to the ATDS definition, the 2015 Order largely focuses on the meaning of the

word "capacity," and specifically whether it is limited to "present ability" or includes "potential ability" as well. *Id.* at ¶¶ 15-20.

In the context of this discussion of "capacity" however, the 2015 Order contains confusing and seemingly contradictory statements concerning the *functions* that an ATDS must have the capacity to perform. On the one hand the Commission stated that "we affirm our previous statements" concerning ATDSs, "including when the caller is calling a set list of consumers," and "reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer' for the same reason. *Id.* at ¶ 10. On the other hand, the Commission made statements that appeared to be inconsistent with the purported reaffirmation of its prior orders. *See Id.* at ¶ 16 ("autodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so.")

Despite these seemingly inconsistent statements in the 2015 Order, the FCC's repeatedly reiterated view on the issue was clear enough for this Court to rule in 2017 that ATDSs include text messaging systems that do not produce numbers using a random or sequential number generator, but instead dial telephone numbers

stored in list. *Blow*, 855 F.3d at 800-02. In doing so, this Court relied on the 2003 Order, the 2008 Order, the 2012 Order, and the 2015 Order, and held that it was bound by those orders under the Hobbs Act. *Id.* at 802-03. The Court did note, however, that the 2015 Order was currently on appeal. *Id.*, citing *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir., argued Oct. 19, 2016).

The D.C. Circuit issued its opinion in *ACA Int'l* on March 16, 2018. 885 F.3d 687. The district court's opinion in this case is premised on the notion that *Blow* is not controlling because *ACA Int"l* invalidated not just the 2015 Order before it, but all of the FCC's orders interpreting the ATDS definition going back to 2003. Doc. 86 at p. 10. This is a striking conclusion considering the plain language of *ACA Int'l* limits its review to the 2015 Order alone and signals that there is no problem with the prior orders. 885 F.3d at 703. In essence, the district court found that *ACA Int'l impliedly* vacated 15 years' worth of perfectly valid FCC orders without ever saying that it was doing so.

Although Gadelhak maintains that the FCC opinions are still valid and controlling as discussed below, the FCC's 15 years of interpretations at the very least gives persuasive support to the Ninth

Circuit's interpretation of the statutory language in *Marks*.

VI. The FCC's Orders Remain Valid after *ACA International*

It is true that some courts have interpreted *ACA Int'l* in the same way as the district court, but the most persuasive authority holds that the prior FCC orders are still valid and binding under the Hobbs Act. *See e.g., Maes v. Charter Commun.*, 345 F.Supp.3d 1064, 1067-70 (W.D. Wisc. 2018).[6]

To begin, *ACA* discusses only the 2015 Order in any detail. Indeed, the D.C. Circuit never even mentions the 2012 Order and, as shown further below, it references the 2003 and 2008 orders as

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[6] *See also Ramos v. Hopele of Fort Lauderdale, LLC*, 2018 U.S. Dist. LEXIS 139947 (S.D. Fla. 2018) ("The ACA decision does not affect the definition of an ATDS as set forth in the FCC's 2003, 2008, or 2012 Orders."); *Ammons v. Ally Fin.*, 2018 U.S. Dist. LEXIS 108588, *17-18 (M.D. Tenn. 2018) ("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 U.S. Dist. LEXIS 101700, *7 (N.D. Cal. 2018) ("the court discusses but does not rule on the validity of the 2003 FCC Order or the 2008 FCC Order."); *Swaney v. Regions Bank*, 2018 U.S. Dist. LEXIS 85217, *3 (N.D. Ala. 2018) ("In its 2003 Order, the FCC concluded that the defining characteristic of an ATDS is 'the capacity to dial numbers without human intervention.' In light of ACA International, that proposition still stands.") (internal citations omitted).

background only. It never purports to invalidate them. At the outset, the D.C. Circuit thoroughly explained both the scope of the petition and the scope of its inquiry. *ACA Int'l*, 885 F.3d at 691-95. In doing so, it refers to the 2015 Order only. At no point does the court state that the petitioners sought to challenge any prior FCC order and at no point does the court state that it will be reviewing those prior orders:

> "In this case, a number of regulated entities seek review of a 2015 order in which the Commission sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls . . . Petitioners and intervenors seek review of four aspects of the Commission's order [singular] . . . We will take up the challenges to those four aspects of the Commission's 2015 ruling[.] *Id.* at 691-94 (emphasis and notation added).

Before moving to the merits, the court explains the standard of review and previews its ultimate opinion. Here too it refers only to the 2015 order:

> "Under the Administrative Procedure Act, we assess whether the Commission's challenged actions in its 2015 order were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) . . . Applying those standards to petitioners' four sets of challenges to the Commission's 2015 Declaratory Ruling, we set aside the Commission's explanation of which devices qualify as an ATDS . . ." *Id.* at 694-95 (emphasis added).

Addressing the merits, the court begins with the 2015 Order's treatment of the "capacity" issue. As summarized by the court, the

2015 Order held that "that the 'capacity' of calling equipment "includes its potential functionalities" or "future possibility," not just its "present ability." *Id.* at 695, citing *2015 Order*, at 7974 ¶ 16, 7975 ¶ 20. In the court's view, this interpretation of "capacity" was "an unreasonably, and impermissibly, expansive one" *Id.* at 700.

Moving to 2015 Order's seemingly contradictory statements regarding the functions an ATDS must have the capacity to perform, the court dealt first with an argument by the FCC that review *of the 2015 Order* would be impermissible as to those portions of the order that supposedly summarized the FCC's prior orders. The FCC argued in its brief that:

> "The Court lacks jurisdiction, however, over the Commission's statements summarizing its past disposition of issues addressed in prior orders that the Commission did not reconsider or reopen here." Brief for Respondents at 8, *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. Jan 24, 2016) - *FCC Response Brief* at p. 8 (emphasis added).

The court rejected this argument because it had jurisdiction to review the statements *in the 2015 Order*, even if they *purported to summarize* prior holdings, but are actually inconsistent with them:

> "The agency reasons that the issue was resolved in prior agency orders . . . According to the Commission, because there was no timely appeal from [the 2003 and 2008] orders, it is too late

> now to raise a challenge by seeking review of a more recent declaratory ruling [singular] that essentially ratifies the previous ones. We disagree.
>
> While the Commission's latest ruling [singular] purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review . . . The ruling [singular] is thus reviewable on both grounds. *Id.* at 703 (emphasis and notation added)

Because the court concluded that it had jurisdiction to review "the ruling" [singular], there is no merit to the contention that the court vacated the 2003, 2008, and the unmentioned 2012 Order as well. Indeed, both the court's discussion and ultimate holding on the functionality issue, again, refer only to the 2015 Order:

> "The role of the phrase, 'using a random or sequential number generator,' has generated substantial questions over the years. The Commission has sought to address those questions in previous orders and did so again in the 2015 Declaratory Ruling we consider here. The Commission's most recent effort [singular] falls short of reasoned decisionmaking . . . The Commission's ruling [singular] appears to be of two minds on the issue." *Id.* at 701 (emphasis and notation added)

As the court explained, *the 2015 order*, not any prior FCC Order, fell short of reasoned decision making because it was *internally inconsistent* on the functionality issue:

> "While the 2015 ruling indicates in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, it also

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

Id at 702-03 (emphasis and notations added).

The notion that *ACA Int'l* invalidated all of the FCC's prior orders, therefore, cannot be squared with the plain language of the opinion. "Its analysis and holding were limited to the 2015 order: it looked at the ways in which the 2015 order expanded upon prior rulings, and then struck down those expansions as unreasonable. Although it discussed the content of the 2003 order, it did so only to highlight its contradictions with the new rules." *Maes*, 345 F.Supp.3d at 1069.

Moreover, *ACA Int'l* "explicitly stated that it was not ruling on which interpretation of the TCPA was correct, so it is not reasonable to infer that it was reaching back and invalidating all prior FCC orders that expressed a particular interpretation of the TCPA." *Id.* at *8. "In the absence of such a rejection, district courts do not have the authority to impose their own interpretation of the TCPA." *Id.* at *9.

The district court here disagreed, relying on language in the opinion that the court was reviewing the FCC's "pertinent pronouncements" and "set aside the Commission's 'treatment' of those matters." SA 10, quoting *ACA Int'l*, 885 F.3d at 701, 03. However, both of these statements were expressly referring to the 2015 Order alone. *Id.* at 701 ("While the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review."); *Id.* at 703 ("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.")

The district court also relied on a single sentence stating that "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." SA 10, quoting *ACA Int'l*, 885 F.3d at 701. Yet this is pure dicta, which the D.C. Circuit posited to explain why petitioners before the FCC felt it necessary to submit requests for both a declaratory ruling and a rulemaking. *Id.* At no point does the D.C. Circuit ever identify or

analyze a single statement from the FCC's prior orders as unclear or otherwise improper in any way. There is therefore no indication that the D.C. Circuit intended to invalidate them.

The district court also thought that nullification of the prior orders was implied because the FCC stated in its 2015 order that it was simply reaffirming its prior orders on the issue, so an invalidation of the 2015 Order would inherently invalidate the prior orders as well. SA 10, citing 2015 Order, 20 FCC Rcd. at 7971 ¶ 10 & n. 39. Yet *ACA Int'l* made perfectly clear that it was invalidating the 2015 Order because it *purported to* affirm those prior orders, but was in fact *inconsistent* with the prior orders and internally inconsistent as well. quoting *ACA Int'l*, 885 F.3d at 701-03; *see also Maes*, 345 F. Supp. 3d at 1068 ("[T]he flaw in the 2015 ruling was not that it reaffirmed the 2003 order, but that it both reaffirmed the 2003 order and contradicted it.")

If, instead, the 2015 Order was simply a consistent and coherent reaffirmation of its prior orders, the D.C. Circuit would have found no problem with it. *Id.* at 703 ("It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations

in the same order.") As another court put it, "[o]nly the 2015 Order contained a contradiction." *Duran v. v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 489 (E.D. N.Y. 2019). Thus, "the logic behind invalidating the 2015 Order does not apply to the prior FCC orders[.]" *Id.* at *30.

Finally, the district court conducted its own independent (albeit cursory) analysis of the 2003 and 2008 orders and found that they "fail to satisfy the requirement of reasoned decisionmaking," so the D.C. Circuit's concern about the 2015 Order "equally applies to the 2003 and 2008 orders," even if the D.C. Circuit never said as much. SA 11. This analysis fails for two reasons. First, the district court lacked jurisdiction to independently review the validity of the 2003 and 2008 orders under the Hobbs Act. *Blow,* 855 F.3d at 802, citing *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 448-50 (7th Cir. 2010).[7]

[7] Although the Supreme Court recently granted certiorari in another case to consider "whether the Hobbs Act required [a] district court . . . to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.," it did not answer the question and instead remanded the case to the Court of Appeals to address "preliminary issues." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 2019 U.S. LEXIS 4181 (2019). Thus, this Court's Hobbs Act precedent remains controlling.

Second, even if the district court had jurisdiction to independently review those orders, it is not clear what exactly it found to be problematic about them, other than their departure from its own interpretation of the statutory text. Doc. 86 at p. 10. The district court thus failed to afford the FCC's interpretation any deference whatsoever, much less the deference that would be required by *Chevron U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984) if the Hobbs Act did not bar the Court's review.

VII. AT&T's TACRFT System is an ATDS under Either Interpretation of the Statute

For the reasons stated above, AT&T's TACRFT system is an ATDS under the FCC's Orders and under the plain language of the statutory definition because it undisputedly (1) stores telephone numbers to be called and (2) automatically dials those telephone numbers without human intervention. *See Marks*, 904 F.3d at 1052-53. AT&T has never disputed these facts. SA 37, ¶¶ 13-15, 18, 22-27.

In the event this Court holds that the FCC's orders are now invalid and further construes the statutory definition to always require a capacity to use a random or sequential number generator, Gadelhak submits that AT&T's TACRFT system still qualifies as an ATDS.

It is undisputed that TACRFT automatically *generates numbers* through the operation of computer code. AT&T admitted in its briefing that TACRFT uses computer code "to generate numbers for the surveys[.]" SA 37, ¶ 11; SA 36, ¶ 9. The manager of the TACRFT system, Kerry Lyon, similarly testified that the computer code would "generate a number to be sent to [computers in the Market Research Organization]" whenever it detected certain interactions on an account. Doc. 74-1 at p. 12 (Lyon Dep. at 23:1-7).

The dispute is thus whether the system has the capacity to generate "*random or sequential*" numbers. Gadelhak submits that the system generates "random" numbers in two ways. First, it generates *contextually* random numbers, i.e., numbers "chosen at random."[8] AT&T's own testimony establishes the point. Recall that TACRFT is not programmed to send survey text messages to the phone numbers that were involved in the triggering customer service interactions, but instead to any cellular telephone number that is somehow associated with the account. SA 36, ¶ 8. Kerry Lyon testified that when there are

[8] *See* https://www.merriam-webster.com/dictionary/random (last visited June 28, 2019).

multiple cellular telephone numbers associated with a particular account, the software chooses only one of those numbers to receive the survey text and that this choice between numbers "could be randomized" in the software code. Doc. 66-8 at p. 59 (Lyon Dep at 143:2-19). TACRFT thus had the present capacity to produce random telephone numbers, as opposed to a mere "future possibility." *See ACA Int'l*, 885 F.3d at 695, citing *2015 Order*, at 7974 ¶ 16, 7975 ¶ 20.

Although AT&T later contended that Mr. Lyon "has since confirmed that the code used to generate numbers for the surveys will select the first eligible number, not a random number,"[9] that attempted clarification does not meaningfully distinguish "first eligible" from "random." More importantly, it does not refute the notion that the system at least had the *capacity* to make a random selection.

But there is another sense in which TACRFT utilizes a random or sequential number generator, which tracks this Court's understanding of the term: TACRFT generates *numerically random*, as opposed to numerically *sequential*, telephone numbers. In *Blow*, this Court stated

[9] SA 37, ¶ 11, citing Doc. 74-3 at ¶ 5.

that "the statute's reference to a 'random or sequential number generator' stems from telemarketers' practice of using autodialing equipment to either dial random 10-digit strings of numbers or call numbers in large sequential blocks." 855 F.3d at 800. Other courts have expressed a similar understanding. *See e.g., Griffith v. Consumer Portfolio Servs.*, 838 F. Supp. 2d 723, 735 (N.D. Ill. 2011) ("the phrase 'random or sequential number generator' is not defined. As we understand these terms, 'random number generation' means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on.")

Under this view, a "random or sequential number generator" under the TCPA is a function that produces a series of telephone numbers that are either numerically random (e.g., (xxx) 867-5309, (xxx)-736-5000) or numerically sequential (e.g. (xxx) 234-5678, (xxx) 234-5679). AT&T's TACRFT system is an example of the former. There is no dispute that TACRFT generates a series of telephone numbers and there is no dispute that those telephone numbers are numerically random. TACRFT therefore produces telephone numbers uses a random or sequential number generator.

The district court rejected the notion that TACRFT uses a random or sequential number generator because it construed Gadelhak's arguments regarding randomness as referring to the "*order* in which calls are made" rather than the process by which the numbers are generated. *See* Doc. 86 at p. 16 ("[T]he D.C. Circuit already explained that numbers must necessarily 'be called in some order—either in a random or some other sequence. Accordingly, the phrase 'using a random or sequential number generator' would be meaningless if it simply referred to the order in which calls were made."), citing *ACA International*, 885 F.3d at 702. But that is not what Gadelhak is arguing at all. He is not contending that the dialing order is random or sequential, but rather that the numbers themselves are both contextually and numerically random.

VIII. The District Court's Interpretation Allows for Trivial Circumvention of the Statute

The district court's view is that "ATDS does not cover systems that dial from preset lists." Doc. 86 at p. 13; *id.* at p. 14 (ATDS 'does not cover calls to a preset list"). Under this view, the statute was intended to apply only to systems that dial *completely arbitrary* telephone numbers and so the use of a pre-set list that limits the scope of numbers

that will be called is all that is required to remove a dialing system from regulation. Yet this view allows even a telemarketer that *wanted to* dial completely arbitrary telephone numbers to easily and trivially circumvent the statute.

Consider a system that automatically dials from a preset list that contains *only* valid telephone numbers under the North American Numbering Plan (e.g. only those numbers with the format [2-9][0-9][0-9] - [2-9][0-9][0-9] - [0-9][0-9][0-9][0-9]), or perhaps the list contains only those valid numbers beginning with a 312 or 772 area code. That system dials completely arbitrary numbers, yet it dials from a preset list and is therefore not an ATDS under the district court's view. Telemarketers employing such a list would be free to unleash billions of calls upon the public with reckless abandon.

Or how about a system operated by Alphabet, Inc., that dials from a preset list containing only the telephone numbers of every person using Google to search the internet? That system would also be dialing from a "preset list" containing millions of telephone numbers. One might be inclined to spot a difference in that the Alphabet system, and AT&T's system here, are calling numbers believed to be affiliated with

the users of their services. Yet that distinction is already accounted for in the statute via the affirmative defense of "prior express consent," which allows business to use automatic dialing systems to call customers who have given prior express consent to be called. 47 U.S.C. § 227(b)(1)(A). If Congress did not intend for its ATDS prohibitions to apply to calls made by businesses to numbers believed to belong to their customers, it could have easily drafted statutory language to exclude such uses of automatic dialing systems. Instead of doing that, it created a consent defense that would have been *unnecessary* if the prohibitions did not apply in the first place.

Gadelhak need not posit a parade of unlikely and hypothetical horrors. Autodialers are making billions of robocalls every year even while callers largely believe their systems are subject to the TCPA. According to a study cited by the FCC in its 2019 Robocall Report, there were nearly forty-eight billion robocalls placed in 2018. Report on Robocalls – A Report of the Consumer and Governmental Affairs Bureau, CG Docket No. 17-59, at p. 6, ¶ 13 (February 2019).[10] The

[10] Available at https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf (last visited July 1, 2019)

same study found that in November of 2018 alone, there were 5.1 billion calls placed for the month, 169.6 million calls per day, 7.1 million calls per hour, 2,000 calls per second, and an average of 15.7 calls per person. *Id.* It is only reasonable to assume that call volumes will rise if the Court confirms that virtually every autodialer in the country can send text message spam without fear of liability under the TCPA.

Conclusion

The Court should rule that AT&T's system is an ATDS as a matter of law and reverse the district court's judgment.

Respectfully Submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this brief contains 11,081 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in 14 point Century Schoolbook, a proportionally spaced typeface.

Dated: July 1, 2019

s/ *Timothy J. Sostrin*
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Attorney for Plaintiff-Appellant

PROOF OF SERVICE

I, Timothy J. Sostrin, certify that on July 1, 2019, I served the following registered users of the court's electronic filing system with the foregoing Brief by electronically filing the same:

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Attorney for Plaintiff-Appellant

No. 19-1738

In the United States Court of Appeals
for the Seventh Circuit

ALI GADELHAK,
on individually and on behalf of all others similarly situated
Plaintiff-Appellant,

v.

AT&T SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
No. 17-cv-1559, Judge Chang presiding

SHORT APPENDIX OF PLAINTIFF-APPELLANT ALI GADELHAK

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CERTIFICATION PER 7TH CIR. R. 30(d)

Counsel for Plaintiff-Appellant certifies that all materials required by 7th Cir. Ct. R. 30 (a) and (b) are included.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

ALI GADELHAK, on behalf of himself and all others similarly situated, Plaintiff(s), v. AT&T SERVICES, INC., Defendant(s).	Case No. 17-cv-01559 Judge Edmond E. Chang

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment entered in favor of Defendant and against Plaintiff. Case dismissed with prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Edmond E. Chang on a motion for summary judgment.

Date: 3/29/2019

Thomas G. Bruton, Clerk of Court

s\Sandra Brooks, Deputy Clerk

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

ALI GADELHAK, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	No. 17-cv-01559
v.	)	
	)	Judge Edmond E. Chang
AT&T SERVICES, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Ali Gadelhak brought this proposed class action after he received automated text messages from Defendant AT&T Services, Inc. (AT&T), allegedly in violation of the Telephone Consumer Protection Act (TCPA).[1] Gadelhak and AT&T now cross-move for summary judgment. The motions present the parties' disagreement over the proper definition of the statutory term "automated telephone dialing system," and whether AT&T employed one when it sent text messages to Gadelhak and others. For the reasons explained below, the Court grants AT&T's motion and denies Gadelhak's motion.

I. Background

In deciding cross motions for summary judgment, the Court views the facts in the light most favorable to the respective non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). So when the Court

[1]This Court has subject matter jurisdiction over the case under 28 U.S.C. § 1331 and 29 U.S.C § 1132.

evaluates Gadelhak's summary judgment motion, AT&T gets the benefit of reasonable inferences; conversely, when evaluating AT&T's motion, the Court gives Gadelhak the benefit of the doubt.

AT&T is a major telecommunications corporation. R. 22, Answer ¶¶ 6, 7. Since around 2015, AT&T has engaged in a program called the AT&T Customer Rules Feedback Tool, also known (at least to the parties) as "TACRFT." R. 70.8, Lyon Dep. at 12:9-12; R. 52.2, Lyon Dec. ¶2. According to AT&T, the program sends surveys to customers of its corporate affiliates—DIRECTV, for example—via text message in order to assess customers' recent interactions with service representatives. Lyon Dec. ¶¶ 2-4. At the end of each survey, AT&T also includes an advertisement for its smartphone application, MyAT&T. R. 70.5, Abel Dep. at 69:21-25.

AT&T employs an automated process to select the numbers to which it sends the TACRFT surveys. First, a computer system for each AT&T affiliate identifies customer accounts that have engaged in qualifying transactions with a customer service representative. Lyon Dep at 35:7-13, 36:15-37:13; Lyon Dec. ¶ 5. Then, each of those computer systems sends a list of the phone numbers associated with each flagged account to AT&T's Market Research Organization for further processing. Lyon Dep. at 139:21-24. The list of these phone numbers is known as the Gross Sample List. *Id.* at 139:21-140:6. This list includes every phone number associated with a flagged account, rather than just the phone number that engaged in the qualifying transaction. Lyon Dep. at 21:6-22:2; R. 74, Def.'s Resp. PSOF ¶¶ 7, 8. Once the Gross Sample List is compiled, a computer system within the Market Research

Organization narrows down the list to one number for each account by (1) removing any non-cellular numbers; and (2) selecting the first cellular number listed for each account. Lyon Dep. at 140:7-25; R. 74.3, Lyon Dec. II ¶¶ 3-6. This pared-down list is then sent to AT&T's outside vendor, Message Broadcast, who sends out pre-programmed text-message surveys previously drafted by AT&T. Lyon Dep. at 57:14-16, 130:13-20; R. 70.7, Joiner Dep. at 63:6-12. It is undisputed that a computer, not a human, compiles the list of telephone numbers to which these surveys are directed. Def.'s Resp. PSOF ¶¶ 9-11.

Plaintiff Ali Gadelhak lives in Chicago, Illinois and is not a customer of AT&T or any AT&T affiliate. R. 70.9, Gadelhak Dep. at 81:7-82:4, 84:2-85:14; Def.'s Resp. PSOF ¶ 38. Gadelhak registered his cell phone number with the Do Not Call list in May 2014. Gadelhak Dep. at 76:12-77:24. Nonetheless, in July 2016, Gadelhak received five text messages from AT&T asking survey questions in Spanish. Lyon Dec., Ex. A, Gadelhak Call Log; Gadelhak Dep., Ex. 33. AT&T insists that TARCRFT is designed to send text messages only to AT&T customers, so Gadelhak's number must have been erroneously listed on an AT&T account. Lyon Dec. ¶ 5; Def.'s Resp. PSOF ¶ 41.

In February 2017, Gadelhak brought this proposed class action against AT&T for violations of the Telephone Consumer Protection Act. Gadelhak alleges that AT&T "negligently, knowingly, and/or willfully contacted" him via text message using an automated telephone dialing system (ATDS) "without his prior consent." R. 20, Compl. ¶ 1. He also alleges that AT&T did the same to others, on whose behalf

Gadelhak brings class allegations. *Id.* ¶¶ 34, 35, 39. Both parties now move for summary judgment, content to litigate class certification (if Gadelhak were to prevail) after a decision on summary judgment. In its motion, AT&T asserts that it did not use an ATDS to send a text message to Gadelhak and thus did not violate the TCPA. R. 51, Def.'s Br. at 1. For his part, Gadelhak asks the Court to declare as a matter of law that AT&T's TACRFT system employs an ATDS. R. 71, Pl.'s Br. at 1-2. Much of the parties' dispute boils down to whether the D.C. Circuit's opinion in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) nullified previous FCC orders defining the term ATDS and, if so, what is the proper definition of that statutory term under the plain language of the TCPA.

II. Legal Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists 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). In evaluating summary judgment motions, courts must "view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up).[2] The Court "may not weigh conflicting evidence or make credibility determinations," *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d

[2]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

697, 704 (7th Cir. 2011) (cleaned up), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

II. Analysis

A. Statutory and Regulatory History of the TCPA

To start, it is necessary to set forth the TCPA's framework. Enacted in 1991, the TCPA generally prohibits making calls using "any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). The statute 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." § 227(a)(1). This general prohibition has three exceptions: (1) calls made with "prior express consent;" (2) emergency calls; and (3) calls made to collect government debts. § 227(b)(1)(A).

The FCC has the authority to promulgate regulations implementing the TCPA. *See ACA International*, 885 F.3d at 693. In 2003, the FCC promulgated regulations that interpreted the term ATDS to include "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when

a sales 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). The Commission referred to these types of devices as "predictive dialers" and explained that they have "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. According to the 2003 Order, telemarketers may have primarily relied on dialing equipment "to create and dial 10-digit telephone numbers arbitrarily" in the past, but "to exclude… equipment that use[s] predictive dialing software from the definition of [ATDS] simply because it relies on a *given* set of numbers would lead to an unintended result." *Id.* at 14092 ¶¶ 132, 133 (emphasis added). The Commission reasoned that it made little sense to permit calls to "wireless numbers… when the dialing equipment is paired with predictive dialing software and a database of numbers," but prohibit calls "when the equipment operates independently of such lists and software packages." *Id.* ¶ 133.

The Commission affirmed this interpretation in 2008, explaining 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." *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2008 Declaratory Ruling"), 23 FCC Rcd. 559, 566 ¶ 13 (2008). 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 by the party "warrant[ed] reconsideration of [the 2003] findings." *Id.* at 567 ¶ 14.

Seven years later, the Commission revisited and again reaffirmed its earlier take: "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 Commission compared predictive dialers to dialers that "utilize random or sequential numbers instead of a list of numbers" and stated that both "retain the capacity to dial thousands of numbers in a short period of time." *Id.* at 7973 ¶ 14. In the Commission's view, any device that "generally has the capacity to store or produce, and dial random or sequential numbers… even if it is not presently used for that purpose, including when the caller is calling a set list of consumers," met the definition of "autodialer" under the TCPA. *Id.* at 7972 ¶ 10.

Under the Hobbs Act, this Court, sitting as a district court, does not have the authority to invalidate the FCC's rulings, because "[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); *Blow v. Bijora*, 855 F.3d 793, 802 (7th Cir. 2017).[3] In *ACA International*,

[3]The Supreme Court is considering this interpretation of the Hobbs Act in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (oral argument heard on March 25, 2019). That particular dispute does not impact the Court's holding here.

however, the D.C. Circuit consolidated several Hobbs Act petitions for review of the 2015 Declaratory Ruling and invalidated the Commission's interpretation of ATDS, because it "fail[ed] to satisfy the requirement of reasoned decisionmaking." 885 F.3d at 703. The D.C. Circuit explained that the 2015 Declaratory Ruling adopted two irreconcilable definitions of the term ATDS: "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 is it enough if the device can call from database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue." *Id.* at 701 (emphasis in original). Despite this holding, the D.C. Circuit declined to define ATDS in its own terms, but stated that it was permissible for the Commission to adopt either interpretation. "But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order." *Id.* at 703. So the D.C. Circuit invalidated the 2015 Declaratory Ruling.

B. *ACA International*'s Scope

In this case, neither party disputes that the Commission's 2015 Declaratory Ruling was overturned and invalidated by *ACA International*. Def.'s Br. at 8; Pl.'s Br. at 15. AT&T, however, argues that the opinion also invalidated the Commission's prior rulings defining ATDS, Def,'s Br. at 8-11, while Gadelhak asserts that the case's holding is limited to the 2015 Declaratory Ruling, Pl.'s Br. at 15-20. A close read of *ACA International* and the 2015 Declaratory Ruling make clear that AT&T has the better argument.

It is true that the petitions in *ACA International* sought review only of the 2015 Declaratory Ruling, but the petitions zeroed-in on four specific aspects of the order. *ACA International*, 885 F.3d at 693-94. Most pertinent to this case was the Commission's interpretation of what functions a system needs to have in order to qualify as ATDS. On that question, the Commission argued "that the issue was resolved in prior agency orders—specifically, declaratory rulings in 2003 and 2008," and that it was too late to "raise a challenge [to those orders] by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones." *Id.* at 701. The D.C. Circuit disagreed and proceeded to review all "pertinent pronouncements" from the Commission on the subject. *Id.* The court determined that "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform," and then also set aside the Commission's "treatment" of the qualifying functions of an ATDS. *Id.* at 701, 703.

The Commission's own language in the 2015 Declaratory Ruling also bolsters the interpretation that *ACA International* nullified the FCC's previous pronouncements defining ATDS. The 2015 Declaratory Ruling states that the Commission "reaffirm[s]" previous statements, and refers specifically to the 2003 Declaratory Ruling. 2015 Declaratory Ruling, 30 FCC Rcd. at 7971 ¶ 10 & n. 39*; see also ACA International*, 885 F.3d at 694 ("The Commission reaffirmed prior orders deciding that 'predictive dialers'—equipment that can dial automatically from a given list of telephone numbers using algorithms to predict 'when a sales agent will be available'—qualify as autodialers.").

Moreover, the D.C. Circuit's concern in *ACA International*—that the 2015 Declaratory Ruling, "in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking"—equally applies to the 2003 and 2008 orders. 885 F.3d at 703. The 2003 Order made clear that the Commission saw a difference between generating and dialing random or sequential numbers, on the one hand, and dialing from a list of numbers on the other. 2003 Order, 18 FCC Rcd. at 14092 ¶ 132*; see also ACA International*, 885 F.3d at 702. But it then went on to state that, "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Id.* at 14092 ¶ 133. The 2008 Declaratory Ruling held the same, as it simply "affirm[ed]" the interpretation of ATDS promulgated in the 2003 Order. 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 12. With the Commission's repeated affirmations of the prior orders, this Court holds, as other courts in this District have, that *ACA International* invalidated the Commission's understanding of the term ATDS as articulated in the 2015 Declaratory Ruling, as well as the 2008 Declaratory Ruling and the 2003 Order. *See Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 935 (N.D. Ill. 2018); *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1161 (N.D. Ill 2018).

C. Defining ATDS Under the TCPA

Because *ACA International* invalidated the Commission's prior orders defining the term ATDS—and also declined to articulate their own definition of the term—the

Court moves on to interpreting the TCPA unburdened by the Commission's definitions. Here, the pertinent question is really whether predictive-dialing devices that lack the capacity to generate numbers either randomly or sequentially, and instead only dial numbers from a predetermined list, meet the statutory definition of ATDS. AT&T argues that the statutory text dictates a "no" answer, Def.'s Br. at 11-13, while Gadelhak asserts that a device "that *stores* telephone numbers to be called and automatically dials those numbers falls within [the] statutory definition," Pl.'s Br. at 6 (emphasis in original).

The Court "must begin with [the TCPA's] 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) (interpreting 28 U.S.C. § 6330(c)(4)(A)) (cleaned up). In other words, the Court must give the TCPA its plain meaning. *Coleman v. Labor & Indus. Review Comm'n of Wis.*, 860 F.3d 461, 473 (7th Cir. 2017). To do so, 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) (cleaned up) (quoting *McNeill v. United States*, 563 U.S. 816, 819 (2011)). And it must "accord words and phrases their ordinary and natural meanings and avoid rendering them meaningless, redundant, or superfluous." *Scherr*, 703 F.3d at 1077 (cleaned up).

Under the TCPA, an ATDS has "the capacity to store or produce telephone numbers to be called, using a random or sequential number generator," and then call the numbers. 47 U.S.C. § 227(a)(1). Gadelhak asserts that the phrase "using a

random or sequential number generator" modifies only the verb "produce," and has no effect on the verb "store." Pl.'s Br. at 7. Gadelhak cites to the Ninth Circuit opinion in *Marks v. Crunch San Diego, LLC* to support this argument. *Id. (*citing 904 F.3d 1041, 1051-52 (9th Cir. 2018)). In *Marks*, the Ninth Circuit defined ATDS as "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." 904 F.3d at 1053. The court came to this conclusion after examining § 227(a)(1), other provisions of the TCPA, and the legislative history of the statute. *Id.* at 1050-53. This Court respectfully disagrees with the Ninth Circuit's holding in *Marks* and Gadelhak's argument here.

At the outset, Gadelhak's reading of § 227(a)(1) is difficult to square with the plain language of that provision. Both "store" and "produce" are transitive verbs, meaning both require an object. *Pinkus*, 319 F. Supp. 3d at 937-38. Here, that object is "telephone numbers to be called." § 227(a)(1). And the phrase "using a random or sequential number generator" modifies neither "store" nor "produce," but instead actually modifies "telephone numbers to be called." *Id.* This is evidenced by the phrase's position immediately after "telephone numbers to be called." *Id.* Put another way, the most sensible reading of the provision is that the phrase "using a random or sequential number generator" describes a required characteristic of the *numbers* to be dialed by an ATDS—that is, *what* generates the numbers.

To resist this interpretation, Gadelhak points to other provisions in the TCPA. As he discusses in his brief, there are two exceptions to the prohibition against

automated calls that, it is true, do lead one to question whether calls dialed from a predetermined list are covered. Pl.'s Br. at 8-10. First, there is an exception for calls made with the prior consent of the called party. 47 U.S.C. § 227(b)(1)(A). Gadelhak, citing *Marks*, argues that there is no way to take advantage of this exception without dialing from a list of telephone numbers belonging to consenting individuals. Pl.'s Br. at 9 (citing *Marks*, 904 F.3d at 1051). Put another way, the exemption seems to imply that calling from a predetermined list of numbers qualifies a device as an ATDS, but that when the list is of those individuals who have given their consent, it is exempted from the prohibition. What Gadelhak overlooks though, is that the consent exception is drafted in such a way that it also applies to calls made using an artificial or prerecorded voice—not just those made using an ATDS. 47 U.S.C. § 227(b)(1)(A). So the consent exception still does have an effect—it does not suffer the embarrassment of being nugatory—even if ATDS does not cover systems that dial from preset lists. The consent exception does not undermine the non-preset-list interpretation of ATDS.

The second exception on which Gadelhak relies is for calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). But the same reasoning applies to undermine the persuasiveness of the inference to be drawn from this exception: it also applies to calls made with an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A). So, again, the federal-debt

exception can co-exist with a definition of ATDS that does not cover calls to a preset list.[4]

Similarly, Gadelhak's argument that Congress ratified the Commission's construction of the TCPA when it added the federal-debt exception in 2015, but left the definition of ATDS unchanged, is insufficient to overcome the plain meaning of the statutory definition of ATDS. The D.C. Circuit's review of the 2015 Declaratory Ruling was already pending at the time of Congress's amendment. *See ACA v. FCC*, Case No. 15-1211 (D.C. Cir.), Dkt. No. 1 (July 10, 2015) (Petition for Review); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (Nov. 2, 2015). As a result, there was no "consistent judicial construction" at the time of the amendment, precluding any conclusions about Congress's approval of the Commission's interpretation of the statute. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 350-51 (2005).

Gadelhak's final argument is that the Court's reading of § 227(a)(1) renders the word "store" superfluous, "because any number that is stored using a random or sequential number generator must logically also have been produced using a random or sequential number generator." Pl.'s Br. at 11. At the outset, even if this were true, it would not, by itself, justify disregarding the plain meaning of the provision. "The canon against surplusage is not an absolute rule." *Marx v. General Revenue Corp.*,

[4]It must also be said that, as time marches on and Congress adds to and amends a statutory framework in piecemeal provisions, at some point it is not surprising that provisions are added as fail-safe measures to broadly prevent the statute's application in a particular setting. This might be an instance where Congress simply wanted to guarantee that the TCPA, which set a statutory damages minimum for violations (and per violation), would never be applied to attempts to collect a debt owed to the federal government.

568 U.S. 371, 385 (2013). More important, the Court's interpretation does not actually render "store" superfluous. The word's presence in the provision ensures that systems that generate numbers randomly or sequentially, but then store the numbers for a period of time before dialing them later after a person has intervened to initiate the calls, are still covered by the statutory definition of ATDS. All in all, none of Gadelhak's arguments are persuasive; instead, the numbers stored by an ATDS must have been generated using a random or sequential number generator.

D. Application to AT&T's TACRFT Program

Gadelhak concedes that the system employed by AT&T for its TACRFT program "generates a list of telephone numbers to be called via automated computer processes." Pl.'s Br. at 12. Based on this description, AT&T's system is not an ATDS as defined in the statute. Gadelhak makes the additional argument, though, that "AT&T's dialing system also uses a random number generator to produce telephone numbers to be called." *Id.* at 13. In support of this assertion, Gadelhak cites to deposition testimony from AT&T's Director-Market Research & Analysis, Kerry Lyon. *Id.*; Lyon Dep. at 141:22-143:19; Lyon Dec. ¶ 1. Lyon stated that, when AT&T's system was confronted with an account that had more than one cellular phone number listed, he was not sure how the system chose which cellular number to call: "[I]t could be randomized, I'd have to look at the code." Lyon Dep. at 143:16-17. Gadelhak latched onto this comment as proof that AT&T's system was generating telephone numbers randomly. Lyon, however, later submitted a declaration in which

he clarified that the AT&T system "selects the first eligible wireless number to send the survey system." Lyon Dec. II ¶ 5.

Even so, Gadelhak continued to argue that Lyon's testimony was proof that AT&T's system at least had *the capacity* to generate numbers randomly, because it was able to "randomly" select numbers to dial from the compiled list of accounts. Pl.'s Br. at 13 ("Plaintiff pointed to the deposition testimony of Kerry Lyon, who testified that when the initial list of telephone numbers contains multiple telephone numbers for the same account, the computer randomly selects one of those numbers to receive the text message and thus randomly generates that number for dialing."). But the D.C. Circuit already explained that numbers must necessarily "be called in *some* order—either in a random or some other sequence." *ACA International*, 885 F.3d at 702 (emphasis in original). Accordingly, the phrase "using a random or sequential number generator" would be meaningless if it simply referred to the order in which calls were made. Moreover, the organization of the provision does not support a reading where "using a random or sequential number generator" refers to the order numbers from a list are dialed. Otherwise, the provision would read "to store or produce telephone numbers to be called; and to dial such numbers, using a random or sequential number generator." Based on the record evidence, there is no genuine dispute that AT&T's system cannot *generate* telephone numbers randomly or sequentially—as those terms are used in the TCPA—and thus it is not an ATDS and is not prohibited.

IV. Conclusion

For the reasons discussed, Gadelhak's motion for partial summary judgment is denied and AT&T's motion for summary judgment is granted. Final judgment shall be entered. The status hearing of April 4, 2019 is vacated.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: March 29, 2019

Tacrft QA Call Control

Home
Survey Call
Callback Call
Callback Test Platform
Inbound Callback
Twitter
Email
SMS
SMS Lookup (Multi)
Logout

Phone Number	Survey ID	Start Date	End Date
[redacted]9978	All	01/01/2016	12/31/2016

Submit

SMS Result:	Unknown

Timestamp	MT	MO
07/15/2016 10:11:35	Valued Customer, gracias por llamar a AT&T. En breve recibira unos mensajes para opinar acerca de su llamada.	
07/15/2016 10:27:08	Cuan probable recomendaria los servicios de AT&T a un amigo o familiar en una escala del 10 al 1? 10 (definitivamente) al 1 (no recomendaria)	
07/15/2016 10:30:32		Who is this
07/15/2016 10:30:33	Gracias. Cuan satisfecho esta con el manejo general de la llamada por Catherine Miche en escala del 10 al 1? 10 = muy satisfecho a 1 = muy insatisfecho	
07/15/2016 10:35:18		Please tell me who this is. I do not speak Spanish
07/15/2016 10:35:19	Gracias. Cuantas veces tuvo que contactar AT&T para resolver su solicitud? 1. Uno 2. Màs de uno 3. Todavia no se ha resuelto	
07/15/2016 10:35:51		Stop sending me messages
07/15/2016 10:35:51	Recivido: Usted a optado no completar la encuesta hoy. Conteste "STOP ALL" para optar no recibir mas informacion o contactos de AT&T. Gracias.	

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

ALI GADELHAK, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	17-cv-1559
v.	)	Hon. Edmond Chang
AT&T SERVICES, INC.	)	JURY DEMAND
Defendant.	)	

PLAINTIFF'S LR 56.1 STATEMENTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Local Rules 56.1(a)(3), 56.1(b)(3)(B), and 56.1(b)(3)(C), Plaintiff Ali Gadelhak ("Plaintiff") submits the following response to the Statement of Material Facts filed by Defendant AT&T Services, Inc. ("Defendant") in support of its Motion for Summary Judgment (Doc. 52) and a Counter Statement of Additional Material Facts, both in opposition to Defendant's Motion and in support of Plaintiff's Cross Motion for Partial Summary Judgment:

LR 56.1(b)(3)(B) Response

1. Plaintiff Ali Gadelhak ("Gadelhak") is an individual who was during all relevant times a resident of Chicago, Illinois.

Response: Admitted.

2. Defendant AT&T Services Inc. ("AT&T") is a Delaware corporation that maintains its principal place of business in Texas.

Response: Admitted.

3. Gadelhak resided in Chicago, within the Northern District of Illinois, at the time he

received the texts that form the basis for this Complaint.

Response: Admitted.

4. AT&T engages in the AT&T Customer Rules Feedback Tool ("TACRFT"), a program through which text message surveys are directed to the customers of its corporate affiliates to assess the customers' satisfaction with their interactions with service representatives.

Response: Denied that the text message surveys are sent only to customers of AT&T's corporate affiliates. Plaintiff received several of the text messages and he was not a customer of any AT&T affiliate. *See Gadelhak Dep.* at 81:25 – 82:4, 84:2 – 85:14. In addition, hundreds of other non-customers received a survey text messages in 2016 and 2017 alone, and [redacted]. *Exhibit A - Stipulation* at ¶¶ 1-6; *Exhibit B – Excerpt of Survey Responses*.[1]

5. The TACRFT program covers customers of a variety of products of AT&T's affiliates, including cellular service, DIRECTV satellite service, and U-verse voice, TV, and Internet service.

Response: Denied that the text message surveys are sent only to customers of these services. Plaintiff received one of the text messages and he was not a customer of any of these services. *See Gadelhak Dep.* at 81:25 – 82:4, 84:2 – 85:14. In addition, hundreds of other non-customers received a survey text messages in 2016 and 2017 alone, and [redacted]. *Ex. A - Stipulation* at ¶¶ 1-6; *Exhibit B – Excerpt of Survey Responses*.

6. Customers receive surveys only after they have been involved in an interaction with a representative of the AT&T-affiliated business that provides their service.

[1] For illustrative purposes, this exhibit is only an excerpt of the non-customer text messages produced by AT&T. It is not a complete list.

Response: Denied that the text message surveys are sent only to persons who have been involved in an interaction with a representative of the AT&T-affiliated business. Plaintiff received one of the text messages and had no interaction with any such representative. *See Gadelhak Dep.* at 81:25 – 82:4, 84:2 – 85:14. In addition, hundreds of other non-customers received a survey text messages in 2016 and 2017 alone, and [redacted]. *Exhibit A - Stipulation* at ¶¶ 1-6; *Exhibit B – Excerpt of Survey Responses*.

Denied further that the specific telephone numbers to which the surveys are sent were in any way involved in an underlying interaction. When AT&T's computer system detects a qualifying interaction, it randomly selects any cellular telephone number associated with the account in AT&T's records to receive a survey text message, regardless of whether or not that telephone number was involved in the underlying interaction. *Lyon Dep.* at 21:6 – 22:2, 141:7 - 143:19; *Taylor Dep.* at 32:17-24; *Barret Dep.* at 47:5 - 48:15, 51:4-16.

7. TACRFT surveys are only sent to numbers listed on customer accounts and no numbers are obtained for the TACRFT surveys other than from the relevant customer account databases of AT&T's affiliates.

Response: Admitted that all of the telephone numbers are somehow associated with an account in AT&T's records, **but denied** that the telephone numbers were involved in the customer service interactions that triggered the survey, and denied further that AT&T's records designate those telephone numbers as belonging to the customer at issue. *Lyon Dep.* at 21:6 – 22:2, 139:21 – 140:14, 141:7 - 143:19; *Taylor Dep.* at 32:17-24; *Barret Dep.* at 27:2-5, 29:2 – 31:10, 47:5 - 48:15, 51:4-16; *Abel Dep.* at 33:8-19, 46:3-19.

8. The cellular telephone number identified as Mr. Gadelhak's received a series of text messages pursuant to the TACRFT program in July, 2016.

Response: Admitted.

9. The survey group at AT&T receives files from the customer systems of its affiliates. Those files show which customers had qualifying interactions with service representatives.

Response: Denied that the telephone numbers in the files were involved in any qualifying interactions. When AT&T's computer system detects a qualifying interaction, it randomly selects any cellular telephone number associated with the account in AT&T's records to receive a survey text message, regardless of whether or not that telephone number was involved in the underlying interaction. *Lyon Dep.* at 21:6 – 22:2, 141:7 - 143:19; *Taylor Dep.* at 32:17-24; *Barret Dep.* at 47:5 - 48:15, 51:4-16.

10. The survey texts for the different AT&T-affiliated business units have different requirements for the lists to receive the survey texts, and those requirements are applied by the survey team before the messages are sent. This involves filtering the list provided by the customer databases to generate a final list.

Response: Denied that any human being applies any filters or requirements to the list. The lists are both created and filtered by automated computer processes known as SQL scripts or "code." *Lyon Dep.* at 35:7-18, 56:7 – 57:7, 65:25 – 66:6; 72:19-21, 130:10 - 133:4 138:21 – 141:3; *id.* at exs. 27 - 28.

11. Once the requirements for a given survey program are applied, a flat file is generated. That flat file includes the remaining telephone numbers and a unique identifier that can be used to track the surveys.

Response: Admitted.

12. The flat files are "just an electronic list."

Response: Admitted.

13. The TACRFT surveys are not sent by AT&T itself. Instead, AT&T contracts with a vendor, Message Broadcast, to physically send the texts.

Response: Denied. As Message Broadcast testified, AT&T itself sends the Survey messages. *Joiner Dep.* at 60:7-13. [redacted]. *Lyon Dep.* at 81:16 – 83:3; *Id.* at ex. 18, p. 3; *Joiner Dep*. at 12:23 – 13:17. In addition, AT&T owns the "short code" address from which the messages are sent. *Joiner Dep.* at 22:9-15. [redacted]. *Lyon Dep.* at ex. 16, pp. 37 - 41.

14. Message Broadcast receives the flat file from AT&T via point-to-point connectivity via a virtual private network (VPN). All of the flat files Message Broadcast uses are created by AT&T.

Response: Admitted.

15. Once Message Broadcast receives the flat file, one of its employees compares the flat file to relevant "do-not-call" and "stop" lists to ensure individuals who requested not to receive such communications do not receive the texts.

Response: Denied. AT&T's Market Research Organization, not Message Broadcast, is responsible for maintaining and applying any "do-not-call" or "stop" lists and, to the extent any comparisons to such lists occur, they occur via automated computer processes within the Market Research Organization. *See Lyon Dep.* 92:10 – 93:19.

16. The Message Broadcast individual then uploads the remaining data into Message Broadcast's system, which instructs a particular survey to be directed at the telephone numbers. The system does not dial any telephone numbers that are not included on the flat file.

Response: Admitted that a Message Broadcast employee uploads the list of telephone numbers into a database called the Reporting Database used to store the numbers that will then be automatically dialed by the system and to store electronic records of those transmissions. *Joiner Dep.* at 61:11 – 62:16.

17. That system then uses a short message peer-to-peer ("SMPP") protocol to send the survey text message to the recipient's number.

Response: Admitted.

18. Messages sent under the TACRFT program are delivered from a "short code."

Response: Admitted.

19. The equipment used by Message Broadcast does not have the capacity to dial random or sequential numbers, rather it can only dial those numbers provided to it by AT&T.

Response: Denied. The list of telephone numbers may contain multiple phone numbers associated with a single qualifying account in AT&T's records. Where multiple numbers exist, computer code running in the Market Research Organization's systems randomly chooses one of those telephone numbers on the account to receive the survey. *Lyon Dep.* at 141:22 – 143:19.

20. Gadelhak's designated expert, Randall Snyder, admitted that his opinion that dialing from a list is equivalent to dialing sequentially would lead him to consider group texting on a smartphone sequential dialing.

Response: Denied that Mr. Snyder testified that he considers normal group texting on a smartphone to be an automatic telephone dialing system. Mr. Snyder testified that, in rare cases,

specialized software can be added to smartphone devices that give them the required functionality to be automatic telephone dialing systems. *Snyder Dep.* at 171:22 – 172:10, 178:3-11. For instance, he testified that in a prior, unrelated case, he opined that LA Fitness had used an automatic telephone dialing system when its sales manager downloaded a mass texting application on to his iphone that imported and stored tens of thousands of telephone numbers from LA Fitness's systems onto the device, stored and utilized a template marketing message, and automatically sent that template message *en masse* to 500 numbers at a time. *Snyder Dep.* at p. 176:18 - 178:11.

LR 56.1(a) and 56.1(b)(3)(C) Counter Statement of Material Facts

1. Prior to 2015, AT&T conducted customer service surveys via e-mail and Interactive Voice Response during telephone calls. *Lyon Dep.* at 10:23 – 11:23;

2. In or around 2015, AT&T began implementing a plan to conduct all surveys via automated text message. *Lyon Dep.* at 12:9-12.

3. One of the reasons AT&T decided to conduct surveys via text message was that it gave AT&T the opportunity to invite the recipient to download the MyAT&T smartphone application. *Abel Dep.* at 64:13 – 65:4, 71:19 – 72:16; *id.* at ex. 34, p. 5

4. AT&T wanted its customers to use the MyAT&T smartphone app because it allowed them to "self-serve" their customer service issues and allowed AT&T to move more of its customer service interactions online, rather than to a call center. *Abel Dep.* at 64:13 – 65:4, 69:21 – 72:16; *id.* at ex. 34, p. 5.

5. AT&T's "Market Research Organization" developed and managed "The AT&T Customer Rules Feedback Tool" ("TACRFT") in order to send the automated survey text messages. *Abel Dep.* at 14:21 – 15:13.

6. To implement the Market Research Organization's 2016 "Measurement Plan," AT&T programmed its computer systems to initiate a TACRFT survey whenever any customer service interaction occurred on a combined billing or "ISM" account; i.e., an account where the customer subscribed to DirecTV and either Uverse or AT&T Mobility.; *Lyon Dep.* at 22:3 – 25:12, 27:14-28:11, 101:11 – 102:14, 103:16-104:11; *id.* at ex. 3, pp. 1-2; *Abel Dep.* at 13:8-14.

7. On an hourly basis, computer systems for each of these AT&T affiliates automatically identified accounts with qualifying transactions, and sent an electronic list of the various telephone numbers associated with those accounts, known as the "Gross Sample" list, to the Market Research Organization for further automated processing before the surveys were sent. *Lyon Dep.* at 29:7 - 37:13, 50:18-52:12, 57:8-16, 96:11-25, 139:8 – 140:6.

8. The list is comprised of all telephone numbers associated with the account in AT&T's records; it is not limited to telephone numbers involved in the underlying interaction. *Lyon Dep.* at 21:6 – 22:2, 141:7 - 143:19; *Taylor Dep.* at 32:17-24; *Barret Dep.* at 47:5 - 48:15, 51:4-16.

9. No human being creates the list; it is generated via an automated SQL scripting process. *Lyon Dep.* at 35:7-18.

10. Upon receipt of the list, computer systems within the Market Research Organization automatically identified which of the telephone numbers contained in the list were assigned to cellular telephone service and removed any non-cellular numbers from the list via SQL processing. *Lyon Dep.* at 139:21 – 140:25.

11. If the list contained multiple cellular telephone numbers for the same qualifying account, computer code running in the Market Research Organization's system randomly chose

one of those numbers to receive the survey messages via a random number generator. *Lyon Dep.* at 141:22 – 143:19.

12. The Market Research Organization's computer system automatically sends the remaining list of telephone numbers to AT&T's vendor, Message Broadcast, on a roughly hourly basis, [redacted]. *Lyon Dep.* at 57:8-16, 76:24 – 78:22; *Joiner Dep.* at 63:6-12.

13. Message Broadcast's computer system stored that list of telephone numbers to be called within a database known as the "Reporting Database." *Joiner Dep.* at 64:10-16.

14. AT&T had instructed Message Broadcast to program its computer systems to send specific pre-programmed text messages to those telephone numbers, which AT&T had previously drafted and sent to Message Broadcast, and pre-programmed replies to any responses received from the recipients. *Lyon Dep.* at 120:7-20, 130:10-23; *id.* at ex. 27.

15. Message Broadcast stores the pre-programmed messages for the survey in the same Reporting Database in which it stores the telephone numbers to be called. *Joiner Dep.* at 64:10-16.

16. These pre-programmed messages include an initial Introductory Message, and various Additional Messages, including: three separate survey questions, canned replies to any responses received to the survey questions (e.g. "great!" or "sorry to hear,") a solicitation for additional comments, and a closing message advertising the MyAT&T app. *Lyon Dep.* at 120:7 – 124:5, 130:10-23; *id.* at ex. 27; *Abel Dep.* at 69:21 – 72:16; *id.* at ex. 34, p. 5.

17. The messages pre-programmed in the Spanish language do not provide any opt out instructions or other guidance on who to make the messages stop unless the recipient first replies

to one of the messages with the word "stop". *Doc. 52-2* at p. 6; *Lyon Dep.* 136:19 – 137:20; *Id.* at ex. 27.

18. In order to initiate the survey text messages, Message Broadcast's computer systems pull both the telephone numbers to be called and the appropriate pre-scripted messages that correspond to those telephone numbers from the Reporting Database according to the programmed instructions, and packages them together along with in originating "Short Code," which serves as the sender's address. *Joiner Dep.* at 70:25 – 71:21, 73:11-14; *Exhibit C - Snyder Report* at ¶ 33; *Exhibit A - Stipulation* at ¶ 6.

19. Message Broadcast's computer systems then automatically, and without human intervention, send those message packets to [redacted]. *Lyon Dep.* 82:3 – 83:3; *Id.* at ex. 18, p. 3; *Exhibit C - Snyder Report* at ¶¶ 31-37.

20. [redacted] performs several automated tasks before delivering the messages: it determines whether the recipient telephone numbers are valid, it identifies the carrier networks servicing the recipient telephone numbers so that they can be delivered, and it manages and throttles the automated text message transmission rate to ensure that the automated text messages do not overload the carriers' systems, thus controlling the timing at which the survey text messages are delivered to the recipients. *Exhibit C - Snyder Report* at ¶¶ 23, 32-35.

21. [redacted] connects directly to the networks of multiple carriers throughout the country and aggregates those connections to a single point used by the Message Broadcast System. This allows for *en masse* delivery of the Survey text messages to multiple

carrier networks using a single short code. *Exhibit C - Snyder Report* at ¶¶ 20-21; *Exhibit A - Stipulation* at ¶ 6.

22. It is impossible for a human being to manually transmit a text message using a short code. Text messages sent via a short code can only be sent by computer equipment; otherwise, the originating address of the mobile-terminated text messages would appear as a standard 10-digit cellular telephone number. *Exhibit C - Snyder Report* at p. ¶ 36.

23. Thus, the outbound survey text messages were not sent as a result of a human being dialing a telephone number. *Exhibit A - Stipulation* at ¶ 7.

24. Message Broadcast's computer system "reads" any responses to the survey text message via an automated process called "natural language processing," and determines how to respond. *Lyon Dep* at ex. 3; *Abel Dep.* at 48:10 – 50:23.

25. If the computer determines that it has received a response, it automatically sends an Additional Text Message. *Exhibit A - Stipulation* at ¶ 8.

26. AT&T's expert witness admits that the Additional Messages are sent without any human intervention by Message Broadcast or AT&T. *Joiner Dep.* at 70:18 – 75:2.

27. AT&T stipulates that the outbound survey text message were sent through the following processes:

a. A list of telephone numbers was uploaded into a computer;

b. The computer was programmed to send an initial survey text message and first survey question to each telephone number in the list; and to send each subsequent survey question upon detection of a response to the prior survey question;

c. The computer sent the initial survey text message and first survey question because the telephone number was in the list;

d. The computer sent each subsequent survey question because the computer received a response to the prior survey question

Exhibit A - Stipulation at ¶ 8.

28. AT&T sent approximately 7,000,000 survey text messages per month through the processes set forth above. *Doc. 29-1 – Declaration of Kerry Lyon* at p. ¶ 7.

29. On July 15, 2016, Plaintiff received five of these text messages, pre-programmed in Spanish, pursuant to the same processes, including the Introductory Message at 10:11:35 am, and Additional Messages at 10:27:08 am, 10:30:33 am, 10:35:19 am, and 10:35:51am. *Doc. 52-2 – Message Log* at p. 6; *Lyon Dep.* at 102:11-14; *Gadelhak Dep.* at ex. 33.

30. After receiving the Introductory Message and the first survey question, Plaintiff responded: "Who is this." *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

31. In less than one second, the automated system replied with the second pre-programmed survey question rather than answering Plaintiff's question. *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

32. After receiving the second survey question, Plaintiff responded: "Please tell me who this is. I do not speak Spanish." *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

33. In less than one second, the automated system replied with the third pre-programmed survey question, rather than answering Plaintiff's question. *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

34. After receiving the third survey question, Plaintiff responded: "Stop sending me messages." Doc. 52-2 at p. 6; *Gadelhak Dep.* at ex. 33.

35. In less than one second, the automated system replied with confirmation of the stop request. Doc. 52-2 at p. 6; *Gadelhak Dep.* at ex. 33.

36. Plaintiff received the text messages on his cellular telephone number [redacted] 9978. *Gadelhak Dep.* at 38:8-18, 54:22 – 60:23; 62:3-14; *Id.* at ex. 33.

37. Plaintiff is the sole user of that cellular telephone number and pre-pays for the telephone service. *Gadelhak Dep.* at 64:4 – 65:6, 67:16-23, 74:19-22.

38. Plaintiff was not a customer of AT&T or any AT&T affiliated business at the time AT&T sent the Survey Text Messages. *Gadelhak Dep.* at 81:25 – 82:4, 84:2 – 85:14.

39. Plaintiff registered his 9978 number on the national do not call list on May 23, 2014. *Gadelhak Dep.* at 76:9-77:20.

40. AT&T testified that it does not know how it obtained Plaintiff's telephone number or how it documented that number in its records. *Barret Dep.* at 27:2-5, 29:2 – 31:10; *Taylor Dep.* at 51:7-19; *Abel Dep.* at 33:8-19

41. AT&T testified that it does not know why it sent the survey text messages to Plaintiff's telephone number or what transaction triggered the survey messages to Plaintiff's number as opposed to any other telephone number in its records. *Barrett Dep.* 22:2 – 23:21; *Lyon Dep*. at 22:9-22:2.

Respectfully submitted,

By: /s/ Timothy J. Sostrin

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

ALI GADELHAK, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	17-cv-1559
v.	)	Hon. Edmond Chang
AT&T SERVICES, INC.	)	JURY DEMAND
Defendant.	)	

DEFENDANT AT&T SERVICES, INC. RESPONSE TO PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS

Paragraph No. 1:

Prior to 2015, AT&T conducted customer service surveys via e-mail and Interactive Voice Response during telephone calls. *Lyon Dep.* at 10:23 – 11:23.

RESPONSE:

Undisputed. However, the fact is not material to the motion.

Paragraph No. 2:

In or around 2015, AT&T began implementing a plan to conduct all surveys via automated text message. *Lyon Dep.* at 12:9-12.

RESPONSE:

Disputed. Mr. Lyon testified that AT&T continues to send email and Interactive Voice Response surveys in addition to text surveys. Lyon Dep. (attached hereto as Exhibit A) at 12:1-8. Moreover, the classification of the text messages at issue as "automated" is not supported by the cited testimony and is argument. It is undisputed, however, that approximately 3 years ago AT&T switched a substantial portion of its surveys to using text messages. Lyon Dep. (Ex. A) at 12:9-12.

Paragraph No. 3:

One of the reasons AT&T decided to conduct surveys via text message was that it gave AT&T the opportunity to invite the recipient to download the MyAT&T smartphone application. *Abel Dep.* at 64:13 – 65:4, 71:19 – 72:16; *id.* at ex. 34, p. 5.

RESPONSE:

Disputed. The statement misclassifies the cited testimony. Ms. Abel testified that including language inviting customers to download the AT&T application was a general "organizational goal" and that the surveys were an opportunity to "messag[e] the customer" but did not testify that it was a reason the company made the decision to switch to text messages. Abel Dep. (attached hereto as Exhibit B) 71:19-72-16. Indeed, Ms. Abel testified that the language about the AT&T app was not included in subsequent iterations of the survey. *Id.* at 70:9-71-5. The business goals of the text message survey program are to "reduce the overall volume of survey invitations that were sent," to achieve "a maximum response rate from surveys" to "effectively handle customers who had unresolved issues" and to meet targets regarding net customer satisfaction. *Id.* at 54:21-55:7. However, the fact is not material to the motion.

Paragraph No. 4:

AT&T wanted its customers to use the MyAT&T smartphone app because it allowed them to "self-serve" their customer service issues and allowed AT&T to move more of its customer service interactions online, rather than to a call center. *Abel Dep.* at 64:13 – 65:4, 69:21 – 72:16; *id.* at ex. 34, p. 5.

RESPONSE:

Undisputed. However, the fact is not material to the motion.

Paragraph No. 5:

AT&T's "Market Research Organization" developed and managed "The AT&T Customer Rules Feedback Tool" ("TACRFT") in order to send the automated survey text messages. *Abel Dep.* at 14:21 – 15:13.

RESPONSE:

Undisputed, except to the extent that the classification of the text messages at issue as "automated" is not supported by the cited testimony and is argument.

Paragraph No. 6:

To implement the Market Research Organization's 2016 "Measurement Plan," AT&T programmed its computer systems to initiate a TACRFT survey whenever any customer service interaction occurred on a combined billing or "ISM" account; i.e., an account where the customer subscribed to DirecTV and either Uverse or AT&T Mobility.; *Lyon Dep.* at 22:3 – 25:12, 27:14-28:11, 101:11 – 102:14, 103:16-104:11; *id.* at ex. 3, pp. 1-2; *Abel Dep.* at 13:8-14.

RESPONSE:

The cited testimony mischaracterizes the testimony to the extent it states that the surveys were sent "to implement the Market Research Organization's 2016 Measurement Plan." Mr. Lyon testified that the "[M]easurement [P]lan" is only a "high level overview of the particular survey" that describes the nature of the program. Lyon Dep. (Ex. A) 101:11-17. The paragraph is otherwise undisputed.

Paragraph No. 7:

On an hourly basis, computer systems for each of these AT&T affiliates automatically identified accounts with qualifying transactions, and sent an electronic list of the various telephone numbers associated with those accounts, known as the "Gross Sample" list, to the Market Research Organization for further automated processing before the surveys were sent. *Lyon Dep.* at 29:7 - 37:13, 50:18-52:12, 57:8-16, 96:11-25, 139:8 – 140:6.

RESPONSE:

Disputed that the files come to the Market Research Organization on a regular hourly basis, as Mr. Lyon testified that the time frames in which his team received files were not exact. Lyon Dep. (Ex. A) 57:8-22. Moreover, the reference to the processing the list undergoes as automated is argument and not supported by the evidence cited. The process in fact involves work performed under the supervision of Mr. Lyon's team. For example, Mr. Lyon testified regarding computerized scrubbing procedures performed on the data as it comes in to ensure it complies with business requirement rules. Lyon Dep. (Ex. A) 23:8-24:13; 66:7-67:19. The remainder of the paragraph is not disputed.

Paragraph No. 8:

The list is comprised of all telephone numbers associated with the account in AT&T's records; it is not limited to telephone numbers involved in the underlying interaction. *Lyon Dep.* at 21:6 – 22:2, 141:7 - 143:19; *Taylor Dep.* at 32:17-24; *Barret Dep.* at 47:5 - 48:15, 51:4-16.

RESPONSE:

Disputed to the extent that only one telephone number on an account receives a text message survey, not all of the telephone numbers associated with the account. Lyon Dep. (Ex. A) 141:20-142:13. The remainder of the paragraph is undisputed.

Paragraph No. 9:

No human being creates the list; it is generated via an automated SQL scripting process. *Lyon Dep.* at 35:7-18.

RESPONSE:

Undisputed.

Paragraph No. 10:

Upon receipt of the list, computer systems within the Market Research Organization automatically identified which of the telephone numbers contained in the list were assigned to cellular telephone service and removed any non-cellular numbers from the list via SQL processing. *Lyon Dep.* at 139:21 – 140:25.

RESPONSE:

Undisputed.

Paragraph No. 11:

If the list contained multiple cellular telephone numbers for the same qualifying account, computer code running in the Market Research Organization's system randomly chose one of those numbers to receive the survey messages via a random number generator. *Lyon Dep.* at 141:22 – 143:19.

RESPONSE:

Disputed as to the assertion that the computer code pulls numbers "randomly" or via a random number generator. Mr. Lyon testified that when more than one telephone number is listed on an account, the computer system "would go with the first one that actually was eligible." Lyon

Dep. (Ex. A) at 142:4-143:19. Although Mr. Lyon testified in his deposition that he was unsure of how the system selected a number amongst eligible numbers, he has since confirmed that the code used to generate numbers for the surveys will select the first eligible number, not a random number. Lyon Decl. (attached hereto as Exhibit C) ¶¶ 4-6.

Paragraph No. 12:

The Market Research Organization's computer system automatically sends the remaining list of telephone numbers to AT&T's vendor, Message Broadcast, on a roughly hourly basis, via a direct connection between AT&T's servers and Message Broadcast's servers. *Lyon Dep.* at 57:8-16, 76:24 – 78:22; *Joiner Dep.* at 63:6-12.

RESPONSE:

Undisputed.

Paragraph No. 13:

Message Broadcast's computer system stored that list of telephone numbers to be called within a database known as the "Reporting Database." *Joiner Dep.* at 64:10-16.

RESPONSE:

Undisputed.

Paragraph No. 14:

AT&T had instructed Message Broadcast to program its computer systems to send specific pre-programmed text messages to those telephone numbers, which AT&T had previously drafted and sent to Message Broadcast, and pre-programmed replies to any responses received from the recipients. *Lyon Dep.* at 120:7-20, 130:10-23; *id.* at ex. 27.

RESPONSE:

Undisputed.

Paragraph No. 15:

Message Broadcast stores the pre-programmed messages for the survey in the same Reporting Database in which it stores the telephone numbers to be called. *Joiner Dep.* at 64:10-16.

RESPONSE:

Undisputed.

Paragraph No. 16:

These pre-programmed messages include an initial Introductory Message, and various Additional Messages, including: three separate survey questions, canned replies to any responses received to the survey questions (e.g. "great!" or "sorry to hear,") a solicitation for additional comments, and a closing message advertising the MyAT&T app. *Lyon Dep.* at 120:7 – 124:5, 130:10-23; *id.* at ex. 27; *Abel Dep.* at 69:21 – 72:16; *id.* at ex. 34, p. 5.

RESPONSE:

AT&T disputes the classification of the message referring to the MyAT&T app as an advertisement, which is a legal conclusion and argument. Furthermore, AT&T disputes that the language regarding the MyAT&T app was included in all iterations of the survey messages. Abel Dep. (Ex. B) 70:9-71-5. Those disputed issues are not material to the motion, however, and the remainder of the paragraph is undisputed.

Paragraph No. 17:

The messages pre-programmed in the Spanish language do not provide any opt out instructions or other guidance on who to make the messages stop unless the recipient first replies to one of the messages with the word "stop". *Doc. 52-2* at p. 6; *Lyon Dep.* 136:19 – 137:20; *Id.* at ex. 27.

RESPONSE:

The cited evidence refers only to service to ISM customers, not all other surveys and thus the statement is unsupported as to the other surveys. AT&T does not contest the statement as applied to the surveys sent to the ISM customers referenced in the evidence cited. In any event, the statement is not material to the instant motion.

Paragraph No. 18:

In order to initiate the survey text messages, Message Broadcast's computer systems pull both the telephone numbers to be called and the appropriate pre-scripted messages that correspond to those telephone numbers from the Reporting Database according to the programmed instructions, and packages them together along with in originating "Short Code," which serves as the sender's address. *Joiner Dep.* at 70:25 – 71:21, 73:11-14; *Exhibit C - Snyder Report* at ¶ 33; *Exhibit A – Stipulation* at ¶ 6.

RESPONSE:

Undisputed.

Paragraph No. 19:

Message Broadcast's computer systems then automatically, and without human intervention, send those message packets to AT&T's External Message Gateway aggregator platform or "SMS Aggregator" for delivery to the recipients. *Lyon Dep.* 82:3 – 83:3; *Id.* at ex. 18, p. 3; *Exhibit C - Snyder Report* at ¶¶ 31-37.

RESPONSE:

Undisputed.

Paragraph No. 20:

AT&T's SMS Aggregator platform performs several automated tasks before delivering the messages: it determines whether the recipient telephone numbers are valid, it identifies the carrier networks servicing the recipient telephone numbers so that they can be delivered, and it manages and throttles the automated text message transmission rate to ensure that the automated text messages do not overload the carriers' systems, thus controlling the timing at which the survey text messages are delivered to the recipients. *Exhibit C - Snyder Report* at ¶¶ 23, 32-35.

RESPONSE:

Undisputed.

Paragraph No. 21:

AT&T's SMS Aggregator connects directly to the networks of multiple carriers throughout the country and aggregates those connections to a single point used by the Message Broadcast System. This allows for *en masse* delivery of the Survey text messages to multiple carrier networks using a single short code. *Exhibit C - Snyder Report* at ¶¶ 20-21; *Exhibit A - Stipulation* at ¶ 6.

RESPONSE:

The evidence cited does not support the classification of the survey messages being sent *en masse.* To the contrary, the Message Broadcast system sends "a specific message to a specific number." Joiner Report (Doc 58-1) at ¶ 7. The remainder of the paragraph is undisputed.

Paragraph No. 22:

It is impossible for a human being to manually transmit a text message using a short code. Text messages sent via a short code can only be sent by computer equipment; otherwise, the originating address of the mobile-terminated text messages would appear as a standard 10-digit cellular telephone number. *Exhibit C - Snyder Report* at p. ¶ 36.

RESPONSE:

Undisputed.

Paragraph No. 23:

Thus, the outbound survey text messages were not sent as a result of a human being dialing a telephone number. *Exhibit A - Stipulation* at ¶ 7.

RESPONSE:

Undisputed.

Paragraph No. 24:

Message Broadcast's computer system "reads" any responses to the survey text message via an automated process called "natural language processing," and determines how to respond. *Lyon Dep* at ex. 3; *Abel Dep.* at 48:10 – 50:23.

RESPONSE:

Undisputed.

Paragraph No. 25:

If the computer determines that it has received a response, it automatically sends an Additional Text Message. *Exhibit A - Stipulation* at ¶ 8.

RESPONSE:

Undisputed.

Paragraph No. 26:

AT&T's expert witness admits that the Additional Messages are sent without any human intervention by Message Broadcast or AT&T. *Joiner Dep.* at 70:18 – 75:2.

RESPONSE:

Undisputed.

Paragraph No. 27:

AT&T stipulates that the outbound survey text message were sent through the following processes:

a. A list of telephone numbers was uploaded into a computer;

b. The computer was programmed to send an initial survey text

message and first survey question to each telephone number in the list;

and to send each subsequent survey question upon detection of a

response to the prior survey question;

c. The computer sent the initial survey text message and first survey question because the telephone number was in the list;

d. The computer sent each subsequent survey question because the computer received a response to the prior survey question.

Exhibit A - Stipulation at ¶ 8.

RESPONSE:

Undisputed.

Paragraph No. 28:

AT&T sent approximately 7,000,000 survey text messages per month through the processes set forth above. *Doc. 29-1 – Declaration of Kerry Lyon* at p. ¶ 7.

RESPONSE:

Undisputed.

Paragraph No. 29:

On July 15, 2016, Plaintiff received five of these text messages, pre-programmed in Spanish, pursuant to the same processes, including the Introductory Message at 10:11:35 am, and Additional Messages at 10:27:08 am, 10:30:33 am, 10:35:19 am, and 10:35:51am. *Doc. 52-2 – Message Log* at p. 6; *Lyon Dep.* at 102:11-14; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 30:

After receiving the Introductory Message and the first survey question, Plaintiff responded: "Who is this." *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 31:

In less than one second, the automated system replied with the second preprogrammed survey question rather than answering Plaintiff's question. *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 32:

After receiving the second survey question, Plaintiff responded: "Please tell me who this is. I do not speak Spanish." *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 33:

In less than one second, the automated system replied with the third preprogrammed survey question, rather than answering Plaintiff's question. *Doc. 52-2* at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 34:

After receiving the third survey question, Plaintiff responded: "Stop sending me messages." Doc. 52-2 at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 35:

In less than one second, the automated system replied with confirmation of the stop request. Doc. 52-2 at p. 6; *Gadelhak Dep.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 36:

Plaintiff received the text messages on his cellular telephone number 773-290-9978. *Gadelhak Dep.* at 38:8-18, 54:22 – 60:23; 62:3-14; *Id.* at ex. 33.

RESPONSE:

Undisputed.

Paragraph No. 37:

Plaintiff is the sole user of that cellular telephone number and pre-pays for the telephone service. *Gadelhak Dep.* at 64:4 – 65:6, 67:16-23, 74:19-22.

RESPONSE:

Disputed to the extent that Gadelhak shares his telephone plan with his family members (Gadelhak Dep. (attached hereto as Exhibit D) 66:9-67:15) and is reimbursed or has been reimbursed for his plan from his prior employer, Ernst and Young. *Id.* at 73:11-74:13. The remainder of the paragraph is not disputed, but is not material to the motion.

Paragraph No. 38:

Plaintiff was not a customer of AT&T or any AT&T affiliated business at the time AT&T sent the Survey Text Messages. *Gadelhak Dep.* at 81:25 – 82:4, 84:2 – 85:14.

RESPONSE:

Undisputed. However, the fact is not material to the motion.

Paragraph No. 39:

Plaintiff registered his 9978 number on the national do not call list on May 23, 2014. *Gadelhak Dep.* at 76:9-77:20.

RESPONSE:

Undisputed. However, the fact is not material to the instant motion.

Paragraph No. 40:

AT&T testified that it does not know how it obtained Plaintiff's telephone number or how it documented that number in its records. *Barret Dep.* at 27:2-5, 29:2 – 31:10; *Taylor Dep.* at 51:7-19; *Abel Dep.* at 33:8-19.

RESPONSE:

Disputed. AT&T's policies show that if Plaintiff's number was listed as a can-be-reached number on a customer, it would have been provided by an AT&T customer. Taylor Dep. (attached hereto as Exhibit E) at 59:9-60:3 (a CBR is a customer-designated number at which the customer

can be reached); 63:20-64:21 (describing the process by which CBRs are verified). To the extent the number was listed in error, AT&T does not dispute that it does not know the source of the error (for example, whether the mistake was a typographical error or a misstatement by the customer).

Paragraph No. 41:

AT&T testified that it does not know why it sent the survey text messages to Plaintiff's telephone number or what transaction triggered the survey messages to Plaintiff's number as opposed to any other telephone number in its records. *Barrett Dep.* 22:2 – 23:21; *Lyon Dep*. at 22:9-22:2.

RESPONSE:

Disputed. Gadelhak would only have received the message at issue because his number was listed on an AT&T account and because that account had recently engaged in a transaction with AT&T. *See* AT&T's Statement of Facts, ¶¶ 6-7.

Dated this 24th day of October, 2018

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