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.	)	
Defendant.	)	

DEFENDANT AT&T SERVICES INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

AT&T Services Inc. ("AT&T") moves for summary judgment on Plaintiff Ali Gadelhak's ("Gadelhak") claim that AT&T violated the Telephone Consumer Protection Act ("TCPA"). Gadelhak claims he received a customer service survey text message from AT&T on his cellular telephone without his prior consent to be called. But that claim fails as a matter of law because such a text is actionable under the TCPA only if sent by means of an "automatic telephone dialing system" ("ATDS"), 47 U.S.C. § 227(b)(1)(A)(iii), and AT&T did not use an ATDS to send the text message to Gadelhak.

On March 16, 2018 in the consolidated appeal of *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. Mar. 16, 2018), the United States Court of Appeals for the D.C. Circuit issued a major decision regarding the scope of the TCPA. In that decision, the D.C. Circuit reviewed and rejected the FCC's prior guidance regarding what type of dialing equipment constitutes an ATDS. *Id.* at 695-703. The Court criticized the FCC's sweeping definition of an ATDS, and in particular questioned the FCC's position that a dialing system can qualify as an ATDS even if it does not have the capacity to store and send numbers in random and sequential order. *Id.* The FCC has since initiated rulemaking proceedings and sought comments from relevant stakeholders to provide new guidance. *FCC Public Notice*, 2018 WL 2253215 (F.C.C. May 14, 2018) ("FCC Notice").[1] In the meantime, the definition of an ATDS contained in the statute governs. *Marshall v. CBE Grp., Inc.* 2018 WL 1567852 at *5 (D. Nev. Mar. 30, 2018) ("In light of [the D.C. Circuit's] ruling, the Court will not stray from the statute's language") (internal quotations omitted). Under a straightforward reading of the statute, AT&T did not employ an ATDS when it sent text messages to Gadelhak.

[1] This Court previously declined to stay this case pending the result of those proceedings. Dkt # 47.

The TCPA requires that to constitute an ATDS (and thus fall within the TCPA's ambit), equipment must have the "capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The undisputed facts show that the equipment used to place the survey texts did not store or produce numbers dialed via the use of "a random or sequential number generator," but rather dialed numbers only from "flat files" containing lists of AT&T customers. Nor does the equipment have the capacity to use a random or sequential number generator.

FACTUAL BACKGROUND

1. The Allegations of Plaintiff's Complaint

Gadelhak's First Amended Complaint (Dkt. # 20) contains a single count, asserting that AT&T violated the TCPA by placing texts using an ATDS to his cell phone without his consent. Am. Comp. ¶¶ 33-38. Gadelhak claims that AT&T caused a customer satisfaction survey text to be sent to his number on July 15, 2016. *Id.* at ¶ 22. After Gadelhak responded to the message inquiring who sent the message, he alleges he received additional messages that were not responsive to his inquiries. *Id.* at ¶¶ 24-27. Gadelhak asserts that he is not an AT&T customer and that the messages were thus sent to his cellphone without his consent. *Id.* at ¶¶ 23, 31.

2. The Survey Program At Issue

AT&T sends text message surveys to the customers of its corporate affiliates under the AT&T Customer Rules Feedback Tool ("TACRFT"). Statement of Undisputed Facts ("SOF") ¶ 4.[2] TACRFT covers AT&T-affiliated cellular telephone users, DIRECTV satellite users, and users of AT&T affiliated U-verse TV, Voice, and Internet products. *Id.* at ¶ 5. Each survey results from an interaction that the customer had with an AT&T service representative. *Id.* at ¶ 6.

[2] Citations to the Statement of Undisputed Facts refer to the L.R. 56.1 statement filed concurrently with this motion, along with relevant supporting materials.

No surveys are sent to any numbers other than those listed in the customer databases of AT&T's affiliates as contact numbers provided by the customers who had relevant interactions. *Id.* at ¶ 7 One such customer service survey was directed at Gadelhak's number. *Id.* at ¶ 8.

3. **The Equipment Used to Send The Survey Texts**

AT&T does not send the TACRFT surveys itself, but instead contracts with a vendor (Message Broadcast) to do so. SOF ¶ 13. To send the messages, the survey group at AT&T receives files from the customer systems of its affiliates that show those customers who had qualifying interactions with a service representative. *Id.* at ¶ 9. Separate AT&T companies have different survey programs and each program has its own business requirements for the surveys. *Id.* at ¶ 10. Those requirements determine the rules used to filter the list of customer numbers into a final list of those individuals who receive surveys. *Id.* Once these rules are applied, a "flat file" is generated. *Id.* at ¶ 11. The flat files contain the telephone numbers from AT&T's systems, along with a unique identifier that can be used to track the survey. *Id.*

That flat file is transferred from AT&T to Message Broadcast via point-to-point connectivity over a virtual private network ("VPN"). *Id.* at ¶ 14. A person at Message Broadcast then 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. *Id.* at ¶ 15. The Message Broadcast employee then uploads the data into a system and instructs a particular survey to be directed to the remaining numbers. *Id.* at ¶ 16. That system then uses a short-message peer-to-peer ("SMPP") protocol to send the survey text message to the recipient's number. *Id.* at ¶ 17.

STANDARD

A party can move for summary judgment as long as 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). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

The applicable provision of the TCPA requires that a call or text be placed using either an ATDS or a prerecorded voice to sustain a claim. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *Izsak v. Draftkings, Inc.*, 191 F. Supp. 3d 900, 904 (N.D. Ill. 2016). Since only texts (not voice calls) are at issue, Gadelhak did not (and could not) allege that a prerecorded voice was used. Therefore, he must show that the texts at issue were sent using an ATDS to have a viable TCPA claim.

"[A] device constitutes an ATDS if it has the capacity to perform both of two enumerated functions: 'to store or produce telephone numbers to be called, using a random or sequential number generator"; and "to dial such numbers." *ACA*, 885 F.3d at 701. Prior to *ACA*, these narrow statutory requirements had been substantially (and impermissibly) broadened by the FCC in a series of orders dating back more than a decade. *ACA*, however, found those orders to be arbitrary and capricious and properly overturned them. *Id.* at 702-03. This Court, therefore, must assess Gadelhak's claim against only the plain language of the TCPA, using ordinary principles of statutory interpretation to guide it. Under the plain language of the statute, the system used by AT&T's vendor Message Broadcast does not constitute an ATDS.

A. The FCC's Prior Guidance Regarding The Definition Of An ATDS—Which Aimed To Expand The Definition To Cover Essentially Any Equipment That Makes Automated Calls—Has Been Invalidated.

1. Overview of Prior FCC Interpretations of an ATDS

The FCC is empowered to implement regulations interpreting the TCPA. 47 U.S.C. § 227(b)(2). Over nearly two decades, the FCC took full advantage of that authority and issued a series of orders purporting to speak to what constitutes an ATDS under the statute. *See In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 2003 WL 21517853 (1993) ("2003 FCC Order"); *Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 2008 WL 65485 (2008) ("2008 FCC Order"); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 15391, 2012 WL 5986338 (2012) ("2012 FCC Order"); *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.R. 7961, 2015 WL 4387780 (2015) ("2015 FCC Order"). These orders, taken collectively, dramatically expanded the scope of the TCPA from its original text.

For example, in 2003 the FCC found "that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment.'" 2003 FCC Order at 14093. The FCC had previously defined a predictive dialer in its notice of rulemaking as "an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 17 F.C.C.R. 17459, 17465 n.37, 2002 WL 17503 (2002). In subjecting this equipment to the TCPA, the FCC concluded that predictive dialers should be deemed an ATDS even if they dial from a database of numbers:

> The hardware, 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*. . .. The principal feature of predictive dialing software is a timing function, not number storage or generation.

2003 Order at 14091 (emphasis added). In 2008, the FCC rejected a request (from ACA) to reconsider its ruling regarding predictive dialers, and "affirm[ed] that a predictive dialer constitutes an [ATDS]." 2008 Order at 566.[3]

In 2012, the FCC addressed a petition for a declaratory ruling regarding certain text messaging practices. 2012 Order at 15391. The FCC did not expressly rule upon whether the petitioner's equipment constituted an ATDS or purport to rule upon the definition of an ATDS. However, in a confusing footnote oft-cited by plaintiffs in TCPA cases, the FCC quoted the statutory definition of an ATDS as having the "capacity" to store or produce numbers using a random or sequential number generator, and then cited to its 2003 Order to state that it had found the statutory definition "covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." 2012 Order at 15392, n.5.[4] And in the 2015 Order, the FCC took an even more expansive view of the statutory definition of an ATDS, concluding that its reference to the "capacity" for random/sequential number generation and dialing went beyond the device's current capabilities and instead encompassed the "potential functionalities" or "future possibility[ies]" of equipment, including features that can be later added through software changes or updates. 2015 Order at 7974, 7976.

2. The *ACA* Decision Overrules The Prior FCC's Guidance

Those FCC decisions, however, are no longer good law and the broad sweep they gave the TCPA is no longer entitled to deference. The FCC's ability to issue regulations interpreting

[3] There can be no dispute here that Message Broadcast's equipment, which sends text messages, is not a "predictive dialer" within the meaning of these FCC orders. It sends texts, rather than place voice phone calls at a pace designed to "predict" when a sales agent will be available to take a call.

[4] This, of course, begs the question of what the FCC meant when it referred to the "specified capacity"—the "capacity" specified in the statute that it just quoted in the prior sentence, or the capacity to "generate numbers and dial them without human intervention" that the FCC then referenced.

the TCPA is, of course, subject to the ordinary limitations of administrative law, including review by a circuit court under the Hobbs Act. 28 U.S.C. § 2342(1) (providing federal courts of appeals with exclusive jurisdiction to determine the validity of FCC orders). Thus, in *ACA*, the D.C. Circuit, in reviewing the FCC's 2015 Order, "set aside . . . the [FCC's] effort to clarify the types of calling equipment that fall within the TCPA's restrictions." *ACA*, 885 F.3d at 692.[5] In doing so, the D.C. Circuit found "[t]he impermissibility of the Commission's interpretation of the term "capacity" in the autodialer definition is compounded by inadequacies in the agency's explanation of the requisite features [of an autodialer]," thus rendering both the 2015 order and the past orders unreasonable, arbitrary, and capricious. *Id.* at 701.

a. **The D.C. Circuit Set Aside the FCC's Definition of "Capacity."**

As discussed *supra*, in the 2015 Order, the FCC expanded the scope of the TCPA by finding that even "potential" functionalities of equipment could constitute the "capacity" to store or generate numbers to be called using a random or sequential number generator regardless of whether those functionalities were actually installed at the time of the call. The *ACA* court found this expansive definition was "utterly unreasonable in the breadth of its regulatory [in]clusion." *Id.* at 699. For example, the court noted that under the FCC's construction, every ordinary smartphone would constitute an ATDS, a result it found unreasonable and inconsistent with the statute. *Id.* at 697. At the same time, however the court provided no clear construction of its own regarding the statutory definition of an ATDS or the term "capacity," leaving the meaning of that term for future courts and/or the FCC to decide. *Id.* at 699.

[5] *ACA* involved a consolidated set of appeals from the 2015 Order and thus served as the single reviewing court under the Hobbs Act. *See Herrick v. GoDaddy.com, LLC*, 2018 WL 2229131 at *5 n.5 (D. Ariz. May 14, 2018). Because *ACA* served as the exclusive reviewing court of a consolidated appeal for Hobbs Act purposes, its decision is binding on this Court. *FCC v. ITT World Commc'ns Inc.*, 466 U.S. 463, 468 (1984); *Marshall*, 2018 WL 1567852 at *5 n.4.

b. **The D.C. Circuit Rejected the FCC's Treatment of the Functionality Required To Qualify a Device as an ATDS.**

The D.C. Circuit also addressed challenges to the FCC's explanation of the type of functionalities that qualify equipment as an ATDS. For example, as described above, the FCC's orders define an ATDS to include "predictive dialers," as well as certain types of automated equipment that dial from a database or some other list of numbers; but, at the same time, the FCC stated that equipment must have the capacity to "dial random or sequential numbers" to constitute an ATDS, which would seemingly not include those sorts of dialers. *Id.* at 702-03. *ACA* thus specifically contrasted dialing random or sequential numbers with dialing numbers from a list, in finding these provisions of the orders were contradictory:

> Anytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence. As a result, the ruling's reference to "dialing random or sequential numbers" cannot simply mean dialing from a set list of numbers in random or other sequential order: if that were so, there would be no difference between "dialing random or sequential numbers" and "dialing a set list of numbers".

Id. at 702. The court thus set aside these portions of the FCC's ruling, concluding that they failed to satisfy the requirement of reasoned decision-making:

> 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). . . . [T]he Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.

Id. at 702-03. However, the court again made no clear statutory interpretation of its own. To the contrary, it stated that "[i]t might be permissible for the Commission to adopt either interpretation." *Id.* at 703.

c. **The *ACA* Decision Is Not Limited to the 2015 Order, But Instead Overturned All Past FCC Guidance.**

Courts have split on the question as to whether older FCC guidance (*i.e.*, the 2003, 2008 and 2012 Orders) regarding what constitutes an ATDS is still entitled to deference after the *ACA* decision. *Compare Herrick v. GoDaddy.com LLC*, 2018 WL 2229131 at *7 (D. Ariz. May 14, 2018); *Sessions v. Barclays Bank Delaware*, 2018 WL 3134439 at *4 (N.D. Ga. June 25, 2018); *Marshall*, 2018 WL 1567852 at *5 (D. Nev. March 30, 2018) *with Maddox v. CBE Grp., Inc*, 2018 WL 2327037 at *4 (N.D. Ga. May 22, 2018); *Reyes v. BCA Fin. Servs.*, 2018 WL 2220417 at *11 (S.D. Fla. May 14, 2018); *Ammons v. Ally Fin. Inc.*, 2018 WL 3134619 at *6 (M.D. Tenn. June 27, 2018). However, the cases finding that *ACA* applies to the older orders plainly have the better of the argument. In *ACA*, the FCC had argued that its prior rulings were beyond the court's jurisdiction. 885 F.3d at 701. The D.C. Circuit "disagree[d]" with that assertion, and instead reviewed the 2015 FCC Ruling *and* the prior rulings. *Id.* This was because the "prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *Id.* The *ACA* court found that the FCC's prior orders did not reasonably make clear whether a device could "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." *Id.* at 702-03.

Moreover, the FCC's expansion of the TCPA in prior orders was also explicitly addressed and found inconsistent with the requirements of reasoned rulemaking in *ACA.* As the *ACA* court recognized, the FCC identified the ability to "dial numbers without human intervention" and the ability to "dial thousands of numbers in a short period of time" as "basic function[s]" of an ATDS in its *prior* orders, not just the 2015 Order. *Id.* at 703. The D.C. Circuit nevertheless concluded that the FCC's treatment of these other "function[s]" was also flawed. *Id.* The FCC guidance concerning "human intervention" was contradictory as it stated that a "basic function" of an ATDS was the ability to dial numbers without human intervention but also that

"a device might still qualify as an [ATDS] even if it cannot dial numbers without human intervention." *Id.* As to dialing thousands of numbers in a short period of time, the Court recognized that the FCC had called this a "basic function" of an ATDS, but never stated whether it was a "necessary", "sufficient", or even "relevant condition" and gave no additional guidance such as "what would qualify as a 'short period of time.'" *Id.*[6] Since the prior orders "had said the same," the D.C. Circuit also "set aside" those orders "without qualification." *Sessions*, 2018 WL 3134439 at *4 (quoting *ACA*, 885 F.3d at 703).

The D.C. Circuit court had jurisdiction to address these older rulings. Prior regulations can be challenged either by petition for rulemaking or under the reopening doctrine. *Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007)). Petitioning for a rulemaking is "ordinarily . . . the appropriate way in which to challenge a longstanding regulation." *Id.* (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996). In addition, an "agency's reconsideration of a rule in a new rulemaking constitutes a reopening when the original rule is 'reinstated' so as to have renewed effect." *Id.* (quoting *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F. 2d 147, 152 (D.C. Cir. 1990). "[W]here an agency's actions show that it has not merely republished an existing rule in order to propose minor changes to it, but has reconsidered the rule and decided to keep it in effect, challenges to the rule are in order." *Pub. Citizen*, 901 F.2d at 150. In *ACA*, "[p]etitioners covered their bases by filing petitions for both a declaratory ruling and a rulemaking." 885 F.3d at 701. In response, the FCC "issued a declaratory ruling that purported to provid[e] clarification on the definition of autodialer and denied the petitions for rulemaking on the issue." *Id.* Thus, the D.C. Circuit's review was on

[6] Even the FCC has recognized that this ruling necessarily has the effect of abrogating *all* of its past guidance. On May 14, 2018, the FCC requested comment for additional rulemaking on the fundamental questions of "what constitutes an [ATDS]" and what "functions a device must be able to perform to qualify as an [ATDS]." *See* FCC Notice 2018, 2018 WL 2253215 at *1.

"both grounds" and it had jurisdiction to consider the earlier orders. *Id.*; *Sessions*, 2018 WL 3134439 at *4 ("the FCC's prior rulings were reviewable on two grounds.").

B. After ACA, the Court Must Rely on the Statutory Language in Assessing the Scope of 47 U.S.C. § 227(a)(1) Which Requires Summary Judgment in Favor of AT&T.

Since the D.C. Circuit rejected both the FCC's guidance related to the term "capacity" and its guidance regarding the functions necessary to qualify as an ATDS, courts interpreting the TCPA now must look to the language of the statute itself when assessing the scope of those terms. *Marshall*, 2018 WL 1567852 at *5. "In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." *Artis v. D.C.*, 138 S. Ct. 594, 603 (2018) (internal citations and quotations omitted). Where "the statute's language is plain" the analysis should "begin with the language of the statute itself, and that is also where the inquiry should end." *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal citations omitted). Here, the TCPA defines an ATDS as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." 47 U.S.C. § 227(a)(1). This language is unambiguous—to constitute an ATDS, equipment must have the capacity to store or produce numbers to be called using a random or sequential number generator, and *not* simply dial numbers from a list.

1. Dialing From A List of Numbers Is Not Random or Sequential.

It is not contested that the system used by Message Broadcast to send the texts only dials the numbers contained in flat files sent to it by AT&T. SOF ¶ 16. Nor is it disputed that the numbers in the flat files are generated from AT&T's customer databases, after an interaction with the customer, and that the numbers utilized by the system are not obtained from any other source (including a random or sequential number generator). *Id.* at ¶¶ 7, 9. As the *ACA* court

recognized, there is a distinction between equipment that can "*generate* and then dial random or sequential numbers" and the "use of equipment to call[] a set list of consumers." *ACA*, 885 F.3d at 701-02. Indeed, a "'[r]andom or sequential number generator' cannot reasonably refer broadly to any list of numbers dialed in random or sequential order, as this would effectively nullify the entire clause." *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014) (internal citations omitted); *see also Herrick*, 2018 WL 2229131 at *8 ("[I]f the statute meant to only require than an ATDS include any list or database of numbers, it would simply define an ATDS as a system with the capacity to store or produce numbers to be called."). Rather, "[r]andom number generation means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on." *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014). The FCC similarly acknowledged this distinction in its recent notice requesting comments regarding the definition of an ATDS. *See FCC Notice*, 2018 WL 2253215 at *2 n. 19 (the D.C. Circuit "explain[ed] that dialing numbers from a set list cannot, by itself, qualify as dialing random or sequential numbers.").[7]

Indeed, holding that dialing from a list constitutes storing or producing numbers to be dialed using a random or sequential number generator would lead to the same absurd results that led the *ACA* court to conclude that the FCC's prior guidance was unreasonably overbroad. Plaintiff's expert conceded in his deposition that, under this interpretation, simply texting a group of contacts on your cellular telephone would constitute dialing numbers stored in a "sequential order," rendering ordinary use of an iPhone an ATDS and the sender subject to

[7] This interpretation also aligns with historical practices at the time the TCPA was enacted, since telemarketers would dial truly randomly in blocks or in random strings. *See Dominguez v. Yahoo, Inc.*, 629 F. Appx 369, 372 (3d Cir. 2015) ("The statute's reference to a 'random or sequential number generator' reflects that, when the statute was enacted in 1992, telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings.").

TCPA liability. SOF ¶ 20. As the D.C. Circuit found, this is inconsistent with the purpose of the statute and impermissibly subjects vast quantities of communications to TCPA liability.

Courts recognized the distinction between dialing from a list and dialing randomly and sequentially even before *ACA.* For example, in *Trumper v. GE Capital Retail Bank*, the plaintiff alleged that the defendant-bank mistakenly placed calls to her cell phone in an attempt to reach a different individual (*i.e.*, the customer). 79 F. Supp. 3d 511 (D.N.J. 2014). The court in *Trumper* observed that the "[c]omplaint takes the position that the calls were placed using an [ATDS]–a random number or sequential number generator–[but] it appears that the calls were directed at" a specific person, and thus not random. *Id.* at 513. Thus, the allegations failed to state a claim that an ATDS was utilized. *Id.*; *see also Despot v. Allied Interstate Inc.*, 2016 WL 4593756 at *5 (W.D. Pa. Sept. 2, 2016) ("Moreover, the calls were not random or sequential because they were made to Plaintiff"); *Daniels v. Community Lending Inc.*, 2015 WL 541299 at *7-8 (S.D. Cal. Feb. 9. 2015) (dismissing a TCPA claim and stating that the "alleged calls to Plaintiffs do not appear to have been 'random', 47 U.S.C. § 227(a)(1); instead the calls are alleged to be directed specifically toward Plaintiffs."); *Dominguez v. Yahoo Inc.*, 2018 WL 3118056 at *4 (3d Cir. June 26,2018) ("those messages were sent precisely because the prior owner of Dominguez's telephone number had affirmatively opted to receive them, not because of random number generation"). Here, the undisputed facts show that AT&T was attempting to reach a particular person (its accountholder) when it sent the text message, the same fact pattern found not to constitute storing or dialing using a random or sequential number generator in these prior cases.

2. The Equipment at Issue Does Not Have The Capacity To Store or Produce Numbers to be Called, Using a Random or Sequential Number Generator.

Gadelhak may argue that it is irrelevant that the Message Broadcast system currently dials only from a list of numbers because the system might be modified in some way to use a

random or sequential number generator. This argument, however, is inconsistent with *ACA*, which recognized that defining "capacity" to include features that can be added through any type of changes or updates would be improper. *ACA*, 885 F.3d at 697. *ACA* thus found:

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

Id. at 696. In applying this distinction after *ACA*, the Second Circuit found "a distinction between a device that currently has features that enable it to perform the functions of an autodialer—whether or not those features are actually in use during the offending call—and a device that can perform those functions only if additional features are added." *King v. Time Warner Cable Inc.*, 2018 WL 3188716 at *5 (2d Cir. June 29, 2018). Thus, the court concluded that "capacity" referred only to a "device's current functions," not to potential modifications to hardware or software. *Id.* at *7. This rule, which should be adopted by this court, limits the scope of the TCPA to reach only the conduct it was meant to address—persons who are using random or sequential dialing to contact people they have no reason to believe consented to receive calls.

Here, the undisputed facts show that Message Broadcast used a proprietary system wholly dedicated to sending texts under the TACRFT program. The only source for numbers are AT&T's customer databases, which feed the Message Broadcast system through flat files. SOF ¶¶ 7, 9, 11, 14, 16. There are no random or sequential number generators installed, and including such tools would require modification of the current system for a different purpose.

The facts, therefore, are similar to those in the most recent pre-*ACA* case decided by the Seventh Circuit regarding the definition of an ATDS under the TCPA. *See Blow v. Bijora*, 855

F.3d 793, 801 (7th Cir. 2017). In that case, a retailer (Akira) hired a third-party marketing company (Opt It) to send texts to customers. Opt It's CEO testified regarding the process that:

> Opt It obtained a spreadsheet of customer phone numbers from Akira and imported those numbers into its system and that telephone numbers texting the message "Akira" to the short code Akira provided were automatically added to Opt It's text messaging list. . .. The messages are drafted by humans, who decide when the message will be sent, and press a button to either send the messages or schedule a future sending. [The CEO] also explained that the Opt It platform lacked the ability to store or produce number using a random or sequential number generator.

Id. at 801. This platform thus functioned similarly to Message Broadcast's. It dialed only from a list of numbers, required a human being to ultimately sign off and start the texting process, and did not store or produce numbers randomly or sequentially. The Seventh Circuit found that the testimony established that Akira's "platform lacks the present capacity to use a random or sequential number generator for storing or producing numbers." *Id.* at 801. However, it nevertheless overturned summary judgment on the grounds that it was required to defer to the "FCC's conclusion that equipment need not possess the 'current capacity' or 'present ability' to use a random or sequential number generator." *Id.*[8] (internal citations omitted). But that conclusion is no longer good law, and thus even if the system might theoretically be modified in to store or produce numbers randomly or sequentially, that would not save Gadelhak's claim.[9]

CONCLUSION

AT&T is entitled to summary judgment on Gadelhak's claim since the equipment used to send a text to his cellular number does not constitute an "automatic telephone dialing system."

[8] The court upheld summary judgment on the alternative grounds that the calls were made with consent. *Blow*, 855 F.3d at 803-05.

[9] The Seventh Circuit found that "absent a direct appeal to review the 2015 FCC Order . . . we are bound to follow it." *Id.* at 802. However, the Seventh Circuit also found that *ACA* was such an appeal. *Id.* ("Remarkably, neither party mentions just such a direct appeal currently pending in the D.C. Circuit, where multiple companies filed petitions under the Hobbs Act challenging the 2015 FCC Order and its definition of an autodialer in particular.").

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CERTIFICATE OF SERVICE

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