Case No. 21-35746

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BORDEN, individually, and on behalf of all others similarly situated,

Appellant/Plaintiff,

vs.

EFINANCIAL, LLC, a Washington Limited Liability Company

Appellee/Defendant.

On Appeal From The United States District Court
For The Western District of Washington
Case No. 2:19-cv-01430

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

The core facts of this case are straightforward. Within the context of a sophisticated, mass telemarketing campaign, eFinancial used an advanced mass text message dialing platform to bombard individuals, including Mr. Borden, with unwanted, generic, and impersonalized text message advertisements.

Even though this campaign constituted the exact type of conduct that the TCPA was designed to protect against, the District Court dismissed Mr. Borden's claims based on a single legal question, governed by a single case on which both Parties equally rely:

> **What constitutes an ATDS after the Supreme Court's recent decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021)?**

Mr. Borden and the putative class, utilizing the precise language chosen by Justice Sotomayor and the authors of *Duguid*'s majority opinion, argue that, post-*Duguid*, an ATDS is technology that "[has] the capacity either to ***store*** a telephone number using a random or sequential generator or to ***produce*** a telephone number using a random or sequential number generator." *Duguid*, 141 S. Ct. at 1167 (emphasis added). This exact definition of an ATDS – which repeats almost verbatim the statutory language of the TCPA – is repeated several times throughout the Court's opinion, without modification. *See id* at 1167 ("As defined by the TCPA, an [ATDS] is a piece of equipment with the capacity both 'to store or produce telephone numbers to be called, using a random or sequential number generator,'

and to dial those numbers."); *id* at 1170 ("In sum, Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator."); *id*. at 1173 ("We hold that a necessary feature of an [ATDS] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.").

Because Mr. Borden's allegations establish that eFinancial's advanced mass text message dialing platform used a sequential number generator to both (1) ***store*** phone numbers to be called and (2) ***produce*** phone numbers to be called by picking the order in which to dial phone numbers from eFinancial's massive database of personal contact information (which was obtained without the necessary Prior Express Written Consent), Mr. Borden argues that *Duguid* clearly establishes that his claims survive.

In other words, whereas Mr. Duguid's claims failed and the Ninth Circuit's opinion in his favor was reversed because Facebook's login notification system did not utilize a random or sequential number generator in any manner, here Borden's allegations establish that eFinancial not only used such technology but did so in a manner explicitly envisioned by *Duguid*. *Compare Duguid,* 141 S. Ct. at 1172 n.7 ("For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store

those numbers to be dialed at a later time") *with id*. at 1168 ("As relevant here, the Ninth Circuit held that … an autodialer need not … use a random or sequential generator."); *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019) ("In *Marks*, we clarified that the adverbial phrase 'using a random or sequential generator' modifies only the verb 'to produce,' and not the preceding verb, 'to store,' [therefore] an ATDS need not be able to use a random or sequential generator … [and can] merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'").

Nonetheless, eFinancial argued, and the District Court adopted, an errant definition post-*Duguid*. Moving away from the precise language used in the TCPA and subsequently re-adopted by *Duguid*, the District Court instead adopted an erroneous new standard: an ATDS must "[have] the capacity to use a random or sequential number generator to ***generate*** the phone numbers [to be called] in the first instance." ER 11; ER 13 (dismissing Mr. Borden's claims for the sole reason that "[h]e does not allege that eFinancial's system 'generate[s] random or sequential phone numbers' to be dialed.") (hereinafter "Telephone Number Generation Standard").

Unsurprisingly, neither eFinancial nor the District Court can cite to any portion of the *Duguid* opinion in support its Telephone Number Generation Standard, nor does it cite to any discussion from *Duguid* regarding the origin of the

telephone numbers to be dialed as any consideration, much less a dispositive one, when determining whether an ATDS was used. Instead, the District Court first misconstrues the Ninth Circuit's opinion in *Duguid* – believing it to be based on the origin of the telephone numbers dialed, as opposed to the use of a random or sequential number generator to store or produce those numbers for dialing – and then finds that because *Duguid* reversed the Ninth Circuit's opinion, it must have therefore required "that a random or sequential number generator [be used] to generate the phone numbers in the first instance," even though *Duguid* did not expressly or implicitly include such a requirement. ER 4-16.

Moreover, the same public policy concerns raised by *Duguid* further dictate that the District Court's interpretation of an ATDS must be reversed. According to the District Court's rationale, a telemarketer could purchase a list of every telephone number in a specific geographic area and then use a random or sequential number generator to pick the order in which to automatically dial each number in the context of a mass telemarketing campaign - and this conduct would not violate the TCPA simply because the telephone numbers themselves were not randomly or sequentially generated by the telemarketer's system.

This was not *Duguid*'s ruling. The question before *Duguid* was one of statutory construction: whether the clause "using a random or sequential number generator" modifies both verbs that precede it ("store" and "produce") or only the

closest one ("produce"). *Id*. at 1169. In answering this question, the Court engages in a lengthy discussion of statutory construction (ultimately finding that the clause modifies both verbs), and further provides explanations for how random and sequential number generators can be used to "store" and "produce." *Id*. at 1171-72 ("It is true that, as a matter of ordinary parlance, it is odd to say that a piece of equipment 'stores' numbers using a random number 'generator.' But it is less odd as a technical matter."); *Id.* at 1172 n.7 (citing to PACE Brief, ER 51) (defining "produce" as to "select, retrieve, and provide [a] number from memory" for dialing; and explaining that random and sequential number generators can "store" telephone numbers in a "fleeting and transient in nature" for immediate dialing or for a "longer time" for subsequent dialing).

The District Court's interpretation completely ignores *Duguid*'s lengthy construction and explanation of the TCPA's use of the words "store" and "produce" and instead drastically over-simplifies *Duguid*'s ruling by conflating the language used and adopted by *Duguid* - "the capacity to store or produce a number using a random or sequential number generator" – with its own additional requirement that the system must "generate the phone numbers in the first instance." ER 11. This result and interpretation would allow for telemarketers to act with reckless abandon, does not comport with *Duguid*'s newly announced standard, and must be corrected by this Court.

JURISDICTIONAL STATEMENT

This case was brought under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. Because federal law creates the right of action, the District Court had original jurisdiction under 28 U.S.C. § 1331.

The District Court's Order dismissing, with prejudice, Appellant/Plaintiff, David Borden's Second Amended Complaint ("SAC") was issued on August 13, 2021. ER 4-16. Borden filed a timely Notice of Appeal on August 31, 2021. ER 216-217. The Court therefore has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this is a timely filed appeal from the District Court's final order granting Appellee/Defendant, eFinancial, LLC's Motion to Dismiss with Prejudice. ER 3.

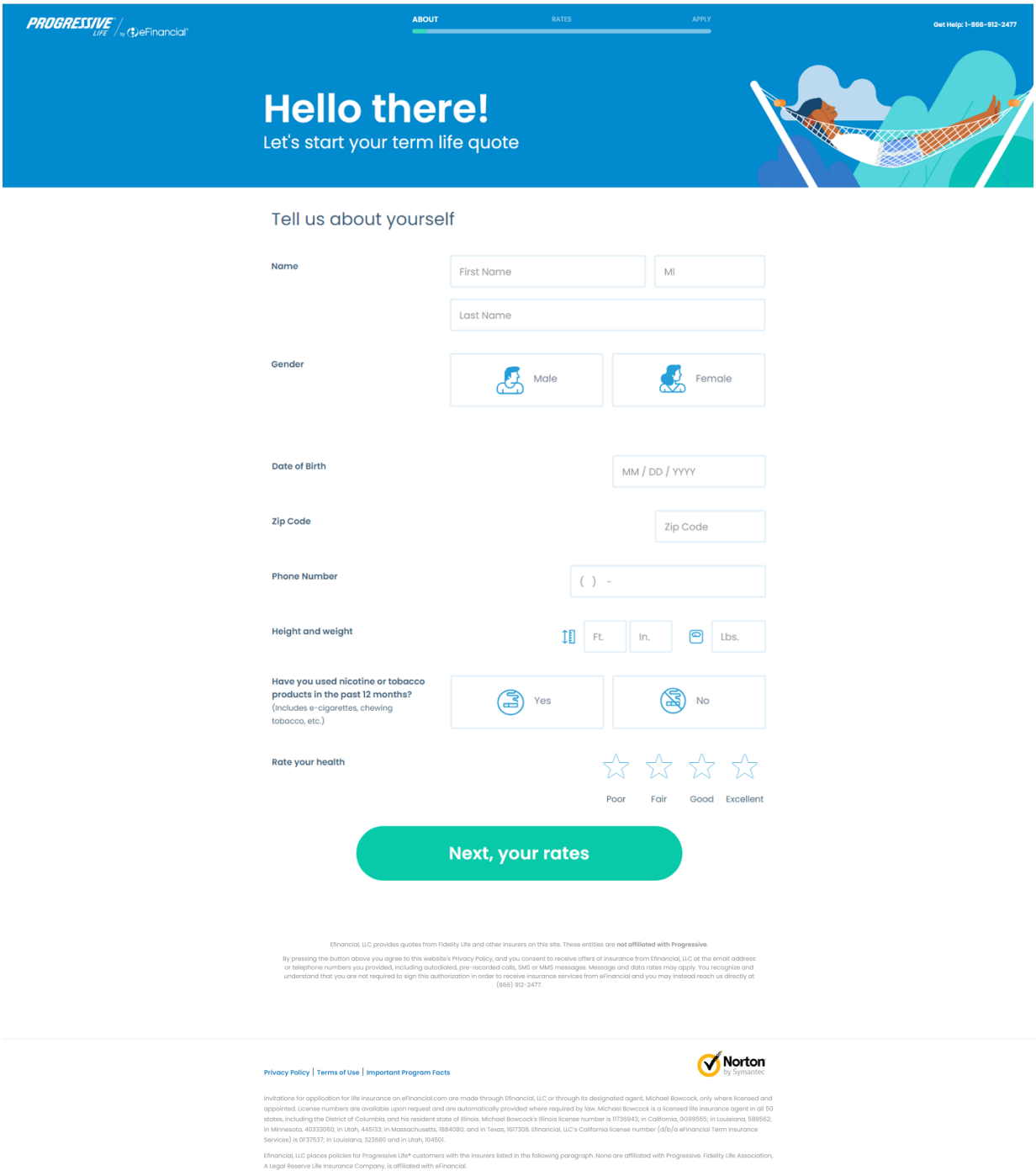
STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Borden has plausibly alleged that eFinancial sent text message advertisements using an ATDS in violation of the TCPA, where Borden has alleged that eFinancial used a sequential number generator to store telephone numbers and produce telephone numbers by picking the order in which the telephone numbers were texted from eFinancial's database, thereby using a sequential number generator to store and produce telephone numbers to be texted as required by the plain language of the TCPA and as recently affirmed by the United States Supreme Court in *Duguid*.

2. Whether Borden's SAC plausibly alleged that eFinancial did not obtain Borden's Prior Express Written Consent to send text message advertisements using an ATDS, where eFinancial did not adhere to the requirements of 47 C.F.R. § 64.1200(f)(8).

STATEMENT OF THE CASE

On December 22, 2018, Borden was shopping on the Internet for life insurance to price and potentially purchase a policy. ER 196. At some point while shopping online, Borden came upon Progressive.com's website, which offered life insurance products for sale. *Id*. To obtain an online quote and begin the website-initiated purchase of life insurance, the website prompted Borden to provide certain basic information and click a button with the words "Get a quote," written on the button. ER 197. Borden entered the requested information, and clicked the "Get a quote," button. *Id*. Borden's web browser was then directed to a webpage substantially similar to the following (ER 191):



As shown above, there is a status bar on the top of the webpage, which describes the above webpage as the "ABOUT," webpage; the next webpage as the

"RATES," webpage; and the following webpage as the "APPLY," webpage. ER 199. To proceed from the ABOUT webpage to the RATES webpage, Borden was required to provide certain demographic information, and then click a button labeled "Next, your rates." *Id*. There was no way for Borden to proceed to the RATES section and continue the website-initiated purchase of life insurance without clicking the "Next, your rates" button. *Id*. As such, Borden proceeded to fill in the requested information, and then clicked on the "Next, your rates," button. *Id*.

Unnoticed by Borden at the time, there was extremely fine print located below the "Next, your rates," button which stated:

> By pressing the button above you agree to this website's Privacy Policy, and you consent to receive offers of insurance from Efinancial, LLC at the email address or telephone numbers you provided, including autodialed, pre-recorded calls, SMS or MMS messages. Message and data rates may apply. You recognize and understand that you are not required to sign this authorization in order to receive insurance services from eFinancial and you may instead reach us directly at (866) 912-2477. *Id*.

This language was located below the "Next, your rates," button required to continue with Borden's website-initiated purchase of life insurance; was in a significantly smaller and lighter font than the fonts used for the demographic queries above the fine print; the "Next, your rates" button included no reference to the fine print below; and there was no check box or other mechanism to continue the website-

initiated purchase of life insurance without clicking the "Next, your rates" button. ER 199-200.

After clicking the "Next, your rates" button, Borden was directed to the RATES webpage, as indicated by the status bar at the top. ER 200. On the RATES webpage, Borden was presented with life insurance rates and rate-related information. *Id*. To finalize his website-initiated purchase of life insurance, Borden was then permitted to either continue his website-initiated application for the purchase of life insurance by purchasing those products online or was informed that one of eFinancial's licensed agents could call him to finalize the website-initiated purchase of the life insurance policy, after he provided his email address and clicked the "Submit" button. ER 200-201.

Ultimately, Borden decided not to move forward with his application and did not enter any additional information or click any additional buttons. ER 201. After declining to move forward with the purchase of life insurance through the Progressive.com website, Borden ran a Google search for other life insurance options, and promptly forgot about his visit to the Progressive.com website. *Id*.

Unbeknownst to Borden, however, after he clicked "Next, your rates," Borden and the putative class were automatically scheduled to be sent, *en masse*, text message advertisements from eFinancial, which began with an identification of the sender as eFinancial and contained substantially similar stock advertising language.

ER 201-202. None of the text message advertisements were targeted to Borden or any particular individual, and each similarly advertised the quality and availability of eFinancial's products (collectively referred to as the "eFinancial Insurance Text Message Advertisements"). *Id*.

In sending these eFinancial Insurance Text Message Advertisements, eFinancial used a sequential number generator to store and subsequently produce (i.e., select, retrieve, and/or provide the number from memory) Borden's and the putative class's telephone numbers. ER 202. eFinancial used the sequential number generator to determine the order in which to pick the telephone numbers to be dialed from its own stored list (database), such that each eFinancial Insurance Text Message Advertisement was sent in an adjustable but predetermined sequential order, based on the number of days since Borden's and the putative class's telephone numbers were obtained during their website-initiated purchase of life insurance process[1] ("eFinancial Mass Text Advertisement Sequential Order"). *Id*. This was done for the sole purpose of bombarding Borden and the putative class with eFinancial Insurance Text Message Advertisements in a specific, yet adjustable, sequential order. *Id*.

Sure enough, roughly one week after visiting Progressive.com to shop for life insurance, on December 26, 2018, and continuing for a full month, through and

[1] The information obtained from this process is referred to by eFinancial as a "lead."

including January 25, 2019, Borden began to receive the automatically generated eFinancial Insurance Text Message Advertisements to his cell phone, in the eFinancial Mass Text Advertisement Sequential Order. *Id*. The short code listed on each of the eFinancial Insurance Text Message Advertisements sent to Borden was 95578, a short code identified by the U.S. Short Code Directory as a dedicated, non-vanity short code owned and controlled by eFinancial. ER 205.

At the time the eFinancial Insurance Text Message Advertisements were sent, Borden had no recollection of visiting eFinancial's website when shopping for life insurance. *Id*. Borden, therefore, was annoyed and surprised that the eFinancial Insurance Text Message Advertisements were being sent to his cellular phone through a clearly automated process, given, among other things, the stock nature of the content, the apparent sequential order in which the advertisements were sent, and the use of a short code. *Id*.

Over the past many years, Borden, like many, has received a significant number of spam text messages, many of which falsely indicate that they are being sent in response to supposed requests made by Borden that were never in fact made. *Id*. As such, Borden reasonably assumed the eFinancial Insurance Text Message Advertisements were spam of that type and as such, did not opt-out, because he feared that the eFinancial Insurance Text Message Advertisements were potentially dangerous phishing text messages, and that any response could result in further

intrusions to his privacy. *Id*. With each eFinancial Insurance Text Message sent to Borden, however, his frustration increased, and he subsequently brought the instant action. *Id*.

After the initial complaint in this matter was filed, the Parties began to discuss the case and informally exchange certain pertinent discovery. ER 206. This discovery not only refreshed Borden's recollection as to the events recounted above, but further confirmed that an ATDS was used to send the eFinancial Insurance Text Message Advertisements to Borden and the putative class, and that no PEWC had been given. *Id*.

This discovery confirmed that eFinancial's ATDS uses a sequential number generator not only to store telephone numbers, but also to subsequently determine the order in which to pick the telephone numbers to be dialed (*i.e.*, "produce"). ER 207. Specifically, eFinancial's ATDS picks the order based on the adjustable but predetermined eFinancial Mass Text Advertisement Sequential Order, for the sole purpose of dialing those numbers and sending them eFinancial Insurance Text Message Advertisements *en masse*. *Id*.

Discovery further confirmed that eFinancial's ATDS uses a sequential number generator to assemble sequential strings of numbers in a field labeled LeadID, which are then stored and assigned to a telephone number from eFinancial's database. *Id*. As part of eFinancial's mass texting campaign, these LeadID numbers

are then used by the sequential number generator to point to a specific phone number in order, based on the adjustable but predetermined eFinancial Mass Text Advertisement Sequential Order. *Id*. eFinancial's ATDS further has the capacity to dial the assembled sequential strings of numbers it stores in the LeadID field. *Id*.

On June 8, 2021, eFinancial filed its Motion to Dismiss Borden's SAC. ER 171-190. In its Motion, eFinancial attempts to avoid liability for its conduct by advancing only two discrete theories: (1) Borden cannot plausibly allege the use of an ATDS, post-*Duguid*, for the sole reason that "his phone number was called from a stored list;" and (2) even if Borden did plausibly allege use of an ATDS, Borden had provided his prior express written consent to receive eFinancial's text messages. ER 175.

Borden subsequently filed his Response on July 8, 2021, noting that neither of eFinancial's positions were supported by the Supreme Court's recent opinion in *Duguid* or the statutory and regulatory text of the TCPA. ER 144. With regards to eFinancial's use of an ATDS post-*Duguid*, eFinancial simply ignores the Court's comprehensive statutory construction and analysis and argues that *Duguid* is somehow a case about "stored lists," and that the District Court should focus solely on how the telephone numbers that eFinancial bombarded with telemarketing messages were "obtained" or "generated," rather than, as the USSC clearly dictated, how such numbers were "stored" or "produced" for calling. ER 144-145, *citing*

Duguid, 141 S. Ct. at 1167. Moreover, eFinancial simply ignores the one and only place in which *Duguid* does address the issue of a stored list – an explicit recognition that an ATDS can, in fact, be used in conjunction with a stored list of telephone numbers where, as here, the equipment is used to randomly or sequentially determine the order in which to "produce" and then dial the numbers from that list, irrespective of how those numbers are obtained and/or generated. *Id*. at 1172 n. 7.[2]

On August 13, 2021, the District Court entered its Order granting eFinancial's Motion to Dismiss. DE 4-16. Without any direct textual support, the District Court interpreted *Duguid* to mean that an ATDS must "[have] the capacity to use a random or sequential number generator to generate the phone numbers [to be called] in the first instance," and dismissed Borden's claims for the sole reason that "[h]e does not allege that eFinancial's system 'generate[s] random or sequential phone numbers' to be dialed." ER 11-13. Because the District Court found that Borden had not plausibly alleged the use of an ATDS, it declined to address eFinancial's arguments regarding prior express written consent. ER 15. This appeal then followed.

SUMMARY OF THE ARGUMENT

I. In *Duguid*, the Supreme Court clearly articulated the operational definition of an ATDS: Equipment that has "the capacity to use a random or sequential number generator to either store or produce phone numbers to be called."

[2] eFinancial subsequently filed a Reply on July 23, 2021. ER 123-139.

Duguid, 141 S. Ct. at 1167. As such, the ultimate question in *Duguid* was not whether Facebook "generated" the numbers it called, but whether Facebook used a random or sequential number generator to "store" or "produce" those numbers to be called. *Id*. Similarly, the question before this Court is not - as argued by eFinancial and the District Court – whether eFinancial "generated" the numbers it called, but whether eFinancial used a random or sequential number generator to "store" or "produce" those numbers to be called.

A plain reading of *Duguid* – in particular its use of the phrases "store" and "produce" within the context of the use of a random or sequential number generator – clearly establishes that eFinancial not only used a random or sequential number generator to send the offending text message advertisements but did so in a manner explicitly envisioned by *Duguid*. *See Duguid,* 141 S. Ct. at 1172 n.7 ("For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time"); *Id.* at 1172 n.7 (citing to PACE Brief, ER 43) (defining "produce" as to "select, retrieve, and provide [a] number from memory" for dialing).

Unlike the targeted, individualized system analyzed in Facebook, which the Court found was not an ATDS because it "neither stores nor produces numbers using a random or sequential number generator," the sophisticated text message advertising campaign conducted by eFinancial utilized a sequential number

generator not only to store telephone numbers to be dialed, but also to subsequently determine the order in which to pick the telephone numbers to be dialed (*i.e.*, "produce"), using generated sequential strings of numbers which were then stored and assigned to a telephone number from eFinancial's database for the purpose of sequential dialing.

II. While the District Court declined to address eFinancial's arguments regarding prior express written consent, the record below is more than sufficient for this Court to make a finding that, at this stage in the proceedings, Borden has plausibly alleged that eFinancial did not obtain his Prior Express Written Consent ("PEWC") to be sent the offending text message advertisements.

Clear mandates from the FCC, affirmed by numerous courts, require that telemarketers establish **"full compliance"** with the requirements of 47 C.F.R. § 64.1200(f)(8) in order to be afforded the benefit of the PEWC defense, to ensure that courts will not be forced to engage in a highly factual, case-by-case determination of "how close" a telemarketer came to complying with the FCC's long-standing requirements.

eFinancial has clearly not established full compliance with the PEWC requirements here because: 1) its purported fine print disclosures were not clear and conspicuous; 2) its purported fine print disclosures did not inform Borden and the putative class that they were agreeing to the receipt of telemarketing; and 3) Borden

and the putative class could not make their website-initiated purchase of life insurance without entering into the purported agreement. eFinancial's substantial compliance argument is legally insufficient, and eFinancial's purported PEWC defense should be rejected.

ARGUMENT

A. Standard of Review

This Court reviews *de novo* the District Court's decision to grant eFinancial's motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007) (citations omitted). "When ruling on a motion to dismiss, we may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.'" *Id*. at 899-900 (citations omitted). Factual allegations in the operative complaint are accepted as true and the pleadings are construed in the light most favorable to the non-moving party. *Id*. at 900.

B. Borden's Second Amended Complaint Sufficiently Alleges that eFinancial used an ATDS

1. *Duguid*'s holding revolves entirely on an ATDS's capacity to "store" or "produce" telephone numbers for dialing, irrespective of how those telephone numbers were "generated."

In the case below, the District Court repeatedly and erroneously frames the crucial question answered by *Duguid* as whether an ATDS must "generate" (*i.e.*, compile telephone numbers using strings of random or sequential numbers)

telephone numbers called or texted, adopting eFinancial's suggested interpretation of *Duguid*'s holding as answering the question of whether an ATDS can ever be used to call telephone numbers from a "stored list." ER 11 (an ATDS must "[have] the capacity to use a random or sequential number generator to ***generate*** the phone numbers [to be called] in the first instance."; ER 13 (dismissing Mr. Borden's claims for the sole reason that "[h]e does not allege that eFinancial's system 'generate[s] random or sequential phone numbers' to be dialed.").

Duguid was not about "stored list" vs. "number generation," however, and the District Court's requirement that a random or sequential number generator must be used to "generate" telephone numbers to be called simply does not constitute any part of *Duguid*'s ultimate holding. *Duguid*, 141 S. Ct. at 1173 ("We hold that a necessary feature of an [ATDS] is the capacity to use a random or sequential number generator to either ***store*** or ***produce*** phone numbers to be called.").

Duguid's analysis begins with a recitation of the statutory definition of an ATDS: "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." *Duguid*, 141 S. Ct. at 1169, citing 47 U.S.C.S. § 227(a)(1). The Court then plainly sets out the actual dispute before it, which concerns the proper statutory construction and interpretation of that definition, followed by the Court's ultimate holding:

> [Whether] the clause 'using a random or sequential number generator' modifies both verbs that precede it ('store' and 'produce'), [or whether] it modifies only the closest one ('produce'). We conclude that the clause modifies both, specifying how the equipment must either "store" or "produce" telephone numbers. Because Facebook's notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an [ATDS]. *Id*.

As such, the ultimate question for the *Duguid* court was not whether Facebook "generated" the telephone numbers it called or obtained them via some other means, but whether Facebook used a random or sequential number generator to "store" or "produce" those telephone numbers to be called. *Id*. Because Duguid had not adequately alleged that Facebook had used a random or sequential number generator to "store" or "produce" telephone numbers to be called, the judgement of the Circuit Court was reversed and the case was remanded. *Id*. at 1169 ("Because Facebook's notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an ATDS."); *id*. at 1173 ("We hold that a necessary feature of an [ATDS] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.").

2. The District Court erred in holding that an ATDS must "generate" the telephone numbers to be called.

Despite these clear statements of the proper standard for an ATDS post-*Duguid* – the capacity to use a random or sequential number generator to either ***store*** or ***produce*** numbers to be called – the District Court nonetheless substitutes its own

standard: an ATDS must "[have] the capacity to use a random or sequential number generator to ***generate*** the phone numbers [to be called] in the first instance." ER 11.

Unable to cite to any holding or finding from *Duguid* that would support its substitution of the Court's language ("to either store or produce phone numbers") with its own language ("to generate phone numbers"), the District Court instead attempts to find support for its Telephone Number Generation Standard in the Supreme Court's discussion of prior precedent regarding the definition of an ATDS in the Ninth, Second and Sixth Circuits. ER 11-12.

Specifically, the District Court stated:

> Before *Duguid*, the Ninth, Second, and Sixth Circuits had held that a system qualified as an ATDS if it had the capacity to store phone numbers to be called and to dial such numbers automatically; it did not need to have the capacity to use a random or sequential number generator *to generate the phone numbers in the first instance*.

Id (emphasis added).

The District Court continues to hold that because *Duguid* ostensibly resolved the circuit split between these courts – in favor of contrary holdings in the Third, Seventh and Eleventh Circuits – *Duguid* must have therefore required "that a random or sequential number generator [be used] to generate the phone numbers in the first instance," even though *Duguid* did not expressly or implicitly include such a requirement. ER 11-12 (*citing Duguid I*, 936 F.3d at 1152 (9th Cir. 2020)); *Duran*

v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020); *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020).

The District Court's logic is inherently flawed in that it is based on a misconstruction of the Ninth Circuit's opinion preceding *Duguid*, as well as the referenced decisions of the Second and Sixth Circuits. Contrary to the District Court's statement that the Ninth Circuit's opinion in *Duguid I* focused solely on the ability of an ATDS to "generate the phone numbers in the first instance," the Ninth Circuit in *Duguid I* instead dealt with the same statutory construction issue before the Supreme Court in *Duguid* – whether the clause "using a random or sequential number generator" modifies both "store" and "produce," or only "produce." – and made no mention whatsoever of the ability of an ATDS to "generate the numbers in the first instance." Contrary to *Duguid*'s ultimate holding, these courts found that the clause only modifies the word "produce," therefore holding that an ATDS need not use a random or sequential number generator <u>for any purpose</u>, so long as it stores numbers and calls them automatically. *See Duguid I*, 926 F.3d at 1151.

In *Duguid I*, for example, the Ninth Circuit stated:

> [T]he adverbial phrase "using a random or sequential number generator" modifies only the verb "to produce," and not the preceding verb, "to store." In other words, an ATDS need not be able to use random or sequential generator … it suffices to merely have the capacity to "store numbers to be called" and "to dial such numbers automatically.

Id. (citations omitted).

As such, it was this ruling of the Ninth Circuit – that an ATDS need not have the capacity to use a random or sequential number generator for any purpose – that was reversed by *Duguid*, and the District Court erred in finding that *Duguid*'s resolution of these conflicting cases implied a requirement that a random or sequential number generator must be used to "generate" the telephone numbers themselves, rather than properly adopting *Duguid*'s explicit holding that an ATDS must have "the capacity to use a random or sequential number generator to either store or produce numbers to be called."[3] *Duguid*, 141 S. Ct. at 1173.

[3] Moreover, common sense (and the most basic principles of judicial interpretation) dictates that if *Duguid* had intended to exclude from the definition of an ATDS any system that utilizes a stored list of numbers that was not comprised of previously randomly or sequentially generated telephone numbers, or, had it intended to require an ATDS "to generate" random or sequential telephone numbers, it would have clearly stated so. *See, e.g., Duguid*, 141 S. Ct. at 1173 ("This Court must interpret what Congress wrote, which is that 'using a random or sequential number generator' modifies both 'store' and 'produce'"); *Evans v. Portfolio Recovery Assocs., LLC*, 889 F.3d 337, 346 (7th Cir. 2018) ("[A court's] task is to interpret the words of Congress, not add to them."). It did not, and instead provided an explicit example of how a random or sequential number generator can, in fact, be used to produce telephone numbers from a preproduced list by picking the order for dialing them, which is in no way dependent on the where or how those telephone numbers originated. *See Duguid*, 141 S. Ct. at 1172, n.7.

3. Contrary to the District Court's holding, *Duguid* explicitly confirms that an ATDS can be used in conjunction with a stored list of telephone numbers so long as a random or sequential number generator is used to store or produce those telephone numbers.

Diguid did not, as eFinancial and the District Court suggest, hold that an ATDS must either generate random or sequential telephone numbers or call only telephone numbers that were at some point randomly or sequentially generated. Nowhere does *Duguid* hold that an ATDS must "generate" random or sequential telephone numbers, as opposed to "store" or "produce" telephone numbers using a random or sequential number generator. Rather, to answer the question of whether Facebook used a random or sequential number generator to "store" or "produce" telephone numbers, *Duigid* first had to engage in the very discussion that eFinancial and the District Court ignore – (1) exactly how a random or sequential number generator can be used to "store" or "produce" telephone numbers to be called; and (2) what do those specific functions mean in the context of a random or sequential number generator? *Id*. at 1171-73.

Referencing dictionary definitions of "store" and "produce," as well as a detailed description of the discrete technological capabilities of random or sequential number generators as provided by the Brief for Professional Association for Customer Engagement *et al.* as Amici Curiae ("PACE Brief") and others, *Duguid* explains exactly how a random or sequential number generator can be used to "store"

or "produce" telephone numbers to be called. *Id*. (*citing* PACE Brief, ER 37-43). Contrary to eFinancial's and the District Court's fictitious position that "to produce" means "to generate," there is only one place in *Duguid* where the Court actually references a definition of the phrase "to produce," and it has nothing to do with the generation of numbers. Instead, *Duguid* relies on the definition of "produce" to mean "select, retrieve, and provide [a] number from memory" for dialing - regardless of how those numbers were originally stored into memory or otherwise obtained. *Id*. at 1172, n.7 (*citing* PACE Brief, ER 43).

In *Duguid*, the plaintiff argued that applying the word "store" to the phrase "using a random or sequential number generator" did not make "sense," in the context of the ordinary definition of those words. *Id*. at 1171. In responding to this argument, the Court first noted that, as early as 1988, random number generators were used not just to "generate" numbers, but also, separately, to "store" numbers to be called later. *Id*. at 1171-72 ("It is true that, as a matter of ordinary parlance, it is odd to say that a piece of equipment 'stores' numbers using a random number 'generator.' But it is less odd as a technical matter."); *Id*. (defining "store" to include "fleeting and transient" storage as well as "longer-term" storage.).

In the alternative, the plaintiff argued that since any "number generator" would "necessarily ***produce*** numbers," the use of the phrase "store" is superfluous. *Id*. In correcting this assumption, the Court, referencing the PACE Brief, noted that,

in the context of a number generator, "to produce" does not mean "to generate." *Id*. (*citing* PACE Brief, ER 37-43). Rather, the Court relies on the definition of "produce" referenced in the PACE Brief, which is to "select, retrieve, and provide [a] number from memory" and then provides an explicit example of how an ATDS uses a random or sequential number generator "to produce" telephone numbers for dialing, which is "to determine the order in which to pick phone numbers from a preproduced list." *Id*.

Specifically, the Court references the PACE Brief to explain that a random or sequential number generator can "produce" telephone numbers for dialing by picking the order to dial phone numbers from a saved list by "generating" random or sequential numbers that are then used to identify, or "point to," corresponding telephone numbers from the saved list, for sequential or random dialing. *Id.* at 17-21. This is the exact conduct that Borden has alleged here, as Borden has plausibly alleged that eFinancial's ATDS generated random or sequential numbers (LeadIDs) that were then used to point to corresponding telephone numbers from a saved list, for the purpose of sequential dialing. ER 208.

Moreover, the PACE Brief goes out of its way to note that these processes ("to store" and "to generate") are two separate and distinct functions of an ATDS, and that the use of a number generator does not necessarily imply the "generation" of numbers. ER 40 ("It should be noted that the sequential processing/dialing of

telephone numbers in a list is, by itself, [a] distinct [action] from dialing sequentially generated numbers.").

In short, *Duguid* identifies three distinct processes of a random or sequential number generator: the ability to "produce" numbers, the ability to "store" numbers, and the ability to "generate" numbers. *Duguid*, 141 S. Ct. at 1171-73. In its final holding, however, the Court indisputably limits the operational definition of an ATDS to only two of those processes – "produce" and "store" – making no mention whatsoever of the need "to generate," ultimately holding that an ATDS must "use a random or sequential number generator to either ***store*** or ***produce*** phone numbers to be called." *Id*. at 1173.[4]

In *Montanez v. Future Vision Brain Bank, LLC* – the Colorado District Court adopted in full a Report and Recommendation that denied a nearly identical motion to dismiss under this exact interpretation. *See Montanez v. Future Vision Brain Bank, LLC*, No. 20-cv-02959, 2021 U.S. Dist. LEXIS 67091, at *20 (D. Colo. Apr. 7, 2021)) ("Montanez R&R"), adopted by the district court in whole in *Montanez v.*

[4] While it is true that these three distinct processes often seem to merge in the context of an ATDS, *Duguid* and the PACE Brief make clear that this is not necessarily the case. For instance, if a random or sequential number generator "generates" random or sequential telephone numbers, those numbers would likely be "stored" by the same number generator, either in a transient or long-term manner. ER 37-43. However, those numbers have not been "produced" for dialing unless and until they are selected, retrieved, or provided from memory, regardless of whether the numbers were originally randomly or sequentially generated, or otherwise obtained. *Id*.

Future Vision Brain Bank, LLC, No. 20-cv-02959, 2021 U.S. Dist. LEXIS 82055 (D. Colo. Apr. 29, 2021). In *Montanez*, as here, the plaintiff alleged that the defendant had used an ATDS to send telemarketing text messages to a stored list of telephone numbers that had not been generated by the defendant but had instead been retrieved from customer records. *Montanez* R&R at *17-20 (citing and quoting in support *Geraci v. Red Robin Int'l, Inc.*, 2020 WL 2309559 (D. Colo. Feb. 28. 2020) ("[t]o send the messages, Defendant stored Plaintiff's cellular telephone number in its text messaging system with thousands of other consumers' telephone numbers); *see also Montanez*, No. 20-cv-02959 (D. Colo. Jan. 25, 2021)), D.E. 25-1 ("Amended Class Action Complaint") at 11 ("The [defendant's system] retrieved each phone number from a list of numbers."); *Montanez*, No. 20-cv-02959 (D. Colo. Feb. 16, 2021), D.E. 33 ("Defendant's Motion to Dismiss Amended Complaint") at 9 (stating that Defendant's system "uses lists of phone numbers generated from customer records and maintained in the order the customers signed up for the program.) (citations omitted).

Even though the telephone numbers themselves had not been generated by the defendant's system, the *Montanez* court found that plaintiff had properly alleged that an ATDS had still been used under the *Duguid* standard because, as described above, the defendant's system had determined the order in which to "automatically retrieve[] each telephone number from a [stored] list of numbers." *Montanez* R&R

at *17-20. Specifically, and as explained above, the *Montanez* court found that the plaintiff had adequately alleged that the defendant's system qualified as an ATDS in that it had "produced" telephone numbers using a sequential number generator -- by generating sequential numbers that were used to identify, or "point to," corresponding telephone numbers from a stored list, and then used those sequentially generated numbers to produce the telephone numbers in sequential order to be dialed. *Id.* As such, the *Montanez* court held that the defendant's system used a sequential number generator to store and produce telephone numbers, just as eFinancial has done here. *See also Carl v. First Nat'l Bank*, No. 2:19-cv-504, 2021 U.S. Dist. LEXIS 111889 at *21, n.10 (D. Me. June 15, 2021) (*citing Duguid*, 141 S. Ct. at 1172, n.7 ("Nonetheless, the Court acknowledges, as Plaintiff has argued in his [post-*Duguid*] briefing, that *Duguid* suggested that an ATDS could potentially fall under the TCPA if it 'use[s] a random number generator to determine the order in which to pick phone numbers from a preproduced list, [and] then store[s] those numbers to be dialed at a later time.'")); *Macdonald v. Brian Gubernick PLLC*, No. CV-20-00138-PHX-SMB, 2021 U.S. Dist. LEXIS 216788, at *5 (D. Ariz. Nov. 8, 2021) (Holding that the plaintiff had stated a proper claim that an ATDS was used when plaintiff had alleged that the dialer can automatically call an entire list of leads, can import lists of leads with associated phone numbers, can generate associated

sequential numbers and store them for sequential order dialing, and further noted a pause was heard at the beginning of the call, which is indicative of an ATDS.).

4. Public policy concerns raised by *Duguid* and the FCC dictate that telephone "number generation" cannot be the defining feature of an ATDS.

While *Montanez* and other post-*Duguid* courts that have had the occasion to address this discrete issue make clear that *Duguid* stands for the proposition that a device qualifies as an ATDS if it has the capacity either to store a telephone number using a random or sequential generator, to produce a telephone number using a random or sequential number generator, or do both, irrespective of the origin of those telephone numbers, there are other post-*Duguid* cases that fall into the same trap as the District Court, conflating the use of a random or sequential generator to store or produce telephone numbers, as exhaustively explained by *Duguid*, with the act of telephone "number generation."[5]

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[5] *Compare e.g., Carl*, 2021 U.S. Dist. LEXIS 111889 at *21, n.10 (*citing Duguid*, 141 S. Ct. at 1172, n.7 ("Nonetheless, the Court acknowledges, as Plaintiff has argued in his [post-*Duguid*] briefing, that *Duguid* suggested that an ATDS could potentially fall under the TCPA if it 'use[s] a random number generator to determine the order in which to pick phone numbers from a preproduced list, [and] then store[s] those numbers to be dialed at a later time.'"); *Miles v. Medicredit, Inc.*, No. 4:20-CV-01186 JAR, 2021 U.S. Dist. LEXIS 131128, at *10 (E.D. Mo. July 14, 2021) (finding that the appropriate post-*Duguid* standard is whether the "dialer stores and/or produces telephone numbers using a random or sequential number generator."); *Libby v. Nat'l Republican Senatorial Comm.*, No. 5:21-CV-197-DAE, 2021 U.S. Dist. LEXIS 140103, at *7 (W.D. Tex. July 27, 2021) ("[L]iability is triggered only if the automated system 'us[es] a random or sequential number

When faced with the fact that *Duguid* explicitly recognizes and cites to examples of how an ATDS can perform the required functions of "storing" and/or "producing" telephone numbers using a random or sequential number generator, including, as done by eFinancial here, "to determine the order in which to pick phone numbers from a preproduced list," the District Court attempts to explain away this explicit example by noting that the preproduced list in the PACE Brief example was itself created by a random or sequential number generator, "thus differentiating it from [a] stored list of … phone numbers." ER 14.

This finding, however, is based on a misreading of the PACE Brief and the system it describes. While it is true that in the relevant patent example discussed in the PACE Brief, the preproduced list of telephone numbers is generated by the same system, the PACE Brief also explicitly notes that while that fact happens to be true in the example provided, it is by no means mandated, and the functions of "dialing sequentially generated numbers" and "the sequential processing/dialing of telephone numbers in a list," are identifiably separate and discrete functions of an ATDS, both of which utilize a random or sequential number generator. *See* ER 40, n.4.

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generator' to store or produce the phone numbers that are called.") (citing *Duguid*, 141 S. Ct. at 1171) with *e.g., Timms v. USAA Fed. Sav. Bank*, No. 3:18-cv-01495, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021); *Tehrani v. Joie De Vivre Hosp.*, LLC, No. 19-cv-08168-EMC, 2021 U.S. Dist. LEXIS 165392, at *18-20 (N.D. Cal. Aug. 31, 2021).

Moreover, the same public policy concerns raised by *Duguid* and the FCC further dictate that "number generation" cannot be the defining feature of an ATDS. In *Duguid*, the Court noted that "Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines" by "allowing companies to dial random or sequential blocks of telephone numbers automatically." *Duguid*, 141 S. Ct. at 1167-72. By misstating the proper definition of an ATDS, however, the District Court implicates those very concerns.

For instance, according to the District Court's rationale, a telemarketer could obtain or purchase a list of every single telephone number in a specific geographic area, and then use a random or sequential number generator to pick the order in which to randomly or sequentially dial each and every telephone number in that geographic area in the context of a mass telemarketing campaign, and then in fact randomly or sequentially dial such telephone numbers – and this conduct would not violate the TCPA, simply because, according to the District Court, the telephone numbers themselves were not generated by a random or sequential number generator. This result would allow for telemarketers to act with reckless abandon and would result in exactly the type of intrusive conduct the TCPA was designed to prevent. *See, e.g., In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd 14014, 208, 2003 FCC LEXIS 3673, *210, 29 Comm. Reg.*

(P & F) 830 (F.C.C. June 26, 2003) (FCC cautioning that to exclude calling from stored lists from the TCPA's restrictions, just because such lists were produced by a human rather than a number generator, "would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages.").[6]

Further, this interpretation would in no way implicate the Supreme Court's concern that, if a certain system is classified as an ATDS, it would necessarily produce an outcome where "almost all modern cell phones [would be classified] as autodialers." *Duguid,* 141 S. Ct. at 1172. As detailed above and as supported by the allegations in the SAC, eFinancial's mass telemarketing system is not simply "any equipment that merely stores and dials telephone numbers" (*i.e.*, the standard

[6] The District Court's insistence on "random number generation" further proves unmalleable when the realities of telemarketing practices are further explored. For example, random number generators – when used by telemarketers to generate portions of telephone numbers – are often provided with a static area code and prefixes, and then programmed to generate the subsequent seven or four numbers randomly. Would this practice still meet the District Court's "number generation" standard when three or six of the ten digits in the phone number were generated through human input? What if the universe of numbers called or texted included a mixture of both randomly generated numbers and numbers from an imported list? The absence of caselaw, FCC guidance, or any scholarly discussion regarding what is required for telephone number "generation" to be sufficient to qualify as an ATDS under the District Court's interpretation speaks volumes.

announced by the Ninth Circuit in *Duguid I* and reversed by the Supreme Court in *Duguid*), but is instead a sophisticated mass texting platform that uses a sequential number generator to both determine the order in which to produce the telephone numbers from eFinancial's database for dialing, and to generate sequential numbers that are used to point to corresponding telephone numbers from eFinancial's database, for purposes of determining the random or sequential order in which they would be dialed. *See* ER 202. eFinancial cannot plausibly argue that any ordinary cell phone has such extensive capabilities.

5. Unlike Facebook, eFinancial used a random or sequential number generator to store telephone numbers and produce those telephone numbers by picking the order in which to dial those telephone, thereby satisfying *Duguid*.

Having determined that a device qualifies as an ATDS if it has the capacity either to store a telephone number using a random or sequential generator, or to produce a telephone number using a random or sequential number generator, *Duguid* ultimately found that Facebook's targeted, individualized notification system did not qualify. *Duguid*, 141 S. Ct. at 1169.

Contrary to the District Court's finding that Mr. Duguid lost his appeal because he had not alleged that Facebook's system generated random or sequential telephone numbers to be dialed, *Duguid* instead plainly held that "[b]ecause Facebook's notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an [ATDS]." *Duguid*, 141 S. Ct. at 1169.

Consistent with *Duguid*'s multiple explanations of how a random or sequential number generator can be used to "store" or "produce" telephone numbers to be called, the Court found that Facebook's notification system (1) did not "produce" telephone numbers from a stored list by selecting them or retrieving them in a random or sequential order to be dialed, nor (2) did it "store" telephone numbers using a random or sequential number generator. *Id*. at 1168-69.

In other words, the Court found that because the targeted, individualized Facebook text messages were not sent to telephone numbers stored by a random or sequential number generator or picked from a list using a random or sequential generator, but rather were sent only to a specific telephone number and only upon the occurrence of a potentially unauthorized access to a specific user account, Facebook could not have used a random or sequential number generator to produce or store the telephone numbers, and thus an ATDS was not used. *Id*. at 1167-1173.

The sophisticated text message advertising campaign conducted by eFinancial is a completely different ballgame. Unlike Facebook's targeted, individualized text messages, sent not in any random or sequential order, but only to a specific telephone number in response to a specific occurrence (the potentially unauthorized access to a specific user account), Borden here has instead alleged that each eFinancial Insurance Text Message Advertisement was sent in an adjustable but predetermined sequential order, based on the number of days since the lead form was initially

completed ("eFinancial Mass Text Advertisement Sequential Order"). *See* ER 202-203. In sending these advertisements, eFinancial used a random or sequential number generator to store and subsequently produce (i.e., select, retrieve, and/or provide the number from memory) Borden's and the putative class's telephone numbers for dialing. *Id*.

Specifically, and as explicitly envisioned by *Duguid* and *Montanez*, eFinancial then used a sequential number generator to pick the order in which to dial the telephone numbers from eFinancial's database. *Id*. Further, the limited, early-discovery record below has already demonstrated that the sequential number generator utilized by eFinancial has the capacity to, and in fact did, generate sequential numbers in a field labeled "LeadID," which numbers were then used to identify, or "point to," corresponding telephone numbers from eFinancial's database, in order to determine the sequential order that those telephone numbers would be dialed. ER 207.

By carefully interpreting and applying the specific language used by Congress in the TCPA, the *Duguid* standard attempts operate to protect companies like Facebook - who are sending security alert texts when someone tries to log in from an unknown device - as well as cell phone users who might utilize auto-reply functions, from potentially meeting the definition of an ATDS, while still prohibiting intrusive mass texting and calling campaigns, provided that a random or sequential

number generator was used to store or produce the telephone numbers to be dialed, as was done here.

C. eFinancial did not Obtain Borden's Prior Express Written Consent to Send Telemarketing Text Messages

In the District Court, eFinancial raised a second argument to support its Motion to Dismiss, which was that Borden's claims must be dismissed because "[Borden] gave his prior express consent to receive text messages from eFinancial." ER 175.[7] Having found that Borden had not plausibly alleged the use of an ATDS, the District Court declined to address these arguments. ER 15.

Nonetheless, the PEWC issue was fully briefed in the District Court and properly appealed. ER 216-217. As such, Borden believes that the record below is more than sufficient for this Court to make a finding that Borden's SAC plausibly alleged that eFinancial did not obtain Borden's Prior Express Written Consent to send the eFinancial Text Message Advertisements, and that for this Court to make such a finding here would preserve judicial economy and fairness. *See Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 967 (9th Cir. 2020) (finding that the appellate court can rule "on any basis the record supports, including one[s] the District Court did not reach."); *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (where

[7] Although the District Court and eFinancial sometimes refer to "Prior Express Consent," this appears to be a typo, as the proper standard is "Prior Express Written Consent."

appellate court reversed summary judgment by the District Court in favor of defendants, and remanded with instructions to grant summary judgment for plaintiff, even though the District Court had not reached the merits of plaintiff's claims).

PEWC is an exception to the TCPA that permits telemarketers to engage in otherwise unlawful activity. The Ninth Circuit has determined that proof of "[e]xpress consent is not an element of a plaintiff's *prima facie* case but is an affirmative defense for which the defendant bears the burden." *Berman v. Freedom Fin. Network, LLC*, No. 18-cv-01060, 2019 U.S. Dist. LEXIS 150810, at *6-7 (N.D. Cal. Sep. 4, 2019) (citing *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017)).

For eFinancial to establish that it obtained PEWC from Borden and the Putative Class, and enjoy the benefit of engaging in what would otherwise be unlawful telemarketing activity, it must establish that it obtained a valid signed written agreement that:

> include[s] a clear and conspicuous disclosure informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) the person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

See 47 C.F.R. § 64.1200(f)(9)(i);[8] *Williams v. PillPack LLC*, No. C19-5282, 2021 U.S. Dist. LEXIS 27496, at *15 (W.D. Wash. Feb. 12, 2021); *Aussieker v. Lee*, No. 2:19-cv-00365, 2021 U.S. Dist. LEXIS 19969, at *11 n.7 (E.D. Cal. Feb. 2, 2021) ("If a call or text message contains advertising or is telemarketing, the sender must have secured, prior to sending the message or making the call, the signature of the recipient in a written agreement that includes several specified disclosures.").

Moreover, the mere existence of the disclosure is not enough, as it must not only be "clear and conspicuous," it also must be truthful, insomuch as the telemarketer must actually not require the person signing to sign the agreement (directly or indirectly), or agree to enter into such an agreement, as a condition of purchasing any property, goods, or services. *See, e.g., In re Lyft, Inc.*, 30 FCC Rcd 9858, 9862, 2015 FCC LEXIS 2508, *13, 63 Comm. Reg. (P & F) 728 (Sept. 11, 2015) (holding that merely including the disclosure in 47 C.F.R. § 64.1200(f)(8)(i)(B) is insufficient; it must actually be truthful, and not illusory).

These clear mandates, designed to ensure consumers are fully informed before they provide consent to be bombarded with telemarketing calls and text messages, and conversely, to give telemarketers clarity as to the type and form of the consent

[8] Recently changed from 47 C.F.R. § 64.1200(f)(8) to 47 C.F.R. § 64.1200(f)(9). There have been no changes to the Rule, other than where it can be found in the regulation. As such, because most of the caselaw and rules refer to the regulation as being located at 47 C.F.R. § 64.1200(f)(8), Borden will continue to reference 47 C.F.R. § 64.1200(f)(8) to try to avoid confusion.

they must obtain before engaging in otherwise unlawful telemarketing, came in direct response to the endless calls, letters, and emails that the FCC had been inundated with reflecting the disdain Americans have for telemarketing. *See, e.g., Larson v. Harman Mgmt. Corp.*, No. 1:16-cv-00219, 2016 U.S. Dist. LEXIS 149267, at *7-8 (E.D. Cal. Oct. 26, 2016) ("In 2012, the FCC revised its position in response to 'the volume of consumer complaints we continue to receive concerning unwanted, telemarketing robocalls.'") (*citing* 2012 TCPA Order at 1838); *Gary v. Trueblue, Inc.*, 346 F. Supp. 3d 1040, 1042 (E.D. Mich. 2018) ("Congress enacted the TCPA in response to consumer complaints about unwanted calls and text messages from telemarketers.") (citations omitted). Therefore, the PEWC affirmative defense is only available when its mandates are strictly adhered to, and the FCC, to avoid any potential ambiguity, has repeatedly stated that full compliance with the PEWC requirements – first issued almost a decade ago in 2012 – is required and anything less – the alleged "substantial compliance" suggested by eFinancial – does not qualify. The FCC has made this abundantly clear by rejecting all waiver requests or exemptions from the full compliance requirement since October 7, 2015.[9]

[9] In 2015, after certain petitioners requested a waiver of the PEWC requirements, the FCC extended their deadline to come into **"full compliance"** with 47 C.F.R. § 64.1200(f)(8) to October 7, 2015, and then reiterated in 2016 that after October 7, 2015, **"full compliance"** with 47 C.F.R. § 64.1200(f)(8) was mandatory for all telemarketers. As such, while there was a roughly three-year period in which the FCC, under certain circumstances, allowed for some flexibility and/or "substantial

Simply put, if a telemarketer fails to establish that the language used is clear and conspicuous, or if eFinancial fails to include any of the required information in the mandatory disclosures, no PEWC has been obtained, the telemarketer is not afforded the affirmative defense, and the unlawful activity remains unlawful. *See e.g., Lennartson v. Papa Murphy's Holdings, Inc.*, No. C15-5307, 2016 U.S. Dist. LEXIS 725, at **4-5 (W.D. Wash. Jan. 5, 2016) ("To be sufficient, the consent had to meet the definitional requirements of 'prior express written consent' that the FCC's 2012 Order had outlined and had given telemarketers nearly two years to meet.") (citations omitted); *Larson*, 2016 U.S. Dist. LEXIS 149267, at *10-12 (finding that a disclosure that did not "clearly authorize[] defendants to deliver advertisements or telemarketing messages using an automatic telephone dialing

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compliance" with the PEWC requirements, that time has long since passed. *See In re Rules & Regulations Implementing the TCP Act of 1991 et al.*, 30 FCC Rcd 7961, 8015, 2015 FCC LEXIS 1586, *171 (F.C.C. July 10, 2015) ("2015 TCPA Order") ("Petitioners must come into **full compliance** within 90 days after release of this Declaratory Ruling for each subject call … .") (emphasis added); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd 11643, 11644, 2016 FCC LEXIS 3437, *1, *7, *14-15 (F.C.C. October 14, 2016) ("2016 TCPA Order") ("We emphasize that these seven petitioners should already be in **full compliance** with the Commission's requirements for any calls made 90 days or more after the Commission's 2015 clarification of the written-consent rules because they had the benefit of that clarification in making such calls. … After October 7, 2015, the petitioners and their members were required to be in **full compliance** with the Commission's requirements for each subject call. … Thus, after October 7, 2015, we find that each petitioner and, as relevant, its members should have been in **full compliance** with the Commission's rules for each subject call or it will be subject to any factually warranted Commission enforcement and TCPA liability.") (emphasis added).

system" failed to "establish the existence of a 'prior express written consent' as that term is defined by the FCC's regulation.") (emphasis added).

Here, Borden's SAC clearly alleges that eFinancial failed to fully comply with the PEWC requirements because: 1) eFinancial's purported disclosures were not clear and conspicuous; 2) eFinancial's purported disclosures did not inform Borden and the putative class that they were agreeing to the receipt of telemarketing; and 3) Borden and the putative class could not make their website-initiated purchase of life insurance without entering into the purported agreement. The record below establishes that Borden plausibly alleged that eFinancial did not fully comply with each of these requirements, and as such, its purported PEWC defense should be rejected.

1. eFinancial's purported fine print disclosures were not clear and conspicuous.

First, eFinancial failed to obtain Borden's or the putative class's PEWC because its purported disclosures were not clear and conspicuous, as that term has been defined and interpreted by the FCC and the courts.

As detailed above, for a telemarketer to establish a PEWC affirmative defense pursuant to 47 C.F.R. § 64.1200(f)(8), the telemarketer is required to obtain a signed agreement with the required disclosures, which must be "clear and conspicuous." "'Clear and conspicuous' in this context means 'a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or

other disclosures.'" *Barrera v. Guaranteed Rate, Inc.*, 2017 U.S. Dist. LEXIS 175223, *5 (N.D. Ill. Oct. 23, 2017) (citing 47 C.F.R. § 64.1200(f)(3)). While eFinancial contended that its disclosures meet this "clear and conspicuous" standard merely because "they appeared directly below the 'next, your rates' button," a review of the case law interpreting the clear and conspicuous standard demonstrates that the proper analysis to be done is far more exacting.

In *Barrera*, for example, the court was presented with significantly similar circumstances as here, and summarily denied the defendant's motion to dismiss on this basis. As here, the plaintiff in *Barrera* went on the defendant's website in search of mortgage quotes and provided his phone number as part of the process. *Id.* at *5-6. In order to proceed, the plaintiff had to click a button that said, "Get your free quote." *Id.* As such, the Court concluded that the plaintiff had requested a mortgage quote, and nothing more. *Id.* at *6.

Just as here, the *Barrera* defendant argued that it had included fine print disclosures on its website, which it argued met the disclosure requirements of 47 C.F.R. § 64.1200(f)(8)(i), and that by clicking the "Get your free quote" button, the plaintiff had provided his PEWC to receive unlimited advertisements. *Id.* at *5-7. *Barrera* rejected that argument, noting that, based on the allegations made by the plaintiff, "the placement of the disclosures and the use of a tiny font made it unlikely that Plaintiff knew, when he clicked on the quote button that he was actually opening

the door to a barrage of autodialed telemarketing calls to his cell phone." *Id.* at *7-*8. Ultimately, *Barrera* found these allegations sufficient to state a claim that the defendant's disclosure was not clear or conspicuous, and declined to dismiss the case based on the defendant's asserted PEWC affirmative defense. *See id.* at *5 (The court agreed with the plaintiff that at the pleading stage, the defendant's "purported consent agreement was deficient to authorize the calls.").

Similarly, in *Sullivan v. All Web Leads, Inc.*, another district court again denied a defendant's motion to dismiss based on, among other things, the defendant's failure to obtain an agreement that included a clear and conspicuous PEWC disclosure. *Sullivan v. All Web Leads, Inc.,* 2017 U.S. Dist. LEXIS 84232, *16-22 (N.D. Ill. June 1, 2017). In *Sullivan*, as here, the plaintiff visited a website to obtain quotes and potentially purchase insurance. *Id.* at *1-4. As here, the *Sullivan* defendant argued that it had obtained the plaintiff's PEWC because, on the webpage where the plaintiff was prompted to click a "Submit" button in order to continue through the defendant's website-initiated purchase of insurance, there was fine print language that defendant asserted generally met the requirements of 47 C.F.R. § 64.1200(f)(8)(i). *Id.* at *16-22.

As in *Barrera*, the *Sullivan* court rejected this argument at the pleadings stage, noting that given the size of the fine print disclosures, as well as their orientation within the context of the rest of the page, the defendant "does not as a matter of law

establish reasonable notice of the terms to which [the plaintiff] purportedly gave prior express written consent, let alone a disclosure that was 'clear and conspicuous' under the TCPA." *Id.* at *18 (citations omitted). Specifically, the court found that it was "reasonable for users to assume that their click merely constituted their assent … to getting a health insurance quote," – in contrast to the telemarketing calls that the plaintiff actually received – and that the defendant had thus failed to establish a PEWC affirmative defense. *Id.* at *21. The court was unwilling to "find that [defendant's] alleged consent mechanism gave [plaintiff] reasonable notice sufficient for an enforceable written 'agreement' - to say nothing of the TCPA's heightened 'clear and conspicuous' disclosure requirement governing prior express written consent agreements. Thus, [defendant] has not made a legal showing based on the complaint's allegations that it effectively procured [plaintiff]'s prior express written consent." *Id.* at *21-*22.

Nearly identical arguments apply here. Like the button in *Barrera* that stated, "Get your free quote," or the button in *Sullivan* that stated "Submit," Borden clicked a button that stated "Next, your rates." Much like the *Barrera* and *Sullivan* defendants' failed arguments regarding PEWC, eFinancial here has similarly argued that its fine print disclosures, appearing on that same page, automatically entitles it to a PEWC affirmative defense. *See* ER 176, 185-187. However, the devil is in the details. Just as the *Barrera* and *Sullivan* courts found that their plaintiffs' allegations

regarding font and placement precluded dismissal of their claims on this basis, Borden here has clearly alleged that, given the miniscule light grey font used by eFinancial that is significantly smaller than the font used for the text above (which in addition to being larger, is darker, and mostly in bold type face), as well as its orientation within the context of the rest of the page, which is near the bottom of the webpage, Borden was not put on notice that he was agreeing to anything other than continuing through eFinancial's website-initiated purchase of life insurance process and proceeding to the quotes page. ER 191, 198, 199-200; *see e.g., Sullivan*, 2017 U.S. Dist. LEXIS 84232, at *16-22; *Barrera*, 2017 U.S. Dist. LEXIS 175223, at *5.

Finally, while Borden asserts that he has provided sufficient allegations to establish that eFinancial's purported fine print disclosures were not clear and conspicuous, this determination is typically one for a jury, and not generally grounds for dismissal of a complaint. *See e.g., Davies v. W.W. Grainger, Inc.*, No. 13-cv-03546, 2016 U.S. Dist. LEXIS 160767, at *8 (N.D. Ill. Nov. 21, 2016) ("It is this Court's position that the question of whether the opt-out notice is clear and conspicuous is a mixed question of law and fact. There is the legal issue — whether the opt-out notice is "conspicuous" — and the factual issue — whether a reasonable consumer would be drawn to the notice. Therefore, this issue would be before a jury.") (citations omitted).

2. eFinancial's purported fine print disclosures did not inform Borden that he was agreeing to the receipt of telemarketing.

As outlined above, the FCC provided telemarketers with very clear and specific instructions as to what language and information must be included in the disclosures contained in the agreement a telemarketer is required to obtain in order for a telemarketer to establish that it has PEWC, and repeatedly stated that telemarketers must establish full compliance with these requirements. And, at the very center of these clear and specific instructions is the requirement that the disclosures must inform consumers that they are agreeing to the receipt of "telemarketing." *See* 47 C.F.R. § 64.1200(f)(8)(i).

The requirement that this specific disclosure be made was anything but arbitrary or unintentional given consumers' distain for "telemarketing" in particular. The FCC was keenly aware that by requiring telemarketers, prior to making telemarketing calls and sending telemarketing text messages, to first obtain an agreement that included a disclosure that explicitly informs the person signing that by signing they are agreeing to authorize the seller to deliver or cause to be delivered to the signatory "telemarketing," the intended result would be a reduction in the number of consumers receiving unwanted telemarketing calls and text messages. "Telemarketing" is a term that Americans know, are familiar with, and understand, and it is for this reason that telemarketers must use that term, as opposed to vague phrases, such as "offers of insurance," embedded in fine print.

Here, eFinancial plainly fails to make this required disclosure. Despite the FCC's clear and specific instructions that any purported PEWC disclosures must inform consumers that they are agreeing to the receipt of "telemarketing," that phrase does not appear in eFinancial's purported fine print disclosures, on any of the buttons that Borden had to press in order to continue his website-initiated purchase of life insurance, or, in fact, anywhere on the entirety of eFinancial's webpage. As such, it would not be apparent to any reasonable consumer who may have actually noticed and read the fine print that they would be agreeing to a barrage of telemarketing text messages, due to eFinancial's careful crafting of its purported disclosures to omit any mention of "telemarketing," despite the FCC's clear instruction otherwise. *See Barrera*, 2017 U.S. Dist. LEXIS 175223 at *7 ("it [is] unlikely that Plaintiff knew, when he clicked on the quote button that he was actually opening the door to a barrage of autodialed telemarketing calls to his cell phone.").

Despite its admitted omission of the required "telemarketing" disclosure, eFinancial contended that it nonetheless satisfied this PEWC requirement because its fine print disclosure states "you consent to receive offers of insurance." ER 188. Without any support, eFinancial then claimed that this is "clearly sufficient to give notice of telemarketing as that term is defined by the FCC because an offer naturally encourages purchase." *Id.* This is simply unavailing, as the FCC has explicitly stated that the required disclosures must inform the consumer that "telemarketing"

messages will be sent, and that substantial compliance with this rule – as eFinancial suggests – is demonstrably insufficient. *See* In re Rules Implementing the TCPA Act of 1991 *et al.* Application for Review, 29 FCC Rcd 13998, 14012-14013, 2014 FCC LEXIS 4445, *51-52 (F.C.C. October 30, 2014) ("2014 TCPA Order") (rejecting a substantial compliance argument in the context of the TCPA's fax advertisement opt-out requirements, reiterating that full compliance is required, and informing petitioners that there is no uncertainty or controversy in need of resolution on the issue of substantial compliance). Rather, eFinancial's purported PEWC disclosures are nothing more than an obvious attempt to sidestep the FCC's requirements that must be fully complied with, while still attempting to enjoy the benefits of an affirmative defense from otherwise unlawful telemarketing. This is precisely the type of behavior the FCC does not tolerate, and the reason for its full compliance standard.

While the bulk of the legal precedent discussing the FCC's rejection of substantial compliance admittedly exists in the context of the TCPA's facsimile opt-out requirements, the FCC's rationale is equally applicable to the PEWC mandates and the analysis is the same, as both require full compliance with specific sections of 47 C.F.R. § 64.1200, and the FCC has found that where full compliance is required in 47 C.F.R. § 64.1200, substantial compliance, as here, is insufficient. *See, e.g., Drug Reform Coordination Network, Inc. v. Grey House Publ'g., Inc.*, 106 F.

Supp. 3d 9, 16 (D.D.C. 2015) ("[The opt-out notice] did not state, however, that [the defendant] must honor an opt-out within 30 days and that the failure to do so would be unlawful. Accordingly, even if [the defendant] could demonstrate that it had an 'existing business relationship' with [the plaintiff], its noncompliance with the TCPA's strict notice requirements disqualifies it from the safe harbor."); *Brodsky v. HumanaDental Ins. Co.*, No. 10 C 3233, 2014 U.S. Dist. LEXIS 80790, at *9 (N.D. Ill. June 12, 2014) (Holding that the defendant's admission that it failed to include specific language that "[its] failure to respond to an opt-out request within [thirty] (30) days is unlawful," provided evidence that the required opt-out notices on the faxes were insufficient as a matter of law.); *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-cv-05061, 2018 U.S. Dist. LEXIS 102211, at *22-23 (D.S.C. June 19, 2018) ("Defendants admit that Amsterdam's opt-out notice did not [explicitly] state that 'failure to comply within thirty (30) days of the request is unlawful.' Therefore, Defendants have admitted that the faxes' opt-out notices are insufficient as a matter of law.") (internal citations omitted).

Practically, the adoption of eFinancial's substantial compliance theory would inevitably result in endless litigation as to how close to complying with the FCC's requirements a telemarketer must come to avoid liability and ensure that consumers are fully informed of their rights or what they are agreeing to. Telemarketers would be left to guess, and courts would be left to sort out, how close the information

provided in the disclosure must come to what is required to comply with the actual requirements and enjoy the benefit of engaging in what would otherwise be unlawful telemarketing activity. The very purpose of the FCC's strictly construed PEWC requirements, and the reason that the FCC did not afford telemarketers the flexibility to include substantially similar disclosures, and instead mandated what disclosures "shall" be included in the written agreement, was to avoid these issues by providing telemarketers with certainty as to the specific information that must be included in the required disclosures and to ensure that consumers were fully informed as to what they were agreeing to before being bombarded with telemarketing calls and text messages.[10]

[10] The present situation is a prime example of why the FCC's mandated disclosures must be used, and why telemarketers cannot be permitted to disguise the fact that they are seeking consent for telemarketing calls and text messages by using more benign language. Here, eFinancial's purported fine print disclosure states that Borden and the putative class are agreeing to receive "offers of insurance." But what exactly are offers of insurance? Are they insurance quotes? Do they only include communications that provide consumers with detailed insurance offers and the ability to accept such offers, or do they include the broad, non-specific telemarking text messages that were sent in this case, which included no terms, prices, payment options, or actual offers? Merriam-Webster defines an "offer" as "a presenting of something for acceptance," yet not a single one of the eFinancial Text Message Advertisements presented anything for acceptance. *See Offer* (noun), Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/offer (last visited June 22, 2021). It is the unavoidable existence of these intractable questions that moved the FCC to provide telemarketers and consumers with clear instructions regarding the content and form of the specific disclosures to include, and to unequivocally require full compliance with those instructions; instructions that were not followed by eFinancial here.

In support of its argument that eFinancial made this required disclosure, despite not using the language mandated by the FCC, eFinancial cited to one, non-binding district court case in its briefing in the District Court – *Lundbom v. Schwan's Home Serv., Inc.*, No. 3:18-cv-02187, 2020 U.S. Dist. LEXIS 91577 (D. Or. May 26, 2020) – in which the court finds that the defendant adequately made the required "telemarketing" disclosure because "[t]he parties agree that the words 'advertisement' or 'telemarketing' need not be used verbatim in a disclosure to satisfy the "express written consent" standard." *Id.* at *14. As noted above, however, this finding runs contrary to nearly a decade's worth of FCC regulation, clarification and interpretation, and, unsurprisingly, fails to find any relevant or applicable support in case law that upholds its novel interpretation of the clearly stated PEWC requirements.[11]

[11] While *Lundbom* does cites to two cases in arguable support of its holding - *Winner v. Kohl's Dept. Stores, Inc.*, No.-16-1541, 2017 U.S. Dist. LEXIS 131225, 2017 WL 3535038, at *7 (E.D. Pa. Aug. 17, 2017) and *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1101 (11th Cir. 2019) – both cases are in fact inapplicable to the question at hand. In *Winner,* the text messages at issue were issued prior to the issuance of the 2015 TCPA Order, and therefore the same analysis does not apply. *See Winner*, 2017 U.S. Dist. LEXIS 131225, at *24 ("Plaintiffs' reliance on the FCC 2015 Order is misplaced because the events in this case occurred before that Order was promulgated"). Similarly, *Gorss Motels, Inc.* only involves the issue of "prior express consent," as opposed to PEWC, which is a completely different standard, and much more easily obtained. 931 F.3d at 1101. Moreover, both cases are completely devoid of any discussion of the relevant full compliance standard, and neither party had briefed the issue in the underlying papers. The order was properly appealed to the Ninth Circuit and would likely have been reversed in light of the

As such, because eFinancial did not fully comply with the requirements of 47 C.F.R. § 64.1200(f)(8)(i), as there exists no agreement containing the required "telemarketing" authorization information in its disclosure, eFinancial will not be able to establish the existence of PEWC, should not be afforded the benefit of PEWC's affirmative defense, and should not be shielded from engaging in otherwise illegal telemarketing.

3. There was no way for Borden to continue with his website-initiated purchase of life insurance without entering into eFinancial's purported PEWC agreement.

As a final, additional basis for rejecting eFinancial's PEWC defense, eFinancial failed to obtain Borden's or the members of the putative class's PEWC because their ability to continue with their website-initiated purchase of life insurance was entirely conditioned on them signing eFinancial's purported PEWC agreement, in direct violation of 47 C.F.R. § 64.1200(f)(8)(i)(B).

In order for a telemarketer to establish a PEWC affirmative defense pursuant to 47 C.F.R. § 64.1200(f)(8)(i)(B), it must, among other things, have evidence of a written agreement that includes a clear and conspicuous disclosure informing the person signing that the person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement, as a condition of purchasing

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plethora of case law discussed herein, but the appellate court was never given a chance to address the issues, as the case was resolved and dismissed prior to briefing.

any property, goods, or services. As previously noted, the inclusion of this disclosure is mandatory, but merely including it is insufficient if it is not truthful (or if it is illusory). *See In re Lyft, Inc.*, 2015 FCC LEXIS 2508 at *13. In other words, it is not good enough that eFinancial simply include the language that is required by 47 C.F.R. § 64.1200(f)(8)(i)(B); it must be actually be possible for a consumer to continue with their purchase without agreeing to receive telemarketing messages and provide their PEWC. *See id.* ("[B]ecause the opt-out disclosure Lyft provides in the Terms of Service is illusory in nature, we find that Lyft fails to provide a clear and conspicuous disclosure informing the consumer of his or her right to refuse to consent to receive telemarketing or advertising messages.").

eFinancial has failed to satisfy this requirement, as its relevant disclosure language is illusory and fails to comply with the FCC's mandate. As outlined above, there was simply no way for Borden to continue his website-initiated purchase of life insurance without clicking the button that states "Next, your rates," and purportedly agreeing to receive telemarketing messages from eFinancial. There is no check box to decline to agree to the terms contained in the fine print, and simply no other mechanism for Borden or any other consumer to proceed with their website-initiated purchase of life insurance without signing eFinancial's purported PEWC agreement and agreeing to receive an avalanche of unwanted telemarketing messages.

eFinancial's only stated defense for its failure to allow Borden and others to continue with their website-initiated purchase of insurance without agreeing to receive unlimited telemarketing messages – as is clearly required – is that "[a] business like eFinancial [only needs] to provide [an] alternative means of purchase" in order to comply with this mandate and did so by providing a phone number to call. Again, eFinancial provides no support from either the FCC or case law to support this novel "alternative means of purchase" rule of law, nor does it comply with the plain language of the relevant requirement.

In addition to an absence of legal or textual support for its "alternative means" standard, eFinancial also provided no factual basis whatsoever to conclude that eFinancial's telephone-initiated alternative would have provided the Borden with an equivalent product and/or purchasing experience, nor could it at this stage of the proceedings. There was a reason that Borden was looking for website-initiated insurance quotes and not calling live insurance agents – they are completely different experiences and often offer different products and/or pricing. While website-initiated purchases of insurance often provide concrete and transparent pricing offers, a lack of time constraints, and the absence of pressure sales tactics, calls to live insurance agents instead often involve significant additional time (whether due to automated prompts, hold times, or having to relay the same information to multiple representatives); potential costs associated with calling plans; not having

unlimited time to review the options; potential pressure from sales agents, and the possibility of being unable to make a purchase because of diminished hours of operation and availability. [12]

In the end, eFinancial simply cannot meet its burden to establish that Borden would have been offered the same product, at the same price, in the same manner as he was attempting to do, unless he agreed to eFinancial's purported PEWC agreement and the transmission of unlimited telemarketing messages. As such, eFinancial's purported disclosure is "illusory in nature," and fails to comply with the mandates of 47 C.F.R. § 64.1200(f)(8)(i)(B).

[12] Consider eFinancial's argument with regards to a more concrete product. A consumer enters a retail store with the intention of pricing and potentially buying a microwave. The consumer speaks to a sales clerk, and answers all the sales clerk's questions designed to determine the best microwave options to provide the customer. Suddenly, the sales clerk stops and informs the consumer that, actually, if the consumer wants to hear any of the answers to his questions, or actually purchase one of the microwaves in-store, they have to sign a written agreement and agree to receive unlimited telemarketing messages. If the consumer doesn't want to receive unlimited telemarketing messages, their only recourse is to leave the store, go home, and call a phone number to speak to a different sales representative and answer all of that sales representative's questions, despite already having answered a series of questions for the sales clerk. Meanwhile, the sales clerk makes no promises with respect to the types of microwaves that will be available through a phone purchase, whether they are the same, whether there are pricing differences, or if there are other options only available in-store. This, like eFinancial's purported "alternative means" option, is a clear example of the type of illusory statement rejected by the FCC.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for discovery and consideration of Plaintiff's claims on the merits.

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