HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

DAVID BORDEN, individually, and on behalf of all others similarly situated, Plaintiff, v. EFINANCIAL, LLC, a Washington Limited Liability Company, Defendant.	Case No. 2:19-cv-01430-JLR PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT NOTE ON MOTION CALENDAR: July 23, 2021

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24
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26
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 4

A. Plaintiff's Second Amended Complaint Sufficiently Alleges that Defendant Used an ATDS 4

1. *Duguid*'s holding revolves entirely on an ATDS's capacity to "store" or "produce" telephone numbers for dialing, irrespective of how those numbers were obtained or generated. 4

2. *Duguid* explicitly confirms that an ATDS can be used in conjunction with a stored list of telephone numbers. 5

3. Unlike Facebook, Defendant used a random or sequential number generator to determine the order in which to produce and dial numbers, satisfying *Duguid*. 9

B. Defendant did not Obtain Plaintiff and the Putative Class's Prior Express Written Consent to Send Telemarketing Text Messages 13

1. Defendant's purported fine print disclosures were not clear and conspicuous 16

2. Defendant's purported fine print disclosures did not inform Plaintiff and the Putative Class that they were agreeing to the receipt of telemarketing. 19

3. There was no way for Plaintiff and the Putative Class to continue with Their website-initiated purchase of life insurance without entering into Defendant's purported PEWC agreement. 24

III. CONCLUSION 26

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TABLE OF AUTHORITIES

PAGE(S)

CASES

Aussieker v. Lee,
No. 2:19-cv-00365, 2021 U.S. Dist. LEXIS 19969 (E.D. Cal. Feb. 2, 2021)....................14

Barrera v. Guaranteed Rate, Inc.,
No. 17-cv-5668, 2017 U.S. Dist. LEXIS 175223 (N.D. Ill. Oct. 23, 2017) ....*passim*

Berman v. Freedom Fin. Network, LLC,
No. 18-cv-01060, 2019 U.S. Dist. LEXIS 150810 (N.D. Cal. Sep. 4, 2019)......................13

Brodsky v. HumanaDental Ins. Co.,
No. 10 C 3233, 2014 U.S. Dist. LEXIS 80790 (N.D. Ill. June 12, 2014)..........................22

Carl v. First Nat'l Bank,
No. 2:19-cv-504, 2021 U.S. Dist. LEXIS 111889 (D. Me. June 15, 2021)..........................8

Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.,
No. 3:15-cv-05061, 2018 U.S. Dist. LEXIS 102211 (D.S.C. June 19, 2018) 22

Davies v. W.W. Grainger, Inc.,
No. 13-cv-03546, 2016 U.S. Dist. LEXIS 160767 (N.D. Ill. Nov. 21, 2016)....................19

Drug Reform Coordination Network, Inc. v. Grey House Publ'g., Inc.,
106 F. Supp. 3d 9, 16 (D.D.C. 2015) 21

Evans v. Portfolio Recovery Assocs., LLC,
889 F.3d 337, 346 (7th Cir. 2018)..12

Facebook Inc. v. Duguid,
141 S. Ct. 1163 (2021).. *passim*

Gary v. Trueblue, Inc.,
346 F. Supp. 3d 1040, 1042 (E.D. Mich. 2018)...14

Geraci v. Red Robin Int'l, Inc.,
2020 WL 2309559 (D. Colo. Feb. 28. 2020)) 7

Gorss Motels, Inc. v. Safemark Sys.,
931 F.3d 1094, 1101 (11th Cir. 2019) 23

In re Lyft, Inc.,
30 FCC Rcd 9858, 2015 FCC LEXIS 2508 (Sept. 11, 2015) 14, 24, 25

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In re Rules Implementing the TCP Act of 1991 et al.,
29 FCC Rcd 13998, 2014 FCC LEXIS 4445 (F.C.C. October 30, 2014)....21

In re Rules & Regulations Implementing the TCP Act of 1991 et al.,
30 FCC Rcd 7961, 2015 FCC LEXIS 1586 (F.C.C. July 10, 2015) 15

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,
31 FCC Rcd 11643, 2016 FCC LEXIS 3437 (F.C.C. October 14, 2016)....15

Larson v. Harman Mgmt. Corp.,
No. 1:16-cv-00219, 2016 U.S. Dist. LEXIS 149267 (E.D. Cal. Oct. 26, 2016) 14, 15

Lennartson v. Papa Murphy's Holdings, Inc.,
No. C15-5307, 2016 U.S. Dist. LEXIS 725 (W.D. Wash. Jan. 5, 2016)....15

Lundbom v. Schwan's Home Serv., Inc.,
No. 3:18-cv-02187, 2020 U.S. Dist. LEXIS 91577 (D. Or. May 26, 2020)....23

Marks v. Crunch San Diego, LLC,
904 F.3d 1041 (9th Cir. 2018)....10

Montanez v. Future Vision Brain Bank,
No. 20-cv-02959, 2021 U.S. Dist. LEXIS 67091 (D. Colo. Apr. 7, 2021)....6, 7

Montanez v. Future Vision Brain Bank,
No. 20-cv-02959, 2021 U.S. Dist. LEXIS 82055 (D. Colo. Apr. 29, 2021)....6, 7

Sullivan v. All Web Leads, Inc,
No. 17 C 1307, 2017 U.S. Dist. LEXIS 84232 (N.D. Ill. June 1, 2017)....*passim*

Timms v. USAA Fed. Sav. Bank,
No. 3:18-cv-01495, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021) 8, 9

Van Patten v. Vertical Fitness Grp.,
847 F.3d 1037 (9th Cir. 2017)....13

Williams v. PillPack LLC,
No. C19-5282, 2021 U.S. Dist. LEXIS 27496 (W.D. Wash. Feb. 12, 2021) 13, 14

Winner v. Kohl's Dept. Stores, Inc.,
No.-16-1541, 2017 U.S. Dist. LEXIS 131225 (E.D. Pa. Aug. 17, 2017)....23

STATUTES AND OTHER AUTHORITIES

47 U.S.C.S. § 227 *et. seq.*....4

47 C.F.R. § 64.1200....*passim*

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I. INTRODUCTION

Before delving fully into the textual cannons of statutory construction and interpretation and federal regulations that govern the legal claims in this matter, it is important to first clarify the conduct that actually underlies this case, and how vastly different that conduct is from the conduct underlying *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), and other cases relied on by Defendant.

At its factual core, this case is about a sophisticated, mass text message advertising campaign, in which Defendant attempted – unsuccessfully - to surreptitiously obtain consent from individuals looking to make a website-initiated purchase of life insurance, for the sole purpose of bombarding them with generic text message advertisements, through the use of an advanced mass texting platform that utilizes a sequential number generator. *See* Second Amended Complaint ("SAC") at pp. 2-17. This mass telemarketing campaign could not be any more dissimilar to the targeted "notification system" challenged in *Duguid*, and explicitly violates the TCPA under *Duguid*'s newly announced standard.

In its Motion to Dismiss Second Amended Complaint ("Motion"), Defendant attempts to avoid liability for this intrusive conduct, advancing only two discrete theories: (1) Plaintiff 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 Plaintiff does plausibly allege use of an ATDS, Plaintiff provided "his prior express [written] consent to receive text messages from eFinancial." Motion at 1, 5, 19-20. However, neither of these positions are supported by the Supreme Court's recent opinion or the statutory and regulatory text of the TCPA, and Defendant's attempts to avoid liability for its conduct should be rejected.

With regards to Plaintiff's allegations concerning Defendant's use of an ATDS under the new *Duguid* standard, Defendant simply ignores the comprehensive statutory construction and analysis performed by *Duguid*, and instead attempts to convince this Court that *Duguid* is somehow

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1 a case about "stored lists" – without any textual support whatsoever – and that this Court should
2 focus solely on how the telephone numbers that it bombarded with telemarketing messages were
3 "obtained" or "generated," rather than, as the Supreme Court clearly dictated, how such numbers
4 were "stored" or "produced" for calling. *Duguid*, 141 S. Ct. at 1167 ("To qualify as an [ATDS], a
5 device must have the capacity either to store a telephone number using a random or sequential
6 generator, or to produce a telephone number using a random or sequential number generator.")
7
8 (emphasis added).

9 Contrary to Defendant's singular focus on "stored lists", the one and only place in which
10 the *Duguid* court actually addresses the issue of a "stored list" is an explicit recognition by the Court
11 that an ATDS can, in fact, be used in conjunction with a stored list of telephone numbers where,
12 as here, the equipment is used to randomly or sequentially determine the order in which to
13 "produce" and then dial the numbers from that list, irrespective of how those numbers are obtained
14 and/or generated. *Id.* at 1172 n.7 ("For instance, an autodialer might use a random number
15
16 generator to determine the order in which to pick phone numbers from a preproduced list. It
17 would then store those numbers to be dialed at a later time.").

18 With respect to Defendant's argument that Plaintiff provided his Prior Express Written
19 Consent ("PEWC") to receive telemarking messages, Defendant similarly ignores the clear
20 mandates issued by the FCC, and affirmed by the courts cited herein, that significantly limit the
21 breadth of the PEWC affirmative defense, which operates to insulate a party from liability for what
22 otherwise would be unlawful telemarking activity. In an effort to avoid forcing courts from having
23 to engage in the highly factual, case-by-case determinations of "how close" a telemarketer came to
24 complying with the FCC's requirements (an endeavor the Defendant suggests this Court do here),
25
26 these mandates instead require "**full compliance**" with the requirements of 47 C.F.R. §
27 64.1200(f)(8), and the FCC has found that where full compliance is required, substantial compliance

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is simply insufficient. Here, Plaintiff clearly alleges that Defendant failed to fully comply with the PEWC requirements because: 1) Defendant's purported fine print disclosures were not clear and conspicuous; 2) Defendant's purported fine print disclosures did not inform Plaintiff and the putative class that they were agreeing to the receipt of telemarketing; and 3) Plaintiff and the putative class cannot make their website-initiated purchase of life insurance without entering into the purported agreement.

Defendant's Motion fails to establish that Defendant fully complied with each of these requirements, and as such, Defendant's purported PEWC defense should similarly be rejected. *See, e.g., Barrera v. Guaranteed Rate, Inc.*, No. 17-cv-5668, 2017 U.S. Dist. LEXIS 175223, at *7-8 (N.D. Ill. Oct. 23, 2017) (rejecting defendant's PEWC defense on an MTD based on plaintiff's allegations that "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."); *Sullivan v. All Web Leads, Inc.*, No. 17 C 1307, 2017 U.S. Dist. LEXIS 84232 at *18-22 (N.D. Ill. June 1, 2017) (similarly rejecting a PEWC defense on an MTD, finding that plaintiff's allegations regarding the size of the fine print, as well as its orientation within the context of the page "does not as a matter of law establish reasonable notice of the terms … let alone a disclosure that was 'clear and conspicuous' … [t]hus, [defendant] has not made a legal showing based on the complaint's allegations that it effectively procured [plaintiff]'s prior express written consent.").

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II. ARGUMENT

A. Plaintiff's Second Amended Complaint Sufficiently Alleges that Defendant Used an ATDS

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

Throughout Defendant's sparse explanation of the background and logic of *Duguid*'s holding, Defendant repeatedly frames the crucial question answered by the Court as whether an ATDS can ever be used to call telephone numbers from a "stored list," or if an ATDS must instead randomly or sequentially generate (i.e., compile telephone numbers using strings of random or sequential numbers) each telephone number called or texted. *See, e.g.,* Motion at 1 ("[I]n [*Duguid*], the Supreme Court has confirmed that a plaintiff cannot state a claim for violation of the [ATDS] provision of the [TCPA] by alleging that his phone number was called from a stored list. Instead, a plaintiff must allege that his phone number was randomly or sequentially generated."). This question of "stored list" vs "telephone number generation," however, was not the question that was presented to the *Duguid* court, nor does it constitute *Duguid*'s rationale or ultimate holding.

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). *Duguid* then plainly sets out the actual dispute before the Court, 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.*

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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.* Similarly, the ultimate question before this Court is not, as Defendant suggests, whether Defendant generated the telephone numbers it called or obtained them from a preproduced list, but whether Defendant used a random or sequential number generator to "store" or "produce" those telephone numbers to be called. And, as demonstrated herein and as supported by Plaintiff's allegations in his SAC, it certainly did.

2. *Duguid* explicitly confirms that an ATDS can be used in conjunction with a stored list of telephone numbers.

To answer the question of whether Facebook used a random or sequential number generator to "store" or "produce" telephone numbers, *Duigid* first had to clarify how a random or sequential number generator can be used to "store" or "produce" telephone numbers to be called, and what those specific functions can 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"), the *Duguid* court provides several examples of how a random or sequential number generator can be used to "store" and "produce" telephone numbers to be called. *Id.*, *citing* PACE Brief at 15-21. One such example, as pointed out by Defendant, is when the random or sequential number generator is used to "produce" telephone numbers by generating them randomly or sequentially from within a defined number range. *See* PACE Brief at 17 ("the dialer [ ] generates a sequence of telephone numbers within a specific range, which are stored into an array in memory.").

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Defendant's analysis simply stops there, and Defendant asks this Court to conclude that random or sequential number generation is inherently required under *Duguid* in order to qualify as an ATDS. To the contrary, random or sequential number generation is not an inherent requirement, but rather, one example, among others, of random or sequential number production. *Duguid* explicitly recognizes and cites to other 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 "to determine the order in which to pick phone numbers from a preproduced list." *Duguid*, 141 S. Ct. at 1172, n.7. In this example, a random or sequential number generator is used to "produce" a telephone number, or, in other words, to "select, retrieve, and provide [a] number from memory" for dialing, regardless of whether those telephone numbers in memory were generated or, as here, otherwise previously obtained. *See* PACE Brief at 21. Notably, this example of the "produce" function still often includes the number generation feature insisted upon by Defendant, albeit, not to generate telephone numbers, but rather to generate identification numbers that are linked to telephone numbers. *Id.* at 17-21. The example discussed in the PACE Brief cited by the Court, for example, explicitly explained that a random or sequential number generator can determine 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.

Indeed, in the sole post-*Duguid* case cited by Defendant in its Motion – *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* Motion at 13 (citing *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. Future Vision Brain Bank, LLC*, No. 20-cv-02959, 2021 U.S. Dist.

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LEXIS 82055 (D. Colo. Apr. 29, 2021).[1] 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).[2]

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*

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[1] Defendant's Motion includes a pinpoint citation to a quote from the *Montanez R&R*, but incorrectly cites to the District Court's Order adopting the Report and Recommendation. *See* Motion at 9.

[2] Inexplicably, Defendant's Motion inserts the word "telephone" before the word "numbers" in its quote from *Montanez*, when the plaintiff in that case in fact alleged that identifying numbers that correspond to telephone numbers, and not telephone numbers themselves, were generated in sequential order. *See* Motion at 9 *compare with Montanez R&R* at *18 ("[T]he Platform automatically retrieved each telephone number from a list of numbers in a sequential order, generated each number in the sequential order listed, combined each number with the specific content of Defendant's message to create individual 'packets,' and transmitted each packet in a sequential order.").

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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 Defendant did here.

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 numbers, there are other post-*Duguid* cases that fall into the same trap as Defendant, conflating the "use" of a random or sequential generator to store or produce numbers, as explained by *Duguid*, with the act of number generation. *Compare 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.'") *with Timms v. USAA Fed. Sav. Bank*, No. 3:18-cv-01495, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021).

In *Timms*, for example, a South Carolina district court found that the defendant's system was not an ATDS because it was "capable of making telephone calls only to specific telephone numbers from dialing lists created and loaded by Defendant." *Timms*, 2021 U.S. Dist. LEXIS

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1 108083 at *17. While the *Timms* court correctly notes that the *Duguid* court and the PACE Brief
2 detail a manner in which a random or sequential number generator can be used to determine the
3 order in which to pick phone numbers from a preproduced list, it nonetheless finds that the
4 preproduced list must contain randomly or sequentially generated telephone numbers that were
5 generated by the defendant's system. *Id.* This finding, however, is based on a misreading of the
6 PACE Brief and the system it describes. While it is true that in the relevant patent example
7 discussed in the PACE Brief, the preproduced list of telephone numbers is generated by the same
8 system, the PACE Brief also explicitly notes that while that fact happens to be true in the example
9 provided, it is by no means mandated, and the functions of "dialing sequentially generated
10 numbers" and "the sequential processing/dialing of telephone numbers in a list," are identifiably
11 separate and discrete functions of an ATDS. *See* PACE Brief at 18, n.4.
12
13 **3. Unlike Facebook, Defendant used a random or sequential number generator to determine the order in which to produce and dial numbers, satisfying *Duguid*.**
14
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16 Having determined that a device qualifies as an ATDS if it has the capacity either to store
17 a telephone number using a random or sequential generator, or to produce a telephone number
18 using a random or sequential number generator, *Duguid* ultimately finds that Facebook's targeted,
19 individualized notification system does not qualify. *Duguid*, 141 S. Ct. at 1169. Again ignoring the
20 comprehensive statutory construction and factual analysis performed by the *Duguid* court,
21 Defendant baldly asserts that this finding was "because the Plaintiff did not allege that his phone
22 number was randomly or sequentially generated." Motion at 7. The fact that Defendant cannot
23 provide a citation for such a claim is unsurprising, as nowhere in the *Duguid* decision does the Court
24 state, or even imply, that the plaintiff's claims were dismissed because of anything having to do
25 with the generation or origin of the telephone numbers ultimately called.
26
27 Instead, *Duguid* plainly held that "[b]ecause Facebook's notification system neither stores

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nor produces numbers 'using a random or sequential number generator,' it is not an [ATDS]." *Duguid*, 141 S. Ct. at 1169. Consistent with the *Duguid* court'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 did not "produce" telephone numbers for dialing by generating them randomly or sequentially, nor did it "produce" telephone numbers from a stored list by selecting them or retrieving them in a random or sequential order to be dialed. *Id.* at 1168-69. In other words, the Court found that because the targeted, individualized Facebook text messages were not sent in any order, random or sequential, but rather were sent 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, under any recognized meaning of the word "produce," and thus an ATDS was not used. *Id.* at 1167-1173. By carefully interpreting and applying the specific language used by Congress in the TCPA, *Duguid* operates 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 the Ninth Circuit's expansive definition of an ATDS,[3] 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 dialed, as was done here.

Put simply, the sophisticated text message advertising campaign conducted by Defendant is a completely different ballgame. Unlike Facebook's targeted, individualized text messages, sent not in any random or sequential order, but only in response to a specific occurrence (the potentially unauthorized access to a specific user account), Plaintiff here has instead alleged that each eFinancial Insurance Text Message Advertisement was sent in an adjustable but predetermined

[3] *See Marks v. Crunch San Diego, LLC,* 904 F. 3d 1041 (9th Cir. 2018).

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p: 206.489.3802 | f: 206.973.8737

sequential order, based on the number of days since the lead form was initially completed ("eFinancial Mass Text Advertisement Sequential Order"). *See* SAC at ¶¶ 34-37. In sending these advertisements, Defendant used a random or sequential number generator to store and subsequently produce (i.e., select, retrieve, and/or provide the number from memory) Plaintiff and the putative class's telephone numbers for dialing. *Id.* Specifically, and as explicitly envisioned by *Duguid* and *Montanez*, Defendant then used this sequential number generator to determine the order in which to pick the telephone numbers to be dialed from Defendant's database. *Id.* Further, and contrary to Defendant's assertion that such allegations are "unfounded," limited discovery provided to date has also demonstrated that the sequential number generator utilized by Defendant 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 Defendant's database, in order to determine the sequential order that those telephone numbers would be dialed. *Id.* at ¶ 49.

In sum, Defendant's sophisticated telemarketing system shares almost no similarities to the targeted notification system operated by Facebook and is instead exactly the type of list-based ATDS discussed by the *Duguid* court and fully explained by the PACE Brief. 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 Plaintiff's SAC, Defendant's mass telemarketing system is not simply "any equipment that merely stores and dials telephone numbers," 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 Defendant's database for dialing, and to generate sequential numbers that are used to point to corresponding telephone numbers from

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155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

1 Defendant's database, for purposes of determining the random or sequential order in which they
2 would be dialed. *See* SAC at ¶¶ 34-37. Defendant cannot plausibly argue that any ordinary cell
3 phone has such extensive capabilities.

4 Rather, it is Defendant's cramped "no lists" standard that leads to an absurd result when
5 taken to its logical conclusion. For instance, according to Defendant's rationale, a telemarketer
6 could obtain or purchase a list of every single telephone number in a specific geographic area, and
7 then use a random or sequential number generator to determine the order in which to randomly
8 or sequentially dial each and every number in that geographic area in the context of a mass
9 telemarketing campaign, and then in fact randomly or sequentially dial such numbers – and this
10 conduct would not violate the TCPA, simply because, according to Defendant, the telephone
11 numbers themselves were not generated by Defendant's system. This result would allow for
12 telemarketers to act with reckless abandon and would result in exactly the type of intrusive conduct
13 the TCPA was designed to prevent. *See Duguid*, 141 S. Ct. at 1167 ("This case concerns [ATDS]'s,
14 which revolutionized telemarketing by allowing companies to dial random or sequential blocks of
15 telephone numbers automatically.").[4] In the end, this broad loophole suggested by Defendant was
16 neither stated nor intended by the Supreme Court in *Duguid*, is inapposite to *Duguid*'s statutory
17 construction and interpretation of the TCPA's definition of an ATDS, and should not be adopted
18 by this Court.

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23 [4] Moreover, common sense (and the most basic principles of judicial interpretation) dictates that if the *Duguid* Court had intended to exclude from the definition of an ATDS any system that utilizes
24 a stored list of 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
25 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.").
26 It did not, and instead provided an explicit example of how a random or sequential number generator can, in fact, be used to determine the order for dialing telephone numbers on a
27 preproduced list, that is in no way dependent on the where or how those telephone numbers originated.

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p: 206.489.3802 | f: 206.973.8737

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B. Defendant did not Obtain Plaintiff and the Putative Class's Prior Express Written Consent to Send Telemarketing Text Messages

Defendant alternatively argues that even if this Court determines that Plaintiff has adequately alleged the use of an ATDS, Plaintiff's claims must be dismissed because "Plaintiff gave his prior express consent to receive text messages from eFinancial." Motion at 1. Despite this, Defendant fails to ever put forth a conclusive definition of prior express written consent ("PEWC"), or even lay out the relevant showings that Defendant must make to establish that it has obtained Plaintiff's and the Putative Class's PEWC to send telemarketing text messages.

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 Defendant to establish that it obtained PEWC from Plaintiff 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);[5] *Williams v. PillPack LLC*, No. C19-5282, 2021 U.S. Dist. LEXIS

[5] 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), Plaintiff will continue to reference 47 C.F.R. § 64.1200(f)(8) to try to avoid confusion.

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155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

1 27496, at *15 (W.D. Wash. Feb. 12, 2021); *Aussieker v. Lee*, No. 2:19-cv-00365, 2021 U.S. Dist.
2 LEXIS 19969, at *11 n.7 (E.D. Cal. Feb. 2, 2021)("If a call or text message contains advertising or
3 is telemarketing, the sender must have secured, prior to sending the message or making the call,
4 the signature of the recipient in a written agreement that includes several specified disclosures.").
5
6 Moreover, the mere existence of the disclosure is not enough, as it must not only be "clear
7 and conspicuous," it also must be truthful, insomuch as the telemarketer must actually not require
8 the person signing to sign the agreement (directly or indirectly), or agree to enter into such an
9 agreement, as a condition of purchasing any property, goods, or services. *See, e.g., In re Lyft, Inc.*, 30
10 FCC Rcd 9858, 9862, 2015 FCC LEXIS 2508, *13, 63 Comm. Reg. (P & F) 728 (Sept. 11, 2015)
11 (holding that merely including the disclosure in 47 C.F.R. § 64.1200(f)(8)(i)(B) is insufficient; it
12 must actually be truthful, and not illusory).
13
14 These clear mandates, designed to ensure consumers are fully informed before they provide
15 consent to be bombarded with telemarketing calls and text messages, and conversely, to give
16 telemarketers clarity as to the type and form of the consent they must obtain before engaging in
17 otherwise unlawful telemarketing, came in direct response to the endless calls, letters, and emails
18 that the FCC had been inundated with reflecting the disdain Americans have for telemarketing.
19 *See, e.g., Larson v. Harman Mgmt. Corp.*, No. 1:16-cv-00219, 2016 U.S. Dist. LEXIS 149267, at *7-8
20 (E.D. Cal. Oct. 26, 2016) ("In 2012, the FCC revised its position in response to 'the volume of
21 consumer complaints we continue to receive concerning unwanted, telemarketing robocalls.'")
22 (citing 2012 TCPA Order at 1838); *Gary v. Trueblue, Inc.*, 346 F. Supp. 3d 1040, 1042 (E.D. Mich.
23 2018) ("Congress enacted the TCPA in response to consumer complaints about unwanted calls
24 and text messages from telemarketers.") (citations omitted). Therefore, the PEWC affirmative
25 defense is only available when its mandates are strictly adhered to, and the FCC, to avoid any
26 potential ambiguity, has repeatedly stated that **full compliance** with the PEWC requirements –
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p: 206.489.3802 | f: 206.973.8737

1 first issued almost a decade ago in 2012 – is required and anything less – the alleged "substantial
2 compliance" suggested by Defendant – does not qualify. The FCC has made this abundantly clear
3 by rejecting all waiver requests or exemptions from the full compliance requirement since October
4 7, 2015.[6]

5

6 Simply put, if a telemarketer fails to establish that the language used is clear and
7 conspicuous, or if Defendant fails to include any of the required information in the mandatory
8 disclosures, no PEWC has been obtained, the telemarketer is not afforded the affirmative defense,
9 and the unlawful activity remains unlawful. *See e.g., Lennartson v. Papa Murphy's Holdings, Inc.*, No.
10 C15-5307, 2016 U.S. Dist. LEXIS 725, at **4-5 (W.D. Wash. Jan. 5, 2016) ("To be sufficient, the
11 consent had to meet the definitional requirements of 'prior express written consent' that the FCC's
12 2012 Order had outlined and had given telemarketers nearly two years to meet.") (citations
13 omitted); *Larson,* 2016 U.S. Dist. LEXIS 149267, at *10-12 (finding that a disclosure that did not
14 "clearly authorize[] defendants to deliver advertisements or telemarketing messages using an
15 automatic telephone dialing system" failed to "establish the existence of a 'prior express written
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18 [6] In 2015, after certain petitioners requested a waiver of the PEWC requirements, the FCC extended
19 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. §
20 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
21 "substantial 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
22 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 … .")
23 (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
24 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
25 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,
26 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
27 warranted Commission enforcement and TCPA liability.") (emphasis added).

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p: 206.489.3802 | f: 206.973.8737

consent' as that term is defined by the FCC's regulation.") (emphasis added).

Here, Plaintiff's SAC clearly alleges that Defendant failed to fully comply with the PEWC requirements because: 1) Defendant's purported disclosures were not clear and conspicuous; 2) Defendant's purported disclosures did not inform Plaintiff and the putative class that they were agreeing to the receipt of telemarketing; and 3) Plaintiff and the putative class cannot make their website-initiated purchase of life insurance without entering into the purported agreement. Defendant's Motion fails to establish that Defendant fully complied with each of these requirements, and as such, its purported PEWC defense should be rejected.[7]

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

First, Defendant failed to obtain Plaintiff'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,* 2017 U.S. Dist. LEXIS 175223, at *5 (citing 47 C.F.R. § 64.1200(f)(3)). While Defendant contends that its disclosures meet this "clear and conspicuous" standard merely because "they appeared directly below the 'next,

[7] In his SAC, Plaintiff asserts that the purported agreement constituted a browsewrap agreement. Plaintiff acknowledges, however, that various courts have ascribed different definitions to what constitutes browsewrap, click-wrap, and hybrid agreements, and the agreement in question more likely qualifies as a hybrid agreement. Nonetheless, and regardless of how the purported agreement is described, Defendant's purported agreement plainly fails to meet the PEWC requirements and the clear and conspicuous standard, and, as such, Plaintiff will focus on that discussion for the purposes of this Response.

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p: 206.489.3802 | f: 206.973.8737

1 your rates' button," a review of the case law interpreting the clear and conspicuous standard
2 demonstrates that the proper analysis to be done is far more exacting.
3 In *Barrera*, for example, the court was presented with significantly similar circumstances as
4 here, and summarily denied the defendant's motion to dismiss on this basis. As here, the plaintiff
5 in *Barrera* went on the defendant's website in search of mortgage quotes and provided his phone
6 number as part of the process. *Id.* at *5-6. In order to proceed, the plaintiff had to click a button
7 that said, "Get your free quote." *Id.* As such, the Court concluded that the plaintiff had requested
8 a mortgage quote, and nothing more. *Id.* at *6.
9
10 Just as here, the *Barrera* defendant argued that it had included fine print disclosures on its
11 website, which it argued met the disclosure requirements of 47 C.F.R. § 64.1200(f)(8)(i), and that
12 by clicking the "Get your free quote" button, the plaintiff had provided his PEWC. *Id.* at *5-7.
13 The *Barrera* court rejected that argument, noting that, based on the allegations made by Plaintiff,
14 "the placement of the disclosures and the use of a tiny font made it unlikely that Plaintiff knew,
15 when he clicked on the quote button that he was actually opening the door to a barrage of
16 autodialed telemarketing calls to his cell phone." *Id.* at *7-*8. Ultimately, the court found these
17 allegations sufficient to state a claim that the defendant's disclosure was not clear or conspicuous,
18 and declined to dismiss the case based on the defendant's asserted PEWC affirmative defense. *See*
19 *id.* at *5 (The court agreed with the plaintiff that at the pleading stage, the defendant's "purported
20 consent agreement was deficient to authorize the calls.").
21
22 Similarly, in *Sullivan v. All Web Leads, Inc.*, another district court again denied a defendant's
23 motion to dismiss based on, among other things, the defendant's failure to obtain an agreement
24 that included a clear and conspicuous PEWC disclosure. *Sullivan*, 2017 U.S. Dist. LEXIS 84232,
25 at *16-22. In *Sullivan*, as here, the plaintiff visited a website to obtain quotes and potentially
26 purchase insurance. *Id.* at *1-4. As here, the *Sullivan* defendant argued that it had obtained the
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p: 206.489.3802 | f: 206.973.8737

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," Plaintiff clicked a button that stated "Next, your rates." Much like the *Barrera* and *Sullivan* defendants' failed arguments regarding PEWC, Defendant here has similarly argued that its fine print disclosures, appearing on that same page, automatically entitles it to a PEWC affirmative defense. *See* Motion at 2, 11-13. 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, Plaintiff here has

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155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

clearly alleged that, given the miniscule light grey font used by Defendant 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, Plaintiff was not put on notice that he was agreeing to anything other than continuing through Defendant's website-initiated purchase of life insurance process and proceeding to the quotes page. SAC at pp. 7, 24, Ex. 1; s*ee e.g., Sullivan*, 2017 U.S. Dist. LEXIS 84232, at *16-22; *Barrera*, 2017 U.S. Dist. LEXIS 175223, at *5.

Finally, while Plaintiff believes it has provided sufficient allegations to establish that Defendant'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. Defendant's purported fine print disclosures did not inform Plaintiff and the Putative Class that they were 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).

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p: 206.489.3802 | f: 206.973.8737

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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, Defendant plainly and admittedly 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 Defendant's purported fine print disclosures, on any of the buttons that Plaintiff had to press in order to continue his website-initiated purchase of life insurance, or, in fact, anywhere on the entirety of Defendant'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 Defendant's careful crafting of its purported disclosures to omit any mention of "telemarketing," despite the FCC's clear instruction. *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, Defendant contends that it nonetheless satisfied this PEWC requirement because its fine print disclosure states

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155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

1 "you consent to receive offers of insurance." Motion at 14. Without any support, Defendant then claims 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, however, 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 Defendant suggests – is demonstrably insufficient. *See In re Rules Implementing the TCP 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, Defendant'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],

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A Professional Limited Liability Company
155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

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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 Defendant'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 in order 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

DBS | LAW
A Professional Limited Liability Company
155 NE 100th Street, Suite 205 Seattle, WA 98125
p: 206.489.3802 | f: 206.973.8737

1 messages.[8]

2 In support of its argument that Defendant made this required disclosure, despite not using
3 the language mandated by the FCC, Defendant cites to one, non-binding district court case –
4 *Lundbom v. Schwan's Home Serv., Inc.*, No. 3:18-cv-02187, 2020 U.S. Dist. LEXIS 91577 (D. Or. May
5 26, 2020) – in which the court finds that the defendant adequately made the required
6 "telemarketing" disclosure because "[t]he parties agree that the words 'advertisement' or
7 'telemarketing' need not be used verbatim in a disclosure to satisfy the "express written consent"
8 standard." *Id.* at *14. As noted above, however, this finding runs contrary to nearly a decade's
9 worth of FCC regulation, clarification and interpretation, and, unsurprisingly, fails to find any
10 relevant or applicable support in case law that upholds its novel interpretation of the clearly stated
11 PEWC requirements.[9]

12
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14 [8] The present situation is a prime example of why the FCC's mandated disclosures must be used,
15 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, Defendant's purported
16 fine print disclosure states that Plaintiff 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
17 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
18 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
19 the eFinancial Text Message Advertisements presented anything for acceptance. *See Offer* (noun),
20 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
21 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
22 instructions; instructions that were not followed by Defendant here.

23 [9] While *Lundbom* does cites to two cases in arguable support of its holding - *Winner v. Kohl's Dept.*
24 *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
25 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
26 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").
27 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.

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As such, because Defendant 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, Defendant 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 Plaintiff and the Putative Class to continue with their website-initiated purchase of life insurance without entering into Defendant's purported PEWC agreement.

As a final, additional basis for rejecting Defendant's PEWC defense, Defendant failed to obtain Plaintiff'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 Defendant'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 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 Defendant simply include the language that is required by 47 C.F.R. § 64.1200(f)(8)(i)(B); <u>it must be actually be possible for a consumer to continue with their purchase without agreeing to</u>

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 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.

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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.").

Defendant 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 Plaintiff 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 Defendant. There is no check box to decline to agree to the terms contained in the fine print, and simply no other mechanism for Plaintiff or any other consumer to proceed with their website-initiated purchase of life insurance without signing Defendant's purported PEWC agreement and agreeing to receive an avalanche of unwanted telemarketing messages.

Defendant's only stated defense for its failure to allow Plaintiff 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, Defendant 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, Defendant also provides no factual basis whatsoever to conclude that Defendant's telephone-initiated alternative would have provided the Plaintiff with an equivalent product and/or purchasing experience, nor could it at this stage of the proceedings. There was a reason that Plaintiff was looking for website-initiated insurance quotes and not calling live insurance agents –

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1 they are completely different experiences and often offer different products and/or pricing. While
2 website-initiated purchases of insurance often provide concrete and transparent pricing offers, a
3 lack of time constraints, and the absence of pressure sales tactics, calls to live insurance agents
4 instead often involve significant additional time (whether due to automated prompts, hold times,
5 or having to relay the same information to multiple representatives); potential costs associated with
6 calling plans; not having unlimited time to review the options; potential pressure from sales agents,
7 and the possibility of being unable to make a purchase because of diminished hours of operation
8 and availability.

9

10 In the end, Defendant simply cannot meet its burden to establish that Plaintiff would have
11 been offered the same product, at the same price, in the same manner as he was attempting to do,
12 unless he agreed to Defendant's purported PEWC agreement and the transmission of unlimited
13 telemarketing messages.[10] As such, Defendant's purported disclosure is "illusory in nature," and
14 fails to comply with the mandates of 47 C.F.R. § 64.1200(f)(8)(i)(B).

15

16 **IV. <u>CONCLUSION</u>**

17 For all the above stated reasons, Plaintiff therefore respectfully requests that this
18 Honorable Court deny Defendant's Motion to Dismiss.

19

20 [10] Consider Defendant'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
21 to a sales clerk, and answers all the sales clerk's questions designed to determine the best microwave
22 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
23 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
24 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
25 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,
26 whether they are the same, whether there are pricing differences, or if there are other options only
27 available in-store. This, like Defendant's purported "alternative means" option, is a clear example of the type of illusory statement rejected by the FCC.

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1 DATED this 8th day of July, 2021.
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20 **CERTIFICATE OF SERVICE**

21 I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the
22 Court using the CM/ECF system, on this 8th day of July, 2021, which will send a notice of
23 electronic filing to all attorneys of record.
24
25 By *_/s/ Shawn A. Heller_*
Shawn A. Heller, Esq.
26
27