

January 27, 2022

United States Court of Appeals  
21400 United States Courthouse  
601 Market Street  
Philadelphia, PA 19106

RE: *Elizabeth Panzarella, et al v. Navient Solutions, Inc.*  
Third Circuit Case Number: 20-2371  
District Court Case Number: 2-18-cv-03735

Defendant-appellee Navient Solutions, LLC, formerly known as Navient Solutions, Inc. (“NSL”), responds to the two inquiries regarding *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), set forth in the Court’s letter dated January 20, 2022. Plaintiffs-appellants did not address *Facebook* at all in their Brief. Accordingly, to the extent that plaintiffs-appellants submit a response that exceeds the scope of the two inquiries, NSL objects because NSL would not have the opportunity to brief any additional argument raised by plaintiffs-appellants now.

***a. Whether “equipment” qualifies as an automatic telephone dialing system (“ATDS”) under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, et seq. (“TCPA”) as long as it has the mere “capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers,” 47 U.S.C. § 227(a)(1) (emphasis added), or whether, in light of Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021), it must actually generate random or sequential numbers and dial such numbers to qualify as an ATDS.***

In *Duguid*, the United States Supreme Court resolved a years’ long circuit split regarding whether the definition of ATDS was broad (so as to encompass stored lists of phone numbers) or narrow (encompassing only equipment that actually and presently generates random or sequential numbers and then dials them). The Supreme Court analyzed the canons of statutory construction and considered the many opinions issued by circuit and district courts around the nation, and held that the narrow interpretation was proper. It held: “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.” *Duguid*, 141 S. Ct. at 1170-1171 (emphasis added) (holding that Facebook’s equipment that used stored lists of phone numbers associated with accounts was not an ATDS). In other words, the ***potential*** capacity of a dialing system if reconfigured or used

differently is irrelevant. The Supreme Court reasoned: “Expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to . . . nuanced problems when Congress meant to use a scalpel.” *Duguid*, 141 S. Ct. at 1171. In fact, according to the Supreme Court, the expansive definition “would capture virtually all modern cell phones,” and subject unsuspecting cell phone users to the significant remedies available under the Telephone Consumer Protection Act, including statutory damages in an amount of up to \$1,500 per call. *Id.*<sup>1</sup>

***b. Assuming that the equipment that Defendant-Appellee used to contact the Plaintiffs-Appellants includes the SQL server, and such equipment may qualify as an ATDS based on its “capacity” rather than its actual use, whether the record contains evidence that the Defendant-Appellee’s equipment lacked the present capacity “to store or produce telephone numbers to be called, using a random or sequential number generator,” 47 U.S.C. § 227(a)(1).***

Assuming *arguendo* that the dialing software equipment at issue includes the Microsoft SQL Server (it does not<sup>2</sup>), the District Court’s Order should still be affirmed. The undisputed evidence in the record demonstrates that the equipment lacked the **present** capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

Indeed, it is undisputed that: (i) the ININ System dials from lists of phone numbers stored on the SQL Server and uploaded to the dialer; and (ii) those listed phone numbers came from other sources (*i.e.*, a student loan borrower’s account file on NSL’s servicing system), rather than from a random or sequential number generator.<sup>3</sup> (Appx121-125 (Declaration of Joshua Dries (the Senior Director of Dialer

---

<sup>1</sup> In the time since *Duguid* was issued, district courts around the nation have rejected attempts by plaintiffs to argue that a broader interpretation is still permissible. *See, e.g., Barry v. Ally Fin., Inc.*, No. 20-12378, 2021 WL 2936636, at \*3 (E.D. Mich. July 13, 2021) (dismissing TCPA claim and noting that plaintiff’s interpretation of a footnote in *Duguid*, which would have allowed her claim to survive based on a “potential use” of equipment argument, was “constrained”); *Grome v. USAA Sav. Bank*, No. 4:19-CV-3080, 2021 U.S. Dist. LEXIS 164255, at \*14 (D. Neb. Aug. 31, 2021) (rejecting the same type of theory); *Timms v. USAA Fed. Sav. Bank*, No. 3:18-CV-01495-SAL, 2021 WL 2354931, at \*7 (D.S.C. June 9, 2021) (same).

<sup>2</sup> As found by the District Court and as set forth in NSL’s Brief (at pages 27-29), the ININ System does *not* “include[] the SQL server” because that hardware is separate from the dialing software.

<sup>3</sup> The calling lists are created based on student loan accounts that have specific attributes (*e.g.* type of loan, stage of delinquency, etc.). (*See Appx* at 123, ¶ 15 (“A

Operations for NSL)); (Appx10 (Opinion) (the Panzarellas “agree that [NSL] used the SQL system to store and organize contact lists.”).) In other words, the equipment at issue does not have the present capacity to generate random or sequential telephone numbers to be dialed; it only has the present capacity to dial from uploaded lists.<sup>4</sup> *Id.*

## CONCLUSION

The District Court’s Order granting NSL’s Motion for Summary Judgment should be affirmed. It is now settled law that, to qualify as an ATDS, dialing equipment must itself generate random or sequential telephone numbers; dialing from a list of numbers generated elsewhere (as here) is not enough. *Duguid*, 141 S. Ct. 1163, at 1164.

Respectfully submitted January 27, 2022.

*/s/ Lisa M. Simonetti*  
Lisa M. Simonetti (#165996 CA)  
GREENBERG TRAURIG, LLP  
1840 Century Park East, Suite 1900  
Los Angeles, California 90067  
Telephone: 310-586-7700  
simonettl@gtlaw.com

---

dialing campaign is a collection of student loan accounts created by NSL’s dialing operations team and organized by like variables such as length of delinquency[.]”). NSL (which services loans held by other entities) has no reason to call randomly or sequentially generated telephone numbers; it seeks only to reach specific persons about particular student loans.

<sup>4</sup> The Panzarellas’ appeal is based on a theoretical use of the equipment if the calling processes were reconfigured. *See* Op. Brief at 11-12 (discussing the SQL’s Server’s unused but “built-in” ability to generate numbers). Notably, all servers in the world (not just the SQL Server and not just servers associated with a telephone dialer) have a “built-in” ability to generate numbers. *Id.* Congress did not intend the TCPA to encompass all servers; as *Duguid* confirmed, courts must consider whether the calling equipment actually **uses** a telephone number generator (rather than the equipment’s potential capacity if reconfigured). *Duguid*, 141 S. Ct. at 1170-1171 (holding that Facebook’s equipment that used stored lists of phone numbers associated with accounts was not an ATDS and reasoning that “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.” (emphasis added).)

Lindsay N. Aherne (#48391 CO)  
GREENBERG TRAUIG, LLP  
1144 15th Street, Suite 3300  
Denver, Colorado 80202  
Telephone: 303-572-6500  
ahernel@gtlaw.com

Counsel for Defendant-Appellee