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Via ECF

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Patricia S. Dodszuweit, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: ***Elizabeth Panzarella, et al. v. Navient Solutions, Inc.***, No. 20-2371

Dear Ms. Dodszuweit,

This firm represents Plaintiffs-Appellants Elizabeth Panzarella and Joshua Panzarella, and submits the following response to this Court's invitation for supplemental briefing (ECF 43).

1. *Facebook v. Duguid* Does Not Require the Equipment Composing Navient's ININ Dialing System to Actually Call Plaintiffs' Phone Numbers by Random or Sequential Numbers It Generated to Qualify As an ATDS under the TCPA

The Supreme Court's holding in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) does not require that Navient called Plaintiffs' phone numbers randomly or sequentially. Nor does it disturb the statutory text of the TCPA defining an ATDS as "equipment which has the *capacity*—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). While the interpretation and scope of the term "capacity" was the issue before the D.C. Circuit in *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018), it was not the issue before the Supreme Court in *Duguid*. The sole question before the Supreme Court—for which it granted certiorari to resolve a split amongst the circuit courts—concerned only the interpretation of subsection (A) of the TCPA's statutory text defining an ATDS, and sought to resolve the circuit split over the narrow issue of whether the phrase "using a random or sequential number generator" applied to both "store" and "produce" or only to "produce." The interpretation of the term "capacity" was not part of the issue forming the circuit court split, and it was not before the Supreme Court and played no role in the analysis or decision in *Duguid*. Consequently, any

language in the *Duguid* decision that appears to imply that the definition of an ATDS no longer includes the equipment's "capacity" is certainly unintentional, and cannot be read as a pronouncement by the Supreme Court regarding the scope and application of that term in the context of applying the TCPA.

Any proposed description of the scope of the *Duguid* decision to the contrary would effectively write the term "capacity" out of the statute by rendering it entirely meaningless, violating one of the cardinal canons of statutory construction that no word or term should be rendered superfluous. *United States v.* Cooper, 396 F.3d 308, 312 (3d Cir.2005) ("It is a well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous."); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are 'reluctant to treat statutory terms as surplusage in any setting' [] and we decline to do so here") (internal citations omitted)); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (if statute were read as proposed, "then Congress need not have included the explicit 'during or following' condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do").

Furthermore, viewing the *Duguid* decision in context, it is clear that the language extracted by Navient from the *Duguid* decision was only intended by the Supreme Court to emphasize its reasoning for interpreting the phrase "random or sequential number generator" as modifying both "store" and "produce" rather than only "produce." By way of example, the Supreme Court's statement that "[t]he statutory context confirms that the autodialer definition excludes equipment that does not 'us[e] a random or sequential number generator'" was advanced to highlight and contrast the rejected interpretation adopted by the 9th Circuit in *Marks v. Crunch San Diego, LLC,* 904 F. 3d 1041, 1043 (9th Cir. 2018), which interpreted the term "random or sequential number generator" as modifying only the term "produce," such that device could qualify as an ATDS if it only had the capacity to "store … telephone numbers to be called" and "dial such numbers." *Duguid*, 141 S.Ct. at 1171. In other words, it was not intended to be read as a mandate that equipment having the capacity to use a random or sequential number generator does not qualify as an ATDS if that capacity is not used for a given call, only that equipment which lacks that capacity does not qualify as an ATDS. The language and examples used throughout the *Duguid* decision consistently frame a contrast between hypothetical

devices that can *only* dial numbers from a stored list and devices that *only* dial random or sequentially generated numbers, in order to illustrate the reasoning for rejecting the 9th Circuit's interpretation under which the former device would qualify as an ATDS. The decision includes no mention of devices that have the capacity to perform the statutory random or sequential number generator functions *and* the capacity to dial from a stored list, and the decision cannot, therefore, be read as pronouncement having the drastic effect of eliminating a key statutory term that was neither reviewed nor explicitly set aside. For that reason, any argument suggesting that "capacity" is no effectively longer part of the TCPA's ATDS definition after *Duguid* would be entirely misplaced.

The pertinent authorities that have actually interpreted the scope and application of the term "capacity" confirm that dialing equipment which has the "present capacity" to perform the functions enumerated in the statute qualifies as an ATDS, even if those functions are not used to make a given call. By way of example, in the 2015 TCPA Order, the FCC reaffirmed its interpretation that dialing equipment which has the capacity to store or produce, and dial random or sequential numbers (and thus meets the statutory definition) qualifies as an ATDS "even if it is not presently used for that purpose, including when the caller is calling a set list of consumers." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7971-72, ¶10 (2015) ("2015 TCPA Order").

In *ACA Int'l*, the D.C. Circuit acknowledged the FCC's aforementioned interpretation as "unchallenged," observing that "a call made with a device having the capacity to function as an autodialer can violate the statute *even if autodialer features are not used to make the call*," 885 F.3d at 695 (emphasis added). The D.C. Circuit's decision did not take issue with the above emphasized portion of the FCC's interpretation (i.e., that telephony equipment with the requisite statutory "capacity" qualifies as an ATDS even if the autodialer features are not used for a given call); rather, it concluded that the FCC's interpretation of the term "capacity" itself was "unreasonably expansive" and could not be sustained because it was not limited to dialing system equipment's "present capacity," but instead encompassed even "potential functions" that would require the equipment to be modified at a later time. *Id*. Notably, in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. 2018), this Court cited the D.C. Circuit's conclusion with approval in similarly holding that the proper interpretation of the term "capacity" refers to dialing equipment's ability to perform

the requisite statutory functions at the time a given call is made, as opposed to a latent or potential ability that would require modification of the equipment after the call was made. *Id.* at 118-19 (citing *ACA Int'l*, 885 F.3d at 695). This Court's holding in *Dominguez* is therefore consistent with the FCC's above interpretation that equipment with the "capacity" to perform the statutory functions of an ATDS is not required to use those functions for a given call to qualify as an ATDS. This Court merely clarified the limits of that "capacity."

In *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020), the Eleventh Circuit likewise confirmed that the TCPA "applies to devices that have the 'capacity' to identify randomly generated numbers; *it does not require that capacity to be used in every covered call*." *Id.* at 1312, *cert. denied*, 141 S. Ct. 2510 (2021) (emphasis added). Notably, the Supreme Court in *Duguid* concurred with Eleventh Circuit's ATDS interpretation in *Glasser*, belying any argument that the holding in *Duguid* can be read as effectively abrogating *Glasser* regarding the interpretation of a statutory term that was neither before the Supreme Court in *Duguid* nor addressed in the Supreme Court's decision. Numerous district courts have made similar holdings after the *Duguid* decision. *See Jance v. Homerun Offer LLC*, 2021 WL 3270318, *3 (D. Ariz. July 30, 2021) ("[i]n determining whether a defendant called with an ATDS, the central issue is not whether the defendant used [the features of] an ATDS when making the call, but whether defendant's "equipment has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential number generator'"); *Garner v. Allstate Ins. Co.*, 2021 WL 3857786 (N.D. Ill. Aug. 30, 2021) (rejecting argument that plaintiff's allegation describing defendant's dialing system as a "predictive dialer" contradicted allegation that ATDS was used, holding "[p]redictive dialers include a wide variety of devices, [only] some of which do not qualify as an ATDS under the TCPA because they lack the capacity to randomly or sequentially generate numbers to dial").[1]

Furthermore, under the prior panel precedent rule, "[a] panel of this court cannot overrule a prior panel precedent." *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir.1981); *see also* Internal Operating Procedures, United States Court

[1] *See also Atkinson v. Pro Custom Solar LCC*, 2021 WL 2669558 (W.D. Tex. June 16, 2021) (plaintiff's allegation that the defendant "called and texted her using an automatic telephone dialing system that 'has the present … capacity to dial numbers in a random and/or sequential fashion'" was sufficient to state a claim that defendant violated the TCPA).

of Appeals for the Third Circuit, Rule 9.1 ("[T]he holding of a panel in a reported opinion is binding on subsequent panels.... Court in banc consideration is required [to overrule such a holding]"). "A panel of this Court may [also] reevaluate the holding of a prior panel which conflicts with intervening Supreme Court precedent" *In re Krebs*, 527 F.3d 82, 84 (3d Cir. 2008). However, "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir.2007). The Supreme Court has also emphasized that "[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding." *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998). To that end, as explained above, the interpretation of the term "capacity" in the ATDS definition was not before the Supreme Court in *Duguid* and was not addressed in its decision. Thus, this Court's prior panel precedent in *Dominguez* must be followed, even if certain terminology in the Supreme Court's dicta in *Duguid* could be viewed as implicitly conflicting therewith. *See, e.g., Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir.1996) (prior panel precedent may not be disregarded where it "has been only weakened, rather than directly overruled, by the Supreme Court").

2. The Record Contains Evidence That Navient's Equipment Composing Its ATDS Had the Present Capacity to Store or Produce Telephone Numbers to Be Called by Random or Sequential Number Generation

The record, consisting largely of the technical manuals for Navient's ININ dialing system equipment, Navient's testimony concerning its design and functioning, and Plaintiffs' expert's Declaration analyzing the foregoing data, amply supports this ATDS' capacity to randomly and sequentially generate numbers.

The ININ Dialer automatically dials telephone numbers that are programmatically sorted, filtered, reordered, re-sequenced, and uploaded into the system. The Interaction Dialer stores telephone numbers to be called and produces telephone numbers to be called by sorting, filtering, reordering, and re-sequencing telephone numbers that are uploaded from SQL-based database servers ("SQL Server"). (Appx123-125 at ¶¶ 19, 23, 29.) The ININ Dialer as configured by NSL is configured using Microsoft SQL Server technology for the database component of the system, rather than Oracle servers. (Appx123 at ¶19, Appx 266-67 at 97:24-

98:6.)

The SQL Server database technology is incorporated into the overall dialing system and is a core component of the Interaction Dialer (Appx 200, Appx 204, Appx 205, Appx211).

SQL-based databases are essentially designed to create and manage tables of data, including lists of telephone numbers and the ININ dialer must use the SQL-based database technology functions to initiate automatic outbound calls to a contact list. Random number generation and sequential number generation are functions inherent within SQL Server database technologies. SQL provides a built-in ability to automatically generate random and sequential numbers that can be used by an application, like the ININ Dialer's outbound dialing function. (Appx 367-368).

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/s/ James A. Francis

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