No. 21-14045

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COY EVANS, *et al*.,
Plaintiffs-Appellants,

v.

OCWEN LOAN SERVICING, LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
Case Nos.

9:18-cv-81394	9:18-cv-81470
9:18-cv-81430	9:18-cv-81472
9:18-cv-81437	9:18-cv-81475
9:18-cv-81438	9:18-cv-81477
9:18-cv-81441	9:18-cv-81478
9:18-cv-81450	9:18-cv-81479
9:18-cv-81451	9:18-cv-81513
9:18-cv-81454	9:18-cv-81683

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No. 21-14045

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT OF APPELLEE OCWEN LOAN SERVICING, LLC

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Defendant Appellee Ocwen Loan Servicing, LLC ("Ocwen") states that Ocwen is a predecessor by merger to PHH Mortgage Corporation. PHH Mortgage Corporation is a wholly owned subsidiary of PHH Corporation. Ocwen Financial Corporation, which is a publicly held corporation and trades on the New York Stock Exchange under the ticker symbol "OCN", owns 100% of the common stock of PHH Corporation.

Ocwen further certifies that the following is a complete list of trial judge(s), attorneys, persons, associations, firms, partnerships, and corporations who have an interest in the outcome of this case:

Adams, Jeffrey – Appellant
Adams, Joseph M. – Counsel for Appellants
Brown, Bernard – Appellant
Dudley, Albert – Appellant
Evans, Coy – Appellant

Giello, Michael – Appellant
Hunton Andrews Kurth LLP – Counsel for Appellee
Jupin, Katherine – Appellant
Jupin, Victoria – Appellant
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Mitchell, David P. – Counsel for Appellants
Neal, Janelle Alison – Counsel for Appellants
Neba, George – Appellant
Ocwen Financial Corporation – "OCN" – Parent Company of PHH Corporation
Ocwen Loan Servicing, LLC - Appellee
Oudyk, Timothy – Appellant
Pearson, Wendy – Appellant
PHH Corporation – Parent Company of PHH Mortgage Corporation
PHH Mortgage Corporation – Successor by merger to Appellee Ocwen Loan Servicing, LLC
Picuri, Debra – Appellant
Robinson, Stanley – Appellant
Rosenberg, Robin L. – United States District Court Judge for the Southern District of Florida

Scioli, Haylie – Appellant
Sweeney, James – Appellant
Zehner, Dawn – Appellant

Statement Regarding Oral Argument

Appellee does not request oral argument because the U.S. Supreme Court's unanimous holding in Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021), disposes of the main issue in this appeal. Appellee further believes that the other issues raised by Appellants can be resolved on the basis of the parties' written submissions.

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Statement of the Issues

1. Whether the district court held correctly that Appellants failed to state a claim that Ocwen, their mortgage servicer, used an "automatic telephone dialing system" to place calls to their cellular telephones.

2. Whether the district court's order should be affirmed because Appellants failed to allege facts sufficient to state a claim that Ocwen used an artificial or pre-recorded voice on telephone calls placed to them.

3. Whether the district court's order declining to exercise supplemental jurisdiction over Appellants' state law claims should be affirmed.

Statement of the Case

Appellants filed individual cases against Ocwen in the U.S. District Court for the Southern District of Florida in 2018 and 2019. The complaints were substantially similar and alleged that Ocwen, as the servicer of Appellants' mortgages, called Appellants' cellular telephones without their consent in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA"), and with such frequency as could reasonably be expected to harass in violation of the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55, et seq. ("FCCPA").

The cases were transferred and consolidated for pre-trial proceedings before Judge Robin L. Rosenberg on January 4, 2019. The law at that time pertaining to

interpretation of the term "automatic telephone dialing system" ("ATDS") under the TCPA was in flux (as discussed further below), so the district court stayed the cases while waiting for the FCC or Supreme Court to clarify the attributes necessary for dialing equipment to qualify as an ATDS. App. Tab 41 and Appellee's App. Tab 47. Following the Supreme Court's decision in Facebook, Inc. v. Duguid, 141 S.Ct. 1163 (2021), the district court lifted the stay and re-opened the cases. App. Tab 57. Appellants filed their Amended Consolidated Complaint (the pleading at issue in this appeal) on July 23, 2021. App. Tab 66.

The Complaint alleges that Ocwen violated the TCPA by using an ATDS to dial numbers randomly or sequentially in attempting to contact Appellants regarding their mortgage loans (id. at ¶¶ 20-21, 35), and by calling them using an artificial or pre-recorded voice. Id. at ¶¶ 26-27. The Complaint also alleges that Ocwen called Appellants with such frequency and at such times so as to violate the FCCPA. Id. at ¶¶62-63 (incorrectly numbered as ¶¶1-2 on pp. 11-12).

Ocwen moved to dismiss the TCPA and FCCPA claims for failure to state a claim and asked the Court to decline to exercise supplemental jurisdiction over the state-law FCCPA claims. App. Tabs 66, 76. The district court granted Ocwen's motion. App. Tab 77. The district court relied on Duguid's holding that, to prevail on an ATDS claim under the TCPA, a plaintiff must be able to show "in all cases" that her telephone number was dialed at random or in sequence. Id. at 5

(quoting Duguid, 141 S. Ct. at 1170 ("First, the text of [Duguid] is clear: '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**.") (emphases in original)). The district court went on to hold that Appellants failed to state a claim because it was "implausible to suggest that the Plaintiffs were dialed using a random or sequential number generator, particularly when the Plaintiffs concede in their complaint that the Defendant, a loan servicer, called them to collect upon a debt." Id. at 5 (footnote citation omitted). The district court declined to exercise supplemental jurisdiction over the FCCPA claims in light of "the absence of any federal claim before this Court." Id. at 7.

Standard of Review

A court of appeals reviews a district court's order of dismissal with prejudice *de novo*. Isaiah v. JPMorgan Chase Bank, 960 F.3d 1296, 1302 (11th Cir. 2020). "'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" Doe #1 v. Red Roof Inns, Inc., 21 F.4th 714, 723 (11th Cir. 2021) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

Summary of the Argument

The district court's order should be affirmed because Ocwen's dialing system is not an ATDS as that term was construed by a unanimous Supreme Court in Duguid.

The TCPA defines 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). Starting in 2003, the FCC issued a series of orders interpreting the term ATDS and clarifying the types of calling equipment falling within the TCPA's restrictions. But in 2018, the D.C. Circuit held that the FCC's interpretive orders failed to satisfy the requirements of reasoned decision-making and set aside the orders. See ACA Int'l v. FCC, 885 F.3d 687, 703 (D.C. Cir. 2018). With a large body of law having been wiped clean by ACA Int'l, a circuit split developed regarding what type of equipment qualifies as an ATDS. Compare, e.g., Glasser v. Hilton Grand Vacations Co., LLC, 948 F.3d 1301, 1306 and 1312 (11th Cir. 2020) (holding that an ATDS requires random or sequential number generation and does not encompass equipment that dials from preexisting lists of numbers), and Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460 (7th Cir. 2020) (Barrett, J.) (holding that the system at issue was not an ATDS because it dialed numbers stored in a customer database and did not store or produce numbers using a random or

sequential number generator), with Marks v. Crunch San Diego, LLC, 904 F. 3d 1041, 1043 (9th Cir. 2018) (holding that an ATDS is any device that stores telephone numbers to be called, regardless of "whether or not those numbers have been generated by a random or sequential number generator").

The U.S. Supreme Court resolved the split in Duguid. The Court held that, in enacting the TCPA, Congress sought to prohibit telemarketers from using technology that allowed them to dial random or sequential phone numbers (e.g., 555-1212, then 555-1213, etc.). Duguid, 141 S. Ct. at 1167. Parsing the definition of an ATDS in light of Congress' goal, the Court held that "equipment that does not 'us[e] a random or sequential number generator'" is not an ATDS, and that equipment that takes numbers to be called from a list and dials them automatically (such as Ocwen's system) is not an ATDS. Id. at 1171. TCPA liability attaches only if dialing equipment actually dialed a plaintiff's number randomly or in sequence. Id. at 1170 ("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). Accordingly, to qualify as an ATDS after Duguid, a plaintiff must show that he or she was called as a result of his or her telephone number being dialed at random or sequentially. Id. at 1173.

The theory of Appellants and amici is that a plaintiff can state an ATDS claim after Duguid merely by alleging that dialing equipment with the capacity to generate any kind of random or sequential numbers is an ATDS, even if their telephone numbers were not actually dialed at random or in sequence. This side of the circuit split was rejected in Duguid. Amici's argument relies on a strained reading of the ATDS definition that has the meaning of the word "number" switching back and forth in a way that is inconsistent with Duguid and Congress' avowed intent in enacting the TCPA. Moreover, the Supreme Court in Duguid expressly rejected Appellants' overbroad interpretation of the word "capacity," as "it would capture virtually all modern cell phones." Duguid, 141 S. Ct. at 1171.

The district court's order also should be affirmed because Appellants' shotgun pleading – consisting of two sentences asserting only legal conclusions – of an artificial or pre-recorded voice claim under the TCPA does not allege facts that can lead to a plausible inference that a violation of the TCPA occurred. Finally, the district court also correctly declined to exercise supplemental jurisdiction over Appellants' state law claim.

Argument

I. The Court Should Affirm the District Court's Order Dismissing Appellants' TCPA Claims Based on Alleged Use of an ATDS.

The district court followed Duguid and held that Appellants did not state a claim based on alleged use of an ATDS because they "do not and cannot plausibly allege" that their phone numbers were dialed at random or in sequence. App. Tab 77 at 6. This conclusion was based on a) Duguid's holding that to state an ATDS claim a plaintiff must show that he or she was called as a result of his or her phone number being dialed randomly or in sequence; and b) the implausibility that Ocwen, as a loan servicer, would dial numbers at random or in sequence in the hopes of reaching one of its borrowers. Id. at 6-7 ("It is implausible to suggest that the Plaintiffs were dialed using a random or sequential number generator, particularly when the Plaintiffs concede in their complaint that the Defendant, a loan servicer, called them to collect upon a debt. … [T]he only plausible inference is that they were dialed because of their status as serviced customers of defendant.").[1]

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[1] The district court's conclusion on the second point followed from a line of cases dismissing ATDS claims involving, e.g., debt collection or pre-existing customer relationships, because it is implausible to conclude that a defendant with a customer's contact information would nevertheless dial numbers randomly or in sequence in hopes of reaching that customer instead of dialing the number in its files See, e.g., Barry v. Ally Fin., Inc., No. 20-12378, 2021 WL 2936636, at *4 (E.D. Mich. July 13, 2021) (dismissing plaintiff's claims "[b]ecause the calls Plaintiff complains about were directed to Plaintiff specifically

The district court's order should be affirmed for the following reasons.

A. To Be An ATDS, a Dialer Must Generate Random or Sequential Phone Numbers.

The TCPA was enacted in 1991 to address specific problems arising from new technology "which revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically." Duguid, 141 S. Ct. at 1167. The result of this new technology was a "proliferation of intrusive, nuisance calls" to consumers, businesses, hospitals and emergency lines. Id. at 1167-68 (quoting Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, ¶5, 105 Stat. 2394). Congress found this new technology "uniquely harmful" because it "threatened public safety by 'seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services'" and "could simultaneously tie up all the lines of any business with sequentially numbered

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and purposefully, [and] related to her brother's account with Defendant"); Mosley v. Gen. Revenue Corp., No. 1:20-cv-01012-JES-JEH, 2020 WL 4060767, at *4 (N.D. Ill. July 20, 2020) (dismissing TCPA claim based on alleged use of ATDS because it was implausible that a debt collection company would dial numbers randomly or sequentially: "Plaintiff offers no plausible explanation why a debt collection company would need or use a machine which had the capacity to dial or store randomly or sequentially generated numbers"); Snow v. Gen. Elec. Co., No. 5:18-cv-0511, 2019 WL 2500407, at *4 (E.D.N.C. June 14, 2019) (holding that where a plaintiff is "a targeted recipient" of calls, "it is not reasonable to infer that the [calls] were sent with equipment 'using a random or sequential number generator'"). Appellants and amici do not discuss these cases in their briefs.

phone lines." Id. at 1167. Congress therefore restricted the use of an "automatic telephone dialing system," which it defined 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).

A plain reading of this definition shows that the "numbers" that an ATDS's "random or sequential number generator" must have the capacity to generate are telephone numbers. The phrase "using a random or sequential number generator" modifies the phrase "telephone numbers to be called," i.e., the telephone numbers being referred to in the first clause are those produced by a random or sequential number generator. The final reference to "numbers" necessarily means telephone numbers, for it contemplates only numbers that can be "dial[ed]." It is thus natural to read the definition as dropping "telephone" from the second mention of "number" for brevity. It would be odd for Congress to have referred to a different type of number when it used the phrase "random or sequential generator" between two references to telephone numbers. Cf. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 n.4 (2009) ("'[I]dentical words and phrases within the same statute should normally be given the same meaning.'") (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)). All the more so in light of the fact

that the TCPA is found in Title II of the Communications Act of 1934, the federal framework governing the telephone system and assignment of telephone numbers.[2]

The Supreme Court unanimously adopted this natural reading of the statute in Duguid. The Court there granted review to resolve a circuit split "regarding whether an autodialer must have the capacity to generate random or sequential phone numbers." 141 S. Ct. at 1168. The harm being addressed by Congress was new technology which "allow[ed] companies to dial random or sequential blocks of telephone numbers automatically." Id. at 1167 (emphasis added). The ATDS provision of the TCPA thus "target[s] a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity," meaning that "the autodialer definition Congress employed includes only devices that use such technology." Id. at 1171-72.

B. Equipment That Uses a Random or Sequential Number Generator to Dial Numbers from a List is Not an ATDS.

Appellants and amici urge a different interpretation of ATDS, which posits that "number" in the phrase "random or sequential number generator" refers not to

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[2] The TCPA in other places alternates between "telephone number" and "number" without any apparent reason for the distinction other than brevity. Compare 47 U.S.C. § 227(c)(3)(F), (G) (referring to "the telephone number of any subscriber in [the Do-Not-Call] database"), with id. § 227(c)(3)(K) (referring to "persons whose numbers are included in the [Do-Not-Call] database"). And in other places the statute begins by referring to a "telephone number" or "facsimile number" and then uses "number" as shorthand for the rest of the provision. See, e.g., id. § 227(b)(1)(C)(ii), (e)(8)(B).

phone numbers, but to any type of number, such as an index number or other non-telephone number. Opening Br. at 11-13; Amici Br. at 21-28. An example: a party has a list of customer phone numbers that it wishes to call and assigns a random or sequential index number to the phone numbers that determines the order in which they are called. Appellants and amici say that such equipment is an ATDS. Neither the statute, legislative intent, nor Supreme Court precedent supports this interpretation.

"Number" appears three times in the definition of an ATDS: "telephone numbers," "number generator," and "such numbers." Appellants and amici say the second reference is not to a telephone number but any other type of number. Opening Br. at 12-17; Amici Br. at 5. Their unnatural interpretation has the definition referring in the first instance to a telephone number, then to some other unspecified type of number, and then back to a telephone number (to be dialed). The interpretation is even further off the mark when considering the legislative intent, which as the Supreme Court held was intended to restrict technology that allowed parties "to dial random or sequential blocks of telephone numbers automatically." Duguid, 141 S. Ct. at 1167. Or, as this Court previously put it, "[t]hink about the types of calls [the TCPA] seeks to prohibit. … Congress [] passed the law to prevent callers… dialing randomly or sequentially generated

telephone numbers…." Glasser, 948 F.3d at 1307-08. Appellants and amici do not cite any legislative history that supports their awkward and illogical interpretation.

Amici wave off Duguid by saying that the Supreme Court's unanimous decision had nothing to do with the "phrase random or sequential number generator." Amici Br. at 5. But this significantly misstates the nature of the circuit split that Duguid resolved. This Court need look no further than the Supreme Court's own words to see that amici are incorrect, as the Supreme Court said the issue it was resolving was this: "whether an autodialer must have the capacity to generate random or sequential phone numbers." 141 S.Ct. at 1168 (emphasis added); see also Beal v Outfield Brewing House, LLC, No. 20-1961, 2022 WL 868697, at *4 (8th Cir. Mar. 24, 2022) (Duguid's "overall conclusion" is "that a system which merely stores and dials phone numbers is not an Autodialer") (emphasis added).

Moreover, if Appellants and amici are correct, then the ATDS definition would encompass any equipment that automatically dials telephone numbers in some order from a stored list, because "[a]nytime phone numbers are dialed from a set list, the database of numbers must be called in some order – either in a random or some other sequence." ACA Int'l, 885 F.3d at 702. That was the holding in Marks, 904 F.3d 1041. But Duguid overruled Marks. Duguid, 141 S.Ct. at 1168-69. And the Ninth Circuit since has held in an unpublished opinion that Duguid

rejected the Marks' interpretation of an ATDS. Meier v. Allied Interstate LLC, No. 20-55286, 2022 WL 171933 (9th Cir. Jan. 19, 2022); see also Beal, 2022 WL 868697 at *4 (holding that equipment that randomly dials telephone numbers from a stored list is not an ATDS).

Appellants' amici also say that this plain language interpretation renders the "prior express consent" provision of the TCPA superfluous. Amici Br. 14-22. Not so, because the provision applies to prerecorded and artificial voice calls, even if they are not made with an ATDS. 47 U.S.C. §227(b)(1)(A). Moreover, as then-Judge Barrett recognized, "it is possible to imagine a device that has the capacity to generate numbers randomly or sequentially and can be programmed to avoid dialing certain numbers." See Gadelhak, 950 F.3d at 466-67. Amici's "rationale for choosing an atextual interpretation" of ATDS therefore is "unpersuasive." Id.

Amici also ask this question regarding the alleged superfluity of "store" and "produce": "Why would Congress include the terms 'store' and 'produce' if it did not intend for them to do some work in the autodialer definition?" Amici Br. at 16. This Court already has answered that question:

> One last point turns on history. The regulatory record confirms that, at the time of enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing. Sometimes storage would happen; sometimes it wouldn't. Under this reading, § 227(a) occupied the waterfront, covering devices that randomly or sequentially generated telephone numbers and dialed those numbers, or stored them for later dialing.

Glasser, 948 F.3d at 1307; see also Gadelhak, 950 F.3d at 465 ("Given the range of storage capacities among telemarketing devices at the time of enactment, it is plausible that Congress chose some redundancy in order to cover 'the waterfront.'") (quoting Glasser, 948 F.3d at 1307).

The statutory text, legislative history, and precedent all point to the same result: equipment must generate phone numbers at random or in sequence to be an ATDS.[3]

[3] Evans' amici also mention footnote 7 in Duguid, which they claim suggests that the Supreme Court left open the possibility that equipment that uses a random or sequential number generator to select numbers from a list to be called could still be an ATDS. Amici Br. at 10-11. They immediately backpedal though and disclaim reliance on the footnote for their argument (id. at 11), and Appellants do not even mention it in their brief. For good reason: the list of numbers being described in the footnote was a "preproduced list" of telephone numbers that themselves were generated randomly or sequentially. Footnote 7 does not support amici's argument, as courts around the country have held. See Beal, 2022 WL 868697 at *3 (holding that footnote 7 referred to numbers that "were sequentially generated before being stored and later randomly selected"); Timms v. USAA Fed. Sav. Bank, 543 F. Supp. 3d 294, 301 (D.S.C. 2021) ("This court believes the Supreme Court's statement [in footnote 7]—that an 'autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list' and 'then store those numbers to be dialed at a later time'" refers to a list "that is 'sequentially generated and stored.'"); Hufnus v. DoNotPay, Inc., No. 20-CV-08701-VC, 2021 WL 2585488, at *1 (N.D. Cal. June 24, 2021) (holding that plaintiff's "reading of footnote 7 conflicts with Duguid's holding and rationale"); Barry v. Ally Fin., Inc., No. 20-12378, 2021 WL 2936636, at *6 (E.D. Mich. July 13, 2021) (holding that in footnote 7 "the Supreme Court is discussing the process . . . in which the 'preproduced list' is one that is 'sequentially generated and stored'"); Borden v. eFinancial, LLC, No. C19-1430JLR, 2021 WL 3602479, at *5 (W.D. Wash. Aug. 13, 2021) (finding that plaintiff's "argument relies on a selective reading of one line within footnote 7 and ignores the greater context of that footnote and the [Duguid] opinion"); Mey v. DIRECTV, LLC, No. 5:17-CV-

179, 2021 WL 6882400, at *4 (N.D.W. Va. Aug. 18, 2021) (following Timms and Hufnus and concluding that the dialer at issue was not an ATDS); Tehrani v. Joie de Vivre Hosp., LLC, No. 19-CV-08168-EMC, 2021 WL 3886043, at *7 (N.D. Cal. Aug. 31, 2021) (collecting cases and adopting the "result reached by a clear majority of courts"); LaGuardia v. Designer Brands Inc., No. 2:20-CV-2311, 2021 WL 4125471, at *8 (S.D. Ohio Sept. 9, 2021) (rejecting plaintiffs' interpretation of footnote 7 and holding "Plaintiffs contend that this dicta, which addresses a hypothetical in an *amicus* brief, establishes that Responsys is an ATDS because of its ability to randomly generate ID numbers and to use those numbers to determine which phone numbers to send text messages to. A 'clear majority of courts' discount such reliance.") (internal citations omitted); Brickman v. Facebook, Inc., No. 16-CV-00751-WHO, 2021 WL 4198512, at *2 (N.D. Cal. Sept. 15, 2021) (collecting cases and concluding that plaintiff's interpretation of footnote seven would "achieve a result untethered to the Supreme Court's actual holding in Duguid and untethered to the purposes underlying the TCPA"); Samataro v. Keller Williams Realty, Inc., No. 1:18-CV-775-RP, 2021 WL 4927422, at *4 (W.D. Tex. Sept. 27, 2021) (adopting Hufnus' interpretation of Duguid); Camunas v. Nat'l Republican Senatorial Comm., No. CV 21-1005, 2021 WL 5143321, at *5 (E.D. Pa. Nov. 4, 2021) (collecting cases and holding that "if the preproduced list was not created through a random or sequential number generator, it does not meet the [Duguid] standard of an ADTS [sic]"); In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig., No. 11MD02295 JAH - BGS, 2021 WL 5203299, at *3 (S.D. Cal. Nov. 9, 2021) ("[Footnote 7's] reference to the [amici curiae] brief demonstrates the 'preproduced list' mentioned in the footnote is generated through the use of a random or sequential number generator."); Pascal v. Concentra, Inc., No. 19-CV-02559-JCS, 2021 WL 5906055, at *9 (N.D. Cal. Dec. 14, 2021) ("As many courts have observed, however, the reference to a 'preproduced list' in Footnote 7 was based on a specific technology described in the . . . Amicus Brief and that brief makes clear that the preproduced list was itself randomly generated."); Cole v. Sierra Pac. Mortg. Co., Inc., No. 18-CV-01692-JCS, 2021 WL 5919845, at *3 (N.D. Cal. Dec. 15, 2021) ("[T]he use of random or sequential number generators to select an order for storing or dialing telephone numbers entered by other means on a list does not satisfy the TCPA's definition of an ATDS. Footnote 7 of Duguid does not alter that conclusion."); Austria v. Alorica, Inc., No. 2:20-cv-05019-ODW(PVCx), 2021 WL 5968404, at *6 (C.D. Cal. Dec. 16, 2021) ("This Court joins these courts in finding that a system that selects phone numbers from a prepopulated list does not constitute an autodialer where the prepopulated list was not itself generated using a random or sequential number

C. The Interpretation of "Capacity" Suggested by Appellants and Amici Would Sweep Ordinary Smartphones Into the Definition of an ATDS.

The scope of the ATDS definition advocated by Appellants and their amici also is overbroad and would make everyday technology including ordinary smartphones into an ATDS.

Amici describe at length how virtually all computers, including smartphones, can generate random or sequential numbers in some way because "most programming languages" include that capability. Amici Br. at 23. A popular database programming language called SQL, for example, has an "autoincrement function" that produces "sequential integers which are automatically generated." Id. at 26 (quotation marks omitted). Appellants have this functionality in mind when claiming that Ocwen's Aspect system is an ATDS:

> Defendant called Plaintiffs using the "Aspect" dialing system, which consists of functionally complimentary hardware and software components, including an integrated and interconnected database server that has the capacity to generate tables of 10-digit random or sequential numbers and then dial those numbers using outbound dialing software.

App. Tab 66 at ¶ 24. Note that Appellants do not allege that Ocwen actually uses its database to generate random or sequential numbers that it then calls, which would be an odd thing to do for a mortgage servicer, like Ocwen here, that already

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generator, even if the phone number selection process itself involves a random or sequential number generator.").

has a customer relationship and the phone numbers it wishes to dial. See Glasser, 948 F.3d at 1309 and 1311 (asking "Why call random telephone numbers when you could target the consumers who showed an interest in your product or actually owed a debt"; and "Why would anyone ever use an auto-dialer to call people about a debt owed…?"; and finally noting that "[d]ebt collection usually involves non-randomly identified people.").[4] This could be because Appellants had extensive discovery prior to filing the Complaint, including the Rule 30(b)(6) deposition of Ocwen's Director of Dialer and Workforce Management regarding the Aspect phone system used by Ocwen to place the calls at issue, and received from Ocwen the operating manuals and guides for Aspect. Plaintiffs' counsel also received the transcript of the Rule 30(b)(6) deposition of the Senior Product Manager at Aspect

[4] Ocwen used the Aspect phone system to place the calls at issue. At least ten courts across the country have held that the Aspect system does not produce telephone numbers using a random or sequential number generator. See Timms, 2021 WL 2354931, at *5; Wright v. USAA Savings Bank, No. 2:19-cv-00591, 2020 WL 2615441, at *4 (E.D. Cal. May 22, 2020); Denova v. Ocwen Loan Servicing, LLC, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *4 (M.D. Fla. Sep. 24, 2019); Brown v. Ocwen Loan Servicing, LLC, No. 8:18-cv-136-T-60AEP, 2019 WL 4221718, at *4 (M.D. Fla. Sep. 5, 2019); Espejo v. Santander Consumer USA, Inc., No. 11-C-8987, 2019 WL 2450492, at *6 and 8 (N.D. Ill. June 12, 2019); Thompson-Harbach v. USAA Fed. Sav. Bank, 359 F. Supp. 3d 606, 612 (N.D. Iowa Jan. 9, 2019); Keyes v. Ocwen Loan Servicing, LLC, 335 F. Supp. 3d 951, 962 (E.D. Mich. Aug. 16, 2018); Freeman v. Wilshire Com. Cap. LLC, No. CV 2:15-1428 WBS AC, 2018 WL 1173823, at *3 (E.D. Cal. Mar. 6, 2018); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 678 (D. Md. Nov. 28, 2017); Robinson v. Green Tree Servicing, LLC, No. 13 CV 6717, 2015 WL 4038485, at *3 (N.D. Ill. June 26, 2015).

Software, Inc., in a nearly identical case against Ocwen in another district. The most Appellants can muster with the benefit of that discovery is "I know it doesn't work this way, but it's a computer system so it must have the capacity to do so and therefore is an ATDS." See also App. Tab 77 at 2-3 ("the Plaintiffs do not allege that Defendant's dialer machine *creates* numbers to be called using a random number generator.") (emphasis original).

This "capacity" argument runs headlong into the overbreadth problems that motivated the ACA Int'l opinion. The D.C. Circuit held there that the FCC's interpretive orders failed to satisfy the requirements of reasoned decision making and set aside the orders. The court rejected the FCC's interpretive orders regarding "capacity" as "utterly unreasonable in the breadth of its regulatory inclusion." ACA Int'l, 885 F.3d at 703. The court was particularly concerned because "[i]f a device's capacity includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones… meet the statutory definition of an autodialer." Id. at 697. Duguid too rejected this approach: interpreting "capacity" to include computers and smartphones that "store… telephone numbers to be called" and "dial such numbers" would "capture virtually all modern cell phones" and would "take a chainsaw" to the problem of random or sequential telephone number dialing "when Congress meant to use a scalpel." Duguid, 141 S. Ct. at

1171. Hence the Supreme Court's holding: "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. 1170 (emphases added). What counts thus is how the telephone numbers to be called actually are produced, not whether some computer or database or smartphone, as part of the dialing equipment, possibly could also generate numbers randomly or sequentially.

Appellants suggest that Duguid "renders the term 'capacity' void" and makes the term "entirely meaningless." Opening Br. at 15, 17. The reality though is that the Supreme Court applied an interpretation favored by other appellate courts that simply is more narrow than Appellants and amici would like. See, e.g., Dominguez v. Yahoo, Inc., 894 F.3d 116, 121 (3d Cir. 2018) (holding that showing of "latent or potential capacity to function as autodialer" is not enough to state an ATDS claim and that plaintiff must show "present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers") (emphasis added); accord Gadelhak, 950 F.3d at 460 (affirming dismissal of ATDS claim where equipment at issue, like the Aspect system, "exclusively dials numbers stored in a customer database").

Amici claim that "[t]he definition proposed in this brief" avoids the overbreadth and smartphone problems identified by the D.C. Circuit in ACA Int'l

and by the Supreme Court in Duguid. Amici Br. at 33-35. Assuming that amici are referring to amici's own *interpretation* of the ATDS definition, it is clear that amici's argument – that "number" in the phrase "random or sequential number generator" refers to any number and not just telephone numbers – does not address the "capacity" problem at all. The issue addressed by amici, in their own words, was "interpretation of the phrase 'random or sequential number generator,'" i.e., one part of the ATDS definition. Amici Br. at 5. The capacity issue though comes from a prior clause at the beginning of the definition: "equipment which has the capacity…." Amici's explanation makes this all the more clear. The straw man they construct is a smartphone, which amici say is not an ATDS because, according to their interpretation, "it would not use random or sequential number generators to produce or store telephone numbers." Id. at 33. Perhaps a smartphone does not use a random or sequential number generator when a user seeks to dial a contact, but amici's brief says that almost any computer or smartphone can be configured to have the "capacity" to generate random or sequential numbers and then dial them, and that is the problem. Id. 21-25. Amici's argument thus ignores the preceding problematic language ("equipment which has the capacity…"), as well as Appellants' overbroad gloss on it: that so long as equipment has the "capacity" to be configured to generate random or sequential numbers, then that is enough for it to qualify as an ATDS. Amici's

interpretation of "random or sequential number generator" therefore does nothing to resolve the "capacity" problem discussed in Duguid and ACA Int'l.

D. The "Prior Panel Precedent" Rule Does Not Apply.

Appellants' prior panel precedent argument hinges on the premise that the Supreme Court's Duguid opinion did not overrule this Court's prior decision in Glasser. App. Br. at 17-23. Duguid of course resolved a circuit conflict in which Glasser was on the side that prevailed. See Duguid, 141 S. Ct. at 1168-69, n.4 (identifying conflicting circuits). Glasser, like Duguid, held that the clause "using a random or sequential number generator" modifies both the verbs "to store" and "[to] produce" in the TCPA to inform what qualifies as an ATDS. App. Br. at 21.

Appellants say that Glasser, as prior panel precedent, requires reversal here because it purportedly "held" 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.'" App. Br. at 21 (quoting Glasser, 948 F.3d at 1312) (emphasis added). The "capacity" statement was not the holding of Glasser, but instead one of the Glasser court's reasons for rejecting the losing verb-modification argument that Duguid later also rejected. Glasser, 948 F.3d at 1306 (holding that "the clause modifies both verbs").[5] Nevertheless, the Supreme Court

[5] Even if the quoted language from Duguid were considered dicta, as Appellants suggest (App. Br. at 18-19), so too would be Glasser's statement on the issue cited by Appellants. In any event, "there is dicta . . . and then there is

in Duguid said what it said: "in all cases . . . the equipment in question must use a random or sequential number generator." 141 S. Ct. at 1170 (emphases added). Because the "intervening Supreme Court decision is 'clearly on point,'" Atl. Sounding Co. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007) (quoting Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees, 344 F.3d 1288, 1290-92 (11th Cir. 2003)), the prior panel precedent rule does not apply.

Moreover, even if the prior panel precedent rule were applicable, this Court "may decline to follow a decision of a prior panel if necessary to give full effect to a United States Supreme Court decision." Footman v. Singletary, 978 F.2d 1207, 1211 (11th Cir. 1992); see also United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (finding that an intervening Supreme Court standard undermined" the prior panel precedent even though the decision addressed a different crime and a different sentencing law than the crime and the sentencing law at issue in the prior panel case). To the extent the Court feels constrained by Glasser's reasoning in the lone sentence cited by Appellants, even the prior panel precedent rule would allow this Court to give full effect to Duguid.

Supreme Court dicta," and "dicta from the Supreme Court is not something to be lightly cast aside." Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) (internal quotation marks omitted).

II. The District Court's Dismissal of Appellants' Artificial and Prerecorded Voice Claims Should Be Affirmed.

Appellants also contend that the trial court erred by dismissing the TCPA claim with prejudice because its order (1) did not specifically "acknowledge" Appellants' "pre[-]recorded voice" allegations, and (2) did not allow leave to amend. App. Br. at 24-25, n.1. There was no error.

A. Dismissal of the "Pre-Recorded Voice" Claim Was Supported By the Record and Was the Legally Correct Result.

This Court can "affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." See Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (emphasis added); see also Powers v. United States, 996 F.2d 1121, 1123–24 (11th Cir. 1993) (same and affirming dismissal for reasons other than those used by the district court). The district court's decision not to "mak[e] any reference to this alternative theory of liability or any determinations regarding the sufficiency" of those allegations (App. Br. at 24) is not error if dismissal was otherwise correct. See Tambourine Comercio Internacional SA v. Solowsky, 312 F. App'x 263, 287 (11th Cir. 2009) (noting that the court can find the trial court right for any reason in the record even when the Court granted a motion "without comment").

Dismissal here was correct for all the reasons stated in the record on Ocwen's motion to dismiss and reply in support of that motion. App. Tab 67 at 10-12; Tab 76 at 7-9. The entirety of Appellants' factual allegations regarding Ocwen's alleged use of a pre-recorded voice to place calls to them are found in these two sentences of the Complaint:

> 26. Plaintiffs received prerecorded messages from Defendant.
>
> 27. Defendant placed calls to Plaintiffs using an artificial or prerecorded voice in violation of 47 U.S.C. §227(b)(1)(A).

App. Tab 66 at ¶¶ 26-27. As Ocwen argued below, conclusorily alleging use of an artificial or pre-recorded voice is insufficient to state a claim. Bonanno v. New Penn Fin., LLC, No. 5:17-cv-229-OC-30PRL, 2017 WL 3219517, at *6 (M.D. Fla. July 28, 2017) ("Merely alleging [defendant] made calls using an automated dialing system, using an artificial or prerecorded voice, or using both does not create any inference supporting the allegation that calls were made using an automatic dialing system, and are insufficient to state a facially plausible claim.") (internal citations and quotations omitted). A plaintiff must allege facts, such as the date and time and total number of allegedly violative calls, to support an inference that a defendant used a prerecorded voice to call them in violation of the TCPA. Moore v. Online Info. Servs., Inc., No. 13-61167-CIV, 2014 WL 11696696, at *2 (S.D. Fla. Jan. 10, 2014) (dismissing plaintiff's claims for TCPA violation based on pre-recorded voice where "Plaintiff provide[d] no information

about the message or calls Plaintiff allegedly received" and stating that "[w]ithout enhancing the complaint with anything more than the statutory language, Plaintiff provides only a threadbare, 'formulaic recitation of the elements' of a TCPA cause of action, which does not suffice."); Duran v. Wells Fargo Bank, N.A., 878 F. Supp. 2d 1312, 1316 (S.D. Fla. 2012) (dismissing plaintiff's complaint because "[p]laintiff provides no facts whatsoever about any automated or pre-recorded calls [d]efendant allegedly made.").

The Complaint included no facts whatsoever in support of this claim, even though they had for over two years call logs and related information that would be relevant to such a claim. The district court's order therefore should be affirmed because Appellants did not plead sufficient plausible facts to state a claim for relief. See Iqbal, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to state a cause of action.).

B. Dismissal With Prejudice Also is Appropriate Because the Complaint is an Improper Shotgun Pleading.

The district court's order should be affirmed for the additional reason that the Complaint is a shotgun pleading that violates the Federal Rules of Civil Procedure. A complaint should be dismissed as a shotgun pleading when it (1) is "replete with conclusory . . . facts" or (2) does "not separat[e] into a different count

each cause of action or claim for relief." Weiland v. Palm Beach Cty. Sheriff's Off., 792 F.3d 1313, 1321-23 (11th Cir. 2015).[6]

In addition to the conclusory allegations discussed above, Appellants impermissibly lump two separate and distinct TCPA claims into a single cause of action – (1) calls placed using an ATDS and (2) calls placed using a prerecorded/artificial voice. The Eleventh Circuit regularly affirms dismissal of complaints for lumping two independent claims together as Appellants have done here. See Kennedy v. Bell South Telecomm., Inc., 546 Fed. App'x 817, 820 (11th Cir. 2013) (affirming dismissal because plaintiff "did not confine individual claims to separate counts"); Ledford v. Peeples, 657 F.3d 1222, 1239 (11th Cir. 2011) (finding complaint was a shotgun pleading because "it lumps multiple claims together in one count"); see also Moore v. Catalyst Fabric Sols., LLC, No. 5:20-cv-331, 2021 WL 5025130, at *1 (N.D. Fla. Feb. 23, 2021) (dismissing FMLA claim because it impermissibly comingled interference and retaliation claims into a single cause of action).

[6] The fact that the district court made no finding as to whether the Complaint constituted a shotgun pleading does not preclude this Court from affirming dismissal on those grounds, because this Court "may affirm the district court's judgment on any grounds supported in the record." Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1356 (11th Cir. 2018) (dismissing complaint with prejudice as a shotgun pleading, even though argument was not raised below and district court ordered dismissal on the merits).

The Court should also deny Appellants' request to replead because Appellants already have amended their complaints several times. In response to Ocwen's motions to dismiss specifying how Appellants failed to properly plead their claims, they filed at least one (and in some cases two) amended complaints.[7] To address the ongoing pleading deficiencies, when the parties jointly moved to reopen the case, Ocwen proposed a procedure by which Plaintiffs would plead their pre-recorded/artificial voice claims, particularly in light of the discovery that Ocwen had produced:

> As to any remaining TCPA claims related to Ocwen's purported use of a prerecorded or artificial voice to place calls . . . the consolidated complaint shall state all facts that support the remaining claims, include the exact number of calls that Plaintiffs contend they received in violation of [the TCPA], their basis for that contention, and citing to any other evidence supporting Plaintiffs' contentions based on the previously exchanged discovery, including the prior deposition of Ocwen's 30(b)(6) witness Mark Trees.

[7] See, e.g., Mr. Dudley's Amended Complaint, No. 9:18-cv-81454 at DE 15; Mr. Evans' First and Second Amended Complaints. 9:18-cv-81394 at DE 5 and 29; Mr. Giello's First Amended Complaint, No. 9:18-cv-81450 at DE 15; Ms. Victoria Jupin's First Amended Complaint, No. 9:18-cv-81451, DE 24; Mr. Lattanzio's First Amended Complaint, No. 9:18-cv-81477, DE 23; Mr. Neba's First Amended Complaint, No. 9:18-cv-81478, DE 16; Mr. Oudyk's Amended Complaint, No. 9:18-cv-81437, DE 22; Ms. Pearson's First Amended Complaint, No. 9:18-cv-81441, DE 20; Ms. Picuri's First Amended Complaint, No. 9:18-cv-81683, DE 12; Mr. Robinson's Complaint, DE 17; Ms. Scioli's Complaint, No. 9:18-cv-81475, DE 18; Mr. Sweeney's First Amended Complaint, No. 9:18-cv-81513, DE 19; and Ms. Zehner's First and Second Amended Complaints, No. 9:18-cv-81470, DE 7 and 25.

App. Tab 54 at 5. The district court ordered Appellants to file a notice with the Court stating whether or not Appellants opposed Ocwen's proposed procedure. Appellee's App. at Tab 55. Appellants responded by filing a notice of non-opposition, id. at Tab 56, and the district court's order re-opening the case noted that "the parties are in agreement for a procedure to prosecute this case." Id. at 57. Appellants, though, failed to comply with the procedure and to remedy the deficiencies in the artificial or prerecorded voice claims that had been identified for them.

Plaintiffs have had ample notice of their pleading deficiencies and an opportunity to amend to properly state a claim. Their Complaint is still nothing more than a shotgun pleading replete with conclusory allegations regarding use of a pre-recorded voice. The Court should affirm the district court's dismissal with prejudice.

III. The District Court Properly Declined to Exercise Supplemental Jurisdiction Over the Remaining State-Law Claim.

Appellants' Statement of the Issues complains that "the [district] court declined to exercise supplemental jurisdiction o[ver] [the] state-law FCCPA claim." App. Br. at 1. To the extent Appellants challenge dismissal of the state-law claim, the civil appeal statement does not cite this dismissal as error, and Appellants' brief offers no argument on the issue. The issue is thus abandoned. E.g., Cheffer v. Reno, 55 F.3d 1517, 1519 n.1 (11th Cir. 1995) (noting that while appellants have listed an item in their statement of the issues, issue is abandoned if

not addressed in their brief); N.L.R.B. v. McClain of Ga., Inc., 138 F.3d 1418, 1422 (11th Cir. 1998) ("Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived.").

Even if not abandoned, the district court did not abuse its discretion by dismissing the remaining state claim, because the claims giving rise to federal question jurisdiction were properly dismissed, and Appellants identified no basis for independent subject-matter jurisdiction over the state-law claim. Laster v. CareConnect Health Inc., 852 F. App'x 476, 479 (11th Cir. 2021); see also Raney v. Allstate Ins. Co., 370 F.3d 1086, 1089 (11th Cir. 2004) ("We have encouraged district courts to dismiss any remaining state claims when . . . the federal claims have been dismissed prior to trial.").

Conclusion

For the foregoing reasons, the Court should affirm the district court's order dismissing Appellants' Amended Consolidated Complaint with prejudice.

Dated: April 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Pro. 32(g)(1), I hereby certify that this document complies with the type-volume and typeface requirements of Fed. R. App. Pro. 27(d)(2)(A) and 32(a)(5)-(6), because it was prepared in a proportionally spaced typeface using size 14 Times New Roman font and contains 7,519 words excluding the cover page, disclosure statement, certificates of counsel, tables of contents and authorities, signature blocks, and proof of service.

/s/ Ryan A. Becker
Ryan A. Becker

CERTIFICATE OF SERVICE

I certify that on April 6, 2022, the foregoing document was electronically filed using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF. Physical copies of the foregoing also will be submitted to the Court via hand delivery.

/s/ Ryan A. Becker
Ryan A. Becker