Appeal No. 21-35746

IN THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

EFINANCIAL, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:19-cv-01430
Hon. James R. Robart

ANSWERING BRIEF OF DEFENDANT-APPELLEE EFINANCIAL, LLC

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INTRODUCTION

The district court was right to dismiss David Borden's claims with prejudice, and this Court should affirm. The Supreme Court has now clarified that the definition of an automatic telephone dialing system (otherwise known as an "ATDS" or "autodialer") in the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("the TCPA") is limited to a device that randomly or sequentially generates a plaintiff's telephone number in the first instance. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). The statutory text 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). The Supreme Court granted certiorari in *Duguid* "to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the capacity to generate random or sequential *phone* numbers." 141 S. Ct. at 1168 (emphasis added). *Duguid* then held that the statutory definition "requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." *Id.* at 1170. Borden admits that he provided his phone number to eFinancial, and that the five text messages he received from eFinancial were in direct response to his online request for insurance information. Consequently, eFinancial did not generate his phone number by use of an ATDS under the clear holding of *Duguid*. His claims fail as a matter of law.

Borden asks this Court to reverse the district court and allow his claims to continue based on the theory that footnote 7 of the *Duguid* opinion somehow should be read to allow ATDS claims so long as some device-generated sequential (or random) number is used to sequence calls, and that it need not be a device-generated *phone* number. But that misstates the very question presented in *Duguid*. As recognized in a recent Ninth Circuit memorandum disposition, when the statute and the Supreme Court were referring to the generation of a "number," they were referring to a *phone* number, not some other number such as a lead identification number. *See Meier v. Allied Interstate LLC*, No. 20-55286, 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022). A *phone* number must be randomly or sequentially generated by a device—to either then be autodialed, or stored and autodialed later—to satisfy the ATDS definition. That was the whole point of granting the *Duguid* petition for certiorari, as there was a circuit split on whether random or sequential generation of the phone number was required, and of the Court's eventual decision.

Separately, even if Borden's theory were valid, his complaint does not plausibly allege that a random or sequentially generated non-phone number was used to store or produce his phone number. Borden admits that eFinancial texted him in response to his own request for information a few weeks prior, and that it texted him based on the number of days that had elapsed since he submitted his request. The trigger was Borden's own request; the trigger was not a random or sequentially

generated number used to facilitate scattershot consumer outreach. This would be a valid, alternative basis for this Court to affirm dismissal.

Finally, Borden gave valid consent to receive autodialed calls when he submitted his online request for insurance information. The district court did not reach that basis for dismissal, but it would also be another valid basis to affirm.

JURISDICTIONAL STATEMENT

eFinancial agrees with Borden's jurisdictional statement.

ISSUES PRESENTED

1. Whether the district court correctly held that Borden did not plausibly allege use of an ATDS where he admits that eFinancial had his phone number because he provided it to eFinancial when he submitted an online request for insurance information, and the phone number was not the product of random or sequential phone-number generation.

2. Whether the district court should be affirmed on the alternative ground that Borden does not plausibly allege that a random or sequentially generated non-phone number was used to store or produce his phone number.

3. Whether the district court should be affirmed on the alternative ground that Borden's claims fail because he gave valid consent to receive calls sent using an ATDS when he submitted an online request for insurance information.

STATEMENT OF THE CASE

A. Borden's allegations

Borden does not allege that eFinancial called him at random, or that eFinancial sequentially generated his phone number in the first instance. Instead, Borden admits that he voluntarily provided his phone number and other personal information to eFinancial when he visited Progressive.com and filled out a webform to "obtain an online quote and begin the website-initiated purchase of life insurance." ER 205 ¶¶ 17, 18; ER 207 ¶ 22. Borden also admits that he clicked a button, entitled "Next, your rates," that was directly above the following language:

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

ER 206 (emphasis in original) (screenshot from https://ulifeprogressive.efinancial.com/About). Borden claims that he can bring suit because he did not notice this language. ER 207 ¶ 23.

After Borden submitted the webform, he was "presented with [the] life insurance rates and rate-related information" he asked for. ER 208 ¶ 29. He also received a follow up text message a week later—which thanked him for his online

request, gave him instructions to contact eFinancial, and provided an automated method to opt out of further communications:

> Progressive Advantage through eFinancial: Thanks for your life insurance request. Please call 866-235-2755. Msg&Data rates apply. Txt HELP or STOP to opt out.

ER 211 ¶ 36. Borden received four similar text messages over the course of the next month. ER 211–12 ¶ 37. Each of these text messages ended with the same "Txt HELP or STOP to opt out" language. *Id.* Borden does not allege that eFinancial sent him any texts that were not related to his inquiry. Nor does he allege that he texted "STOP to opt out." *See* ER 213 ¶ 41.

B. Procedural history

Borden first filed a putative class action complaint against eFinancial in September 2019. *See* ER 3. That complaint alleged that eFinancial texted Borden in violation of (1) the FCC regulations surrounding the National Do-Not-Call registry, and (2) the TCPA's prohibition against using an ATDS to make calls without prior express consent. *See* SER 6 ¶ 10; SER 7 ¶ 17. Borden sought to recover statutory damages of $1,500 for every insurance text message that eFinancial sent to not only him but also anyone else who received similar text messages over the last five years. *See* SER 8 ¶ 22; SER 13 ¶ 33. He did not acknowledge in the first complaint that he had voluntarily provided his phone number seeking a request for insurance information. *See generally* SER 1–15.

In December 2019, eFinancial filed an Answer asserting several affirmative defenses—including that Borden had given his prior express written consent to receive the alleged text messages and that eFinancial did not use an ATDS to send any of them. *See* SER 16–25.

Nine months later, Borden filed an amended complaint. There, he acknowledged that he provided his phone number in connection with his online request for insurance information. SER 30 ¶ 13–SER 37 ¶ 40. But Borden claimed in this iteration that he had "promptly forgot" about his request after he had submitted it, and that he "had no recollection" of submitting his insurance request a week before he received his first text message from eFinancial. SER 34 ¶ 30; SER 37 ¶ 37. The amended complaint removed Borden's claims based on purported National Do-Not-Call registry violations. A Do-Not-Call violation cannot exist where a plaintiff has submitted an "inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call," 47 C.F.R. § 64.1200(f)(5) (defining "established business relationship"),[1] as Borden had done. *See* SER 30 ¶ 13, SER 35 ¶ 33, 34.

Borden's lawsuit was stayed on October 16, 2020 because of the then-

[1] *See also id.* §§ 64.1200(c)(2) (generally prohibiting "telephone solicitations" to those on the Do-Not-Call registry), 64.1200(f)(15) (defining "telephone solicitation" to exclude calls or messages "[t]o any person with whom the caller has an established business relationship").

forthcoming Supreme Court decision in *Duguid*, which would "inform the central question [of] whether eFinancial used an ATDS to send its text messages to Mr. Borden." SER 51. The stay was lifted after the *Duguid* decision came down. *See* ER 7. Borden then filed a second amended complaint. *Id.*

The second amended complaint generally tracks the first amended complaint, *see* SER 54–78 (redline), but it adds allegations in an apparent attempt to avoid the *Duguid* holding. In particular, Borden alleges that eFinancial's equipment "picks the order . . . in which . . . the telephone numbers [are] to be dialed . . . based on the adjustable but predetermined eFinancial Mass Text Advertisement Sequential Order." ER 215 ¶ 48; *see also* ER 210 ¶ 34; ER 214 ¶ 47 (emphasizing the ability of equipment to determine the order in which to pick telephone numbers to be dialed). The second amended complaint also states (without alleging any facts to support the conclusory statement) that the equipment can "dial the assembled sequential strings of numbers" eFinancial allegedly "stores in the LeadID field" purportedly used to facilitate the sequential dialing of numbers. ER 215 ¶¶ 49, 50. At no point does Borden allege that any automated system generated his phone number by way of a random or sequential number generator.

eFinancial moved to dismiss the second amended complaint with prejudice because Borden (1) did not plausibly allege use of an ATDS, and (2) gave valid

consent to receive autodialed calls in any event. *See* ER 179-98.[2]

C. The district court's final order and judgment

The district court dismissed Borden's second amended complaint with prejudice in light of the Supreme Court's decision in *Duguid*. ER 12-24. The district court did not reach eFinancial's alternative argument that Borden gave his prior express written consent to receive messages sent through an ATDS.

The district court's analysis can be broken down into three distinct parts.

First, the order summarizes how, before *Duguid*, the circuits split over whether an ATDS must use a random or sequential number generator to generate phone numbers in the first instance. The Ninth, Second, and Sixth Circuits had said no; the Eleventh, Seventh, and Third had said yes. *See* ER 19.

Second, the order summarizes the decision in *Duguid.* The TCPA on its face requires an ATDS "(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). *Duguid* held that "the phrase 'using a random or sequential number generator' modifies both 'store' and 'produce' in the statutory definition." ER 20

[2] eFinancial also disputed, and continues to dispute, that the TCPA was intended to or does cover text messages. *See Duguid*, 141 S. Ct. at 1168 n.2, 1173 (assuming that the ATDS prohibitions of the TCPA extend to text messages "without considering or resolving th[e] issue" because it was not disputed by the parties, but noting that "[t]his Court must interpret what Congress wrote" in the TCPA); *but see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (deferring to FCC interpretation that prohibition extends to text messages).

(quoting 141 S. Ct. at 1169). This interpretation comports with the narrow ATDS definition adopted by the Eleventh, Seventh, and Third Circuits and *not* with the broad one of the Ninth, Second, and Sixth Circuits. The district court also succinctly describes the Supreme Court's analysis of the TCPA's legislative history—including how the ATDS prohibition was a response to then-novel 1991 technology that could randomly or sequentially generate phone numbers and thereby tie up emergency services lines and "simultaneously tie up all the lines of any business with sequentially numbered phone lines." ER 21 (quoting *Duguid*, 141 S. Ct. at 1167). In light of this history, "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." ER 21 (quoting *Duguid*, 141 S. Ct. at 1171).

Third, the district court rejected Borden's argument that his claims could proceed as a result of his strained interpretation of footnote 7 of the *Duguid* opinion. Borden asserted that, despite the entire opinion being devoted to the random or sequential generation of phone numbers, footnote 7 actually permits claims if they are based upon automatic generation of some number other than a phone number, including merely to sequence phone numbers that were not otherwise automatically generated. The district court recognized that this argument, which Borden continues to press on appeal, "relies on a selective reading of one line within

footnote 7 and ignores the greater context of that footnote and the opinion." ER 22.

Namely, the purpose of the footnote is to explain why a *narrow* ATDS definition does not render the words "to store" surplusage—despite some circuits' concern that "[c]ommon sense suggests that any number that is stored using a number-generator is also produced by the same number-generator." *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 284 (2d Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2509, *and abrogated by Duguid*, 141 S. Ct. at 1163. In response to this concern, the Supreme Court "cited an amicus brief filed by the Professional Association for Consumer Engagement ("PACE")," ER 22, which, in turn, gave a specific example of how certain 1991 technology (known as "028 Patent" technology) could (1) sequentially generate a series of phone numbers (for instance, all those starting with a 206 area code); (2) "store" those phone numbers in an array for later calling; and (3) randomly "produce" one of the previously generated and stored phone numbers for dialing. *See* ER 49–50. But critically, unlike here where eFinancial's list is allegedly comprised of phone numbers submitted through customers' own requests, "the preproduced list of phone numbers referenced in footnote 7 was itself created through a random or sequential number generator." ER 22.

SUMMARY OF THE ARGUMENT

Dismissal should be affirmed. As in *Meier*, Borden failed to state a claim because he does not allege that eFinancial randomly or sequentially generated his

phone number in the first instance. To the contrary, Borden admits that he provided his phone number to eFinancial when he submitted his online request for insurance information. The text of the TCPA; the nature of the circuit split that *Duguid* resolved; and the question presented, holding, and reasoning of *Duguid* make clear that an ATDS claim cannot stand on allegations that a defendant generated a number that is not a phone number and then used that non-phone number in some manner to choose among phone numbers that were provided by customers. Rather, the ATDS must be used to generate the phone numbers in the first instance.

Separately, even assuming *arguendo* that such allegations mattered, Borden does not plausibly allege that a randomly or sequentially generated non-phone number was used to store or produce his phone number. Borden instead admits that eFinancial texted him in response to his own request for information and based on the number of days that had elapsed since he submitted his request. The trigger for eFinancial's text messages was Borden's own request—not a random or sequentially generated number used to facilitate scattershot consumer outreach. This would be a valid, alternative basis for this Court to affirm dismissal.

Finally, the district court's judgment can be affirmed on the alternative ground that Borden provided valid consent to receive autodialed calls.

STANDARD OF REVIEW

This Court "review[s] de novo the district court's grant of a motion to

dismiss under Rule 12(b)(6) and may affirm on any ground supported by the record." *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 604 (9th Cir. 2019).

ARGUMENT

I. Borden does not and cannot allege that eFinancial used an ATDS.

A. An ATDS must generate random or sequential phone numbers; it is not enough to automatically call stored phone numbers.

The TCPA was enacted in 1991 to address specific problems arising from the use of ATDS technology, "which revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically." *Duguid*, 141 S. Ct. at 1167. This practice "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.'" *Id.* (quoting H. R. Rep. No. 102–317, p. 24 (1991)). It also meant that callers "could simultaneously tie up all the lines of any business with sequentially numbered phone lines." *Id.* Congress therefore restricted the use of ATDS, and it defined 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).

The circuits split over how to interpret this definition starting in 2018.[3]

[3] This split developed after the D.C. Circuit exercised its authority under the Hobbs Act to set aside the FCC's prior interpretations of the term. *See ACA Int'l v.*

Namely, they split over whether an ATDS "must have the capacity to generate random or sequential phone numbers." *Duguid*, 141 S. Ct. at 1168.

The Seventh, Eleventh, and Third Circuits held that an ATDS must *generate* random or sequential phone numbers. These courts reasoned that the phrase "using a random or sequential number generator" modifies *both* verbs in the first half of the ATDS definition—i.e., "store" and "produce."[4]

Conversely, the Second, Sixth, and Ninth Circuits interpreted the phrase "using a random or sequential number generator" as modifying *only* the verb "produce." These circuits therefore held that equipment might qualify as an ATDS if it stores a telephone number in a database and automatically dials that number—even if the phone number was not randomly or sequentially generated.[5]

FCC, 885 F.3d 687, 695 (D.C. Cir. 2018).

[4] *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 468 (7th Cir. 2020) ("We . . . hold that the phrase 'using a random or sequential number generator' describes how the telephone numbers must be 'stored' or 'produced.'"), *cert. denied*, 141 S. Ct. 2552 (2021); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1307 (11th Cir. 2020) (interpreting ATDS as "covering devices that randomly or sequentially generated telephone numbers and dialed those numbers, or stored them for later dialing"), *cert. denied*, 141 S. Ct. 2510 (2021); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (holding ATDS restriction is triggered by "generating random or sequential telephone numbers and dialing those numbers").

[5] *See Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 570 (6th Cir. 2020) (interpreting ATDS to cover Avaya Proactive Contact system that "create[d] . . . calling list[s] based on a stored list of numbers"), *cert. granted, judgment vacated*, 141 S Ct. 2509, and *abrogated by Duguid*, 141 S. Ct. at 1163; *Duran*, 955 F.3d at 287 (interpreting ATDS to cover "ExpressText and EZ Texting programs" that could automatically "call numbers from stored lists, such as those generated,

The Supreme Court in *Duguid* granted certiorari "to resolve a conflict among the Courts of Appeals regarding whether an auto-dialer must have the capacity to generate random or sequential phone numbers." 141 S. Ct. at 1168. It then adopted a narrow, as opposed to broad, ATDS definition, holding that the statutory text "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." 141 S. Ct. at 1170. This interpretation of the plain text comports with the legislative history of the TCPA because, in 1991, "Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines. Unsurprisingly, then, the autodialer definition Congress employed includes only devices that use such technology, and the autodialer prohibitions target calls made to such lines." *Id.* at 1172 (citation omitted).

As a result of the *Duguid* decision, to state an ATDS claim, a plaintiff must plausibly allege that his or her phone number was randomly or sequentially generated. It is no longer enough to allege that a defendant's equipment "automatically . . . send[s] text messages to a stored list of phone numbers as part of scheduled

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initially, by humans"); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1048 (9th Cir. 2018) (interpreting ATDS to cover "Textmunication system" that "automatically sen[t] the desired messages to . . . stored phone numbers at a time scheduled by the client"), *abrogated by Duguid*, 141 S. Ct. at 1163.

campaigns." *Marks*, 904 F.3d at 1053; *see also Allan*, 968 F.3d at 569 (also involving equipment that could automatically "dial[] from a stored list of numbers"); *Duran*, 955 F.3d at 290 (same). This very Court recognized as much in an unpublished decision when it affirmed dismissal of ATDS claims where the plaintiff did not allege his phone number was generated randomly or sequentially in the first instance and instead alleged only that the defendant's "system stores telephone numbers using a sequential number generator because it uploads a customer's list of numbers and produces them to be dialed in the same order they were provided, i.e., sequentially." *Meier*, 2022 WL 171933, at *1. Given the persistence of such claims, a published opinion on the issue would be reasonable.

B. Borden admits that he provided his phone number to eFinancial; he does not allege that it was randomly or sequentially generated.

As in *Meier*, there is no dispute that eFinancial did not randomly or sequentially generate Borden's phone number. Borden admits that he provided his phone number to eFinancial when he submitted an online request for insurance information. *See, e.g.*, Opening Br. at 7–8. That is why eFinancial sent five responsive text messages to Borden. Under the plain text of the TCPA and under *Duguid's* strict, narrow ATDS interpretation, such allegations fail to state an ATDS claim because they are entirely inconsistent with the necessary requirement of the use of a "random or sequential phone number[]" generator. *Duguid*, 141 S. Ct. at 1168, nor is there automatic dialing of "such numbers" that were (never) randomly or

sequentially generated, 47 U.S.C. § 227(a)(1)(B).

C. It is not sufficient for Borden to allege that eFinancial used a number generator to select a calling order.

Borden urges this Court to reverse the district court and hold that he sufficiently pleaded use of an ATDS based on a single, tortured theory: that eFinancial generated identification numbers that were then used to "pick[] the order in which the telephone numbers were texted from eFinancial's database." Opening Br. at 6. Put differently, he claims that random or sequential generation of a number that is not a phone number can trigger the ATDS prohibition, and he argues that footnote 7 of the *Duguid* opinion condones his theory and saves his complaint. He is wrong.

1. A *phone* number must be randomly or sequentially generated to violate the ATDS prohibition.

The plain language of the statutory ATDS definition makes clear that generation of a *phone* number is required. An ATDS is "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). This definition expressly references "telephone numbers," and it gives the reader no basis to infer that the word "number" first refers to a phone number but then refers to any other kind of number—such as a "LeadID." ER 215 ¶ 49. To the contrary, by specifying that an ATDS must be able to "dial *such* numbers," the definition makes clear that "number" refers back to the first mention of "telephone

number." Put another way, it is natural to read the definition as dropping "telephone" from the second and third mention of "number" for brevity, and it is unnatural to read it as Borden suggests: as referring first to a "telephone number," next to a non-telephone number (like a LeadID), and then *back* to a telephone number (to be dialed). Accordingly, the "inquiry begins with the statutory text, and ends there as well [because] the text is unambiguous." *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

The Supreme Court confirmed this in *Duguid* when it "granted certiorari to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the capacity to generate random or sequential *phone* numbers." 141 S. Ct. at 1168 (emphasis added). Borden is simply wrong to claim that *Duguid* has "nothing to do with the generation of [phone] numbers." Opening Br. at 25. *Duguid* had everything to do with the generation of phone numbers—the word is right there in the ATDS definition and in the Supreme Court's framing of the case and its holding that "in all cases, whether storing or producing *numbers to be called*, the equipment in question must use a random or sequential *number generator*." 141 S. Ct. at 1170 (emphasis added). By contrast, there is no statutory basis for Borden's focus on the use of an identification number to "pick[] the order in which the telephone numbers were texted from eFinancial's database." Opening Br. at 6. Nor does automatic ordering of calls implicate the concerns that motivated

Congress to limit use of an ATDS, such as because they "tie up the lines of any business with sequentially numbered phone lines." *Duguid*, 141 S. Ct. at 1167 (quoting H. R. Rep. No. 102–317, p. 24 (1991)).

2. Borden ignores the circuit split *Duguid* resolved.

Borden ignores the circuit split that *Duguid* resolved. He insists that there is no dichotomy between claims that involve randomly or sequentially generated phone numbers, on the one hand, and claims that involve retrieval from "stored lists," on the other. *See* Opening Br. at 19, 24–30. But the question of stored numbers versus randomly-or-sequentially-generated numbers is *exactly* what divided the circuits before *Duguid* and *exactly* what that case resolved. The Ninth, Second, and Sixth Circuits held that equipment could qualify as an ATDS merely because it autodialed stored phone numbers that had not been randomly or sequentially generated in the first instance. The Seventh, Eleventh, and Third Circuits held the opposite—that an ATDS must randomly or sequentially generate phone numbers in the first instance. Against this backdrop, the Supreme Court granted certiorari to answer the question of "whether an autodialer must have the capacity to generate random or sequential *phone* numbers," *Duguid*, 141 S. Ct. at 1167 & n.4 (emphasis added), the parties argued over whether or not "Facebook sent text messages to numbers that were randomly or sequentially generated," *id.* at 1168, and the Court ultimately sided with Facebook—after explaining how the TCPA had been enacted

in response to the "unique problems" caused by "the use of random or sequential number generator technology" that had prompted Congress to define ATDS to "include[] only devices that use such technology," *id.* at 1172.

This history makes clear that, if this Court were to accept Borden's interpretation, it would resuscitate the very circuit split the Supreme Court resolved.[6] Worse still, it would resuscitate the overexpansive definition of an ATDS that was rejected in *Duguid*, and that definition "would capture virtually all modern cell phones, which have the capacity to store telephone numbers to be called and dial such numbers." *Id.* at 1171 (cleaned up).

3. Footnote 7 of *Duguid* does not permit Borden's claim.

Even though Borden's entire argument is premised on footnote 7, he fails to address its context or even provide the full footnote.

For context, footnote 7 follows the Supreme Court's observation that:

> Duguid's interpretive approach [of allowing ATDS claims based on calls to stored phone numbers] would have some appeal if applying the traditional tools of interpretation led to a "linguistically impossible" or contextually

[6] District courts have since routinely recognized the nature of the circuit split resolved in *Duguid*. *See, e.g.*, *Edwards v. Alorica, Inc.*, No. 19-CV-02124, 2021 WL 4622390, at *2 (C.D. Cal. Aug. 30, 2021) (recognizing that *Duguid* holds that "ATDS does not encompass devices that merely contact a cellular phone by text or call from 'stored' telephone numbers") *Jovanovic v. SRP Invs. LLC*, No. CV-21-00393, 2021 WL 4198163, at *2 (D. Ariz. Sept. 15, 2021) (also recognizing that "[Duguid] abrogated previous Ninth Circuit precedent" on this point); *see also Guglielmo v. CVS Pharmacy, Inc.*, No. 20CV1560, 2021 WL 3291532, at *2 (D. Conn. Aug. 2, 2021) (describing *Duguid*'s "reading of the TCPA" as "strict").

> implausible outcome. Duguid makes a valiant effort to prove as much, but ultimately comes up short. It is true that, as a matter of ordinary parlance, it is odd to say that a piece of equipment "stores" numbers using a random number "generator." But it is less odd as a technical matter. Indeed, as early as 1988, the U. S. Patent and Trademark Office issued patents for devices that used a random number generator to store numbers to be called later (as opposed to using a number generator for immediate dialing).

141 S. Ct. at 1171–72 (citation omitted). And the full footnote states:

> Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. *See* Brief for Professional Association for Customer Engagement et al. as Amici Curiae 19. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute.

Id. at 1172 n.7 (select citations omitted).

The reference in the footnote to picking phone numbers from a "preproduced list" is not referring to just any stored list. It is referring to a "preproduced list" of phone numbers generated randomly or sequentially by an ATDS. That's why the end of the footnote speaks of how the "storing and producing functions often merge." Dispensing with a requirement of random or sequential generation of the

phone numbers, however, would permit cases involving automated use of *any* stored list; indeed, "[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. But the Court in *Duguid* expressly stated that it was avoiding an interpretation that would be "classifying almost all modern cellphones as autodialers." 141 S. Ct. at 1172; *see also Meier*, 2022 WL 171933, at *1 ("Under Meier's [erroneous] interpretation, virtually any system that stores a pre-produced list of telephone numbers would qualify as an ATDS if it could also autodial the stored numbers. But this is precisely the outcome the Supreme Court rejected in *Duguid*.") (cleaned up).

In short, footnote 7 defends the Supreme Court's decision to adopt a narrow ATDS definition—i.e., one that requires the random or sequential generation of phone numbers in all instances—and specifically rejects Duguid's superfluity argument.[7] The district court was right to reject Borden's argument as "selective" and

[7] The Electronic Privacy Information Center ("EPIC") makes its own superfluity argument, claiming that "[i]nserting 'telephone' into "random or sequential number generator" would also make the prior express consent exception superfluous." *See* Br. of the Electronic Privacy Information Center as Amicus Curiae in Supp. of Plaintiff-Appellant and Reversal (hereinafter "EPIC Br."), at 7. This argument is one of the very arguments that persuaded the Ninth Circuit in the now-overruled decision in *Marks*, 904 F.3d at 1051, and it fails for a number of reasons. First, there is no superfluity because "it is possible to imagine a device that both has the capacity to generate numbers randomly or sequentially and can be programmed to avoid dialing certain numbers." *Gadelhak*, 950 F.3d at 466. Second, there is no superfluity because even if the consent exception never applied with

acontextual. ER 22. Footnote 7 only matters if the facts of a given case follow the facts described in the cited PACE brief, which is not the case here because eFinancial's alleged list of customer phone numbers was not created by random or sequential generation; it was instead created after people like Borden submitted requests for insurance information and provided their phone numbers to eFinancial.[8]

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respect to ATDS calls, it could still apply as to other calls covered in the same subsection—i.e., those made using "an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). Third, even if there were superfluity, PACE's more expansive reading would not resolve the issue because there is no reason to place calls in a random or sequential order "for emergency purposes." *Id.*

[8] Following *Duguid*, district courts across the country have routinely dismissed ATDS claims where an underlying list of phone numbers was not created through random or sequential phone-number generation. *See e.g.*, *Pascal v. Concentra, Inc*., No. 19-cv-02559, 2021 WL 5906055, at *9 (N.D. Cal. Dec. 14, 2021); *In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11md02295, 2021 WL 5203299, at *3 (S.D. Cal. Nov. 9, 2021); *Camunas v. Nat'l Republican Senatorial Comm.*, No. 21-1005, 2021 WL 5143321, at *5 (E.D. Pa. Nov. 4, 2021); *Brickman v. Facebook, Inc*., No. 16-cv-00751, 2021 WL 4198512, at *3 (N.D. Cal. Sept. 15, 2021), *appeal filed*, No. 21-16785 (9th Cir. 2021); *Tehrani v. Joie de Vivre Hosp., LLC*, No. 19-cv-08168, 2021 WL 3886043, at *5 (N.D. Cal. Aug. 31, 2021); *Cole v. Sierra Pac. Mortg. Co*., No. 18-cv-01692, 2021 WL 5919845, at *3 (N.D. Cal. Dec. 15, 2021), *appeal filed*, No. 22-15078 (9th Cir. 2022); *Grome v. USAA Sav. Bank*, No. 19-CV-3080, 2021 WL 3883713, at *5 (D. Neb. Aug. 31, 2021); *Barry v. Ally Fin., Inc.*, No. 20-12378, 2021 WL 2936636, at *6 (E.D. Mich. July 13, 2021); *Timms v. USAA Fed. Sav. Bank*, No. 18-CV-01495, 2021 WL 2354931, at *7 (D.S.C. June 9, 2021).

Relatedly, every one of no less than eleven courts to have considered Borden's argument in context rejected it. *See Austria v. Alorica, Inc.*, No. 20-cv-05019, 2021 WL 5968404, at *4 (C.D. Cal. Dec. 16, 2021); *Gross v. GC Homes, Inc*., No. 21-cv-00271, 2021 WL 4804464 (S.D. Cal. Oct. 14, 2021); *Samataro v. Keller Williams Realty, Inc.*, No. 18-cv-775, 2021 WL 4927422, at *4 (W.D. Tex. Sept. 27, 2021); *Grome*, 2021 WL 3883713, at *5; *Franco v. Alorica Inc*, No. 20-cv-05035, 2021 WL 3812872, at *3 (C.D. Cal. July 27, 2021); *Barry*, 2021 WL

D. The public policy concerns raised by Borden are irrelevant under *Duguid* and not implicated in any event.

Given that Borden's position conflicts with the text of the TCPA and *Duguid*, Borden must lean heavily on public policy concerns. *See* Opening Br. at 30–34. But Borden's "public policy concerns" provide no legitimate basis for this Court to rewrite the statute, as "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016). Indeed, *Duguid* itself held that plaintiffs like Borden cannot "take a chainsaw" to perceived woes by rewriting the TCPA "when Congress meant to use a scalpel" "to the[] nuanced problems" that existed in 1991. *Duguid*, 141 S. Ct. at 1171. Borden's "quarrel is with Congress, which did not define an autodialer as malleably as he would have liked." *Id.* at 1173.

Borden warns that a "telemarketer could obtain or purchase a list of every

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2936636, at *6; *Timms*, 2021 WL 2354931 at *7; *Hufnus v. DoNotPay, Inc.*, No. 20-cv-08701, 2021 WL 2585488, at *1 (N.D. Cal. June 24, 2021). Several of these decisions cite the district court order in this case. *See, e.g.*, *Pascal*, 2021 WL 5906055, at *5; *Camunas*, 2021 WL 5143321, at *5; *Brickman*, 2021 WL 4198512, at *2; *LaGuardia v. Designer Brands Inc.*, No. 20-cv-2311, 2021 WL 4125471, at *7 (S.D. Ohio Sept. 9, 2021); *Tehrani*, 2021 WL 3886043, at *5. And tellingly, the only courts to condone Borden's argument did not discuss the context of footnote 7 or the underlying PACE brief. *See McEwen v. Nat'l Rifle Ass'n of Am.*, No. 20-cv-00153, 2021 WL 5999274, at *4 (D. Me. Dec. 20, 2021); *Miles v. Medicredit, Inc.*, No. 20-cv-01186, 2021 WL 2949565, at *1 (E.D. Mo. July 14, 2021); *Carl v. First Nat'l Bank of Omaha*, No. 19-cv-00504, 2021 WL 2444162, at *11 (D. Me. June 15, 2021); *Libby v. Nat'l Republican Senatorial Comm.*, No. 21-CV-197, 2021 WL 4025798, at *3 (W.D. Tex. July 27, 2021); *Montanez v. Future Vision Brain Bank, LLC*, 536 F. Supp. 3d 828, 837 (D. Colo. 2021).

single telephone number in a specific geographic area, and then use a random or sequential number generator to pick the order in which to randomly or sequentially dial each and every telephone number in that geographic area in the context of a mass telemarketing campaign [so long as] the telephone numbers themselves were not generated by a random or sequential number generator." Opening Br. at 32. But, as explained by the district court, "Congress specifically intended § 227(b)(1)(A) to address the problems caused when companies used technology to dial random or sequential blocks of telephone numbers automatically." ER 20.

Congress limited the use of "uniquely harmful" ATDS technology because the random or sequential generation of phone numbers "threatened public safety by seizing the telephone lines of public emergency services," "could simultaneously tie up all the lines of any business with sequentially numbered phone lines," and could reach all sorts of numbers—including "cell phones, pagers, and unlisted numbers." *Duguid*, 141 S. Ct. at 1167. In light of these concerns, Congress specifically prohibited the use of technology that could "store or produce telephone numbers to be called, using a random or sequential number generator" and automatically dial "such numbers." 47 U.S.C. § 227(a)(1). "None of these concerns are present in a case where the phone numbers being dialed come from a legitimate list of customer or client contacts rather than the workings of a random or sequential number generator." *Austria*, 2021 WL 5968404, at *4. Nor are they "implicate[d]"

by "[s]ystems that use random or sequential numbers merely to select the dialing order of telephone numbers obtained by other means." *Cole*, 2021 WL 5919845, at *3.[9] Indeed, it simply does not matter if random or sequential ordering are part of the calculus in responding to *consumer*-initiated requests for information, since "[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. Finally, Congress was not concerned about *en masse* calling absent the use of random or sequential number generation. For this reason, the FCC recognizes that the mere "fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative of whether that equipment constitutes an autodialer under the TCPA." *Declaratory Ruling on P2P Alliance Petition for Clarification Under the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278, at *2 (June 25, 2020).

In any event, Borden's hypothetical is misplaced here. He does not allege that eFinancial purchased a list of phone numbers to contact him. Instead, he admits that he provided his phone number when he sought the insurance information he then received. ER 205 ¶¶ 17, 18. And the policy argument he articulates would

[9] The lengthy explanation offered by EPIC about how numbers may be randomly or sequentially generated using today's technology (as opposed to that in 1991) is irrelevant for similar reasons. *See* EPIC Br. at 9.

be turned on its head if applied to prevent a business from providing the very information the consumer sought when they submitted their phone number with a request for information. Similar considerations led the FCC to hold that a company does not violate the TCPA by setting up a system that allows, for example, a consumer who "see[s] an advertisement or another form of call-to-action display" to text the word "discount" to the retailer who in turn "replies by texting a coupon to the consumer." *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8015 (2015).

II. Dismissal was also proper because Borden does not plausibly allege that a random or sequentially generated non-phone number was used to pick the order in which his phone number was texted.

Even if Borden's interpretation of footnote 7 were persuasive, which it is not, he does not plausibly allege that a random or sequentially generated non-phone number was used to store his phone number or pick the order in which to produce it for autodialing.

"A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Importantly, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Here, Borden

admits that he provided his phone number to eFinancial when he requested insurance information, and that he received the requested information from eFinancial. *See, e.g.*, ER 205 ¶ 18; ER 210 ¶ 35. It was Borden's request, not some randomly or sequentially generated non-phone number, that served as the trigger for him to receive text messages from eFinancial. Indeed, Borden himself alleges that the text messages were sent "based on the number of days since the lead form was initially completed" by him. ER 210 ¶ 34.

Rather than providing any required detail; Borden simply parrots the language of the TCPA and of footnote 7 in *Duguid* when he alleges that eFinancial "used a sequential number generator to store and subsequently produce" his phone number, ER 210 ¶ 34, and states without *any* further details that "[d]iscovery also confirmed that an ATDS was used" to text him," ER 214 ¶ 45. Indeed, the closest Borden comes to providing factual detail relevant to his theory is when he alleges:

> Defendant's ATDS . . . uses a sequential number generator to assemble sequential strings of numbers in a field labeled LeadID, which are then stored and assigned to a telephone number and are used when the sequential number generator picks the order, which is based on the adjustable but predetermined eFinancial Mass Text Advertisement Sequential Order. Defendant's ATDS further has the capacity to dial the assembled sequential strings of numbers it stores in the LeadID field.

ER 215 ¶¶ 49–50. But here, too, Borden provides no factual detail to explain the basis for any contention that LeadIDs are randomly or sequentially generated; the basis for his position that LeadIDs are supposedly used to track when text

messages need to be sent (as opposed to what happened with a given *lead*, for example, whether or not it resulted in a sale of insurance information); or why he believes eFinancial's system dials LeadIDs as opposed to (as one would more naturally assume) phone numbers.

In sum, even if Borden's footnote 7 theory were valid, he does not plausibly allege facts to support that theory. In fact, his allegations establish the opposite—that his own request for insurance information was responsible for the text messages that he received. This Court may affirm dismissal on this basis as well.

III. Dismissal was also proper because Borden gave valid consent to receive autodialed calls.

Although the district court did not reach the issue, Borden gave valid consent to receive autodialed calls (even though the text messages were not actually autodialed). It would therefore be proper to affirm the district court's order on this alternative ground because valid consent is clear from the face of the complaint and thus "supported by the record." *Beckington*, 926 F.3d at 604.

The TCPA allows the use of an ATDS to place calls "with the prior express consent of the called party." 47 U.S.C. § 227(b)(1). "The implementing regulations establish the type of consent necessary to avoid TCPA liability. A text or call that 'includes or introduces an advertisement or constitutes telemarketing' may only be sent with the recipient's 'prior express written consent.'" *Wick v. Twilio Inc.*, No. C16-00914, 2017 WL 2964855, at *5 (W.D. Wash. July 12, 2017) (quoting 47

C.F.R. § 64.1200(a)(2)).[10] The regulations further specify that "[t]he term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(13). Finally, for prior express written consent (or "PEWC") to be valid, the regulations state:

> The written agreement shall include 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.

47 C.F.R. § 64.1200(f)(9)(i).

When Borden submitted his online request for insurance information, he clicked a "Next, your rates" button appearing directly over the following language:

> Efinancial, LLC provides quotes from Fidelity Life and other insurers on this site. These entities are **not affiliated with Progressive.**
>
> By pressing the button above you agree to this website's [hyperlinked] Privacy Policy, and *you consent to receive offers of insurance from Efinancial, LLC at the email address or telephone numbers you provided, including*

[10] By contrast, "Non-telemarketing texts and calls require only 'prior express consent.'" *Id.* (quoting 47 C.F.R. § 64.1200(a)(1)).

> *autodialed, pre-recorded calls, SMS or MMS messages*. Message and data rates may apply. *You recognize and understand that you are not required to sign this authorization to receive insurance services from eFinancial and you may instead reach us directly at (866) 912-2477*.

ER 206. In so doing, Borden gave valid prior express written consent to receive calls from eFinancial by use of an ATDS. Borden affirmatively clicked a button to enter into a written agreement with eFinancial.[11] And as required under the implementing regulations, he was presented with disclosures that were "clear and conspicuous" because they "would be apparent to the reasonable consumer, [and were] separate and distinguishable from the advertising copy or other disclosures," 47 C.F.R. § 64.1200(f)(3); and he was specifically informed that he was consenting to receive telemarketing calls but not required to consent "as a condition of purchasing any property, goods, or services," *id.* § 64.1200(f)(9)(i)(B).

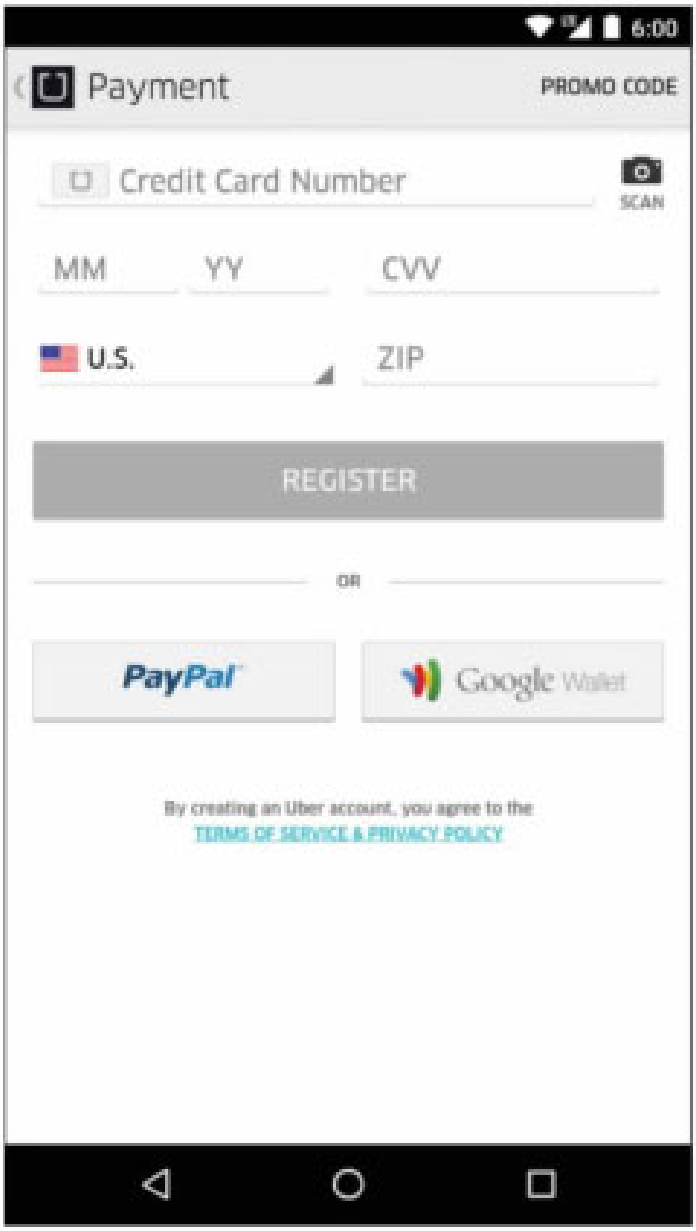
Borden raises three arguments on appeal to try to invalidate his consent to receive calls from eFinancial using an ATDS. Each of these arguments fails.

[11] Although Borden alleges in his second amended complaint that the agreement between him and eFinancial was invalid "browsewrap," ER 207–08 ¶¶ 24, 25, he abandoned this argument before the district court when he admitted that it "more likely qualifies as a hybrid agreement." ER 167 n.7. Borden also does not argue in his opening brief on appeal that there was *no* agreement *at all* between him and eFinancial—he only argues insufficient notice for valid consent. *See Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

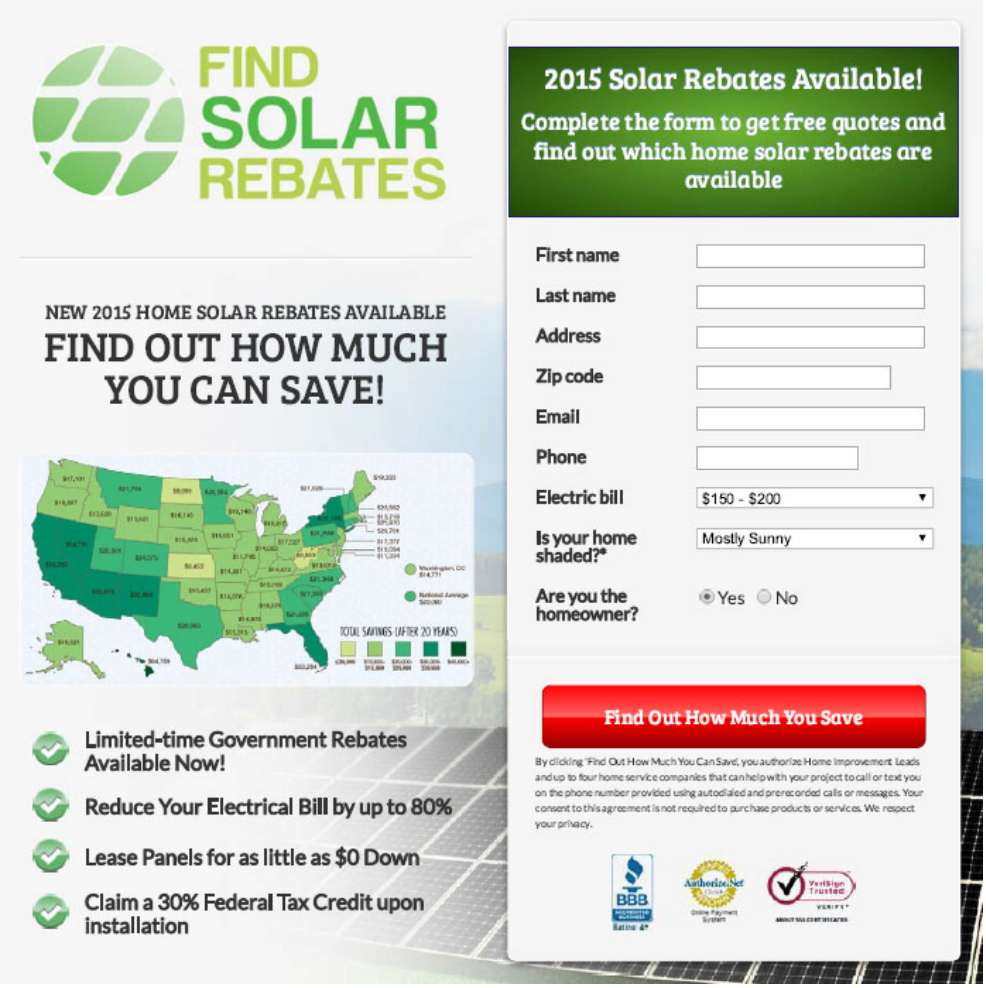
A. eFinancial's disclosures were clear and conspicuous.

Borden first wrongly argues that his consent was not valid because eFinancial's disclosures were not clear and conspicuous.

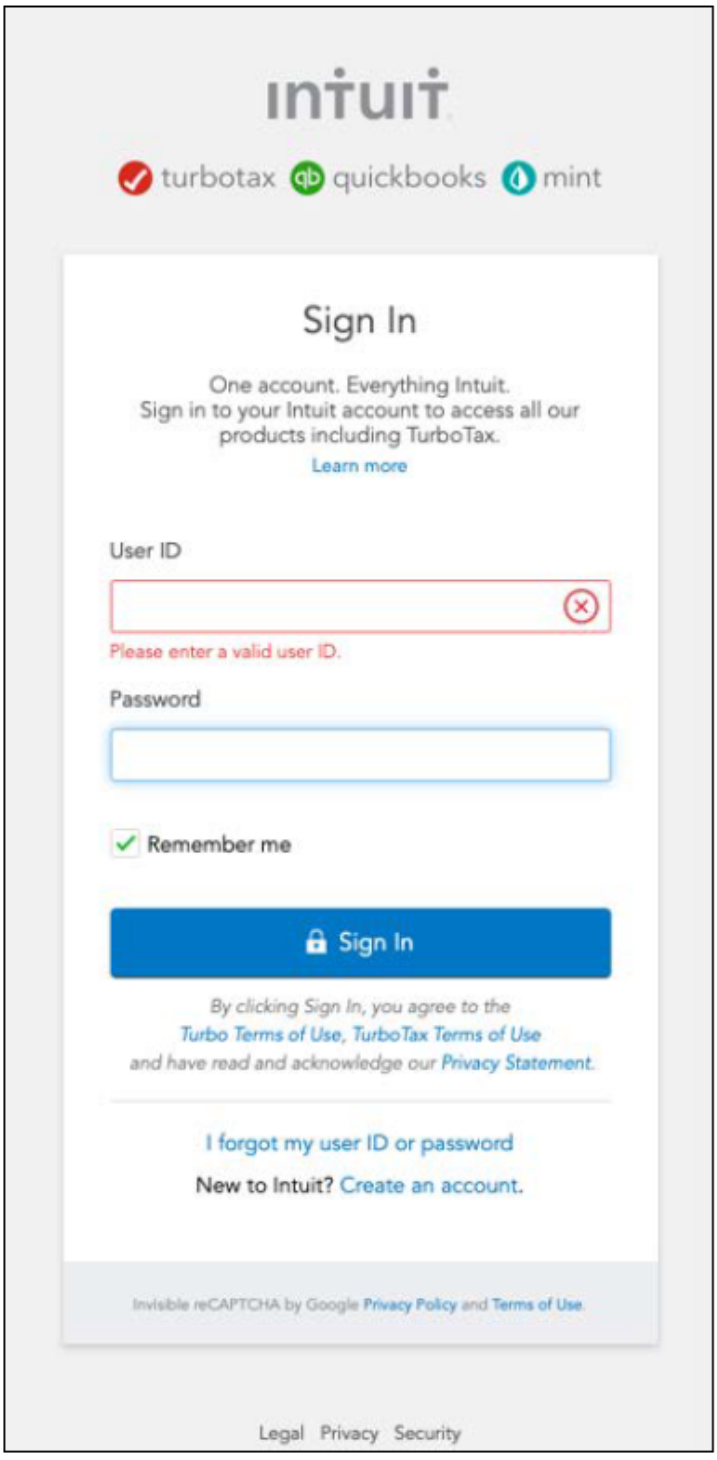
The term *clear and conspicuous* means "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures." 47 C.F.R. § 64.1200(f)(3). The disclosures here are sufficient under this objective standard because they appeared directly below the "Next, your rates" button that Borden had to click before submitting his insurance request. Courts have regularly found disclosures to be sufficiently clear and conspicuous to result in a valid agreement, as a matter of law, where they are similarly placed—such as when Uber informed users immediately under the REGISTER button that "By creating an Uber account, you agree to the [hyperlinked] TERMS OF SERVICE & PRIVACY POLICY," *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017); when Mordernize Inc. included its TCPA disclaimer "directly underneath the button used to submit the web form," *Morris ex rel. Morris v. Modernize, Inc.*, No. 17-CA-00963, 2018 WL 7076744, at *3 (W.D. Tex. Sept. 27, 2018); or when Intuit included a hyperlink to its terms "directly below the sign-in button," *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482, 484 (9th Cir. 2020) (mem. disposition). To be clear, the clickwrap agreements depicted below were found sufficient *as a matter of law*:



Meyer, 868 F.3d at 82.



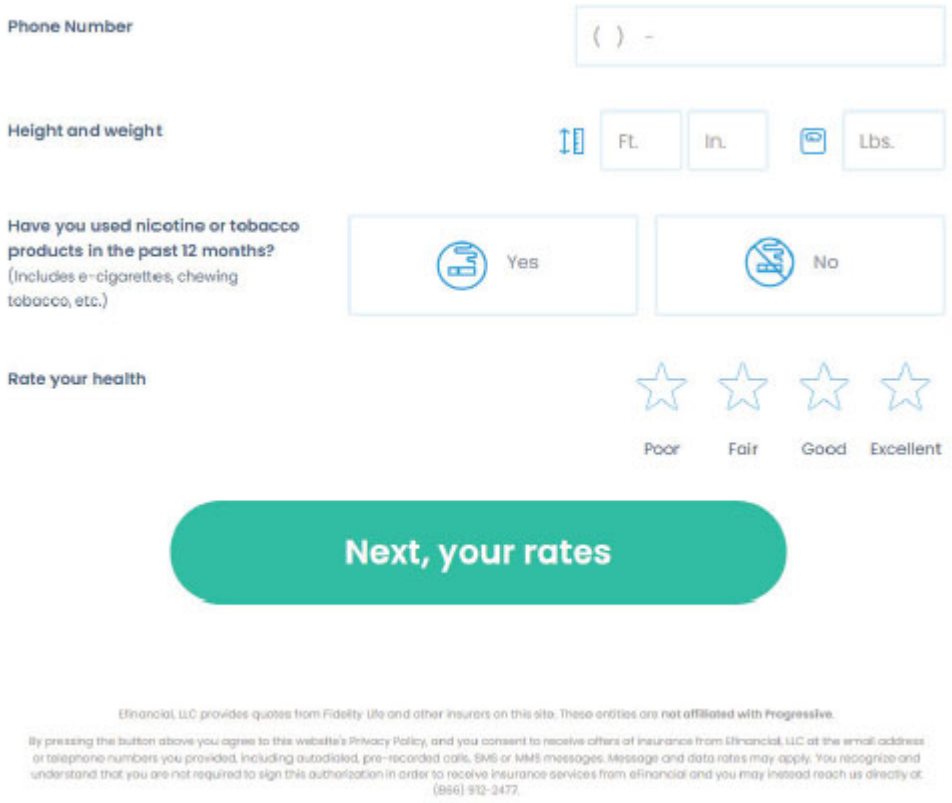
Decl. of Jason Polka in Supp. of Def. Modernize, Inc.'s Mot. for Summ. J. at Ex. A, *Morris*, No. 17-CA-00963, 2018 WL 7076744, ECF No. 56-1.



Def. Intuit Inc.'s Mot. to Compel Arbitration, *Dohrmann*, 823 F. App'x 482, ECF No. 97.

.

Borden claims that eFinancial's disclosures fail because they use "miniscule light grey font" "that is significantly smaller than the font used for the text above." Opening Br. at 46. But the disclosure language is a similar size and color as the rest of the webform—which Borden could read just fine, as demonstrated by the fact that he filled it out. It is also similar in look and feel to the agreements above.



ER 206 (copy of image in complaint cropped to omit large margins).

There is no requirement that TCPA disclosures appear in the same size or color as the rest of a website. When "evaluated holistically, not through mechanical application of formatting rules," *Javier v. Assurance IQ, LLC*, No. 20-CV-02860, 2021 WL 940319, at *3 (N.D. Cal. Mar. 9, 2021), it is clear that

eFinancial's disclosures are "separate and distinguishable" from other language and "would be apparent to the reasonable consumer." 47 C.F.R. § 64.1200(f)(3). It does not matter if Borden failed to read them. *See Meyer*, 868 F.3d at 79 ("While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice."); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012) (rejecting attempt to avoid clickwrap agreement based on failure to read terms and conditions because "it is not reasonable to fail to read a contract before signing it").

Borden cannot, despite his efforts, equate the *undisputed* facts here with those in cases where the court found material factual disputes on conspicuousness. *See* Opening Br. at 42–46. In *Barrera v. Guaranteed Rate, Inc.*, No. 17-cv-5668, 2017 WL 4837597 (N.D. Ill. Oct. 23, 2017), for example, the disclosures were "*far* beneath the 'Get your free quote' button," such that a consumer had to scroll down and examine language at the very "bottom of the webpage." *Id.* at *1 (emphasis added). The key in that case was the "placement of the disclosures" that were not akin to the adjacent disclosures here. *Id.* at *3. The same is true of *Sullivan v. All Web Leads, Inc.*, No. 17 C 1307, 2017 WL 2378079 (N.D. Ill. June 1, 2017), where the court found that the disclosure "appeared in small print at the *bottom* of the page," *id.* at *1, and the plaintiff failed to "scoll[] down further to the bottom of the webpage," *id.* at *8, as required to view the disclosure. This case is different

because the disclosures appeared directly beneath the button Borden admittedly clicked and were similar in size and color as the rest of the webform. As in the above cases and unlike in the factually distinct cases of *Berrera* and *Sullivan*, the disclosures here are clear and conspicuous as a matter of law. *See Meyer*, 868 F.3d at 76 ("[T]he notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law."); *Morris*, 2018 WL 7076744, at *3 ("[T]he disclaimer was clear and conspicuous as a matter of law."); *Dohrmann*, 823 F. App'x at 484 (finding in the first instance as a matter of law that "warning language and hyperlink to the Terms of Use were conspicuous").

B. eFinancial's disclosures were sufficiently informative.

Borden also argues that his consent was not valid because the disclosures did not use the word "telemarketing." *See* Opening Br. at 47–53. But the law requires no such magic language. Disclosures only need inform a consumer with reasonable specificity what messages might be sent. eFinancial disclosed that it would send text messages about insurance offers. Borden does not claim he was misled. Nor could he—Borden received the very texts he was told he would receive.

As already noted, under the FCC regulations, "[t]he term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(13). Here, the disclosure states

"you consent to receive offers of insurance." ER 206. The disclosure passes muster under the regulations because the "offers of insurance" language captures the "encouraging . . . purchase" language as well as the nature of the text messages that eFinancial actually sent in response to Borden's request.

Borden insists that eFinancial needed to use the word "telemarketing." But he does not identify a single case requiring the use of such a "magic word[]." *Lundbom v. Schwan's Home Serv., Inc.*, No. 18-cv-02187, 2020 WL 2736419, at *5 (D. Or. May 26, 2020), *appeal dismissed*, No. 20-35480, 2020 WL 7048196 (9th Cir. Oct. 13, 2020); *see also id.* (citing *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1101 (11th Cir. 2019), for the proposition that "agreements need not use magic words" to establish express consent)). And he is simply wrong to insist that the word should be required because "'telemarketing' is a term that Americans know, are familiar with, and understand." Opening Br. at 47. This framing of the word as self-explanatory overlooks the fact that "telemarketing" is *defined* under the regulations as "encouraging . . . purchase" and the language here described "offers of insurance," which are offers to purchase insurance. The language eFinancial used fits comfortably within the regulations.

Lastly, the "substantial compliance" case law cited by Borden is inapposite because eFinancial does not contend that it came close to complying with the disclosure requirements; rather, eFinancial *fully* complied with those requirements

using language that is accurate and easy for consumers to understand.

C. eFinancial did not require consent as a condition of any purchase.

Finally, Borden insists that it matters that he could not "continue with [his] website-initiated purchase of life insurance" without giving his consent. Opening Br. at 53. Once again, Borden misses the mark.

The FCC regulations require a disclosure stating that a signer "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." 47 C.F.R. § 64.1200(f)(9)(i)(B). The relevant disclosure here expressly states "you are not required to sign this authorization in order to receive insurance services from eFinancial and you may instead reach us directly at (866) 912-2477." ER 206. That disclosure satisfies the FCC requirement because it makes clear that TCPA consent is not required for any eventual purchase of insurance information by Borden.

Borden's response on this point is to frame the "service" at issue as the online provision of quotes,[12] but eFinancial's quotes are offered for free, *see, e.g.*, ER 208 ¶ 29, and are thus not "purchas[ed] services." 47 C.F.R. § 64.1200(f)(9)(i)(B). Moreover, the disclosure clearly provides a phone number that can be called in the alternative to providing consent. Further, while Borden

[12] *See* Opening Br. at 55–56 (arguing that the online purchasing *experience* is different from other purchasing methods).

insists that he must be permitted to retrieve his quote through the Progressive.com website without signing the agreement or calling eFinancial, there is no such requirement under either the TCPA or FCC regulations. A business like eFinancial is thus free to provide alternate *means* of contact if a consumer declines to provide the requested consent. Borden fails to cite a single decision suggesting more is required, nor does he identify a statutory hook for such a requirement.

* * *

In sum, even if Borden had sufficiently alleged use of an ATDS (he has not), any such use was lawful because Borden gave valid consent to receive autodialed calls or texts when he clicked the "Next, your rates" button that appears directly over a clear and conspicuous disclosure that Plaintiff "consent[ed] to receive offers of insurance from Efinancial, LLC at the . . . telephone numbers [he] provided, including autodialed, pre-recorded calls, SMS or MMS messages" and that he was "not required to sign this authorization in order to receive insurance services from eFinancial." ER 206. For these reasons, too, his complaint fails and the district court's judgment should be affirmed.

CONCLUSION

Based upon the foregoing the judgment of the district court dismissing Borden's complaint with prejudice should be affirmed.

Dated: February 2, 2022

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, eFinancial identifies as a related case *Brickman v. Facebook, Inc.*, No. 16-cv-00751, 2021 WL 4198512, at *3 (N.D. Cal. Sept. 15, 2021) (pending in this Court as Case No. 21-16785), which raises the same or closely related issues as those in this appeal. Specifically, in *Brickman* as here, the district court dismissed an ATDS claim because the plaintiff's phone number was not randomly or sequentially generated. And in *Brickman* as here, the district court rejected the plaintiff's argument based on footnote 7 of *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1172 n.7 (2021). The opening brief in *Brickman* is currently due on March 4, 2022, and the answering brief is due on April 4.

Dated: February 2, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,112 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: February 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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