# 22-1726

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

MARINA SOLIMAN, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

SUBWAY FRANCHISE ADVERTISING FUND TRUST, LTD.,
Defendant-Appellee,

Does, 1 through 20, inclusive, and each of them.
Defendant,

On Appeal from the United States District Court for the
District of Connecticut in Case No. 3:19-cv-00592-JAM
Judge Jeffrey A. Meyer

## APPELLANT MARINA SOLIMAN'S OPENING BRIEF


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## JURISDICTIONAL STATEMENT

The United States District Court for the Central District of California had federal question jurisdiction under 28 U.S.C. §1331, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 753 (2012). In her First Amended Complaint, appellant Marina Soliman ("Soliman") alleged two causes of action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"). APX-123-140.[1]

This appeal is from the January 28, 2022 order of the District Court granting Defendant/Appellee's SUBWAY FRANCHISE ADVERTISING FUND, LTD.'s ("Subway" or "Appellee") motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] Soliman's complaint was dismissed with prejudice. APX-16-22. The District Court entered Judgment on July 18, 2022. APX-15. Soliman filed a timely notice of appeal on August 8, 2022. APX-3-14. *See* Fed. R. App. P. 4(a)(1)(A).

[1] Citations to appellant Soliman's Appendix are denoted "APX," followed by the page number.

[2] All subsequent references to rules will be to the Federal Rules of Civil Procedure, unless otherwise specified.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting Subway's motion to under Rule 12(b)(6) when it concluded that Soliman did not allege facts sufficient to state a plausible claim?
2. Does the plain language of the TCPA's definition of Automatic Telephone Dialing System ("ATDS"), pursuant to 47 U.S.C. § 227(a)(1) and the Supreme Court's holding in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), require a plaintiff to allege that the "equipment must use a number generator to generate the phone numbers themselves" or can a plaintiff allege use of an ATDS by alleging that the equipment uses number generators to *either* store or produce telephone numbers to be called?
3. Whether the district court's granting of Subway's motion, pursuant to F.R.C.P. 12(b)(6) violated the requirement that district courts must construe the complaint in the light most favorable to the plaintiff when deciding whether to deny a plaintiff the right to discovery?
4. Whether the district court's holding that Subway's automated SMS blasting platform did not send messages to Soliman utilizing an artificial or voice, contravenes the definition of artificial voice as prohibited by 47 U.S.C. § 227(b)(1)(A)?

## STATEMENT OF THE CASE

On April 22, 2019, Marina Soliman filed a class action Complaint alleging that Subway negligently and willfully violated the TCPA by sending to her cellular telephone and those of others similarly situated telemarketing text messages using an automatic telephone dialing system ("ATDS"). Soliman alleged that solicitation text messages were blasted out *en masse* using an SMS blaster, which is a traditional campaign-based dialing platform that automatically sends thousands of text messages to thousands of people and was used in this fashion to automatically dial Soliman. Soliman further alleged that the SMS blaster was programmed with source code that relied upon number generators to both store and produce the telephone numbers that the system called. Soliman's complaint and accompanying briefing contained a specific example of such number generators used by an SMS blaster alleged to function similarly to the one used by Subway. These telemarketing text messages were sent to consumers without prior express consent, as Soliman (and putative class members) had revoked consent to be contacted by Subway, which Subway ignored. Thus, Subway was mass-dialing thousands of consumers without consent, just as Congress intended to prohibit when enacting the TCPA.

The District Court erred by dismissing Soliman's ATDS allegations. According to the District Court, Soliman's claims failed "because when the Act refers to a 'random or sequential number generator,' it means a generator of random

or sequential telephone numbers." This is inconsistent with the Supreme Court's test, set forth in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) ("*Facebook*"). In *Facebook*, the Supreme Court was asked to clarify a syntax dispute regarding whether the qualifying phrase "using a random or sequential number generator" applied to both the "store" and "produce" components of the TCPA's disjunctive ATDS elements. Under this Court's prior holdings,[3] the qualifying language was held to only modify the latter. The result was that any system which automatically dialed telephone numbers from stored lists was previously considered an ATDS, even if no number generators were coded into the dialer.

*Facebook* does not exclude the dialing software used to dial Soliman, which *does* utilize number generators in the code to both store and produce the telephone numbers to be called. Thus, the District Court's ruling contravenes the instructions of the Supreme Court, which observed that number generators could be used to *either* store *or* produce. According to the District Court, it must do something completely different – generate the telephone numbers themselves, even though the statute does not reference telephone number generation, and the Supreme Court did not include those words in its ruling.

[3] *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018); and *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019).

Soliman alleged with detailed specificity exactly what the Supreme Court instructed a Soliman must allege for a dialing system to be an ATDS. These allegations were convincingly presented. The system used to call Soliman operates and is programmed considerably differently than the system used by Facebook to dial Duguid. Facebook did not use an SMS blasting platform. Its system sent fraud alerts based on a one-to-one triggering event to a specific telephone number, when certain criteria instructed the dialing software to call that specific consumer. Soliman received a mass-blasted marketing text message from an unknown company.

The District Court's ATDS ruling was flawed procedurally and legally. First, the District Court misapplied the Supreme Court's instructions in *Facebook*. Second, the District Court ignored Soliman's allegations and incorrectly looked beyond the pleadings to determine the system was not an ATDS.[4] Soliman plausibly alleged the dialing software used random or sequential number generators to both store and produce telephone numbers to be called. These allegations should have been viewed in their light most favorable to allow for the right to discovery and a determination of the issue on the merits.

[4] How a District Court could do this without reviewing source code or hearing from experts about how the dialer relied upon number generators is unclear.

Soliman alternatively alleged that the system used to automatically send her pre-drafted messages at a pre-scheduled time via SMS utilized an artificial voice. Soliman requested judicial notice of the TCPA's legislative history which shows Congress prohibited artificial and prerecorded voice calls after expressing concerns with agentless communication devices, which it found particularly obnoxious and intrusive. There is no doubt the messages were artificial. The only question is whether the word "voice" is ambiguous and may encompass text-based forms of telephone communications.

The District Court found that voice must mean "[s]ound formed in or emitted from the human larynx in speaking" and ignored Soliman's alternative dictionary definitions of voice: "an instrument or medium of expression" and "to express in words." Voice can mean many things. Text messages have been interpreted by both courts and the FCC to be calls under the TCPA, which is a remedial statute and must be broadly construed. The written language of an SMS communication is simply the communicative counterpart to an oral communication through a phone call. If a text is a call, then a text utilizes a voice. The District Court disagreed, finding that Congress intended to use voice in "the standard way." However, the District Court's narrow interpretation of voice suffers from many textual problems, including that artificial voices are, by definition, inorganic and are not a "[s]ound formed in or emitted from the human larynx in speaking." Artificial voices are sounds created by

computer programs where text is converted into noise through software. Under the District Court's definition of "voice" there is no such thing as an "artificial voice" resulting in the term being mere surplusage. Moreover, because text messages are calls, under the District Court's reading, the TCPA would become inharmonious unless rewritten to carry different standards for texts and calls. The statute treats "any" telephone call as prohibiting artificial voices, presupposing such existence in all contexts. 47 U.C.S. § 47(b)(1)(A). Alternative definitions suffer from textualist problems. Soliman's allegations of artificial agentless text messages satisfies both the letter and spirit of the law.

## STATEMENT OF FACTS

### I. Soliman's Allegations

Soliman's First Amended Complaint alleged individually and on behalf of those similarly situated that Subway negligently and willfully contacted Soliman on her cellular telephone in violation of section 47 U.S.C. § 227(b)(1) of the TCPA. APX-123-140.[5] Soliman alleged that Subway contacted her using an SMS blaster, which is an autodialer program that sends out text message blasts to large lists of

[5] The District Court incorporated by reference additional factual allegations raised by Soliman in briefing, in denying leave to amend. Therefore, this additional argument and briefing is appropriate for this Court to review as part of Soliman's allegations, as it should be presumed that Soliman could further such facts if given the opportunity.

telephone numbers without any manual dialing component. Soliman alleged that Subway contacted her and other consumers using this device after having opted out of receiving such communications from Subway, i.e. without consumers' prior express consent.

Soliman alleged that the SMS blaster used by Subway was an ATDS under *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) ("To qualify as an 'automatic telephone dialing system,' a device must have the capacity ***either*** to store a telephone number using a random or sequential generator ***or*** to produce a telephone number using a random or sequential number generator.") (emphasis added). As the Supreme Court indicated, "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." *Id.* at 1171-72 fn. 7.

On or about December 1, 2016, Soliman received advertising/promotional text messages from Subway on her cellular telephone number ending in -3553 from short code 782-929. The text messages sought to solicit Subway's services:

> FREE CHIPS RULE! Right now @SUBWAY, get ANY bag of chips FREE with a sub purchase. Exp 12/6: http://mfon.us/rk6srrfdjue HELP/STOP call 8447887525

APZ-127. Annoyed by the unwanted advertising material, Soliman responded "STOP" to this text message. *Id*. Subway sent an immediate computer-generated

responsive text message to Soliman that read:

> Subway: You have been unsubscribed from all programs on 782929 and will no longer receive any text alerts. Q's? Reply HELP. Msg & data rates may apply.

*Id*. Despite acknowledgment of receipt of this request for further text messages to cease, on or about December 5, 2016 at approximately 2:28 PM, subway again sent an automated text message to Soliman, which read:

> Your weekly SUBWAY offer is waiting, Don't miss out! Expires 12/6: http://mfon.us/rk6srrfdjue HELP/STOP call 8447887525

*Id*. Soliman alleges that similar telemarketing messages were sent "*en masse* to millions of customers' cellular telephones nationwide." *Id*. Such messages were drafted in advance by Subway, which dictated the prerecorded content and timing of the messages to consumers' telephones. APX-128. The system used to send the messages was an SMS blasting platform operated by Mobivity, which utilized short code messaging to send generic impersonal template messages to millions of consumers in automated dialing campaigns. APX-128-131.

Soliman alleges that the SMS blasting platform utilized random or sequential number generators to store and produce telephone numbers. *Id.* Soliman provided the District Court with known programming code in other SMS blasting platforms used by competitors of Mobivity. Specifically, Soliman gave a known example of

a Sequential Number Generator, which Soliman's counsel are aware is programmed into the software code of a well-known SMS blasting platform:

```
730     if (!this.recordList.isEmpty()) {
731         this.recordNumber++;
732         final String comment = sb == null ? null : sb.toString();
733                                 result = new CSVRecord(this,
this.recordList.toArray(Constants.EMPTY_STRING_ARRAY),
comment,
734             this.recordNumber, startCharPosition);
735     }
736     return result;
737 }
```
[6]

APX-27.

> These lines of code, and specifically the "++" in line 731, generate sequential numbers as part of a loop, used to store and produce telephone numbers, which are thereafter mass-blasted text messages to thousands of consumers in mere seconds, without any human intervention whatsoever. This is publicly available open-source code integrated into the proprietary programming interface of a well-known SMS blasting platform competitor to Mobivity, which operates **identically** to the one used by Subway to robodial Soliman.[7] The sequential number generator in the code above is executed in the process of mass blasting text messages. The program cannot function without executing the sequential number generator above. In fact, this

[6] Available here: https://commons.apache.org/proper/commons-csv/apidocs/src-html/org/apache/commons/csv/CSVParser.html

[7] The dialer code showing this Parser is one example of number generators that are known to exist in dialer code and are used in both the storage and production of telephone numbers to be called by dialing systems. Soliman does not have access to the source code for Subway's dialing system, but alleges number generators were used in its system and gave one known concrete example of number generators used in SMS blaster dialer code. Her complaint should not be read to be limited to this particular example of code, but should be broadly construed, given that this code is illustrative.

> is how all SMS blasters, and indeed any campaign-based autodialers (including predictive dialers), have always been designed and programmed to operate upon actual inspection of the programming code. This is what Plaintiff alleges Subway used to robodial her.

Id.[8]

Subway's SMS blaster used a random or sequential number generator to store and produce telephone numbers and then dialed those stored lists in an automated fashion without human intervention.[9] APX-128-131. These campaigns were agentless, and did not involve a live agent, but rather a text blast sent by a computer. They also involve messages drafted in advance and sent automatically based on pre-programmed parameters. Soliman offers information from the Mobivity website which further supports the position that the Mobivity system works as a standard SMS blasting platform. *Id*. Soliman further alleges that such systems utilize algorithmic dialing, which is how predictive dialers and other campaign-based autodialers that use sequential number generators operate. Soliman alleged with

[8] This descriptive language and dialer code was proffered in Soliman's Motion to Dismiss briefing, and the Court took note of it in denying Soliman leave to amend. For the purposes of this Appeal, it should be treated as part of Soliman's allegations.

[9] Plaintiff is aware that human intervention is not the legal standard for whether a system is or is not an ATDS. However, a lack of human intervention, alleged at the pleading stage, strongly suggests a random or sequential number generator was used to store, or produce (or both) telephone numbers to be called by the dialer. Where human intervention is lacking, this leads to a strong inference that the system relies on number generation, from a pure software engineering perspective. Plaintiff made this allegation to ensure the District Court had more than bare bones allegations of the Supreme Court test.

emphasis that any traditional text blasting platform, "*will have some variation on the coding that is described herein*, which will undoubtedly include either random or sequential number generators that are being executed in conjunction with storing and dialing the telephone numbers, including the dialing of Plaintiff's phone number." APX-34. Soliman alleges that such a system is capable of sending out thousands of messages in the blink of an eye with no manual human involvement beyond pre-programming the campaign parameters. APX-31.

Soliman went on to describe how the SMS blaster used number generators in its code to dial her telephone number, and the telephone numbers of other consumers.

> A dialer operator accesses a database of consumer contact information, which is typically contained in a text delimited file, either in a CSV file, text file, Microsoft Excel, or Microsoft Access file. In essence, this is a spreadsheet, containing rows and columns of data, which includes telephone numbers. The operator will load this data set into the dialing platform, usually through an online web portal. The dialing system will cut the data set into individual lines, unique to each telephone number with an assigned row using a parser. A random or sequential number generator (typically sequential) will generate numbers, and assign those numbers to the data, during a process called indexing. The program will then "store" the data in a temporary cache or RAM memory location accessible to the dialer. A random or sequential number generator is simultaneously used to select and produce the indexed telephone numbers to the dialer. Once the number generator corresponds to a matching number in the stored list, that telephone number will be "produced" from storage to the dialer, which then automatically dials that telephone number. Thus, the system is literally both storing and producing telephone numbers to be called by the campaign autodialing systems. Storage and production occur automatically, without any organic triggering event by a human. The aforementioned process determines which order and sequence the list

> of telephone numbers are to be stored, produced and automatically dialed, as well as the rate at which this process occurs.

APX-30-31.

These campaigns were preprogrammed by Subway, and the Mobivity platform was used to mass dial lists of consumers using number generators that indexed those lists, stored them using either random or sequential number generators (most likely sequential like the Apache code above), and then relied on similar number generators to produce the stored numbers from temporary memory to the dialer to be called.[10] Based on the content and format of the text messages, Soliman alleges they were sent via Subway's SMS Blasting Platform, which is an ATDS, as defined by 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

Soliman alternatively alleges Subway's dialing platform utilized an "artificial voice" as prohibited by 47 U.S.C. § 227(b)(1)(A). Merriam Webster's Dictionary defines "voice" as "an instrument or medium of expression." It defines "artificial"

[10] Campaign-based SMS blasters operate virtually identically to traditional predictive dialers, in that they rely on number generators to both store and produce telephone numbers to be called by the platform. Predictive dialer functionality is described by the FCC. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 ¶¶ 8 fn 31, 131, and 146 (2003) ("2003 FCC Order"). If a predictive dialer being used in predictive dialing mode is treated legally as an ATDS, so too must an SMS blaster because they rely on similar number generation.

as "humanly contrived…often on a natural model: MAN-MADE" and "lacking in natural or spontaneous quality."

The messages sent to Soliman employed a text message as an instrument or medium of expression to deliver an automatic message drafted in advance of being sent, to convey a telemarketing communication. SMS blasting platforms are man-made humanly contrived programs which allow companies to blast out automated messages via non-spontaneous methods, similar to an assembly line in a factory. Such SMS blasting devices are incapable of spontaneity, as they must be programmed by the operator to automatically send messages out, *en masse*, pursuant to preprogrammed parameters.

The text message sent to Soliman was set down in writing in advance by Subway, whose employees wrotestandard automated messages to be sent to Soliman and other class members, and by way of preprogrammed SMS blasting, entered the artificial message into the SMS Blasting platform, and thereafter sent these messages pursuant to scheduled blasts that were programmed by Subway. Thus, Subway employed a text message as an instrument or medium of expression to deliver an artificial message.[11] APX-131-132.

[11] Soliman waives the argument that automated text messages are prerecorded voices for purposes of this appeal.

Soliman's core allegation is that agentless text messages are, from the perspective of legislative history, plain meaning, public policy, and regulatory developments in SMS treatment since the enactment of the TCPA, the same thing as a call utilizing an artificial noise.

## II. The District Court's Order Dismissing the Complaint Without Leave to Amend

The District Court dismissed Soliman's complaint *without* leave to amend, finding the claims failed as a matter of law. APX-16-22. The District Court observed the standard for determination of whether dialing software constitutes an ATDS is whether it has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers." 47 U.S.C. § 227(a)(1). It went on to review *Facebook*, incorrectly summarizing its limited holding and Soliman's allegations as follows:

> And under Soliman's reading, the Act would probably cover much more than mass dialing. As she admits, sequential number generation is "an incredibly common programming tool." Under Soliman's theory, then, the Act would likely cover every call placed by a computer or smartphone.[12] But the Supreme Court has already held that it does not. See Duguid, 141 S. Ct. at 1171. In all, Soliman's reading would "take a chainsaw to the[] nuanced problems [of robocalls] when Congress meant to use a scalpel."

[12] This concern proffered by the District Court was misplaced, as it is factually incorrect, as well as being uninformed by any expert opinion or evidence.

APX-11. Rather than applying the *Facebook* test, which analyzes whether a dialing platform relies upon random or sequential number generators to either store or produce telephone numbers to be called, the District Court misinterpreted the word "produce"[13] and excised the words "store or" from the statute entirely creating a new test that is nowhere in the statute.

The District Court found that an ATDS must "generate random or sequential *telephone* numbers to call." APX-18. (emphasis added). Stated otherwise, if an autodialing platform was programmed to use a random or sequential number generator to either store or produce telephone numbers to be called, but did not self-generate its own list of telephone numbers, then according to the District Court, even though the Supreme Court and the Congress both said otherwise, that system is not an ATDS. The TCPA defines an ATDS as "equipment that 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). For the District Court's Order to be consistent with the statute, an ATDS would need instead

[13] Miriam Webster's Dictionary's first definition of "Produce" is "to offer to view or notice." *Webster's Ninth New Collegiate Dictionary*, 938 (1991). Produce does not mean the same thing as "create" or "generate." Moreover "produce" is a technical computer science term, and the interpretation of its meaning should be viewed under the lexicon of computer science texts. *See Van Buren v. United States*, 141 S.Ct. 1648, 1657 (2021) (technical terms should be interpreted under their technical meaning).

to be defined as "equipment that has the capacity—(A) to create telephone numbers to be called, using a random or sequential telephone number generator; and (B) to dial such numbers." This is not what the statute or the Supreme Court's interpretation of it say.

The District Court's erroneous ruling that dialing software must self-generate the telephone numbers it thereafter dials effectively results in nothing being an ATDS. There do not exist modern dialing platforms that operate in this manner, and such systems have not been used since the 1960s and were well out of fashion when the statute was passed in 1992.[14] Moreover, the self-generation requirement ignores the storage aspect of *Facebook*, as well as systems expressly described in its ruling which rely on number generators to index and automatically dial stored lists of phone numbers produced from storage to the dialer (like the system Soliman alleged). Additionally, cannons of construction would reject a definition of ATDS that categorically excludes systems that dial stored lists of numbers, because such a holding would excise the statutory text regarding prior express consent from the statute. A consent requirement presupposes that an ATDS could dial stored lists of consenting consumers' telephone numbers, as dialing telephone numbers that were

[14] The Supreme Court was aware of this when it issued its ruling, as the history of autodialers technology was presented before the Court in Amicus briefing in *Facebook*. APX-56-85.

self-generated and did not come from a list of consenting consumers would necessarily be unlawful under the District Court's finding, axiomatically rendering the consent requirement mere surplusage.

The District Court also rejected Soliman's alternative argument that the SMS blaster's text to Soliman used an artificial voice. The Court found Soliman's argument was not "standard" but observed that the primary definition of voice in the dictionary was "[s]ound formed in or emitted from the human larynx in speaking." To the District Court, Soliman's reliance on a tertiary definition conflicted with the Court's belief of a "normal" understanding of the term. The District Court refused to consider Legislative History and regulations that supported Soliman's reading of the statute as supporting a finding that agentless communications constituted an artificial voice, despite acknowledging that this Court and the FCC held that a text is a call.[15] Moreover, the District Court utilized canons of construction, specifically the canon of *in pari materia*, which analyzes whether a particular reading is in harmony with other sections of a statute, but failed to analyze Soliman's plain meaning alternative method, or apply the doctrine of remedial statutes, or Soliman's own *in pari materia* arguments that went against Subway's interpretation. For the District Court to have applies statutory construction beyond plain meaning implies

[15] This implies that the words, whether spoken or written, in each communication should be treated similarly (as a voice).

that it acknowledged the statute was ambiguous and searched for aid elsewhere, but it selectively chose to do so, a strawman position contravened by this Court's guidance on interpretation of remedial statutes.

## SUMMARY OF THE ARGUMENT

First, the District Court erred in granting Subway's motion to dismiss under Rule 12(b)(6). Soliman pled facts sufficient to support a reasonable inference that Subway sent text messages to her cellular phone without express permission utilizing an ATDS. Soliman alleged the text messages were sent by a dialing system that "has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." These allegations were plausible and well-supported with detailed facts that sharply differentiated Subway's dialing software from that in *Facebook*. Such allegations included that an SMS blaster was used, that there was no human intervention in the transmission of the mass text blasts, and that mass text blasts were sent indiscriminately to consumers without prior express consent using spoofed numbers. Soliman included actual dialer software Java code from similar systems that relied upon sequential number generators to both store and produce telephone numbers to be called by such dialers, as well as a detailed description of how the software was programmed to do so by using number generators to <u>both store and produce</u> telephone numbers to be called. These facts were sufficient to give rise to a reasonable inference that Subway used an ATDS as

defined by the TCPA. The District Court rewrote Soliman's allegations and narrowly interpreted them to say something less favorable, precluding Soliman from obtaining proving her allegations.

Second, after narrowly and unfavorably interpreting Soliman's well-pled allegations, the District Court ignored the Supreme Court's stated test for determining whether a dialing system is an ATDS. "To qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021). Instead of applying this test, which is satisfied by Soliman's well-pled allegations, the District Court applied a new test found nowhere in the Supreme Court's order: an ATDS must "generate random or sequential ***telephone*** numbers to call." APX-18. (emphasis added). This ruling conflicts with *Facebook*, excising half of the disjunctive test ("store or produce") from the plain language of the statute. It is also impossible for a plaintiff to allege in good faith that an autodialer operates in such fashion, creating an impossible test that consumers could never satisfy.

Third, the District Court committed legal error by holding that an SMS message, which is a "call" under the TCPA, can never be placed using an "artificial voice." The District Court's Order that the term "voice" is unambiguous ignores the

presence of dueling dictionary definitions of the term "voice" and gives preference to a definition that results in the word "artificial" being excised from the statute. If "voice" is ambiguous, then the District Court should have looked to the legislative history and other canons of construction[16] (including the remedial statute doctrine) as cited by Soliman, which strongly support a reading where non-oral written telephonic communications made by a computer qualify for the same privacy protections as non-oral auditory noises made by a computer and communicating the same message.

## STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed *de novo. Myun-Uk Choi v. Tower Rsch. Cap. LLC,* 890 F.3d 60, 65 (2d Cir. 2018). A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. See Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that

[16] The Court sought guidance from canons of construction due to a tacit acknowledgement that the statute was ambiguous, but elected only to look to those canons which supported Subway's reading, while ignoring those supporting Soliman. The Court then went on to erroneously hold the statute was unambiguous.

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Court must accept all factual allegations as true and "draw all reasonable inferences in favor of the nonmoving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir. 2008).

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "[A] well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at p. 556, *quoting Scheuer*, 416 U.S. at p. 236. Moreover, where the facts supporting the plaintiff's allegations are peculiarly within the possession and control of the defendant—not reasonably ascertainable by the plaintiff—the plaintiff is permitted to plead such facts on information and belief. *See Carolina Cas. Ins. Co. v. Team Equipment, Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1224 (3d ed. 2004) ("Pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff ....").

## ARGUMENT

### I. Soliman Alleged a Plausible Claim that Subway Used an ATDS to Place Calls to her Cellular Telephone.

Soliman's position is straightforward. A number generator is a specific piece of software coding that objectively can be reviewed and determined to either be or not be used in a dialing system. One need only review the programming code to ascertain whether such coding is present and being used. The Supreme Court stated that random or sequential number generators must be used in the dialer software, either to "store or produce telephone numbers to be called." Soliman alleged that Subway's system used number generators to both store and produce telephone numbers to be called. Soliman provided detailed allegations about how an SMS blaster is typically programmed to do so, including illustrations of source code where such number generators are present in systems that function similarly to how Subway's system functions. Soliman provided additional allegations giving rise to a strong inference that number generators must have been used to send marketing text messages to her telephone. Yet, the District Court dismissed her claims and denied her the opportunity to discovery.[17]

[17] Such discovery would primarily consist of reviewing source code for the dialing platform, and having experts explain whether and how it implements a random or sequential number generator to store or produce telephone numbers to be called.

Soliman stated plausible allegations that should have been treated as true for purposes of Subway's motion. Soliman's description of the dialing system fell squarely within the Supreme Court's definition of ATDS, yet the District Court made up its own new test that is substantially different in numerous ways from the Supreme Court's instructions. Soliman only asks that the Second Circuit follow the Supreme Court's ruling in *Facebook*, as well as guidance from both this Court and the Supreme Court which instructs courts to view complaints in the light most favorable to a non-moving party, where there is even a slim chance of success on the merits.

A. What Is A Random Or Sequential Number Generator?

Random or sequential number generators are common programming tools used by software engineers when designing software, to automate certain functions in ways that would otherwise be performed by human hand. This term was not invented by Congress. It does not mean the same thing as "telephone number generation."[18] Any software engineer will agree. Number generators are a widely

[18] The statutory text of 47 § 227(a)(1) states "The term "automatic telephone dialing system" means equipment which has the capacity— (A)to store or produce telephone numbers to be called, using a random or sequential number generator..." The use of the phrase "telephone numbers to be called" in the same code section as "number generator" and the key distinction between the term "telephone number" and "number" thereafter indicate that a number generator is not referring to a telephone number generator. Otherwise, the statute would have said "to store or

understood tool of software engineers.[19]

Imagine playing a game of video blackjack. Such programs rely upon number generators to randomize the cards received by the player and the dealer. A number generator does not generate the cards. Those are predetermined by the 52 cards in a standard deck. However, it might generate a number between 1-52 which determines which card the player receives out of the deck. Parsers (number generation code) might be used to index and store the cards of the deck in RAM and assign numbers to each card. A random number generator might then be used to generate a number between 1-52 which matches with the card that was assigned that corresponding number by the parser. The card will then be produced from storage and shown on the screen to the player. This allows the program to operate without a dealer shuffling the deck or dealing the cards through a program that automates this process without the labor cost associated therewith. It cannot be done without random or sequential number generators. An ATDS is basically a video blackjack machine on steroids, which instead of dealing cards, dials telephone numbers, and instead of doing it one hand/call at a time, deals a thousand hands or dials a thousand

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produce telephone numbers to be called, using a random or sequential [telephone] number generator."

[19] *See* https://en.wikipedia.org/wiki/Random_number_generation; https://en.wikipedia.org/wiki/Pseudorandom_number_generator; https://www.reformattext.com/sequential-number-generator.htm

calls per second.

Undersigned counsel studied the code used to program SMS blasters with the assistance of software engineers fluent in Java and found they execute number generation code to store and produce numbers to be called by the dialer. Soliman alleged such number generators were used by Subway's dialing software, and provided actual dialer code, and illustrations for how this might be done, like a video blackjack machine. Using parsers, Soliman's number (and other consumers' numbers) might have been indexed and stored using a sequential number generator, just like the assignment of cards in a deck by the blackjack machine. Using other number generators, Soliman's number would be produced from storage and called forth to the dialer program, which would then know that her number was the one to be called, much like the card being shown to the player on a blackjack machine's screen.

Such programs can dial thousands of consumers in mere seconds, without human intervention, based on whatever parameters are targeted by the operator of the dialing platform (campaigns).[20] Number generators (such as the Apache code in

[20] Blackjack machines are not typically programmed to operate with this level of speed, because it destroys the purpose of the enjoyment of the game for the player if the machine processed thousands of hands per second. But an SMS blaster's goal is speed, not enjoyment, and it is usually programmed to send messages to every telephone number in storage in rapid succession *en masse*.

Soliman's Complaint) are executed in the process of mass SMS blasting. The program cannot function, and therefore cannot dial phone numbers at all, without executing number generators. SMS blasters rely on random or sequential number generators to instruct databases to store and produce telephone numbers to be called. Without this key component, a dialing campaign would require an agent to manually place calls, via organic decision making, or as in *Facebook*,[21] through some other organic one-to-one triggering event.

B. The District Court Misapplied *Facebook's* ATDS Test

*Facebook* does not hold that every TCPA alleging use of an ATDS should be

[21] In *Facebook*, that organic event was somebody trying to gain access to a Facebook account without authorization, and Facebook's system being programmed to notify the account holder. The system did not use random or sequential number generation, but rather simply dialed numbers automatically from a stored list. This is different from the example of the blackjack machine in that a specific card would expressly be requested by the system, bypassing the need for number generators in storage or production. Consistent with the Supreme Court's ruling, just because a computer sent the message does not mean random or sequential number generation is involved. Computers can be programmed to complete isolated tasks upon the occurrence of an isolated organic triggering event. If there are a lot of triggering events, this could optically appear to the untrained eye to be mass dialing, but it is not. The key distinction is that the code in SMS blasters use number generation and dialing campaigns to decide which telephone numbers to dial, while the code in the *Facebook* platform apparently did not, and so it did not fit within the plain language definition of an ATDS. The platform used here sent out impersonal advertisements to thousands of consumers soliciting Subway's services. Systems which "blasts" messages to many people necessarily use a random or sequential number generator.

dismissed on the pleadings.[22] Nor does *Facebook* hold that an autodialer must self-generate telephone numbers. The sole question in *Facebook* concerned a syntax dispute over whether the phrase "using a random or sequential number generator" modified both "store" and "produce." The Supreme Court held that it did, and that therefore, to be an ATDS, a dialing system must use some form of number generation in its programming code to either store or produce the telephone numbers to be called. The Supreme Court did not hold that a dialer must generate random or sequential *telephone* numbers to meet the autodialer definition. Such a holding would have required the Supreme Court to decide the meaning of the phrase "random or sequential number generator"—a question that was not at issue and was not briefed. It also would have required the Supreme Court to significantly alter the plain language of the statute, including by excising words from the statute, and adding words beyond the definition.

In *Facebook*, the Supreme Court held "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity ***either*** to store a telephone number using a random or sequential generator ***or*** to produce a telephone number using a random or sequential number generator." 141 S.Ct. at 1163 (emphasis added). The

[22] This would be the practical result of upholding the District Court's Order because autodialers do not self-generate the telephone numbers they then dial. Such systems have not been used since the 1960s.

Court further observed that "advances in automated technology made it feasible for companies to execute large-scale telemarketing campaigns at a fraction of the prior cost, dramatically increasing customer contacts. Infamously, the development of "robocall" technology allowed companies to make calls using artificial voices, obviating the need for live human callers altogether." *Id.* at 1167.

The Court determined that the texting platform used by Facebook, which sent one-to-one text messages to individuals upon a triggering event and was not alleged to rely on random or sequential number generator coding for either storing or producing telephone numbers to be called, was not the type of technology targeted by Congress. It went on to observe that inclusion of technology that could merely store and then automatically dial, without employing number generation, presented real world problems of overbreadth because such systems "could affect ordinary cell phone owners in the course of commonplace usage, such as speed dialing or sending automated text message responses." *Id.* at 1171.[23] The Court correctly referenced the possibility that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a pre-produced list. It would then

[23] A smartphone is not an ATDS under Appellant's reading of *Facebook*.

store those numbers to be dialed at a later time."[24] *Id.* at 1172 n.7.[25] Such a random number generator would not generate telephone numbers; instead, it would generate what are called index numbers, which correspond to the positions of telephone numbers in an ordered list.[26] This footnote shows, at the very least, that the Supreme Court did not commit to any specific definition of "random or sequential number generator." In fact, it alludes to some aspects of the very technology Soliman alleges was used to dial her.

Two interpretations of the autodialer definition were at issue in *Facebook*. First was the interpretation favored by Facebook and adopted by the Third, Seventh, and Eleventh Circuits that required an autodialer to have the "capacity" to "us[e] a random or sequential number generator" to either produce or store telephone

[24] This part of the Court's reasoning in is inconsistent with any assumption that the "random or sequential number generator" must generate *telephone* numbers. It is also worth noting that predictive dialers and SMS blasters operate in the exact manner described by the Supreme Court in footnote 7, and have for decades. It is not only possible to store telephone numbers using a random number generator, but this is in fact something which many if not most autodialers are programmed to do. An example of such number generation from an actual SMS blaster was pled in Soliman's Complaint.

[25] Some courts have held that a system which automatically re-sequenced numbers on a campaign list would have qualified as an autodialer, if not for the fact that there was no evidentiary showing in the record by plaintiff that it did so by using a random or sequential number generator. *See Grome v. USAA Savings Bank*, No. 4:19-CV-3080, 2021 WL 3883713, at *5 (D. Neb. Aug. 31, 2021).

[26] This excludes cellular telephones, as one's contact lists are stored, produced, and dialed without use of number generators.

numbers to be called. *Facebook*, 141 S. Ct. at 1169. Second was the interpretation favored by Duguid and adopted by the Second, Sixth, and Ninth Circuits, which found that it was sufficient that a dialer "store . . . telephone numbers to be called" and "dial such numbers." *Id*.. The key difference in the two interpretations was a question purely of syntax: whether "using a random or sequential number generator" modified both "store" and "produce" or just "produce." *Id.*

The meaning of "random or sequential number generator" was not at issue. Duguid and the plaintiffs in the other circuit court cases argued that an autodialer need not use a number generator at all. The Supreme Court found that "the most natural construction" of the autodialer definition required that the phrase "using a random or sequential number generator" modify both "store" and "produce." *Facebook*, 141 S. Ct. at 1169. As a result, the Court declared that "whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." *Id*. at 1170. Indeed, the Court repeatedly framed the question presented and its holding without reference to telephone number generation.[27] The Court's holding and primary analysis were based on the syntax of

[27] The Court framed the question presented as having to do with telephone number generation only once. *Duguid*, 141 S. Ct. at 1168. In every other place where the Court stated the question presented or its holding, the Court did so without reference to telephone number generation. *Id.* at 1167 ("To qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a

the clause, not the meaning of the phrase "random or sequential number generator." *Id*. at 1169–70. All other considerations merely "confirm[ed]" the syntactic analysis. *Id*. at 1171.

The District Court's ruling conflicts directly with the Supreme Court's test in numerous ways. As discussed below, the Supreme Court's test is consistent with the statutory text, with legislative history, and with historic existing FCC regulations, as well as doctrines established through precedent. The District Court's ruling conflicts with all of this and turns the TCPA on its head in multiple ways.

### C. The District Court's Ruling Conflicts with the Plain Language of the Statute and Ignores Half of the Supreme Court's Test

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). A "court should give effect, if possible, to every word and every

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random or sequential number generator"); 1169 ("We conclude that the clause modifies both, specifying how the equipment must either "store" or "produce" telephone numbers. Because Facebook's notification system neither stores nor produces numbers "using a random or sequential number generator," it is not an autodialer."); 1171 ("the autodialer definition excludes equipment that does not 'us[e] a random or sequential number generator'"); 1173 ("This Court must interpret what Congress wrote, which is that 'using a random or sequential number generator' modifies both 'store' and 'produce.'"); 1173 ("We hold that a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.")

provision Congress used" in the statute. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013). A court should likewise "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000); *see generally* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, pp. 174–183 (1st ed. 2012) (discussing the surplusage and harmonious-reading cannons). Upholding the District Court's ruling would require both ignoring the Supreme Court's test for ATDS and drastically overhauling the plain language of the TCPA.

"The term "automatic telephone dialing system" means equipment which has the capacity— (A)to store or produce telephone numbers to be called, using a random or sequential number generator..." 47 § 227(a)(1). To qualify as an ATDS "a device must have the capacity ***either*** to store a telephone number using a random or sequential generator ***or*** to produce a telephone number using a random or sequential number generator.") (emphasis added). *Facebook* , 141 S. Ct. at 1163. Both the Supreme Court's test and plain language of the statute emphasize a disjunctive test for the use of number generators. Either a random or sequential number generator can be used to "store" or it can be used to "produce." Soliman alleged Subway's system did both. And yet, the District Court held in dismissing

her claims that the equipment must use a number generator to generate the phone numbers themselves.

The canon against superfluity strongly undermines the District Court's holding, which categorically excluded "storage" as a component of the disjunctive test outlined by the statute and reinforced by the Supreme Court. The statute says "to store or produce" not "to generate." The District Court, by categorically excluding dialing platforms that index and store telephone numbers to be called using number generators, carved out half the test for whether a system is an ATDS. The language "store or" becomes "inoperative, superfluous, void and insignificant" with such a ruling, as if it were excised completely from the statute. The District Court did not give effect to these words that Congress used, and which the Supreme Court took great effort to separately describe in its test, and even provided illustrations of how it might be employed in footnote 7. Accordingly, the District Court's test is unsupported by the plain language of the statute, as well as by the Supreme Court's test in *Facebook*.

Additionally, an interpretation that the definition of ATDS categorically precludes dialing from stored lists of telephone numbers would render the prior express consent requirement mere surplusage. A cornerstone of the TCPA is its codified affirmative defense - prior express consent. *See* 47 U.S.C. §§ 227(b)(1)(A) ("It shall be unlawful for any person within the United States, or any person outside

the United States if the recipient is within the United States-- (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice"). (emphasis added). Prior express consent is an affirmative defense to any otherwise-violative conduct under the TCPA. *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037 (9th Cir. 2017); I*n the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 23 F.C.C. Rcd. 559, 565 (Jan. 4, 2008); APX-95 ("The use of automatic dialing machines which play recorded messages should be reasonably restricted, except where a called party has given prior consent to receive the recorded message.").

An autodialer that is required to self-generate its own lists of numbers to dial, as opposed to dialing from a stored list, could never be used in compliance with the TCPA because there is by definition a lack of consent from an individual whose number is randomly generated. These two concepts are mutually exclusive. It is not only fanciful to imagine, but axiomatically impossible, for there to exist only automated dialing technology that self-generates lists of numbers, in the same universe where stored lists of numbers belonging to consumers that have consented to receive autodialer communications are being exclusively called. And yet, entire regulatory schemes exist to create standards for what is and is not prior express consent. Dozens of circuit cases talk about what it means to consent to a robocall.

The plain language of the statute codifies an affirmative defense for users of autodialer technology so long as they call only those people that consent to receive such calls. Regulations have been adopted. Companies (including Subway) spend resources obtaining consumer contact information to attempt to comply with the written consent requirements when placing calls using otherwise-prohibited technology.

Indeed, Subway's own position regarding consent undermines its view of what constitutes an ATDS. One cannot "consent" to autodialing if by axiom autodialing cannot be performed to a limited list of those who have so consented. And so it follows that by requiring self-generation as a component of the statute, the District Court's definition of ATDS axiomatically excises an entire canon of codified doctrine right out of the plain language of the statute. These two concepts cannot be reconciled.

Reading a statute in a manner which renders core portions of the statute mere surplusage should be avoided when interpreting a statute. *See Duncan v. Walker*, 533 U.S. 167, 174, (2001) ("We are especially unwilling" to treat a statutory term as surplusage "when the term occupies so pivotal a place in the statutory scheme"). The canon assists "where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238, 2240 (2011). Consent is an inextricable component of the TCPA, as it is in any invasion

of privacy statute, because it is not an invasion of privacy if it has been permitted. Guests are not intruders by virtue of their mere presence in one's homes. Yet the plain language of the TCPA can clearly be read two ways with respect to whether or not an ATDS must self-generate the numbers it autodials.

There exists a reading of the TCPA where autodialers do not self-generate lists, but there is no TCPA without the affirmative defense of consent, because consent cannot coexist with autodialers that cannot dial stored lists of numbers. The District Court's Order, if upheld, would require two sections of the TCPA (47 § 227(a)(1) and 47 U.S.C.A. §§ 227(b)(1)(A)) to be rewritten to say something materially different from what Congress enacted, and what the Supreme Court reinforced in *Facebook*. The District Court's Order is therefore in error and must be reversed.

### D. Legislative History and FCC Rulings Support Predictive Dialers Being an ATDS, and SMS Blasters are Programmed Using the Same Number Generator Functions

To illustrate this point further, the legislative history and early FCC rulings on the TCPA support the conclusion that *Facebook* did not disturb the TCPA's application to predictive dialers, which by extension, applies to the SMS blaster alleged by Soliman. Predictive dialers, like SMS blasters, dial databases of telephone numbers in an automated fashion using campaign features, which rely

upon random or sequential number generators to both store and produce the telephone numbers to be called.[28] Similar to SMS blasters, "predictive" dialers also call from a stored list of phone numbers, but utilize algorithms to "predict" when an agent will receive a live answer. This is described in the 2003 FCC Order, as well as in Amicus briefing in *Facebook*. APX-56-85.

The discussion of "predictive dialers" in the FCC's 2003 decision is particularly instructive on the importance of automation as it relates to the TCPA. The FCC described predictive dialers as follows:

> [A] predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers. ... The principal feature of predictive dialing software is a timing function, not number storage or generation. Household Financial Services states that these machines are not

[28] A recent Third Circuit's ruling suggests that traditional predictive dialers, which operate and are programmed identically to the SMS blaster allegedly used in this case, would be an ATDS because they rely upon number generators store and produce telephone numbers to be called. *Panzarella v. Navient Solutions, Inc*., 37 F.4th 867 (3rd Cir. 2022) (dismissing plaintiff's claims on grounds that the dialer was being used in preview mode and was detached from the random or sequential number generators but suggesting that it would be an ATDS had it been used in automated predictive or power dialer mode). *Panzarella* suffers from the timing of the appeal happening during *Facebook*, and therefore not having dialer code in the evidentiary record. Its ruling regarding random or sequential number generation can best be described as uninformed dicta. The present case offers a better vehicle to clarify what a random or sequential number generator is, and how it must be integrated into the dialer's source code in order to qualify as an ATDS.

> conceptually different from dialing machines without the predictive computer program attached.

2003 FCC Order, 18 F.C.C. Rcd. At 14091 (footnotes omitted). Acknowledging the statutory definition of an ATDS, the FCC explained:

> The statutory definition contemplates autodialing equipment that *either stores or produces* numbers. ... It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies. In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed–the *capacity* to dial numbers without human intervention. ...
>
> The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem—an increasing number of automated and prerecorded calls to certain categories of numbers. ... Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome. Therefore, to exclude from these restrictions equipment that use predictive dialing software from the definition of "automated telephone dialing equipment" simply because it relies on a given set of numbers would lead to an unintended result.

*Id*. at 14091-32 (footnotes and paragraph numbering omitted). The FCC found predictive dialers met the definition of an ÁTDS even though the calls were made from a list. *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7973 (2015) (In 2003, "[t]he Commission stated

that, even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition"). Predictive dialers are an ATDS.[29]

The terms "predictive dialer," "SMS blaster" and "campaign" never appear in the Supreme Court's ruling in *Facebook*, nor does the order ever suggest that campaign-based dialers are not an ATDS.[30] It is also worth mentioning that Facebook was not using an SMS blaster, but a completely different type of system that sent responsive text messages based on an organic triggering event. The Supreme Court did not say that SMS blasters are not an ATDS. They were not presented with that question. They were not presented with that fact pattern, or the system specifications or the code for such a system. Indeed, the ruling suggests that reading the Supreme Court's order as precluding an ATDS finding as to such technology would "greatly overstate[] the effects of accepting Facebook's interpretation." *Facebook*, 141 S. Ct. at 1173. This is consistent with the history of

[29] Even the FCC's first ruling on the TCPA in 1992 recognized the importance of restrictions on equipment such as predictive dialers. Referring in part to "predictive dialers" to place live solicitation calls (7 F.C.C. Rcd. 8752, 8756 (F.C.C. September 17, 1992)), the FCC then opined that "both live [referring again to live solicitation calls, such as with a predictive dialer] and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions" (*Id.*).

[30] The Supreme Court had every opportunity to discuss predictive dialers in *Facebook*, because undersigned counsel put the issue before the Court. APX-56-85. Why would nine Justices ignore this issue entirely? Because campaign-based dialers were not before the Court, and there was no contention that Facebook's system relied on campaign dialing or number generation.

autodialers, which have been dialing stored lists of numbers since the 1970s.[31] Predictive dialers, which dial stored lists of numbers using algorithms, have been prohibited since the passage of the TCPA, and have historically been prohibited by the FCC ever since.[32] And if predictive dialers are an ATDS, an SMS blaster would be as well because they function the same, both dial databases using campaigns, and both rely on the same number generator code to do so. Accordingly, the District Court's interpretation of a random or sequential number generator and finding that a system must self-generate telephone numbers is in conflict with the legislative and regulatory history of the TCPA.

### E. Courts After Facebook Have Agreed that Dialers do not Need to Self-Generate Telephone Numbers to be an ATDS

The District Court cited to some courts which agreed that an ATDS must self-generate telephone numbers. However, many courts do not agree with this interpretation of *Facebook*. Many courts have held that allegations relating to SMS

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[31] *See* extensive discussion of predictive dialer patents at APX-56-85.

[32] *See* Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, United States Senate One Hundred Second Congress First Session July 24, 1991, Testimony of Robert Bulmash and Steve Hamm at pgs 11, 16, 19, 24-25, and 27; 7 FCC Rcd. 8752, 8756 (F.C.C. September 17, 1992) at ¶¶ 8-9; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd. 14014, 14115 ¶¶ 131-134 (2003) at ¶¶ 8 fn 31, 131, and 146; see also 47 C.F.R. §§ 64.1200(a)(5-7) (prohibiting predictive dialing with certain abandonment rates, i.e. technology which automatically dials stored lists through campaigns).

blasters and traditional predictive dialing systems (which use number generators in the same manner as SMS blasters) are sufficient to survive the pleadings. One court found that SMS blast telemarketing messages from a long code telephone numbers sufficiently stated a claim where it was alleged that the platform could "store telephone numbers, generate sequential numbers, dial numbers in a sequential order, and dial numbers without human intervention." *Montanez v. Future Vision Brain Bank, LLC,* 536 F.Supp.3d 828, 838 (D. Co. April 29, 2021).

Dozens of courts have ruled similarly. *Atkinson v. Pro Custom Solar LCC,* 2021 WL 2669558 (W.D. TX June 16, 2021) (ATDS allegations survive pleadings where plaintiff alleges a use of a random or sequential number generator to determine dial sequence);[33] *Republican Senatorial Committee*, 551 F.Supp.3d 724 (W.D. TX July 27, 2021) (generic mass texts sufficient to plead ATDS); *Poonja v. Kelly Services, Inc*., 2021 WL 4459526 (E.D. IL, Sept. 29, 2021) ("stop" instruction in generic text sufficient to survive pleadings);[34] *Garner v. Allstate Insurance Company*, 2021 WL 3857786 (N.D. IL Aug. 30, 2021) (allegation of predictive dialer which spoofed telephone number consistent with ATDS);[35] *Callier v. GreenSky, Inc*., 2021 WL 2688622 (W.D. TX May 20, 2021) (same); *Jance v.*

[33] This is exactly what Soliman alleged, but in much greater detail, and with actual examples and illustrations of number generators in actual dialer code.
[34] Soliman's text messages shown above contain a stop message
[35] Soliman alleged spoofing.

*Homerun Offer LLC*, 2021 WL 3270318 (D. AZ July 30, 2021) (same); *MacDonald v. Brian Gubernick PLLC*, 2021 WL 5203107 (D. Az. Nov. 9, 2021) (automatically dialing through imported lists of leads sequentially with a power dialer sufficiently states claim); *McEwen v. National Rifle Association of America*, 2021 WL 5999274 (D. ME Dec. 20, 2021) (rejecting the notion that an ATDS must self-generate telephone numbers).

Other decisions support Plaintiff's reading of a random or sequential number generator referring to programming code, and not to a telephone number generator. In *Barnett v. Bank of America*, 2021 WL 2187950 (W.D.N.C. May 28, 2021), the court agreed that an ATDS did not need to self-generate telephone numbers. However, it observed that plaintiff had not presented evidence that the source code relied on number generation. *Timms v. USAA Federal Savings Bank*, 543 F.Supp.3d 294 (D. SC June 9, 2021) extensively discussed *Facebook* and its discussion in footnote 7 and held that an ATDS need not self-generate telephone numbers, but instead may rely on number generators to store telephone numbers to be called later. *Id*. at 299-302.

Most notable in this discourse is the current split emerging within the Ninth Circuit, which issued two ATDS orders in the last month: *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th. Cir. 2022) ("*Borden*"), and *Brickman v. United States*, 2022 WL 17826875 (9th Cir. Dec. 21, 2022) ("*Brickman*"). *Borden* supports Subway's

position and would uphold the District Court's Order.[36] However, interestingly, just a few weeks later, the *Brickman* court followed *Borden* on purely *stare decisis* principles, while including a strong concurring opinion from Judge Van Dyke, which refuted the *Borden* reasoning. Judge Van Dyke's opinion supports the reading of the statute argued by Soliman, and suggests even within the Ninth Circuit, there is disagreement about the validity of *Borden*.

Judge Van Dyke took issue with *Borden* for several reasons, all ultimately amounting to justification for why number generator does not mean the same thing as telephone number generator. Id. at *2-4. First, *Borden's* analysis overlooks the phrase random or sequential number generator clearly being a tool of computer programming, which should be given its technical meaning, not a colloquial definition. Second, Judge Van Dyke reasoned that a phone number is comprised of numbers much like a wooden chair is made of wood, but that it does not follow that the definition of number should be restricted to telephone numbers any more than the term wooden would (in the context of a wooden chair) preclude application of the term "wood" to a wood lathe. It is more plausible to attribute the technical application of "random number generator" under a plain meaning analysis than to insert limiting descriptive terms not part of the definition crafted by Congress and

[36] Subway will no doubt rely heavily on *Borden* in its Brief. Soliman will respond to those arguments in her Reply.

conflating the term with "random telephone number generator." Judge Van Dyke also points out that interpretation of the definition in such a manner would render Footnote 7 of the Facebook decision nonsensical, and courts are bound by Supreme Court authority on the subject. Therefore, "[t]he fundamental interpretive assumption underlying the *Borden* decision is just wrong." *Id*. at *3.

Judge Van Dyke goes on to observe that *Borden* nullifies the significance of the word "store" in the statute, rendering it mere surplusage, which violates canons of construction and "mangle[s] the text's meaning" and further conflicts with the Supreme Court's emphasis on storage as one of the disjunctive elements of the ATDS definition as justification for why it overturned *Marks v Crunch*. *Id*. at *3. Judge Van Dyke further goes on to address that there is no substance to the fear that giving meaning to the phrase "store" would turn every cell phone into an ATDS, because for a dialing system to be an ATDS, it must not simply store telephone numbers, but use random or sequential number generators to store those numbers, for the purpose of automatically calling them in that order using the same dialing system (as indicated by the statutory text "to be called"). Finally, Judge Van Dyke acknowledges the broader purpose of the TCPA, which is to prohibit automatic dialing that could create nuisance to commercial and residential consumers. *Id*. at *4, citing H. R. Rep. No. 102–317, p. 24 (1991); *see also Duguid*, 141 S. Ct. at 1167

("Autodialers could reach cell phones, pagers, and unlisted numbers, inconveniencing consumers and imposing unwanted fees.").

The concurring opinion in *Brickman* recites a correct reading of the law, and a compelling criticism of the reasoning of the *Borden* court, and by extension, the District Court's opinion. The Second Circuit should follow Judge Van Dyke's opinion, which is more well-reasoned than *Borden*. Soliman acknowledges there are cases on both sides of this debate but holding that self-generation of telephone numbers is the standard would go beyond any reasonable reading of what Congress intended to prohibit, and what the Supreme Court held in *Facebook*. Judge Van Dyke's concurrence in *Brickman* got this right.

F. The District Court Erred Procedurally by Failing to Accept Plaintiff's Allegations as True

As described above, pursuant to authority from this Court and the Supreme Court, the procedural standards under Rule 12(b)(6) require courts to accept well pled allegations as true and read them with all inferences drawn in favor of plaintiff. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Well-pled allegations must be upheld on the pleadings to seek evidence in support thereof, even if there is only a remote chance of success. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Twombly,* 550 U.S. at p. 556.

Soliman's First Amended Complaint alleges facts which, when viewed, in the light most favorable to Soliman, plausibly suggest that Subway contacted her on her cellular telephone through the use of an ATDS. Soliman alleges she received SMS blast messages, sent using a system that operated similarly to a traditional predictive dialer, via short code, involving generic spam messages sent without her consent and after her clear revocation of consent, and that there was no human intervention involved in their transmission. Soliman also asserted that random or sequential number generators were used both to store her telephone number through indexing, and then to produce her telephone number via indexed storage to the dialer, to be called. Soliman provided actual dialer code from a dialing system similar to the one Subway used, which relied upon a sequential number generator to do so, giving further credence to the legitimacy of her allegations.

Conclusions regarding Soliman's TCPA claims are more appropriately drawn at summary judgment, after discovery regarding the specifications of the dialer and expert review. This is even more true where possession of the dialer code is solely within possession of the defendant, precluding Soliman any access to the very information she would otherwise need to state a valid claim. *Carolina Cas. Ins. Co. v. Team Equipment, Inc*., 741 F.3d 1082, 1087 (9th Cir. 2014). The District Court therefore erred in granting the motion to dismiss.

Many courts post-*Facebook* elected to follow this approach rather than issue

preemptive rulings denying plaintiffs their right to discovery. *Miles v. Medicredit, Inc.*, No. 4:20-CV-01186 JAR, 2021 WL 2949565, at *4 (E.D. Mo. July 14, 2021); *Bell v. Portfolio Recovery Assocs., LLC*, No. 5:18-CV-00243-OLG, 2021 WL 1435264, at *1, fns. 4-5 (W.D. Tex. Apr. 13, 2021); *Montanez v. Future Vision Brain Bank, LLC*, No. 20-CV-02959-CMA-MEH, 2021 WL 1697928, at *7 (D. Colo. Apr. 29, 2021); *Gross v. GG Homes, Inc.*, No. 3:21-CV-00271-DMS-BGS, 2021 WL 2863623, at *7 (S.D. Cal. July 8, 2021); *Atkinson v. Pro Custom Solar LCC*, No. SA-21-CV-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16, 2021); *Jance v. Home Run Offer LLC*, No. CV-20-00482-TUC-JGZ, 2021 WL 3270318, at *3 (D. Ariz. July 30, 2021); *Garner v. Allstate Ins. Co.*, No. 20-C-4693, 2021 WL 3857786 at *4 (N.D. Ill. Aug. 30, 2021) (citing *Vance v. Bureau of Collection Recovery LLC*, No. 10 C 6324, 2011 WL 881550, at *2 (N.D. Ill. Mar. 11, 2011)).

Soliman plausibly alleges that Subway utilized an ATDS or, stated differently, "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." Without the benefit of discovery, Soliman lacks the ability to specifically identify the code in Subway's system, however, under the pleading standards of the TCPA, she alleged sufficient facts to plausibly suggest the system qualifies as an ATDS. For these reasons, Soliman should be given the opportunity to discover the exact specifications of Subway's dialing system.

## II. Soliman's Complaint Alleges Use of an Artificial Voice

Subway's SMS blasts are artificial voices, in addition to having been sent via an ATDS. This is based on a plain language interpretation, as well as the statutory history, and cannons of construction regarding remedial statutes like the TCPA. The District Court erred in finding otherwise. Unlike the ATDS issue, which concerns questions of law, fact, and procedure, this is a pure question of law.

The starting point of statutory interpretation lies in the plain language. Soliman bases her allegations on definitions from the dictionary of "artificial" and "voice." Those definitions are as follows: Artificial - "humanly contrived often on a natural model: man-made <an [artificial] limb> <[artificial] diamonds>." Another definition is "lacking in natural or spontaneous quality." *Webster's Ninth New Collegiate Dictionary*, 106 (1991).

The District Court seemed persuaded that Subways' text messages were artificial. Like a traditional artificial voice phone call, Subway's messages were not organic. An organic text message would involve a live person sending it. Organic text messages are interactive – one can respond to them and receive a natural response back from a person, not a machine. Subway's message was drafted in advance and stored in a computer and blasted out to the masses at a later preprogrammed time. It lacked spontaneous quality. Its transmission was incapable of natural alteration, or natural response. The timing of when and how it was to be

sent were determined by a computer, not a person. A robot sent the message. Clearly, it is artificial.

Subway only challenged, and the District Court only took issue with the question of whether the transmission of an artificial text message constitutes a "voice." It is true that there are definitions of "voice" which hinge on oral utterances, vocal cords, and the like, such as the definition cited by the District Court in its order dismissing the claims. However, there are dictionary definitions that extend voice to other forms of communication. An illustrative question frames this issue: do mute persons not have a voice under its common parlance? Can they not voice opinions, or concerns? Can they speak or express themselves using other tools as their voice? They clearly can and do. That is why, in part, there are multiple definitions of the word voice.

The sole legal question that must be answered by this Court is whether Soliman's interpretation of "voice," which is supported by some definitions in the dictionary, and by common usage, is so strained that "voice" is entirely unambiguous. This would foreclose review of the weight of authority (discussed below), which overwhelmingly supports Soliman's reasoning. If this question of ambiguity is overcome, Soliman has stated a valid theory of liability.

A. Voice is an Ambiguous Term

The District Court's reasoning is strained in multiple ways. The Court found that it was inconceivable that Congress had intended to extend oral voice calls to written communications in text messages. According to the District Court, the only definition of "voice" that Congress could have intended would have been "[s]ound formed in or emitted from the human larynx in speaking."

The problem with this reading is multifaceted. First, a statutory definition of voice which requires use of human larynx would axiomatically preclude artificial voices. Artificial voices do not require use of a "human larynx" and are not produced by any organic being, much less a human. They are not oral utterances at all. They are inorganic noises created by computers. There is very little factual distinction between a computer which reads text communication and translates that communication into an artificial audible noise over a telephone and a computer which bypasses this step and simply sends the same text communication directly to a person's cellular telephone. Either way, there can be no doubt that under the District Court's application of its definition of "voice" there is no such thing as an "artificial voice." And so, that cannot be the correct definition, because such a definition excises words from the statute.

Second, the Court's focus on audible oral utterances implicitly conflicts with existing binding FCC Rules, recognized by Courts, which recognize that a text

message is a call under the TCPA. In *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), the Ninth Circuit held that a text message is a "call" within § 227(b)(1)(A), applying *Chevron* deference and deferring to the FCC's interpretation of the term. *Id*. at 953-54. Even *Facebook* concerned a text message which was considered a call. As discussed *supra*, statutes must be read in harmony.

The TCPA prohibits "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 47(b)(1)(A). If a text message is a call, then the disjunctive test (either an ATDS, or an artificial or prerecorded voice) would have to be modified to exclude the second disjunctive element of the test entirely, because there would not be such a thing as an artificial voice for calls that are text messages. Stated otherwise, in the case of a traditional call, the TCPA prohibits "using any automatic telephone dialing system or an artificial or prerecorded voice," but in the case of a text message, the TCPA only prohibits "using any automatic telephone dialing system." As discussed above, a statute must give meaning to all words written therein by Congress, and not result in surplusage.

Thus, the District Court's interpretation of the statute is inharmonious. Such a reading excises the term "artificial" from the statute, as well as leading to

surplusage in the context of artificial calls when those calls are placed via SMS messages. Accordingly, the term voice should be treated as ambiguous.

B. Voice Should Be Interpreted Broadly

There are several reasons to believe the definition of voice targeted by Congress should be interpreted broadly. The purpose of the TCPA is to protect consumer privacy from intrusive telephone communications. The legislative history[37] is clear that the original focus on artificial voice technology prohibition was the fact that such communications involved agentless calls.[38]

> "NACAA officials concluded that complaints about machine-generated telephone calls is one of the fastest growing categories of complaints. The public at least deserves the right to slam the telephone receiver down and have a real person on the other end of the line bear just how frustrated and angry those calls make people and should also have the ability to limit these intrusive calls."

APX-94.

Mr. Hamm went on to distinguish agentless (artificial/prerecorded calls) from those which were live operator assisted (ADADs).[39] APX-94-95. Indeed, the legislative history numerously emphasizes that the artificial/prerecorded voice prohibitions hinge on the fact that the calls are agentless, i.e. the lack of having a

[37] Where a statute is ambiguous it is appropriate to look to legislative history. *Nakano v. United States*, 742 F.3d 1208, 1214 (9th Cir. 2014).
[38] Soliman believes that the crux of an artificial voice being prohibited by Congress stems from a desire to prohibit agentless telephone communications.
[39] For purposes of this analysis, ADAD is historically equivalent to ATDS.

conversation with someone on the other side who can respond to questions or frustration, and instead receiving a static, one-sided message.[40] Soliman was subject to such indignity, as she texted "stop" and because only a computer was on the other end, nobody honored her request to cease the intrusive communications. Congress was being presented with two distinct privacy threats – automated calls sent in high volumes with a computer involving a live agent (campaign/predictive dialers), and agentless calls where consumers were deprived of the dignity of expressing their frustration because only a computer lay at the other end of the telephone (artificial/prerecorded voice).[41] The goal of the statute is served by interpreting

[40] APX-93. ("[O]ne of the constant refrains that I hear . . . from consumers and business leaders who have gotten these kinds of computerized calls is they wish they had the ability to slam the telephone down on a live human being so that that organization would actually understand how angry and frustrated these kinds of calls make citizens, and slamming a phone down on a computer just does not have the same sense of release."); 137 Cong. Rec. S18785-01, S18786 (Nov. 27, 1991) ("Autodialers have grown in use because, as a New York Times story put it, 'they don't eat, they don't sleep and their feelings never get hurt when people curse them or hang up on them. They just call and call and call-each one up to 1,500 times a day.'"); 137 Cong. Rec. H11307-01, H11312 (Nov. 26, 1991) ("[R]obotic calls by machines such as autodialers and computer-generated voices to be a much greater threat to the privacy of our homes than calls by live operators. At least you can vent your anger to a real person if they have interrupted your dinner. You can ask them questions and hold them accountable to some extent.").

[41] The FCC agreed with this distinction. In 1992, the FCC's first ruling on the TCPA recognized the importance of restrictions on equipment two separate types of equipment: "live," which were generally understood to be predictive dialer calls, and "artificial or prerecorded voice" which were characteristically agentless. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8756-57 (F.C.C. September 17, 1992). Similarly,

"voice" under a broad definitions offered by the dictionary.

The TCPA is a remedial statute intended to protect consumers from unwanted automated telephone calls and messages, it should be construed in accordance with that purpose. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047 (9th Cir. 2017) (citing *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013)). Because the TCPA is a remedial statute, it "should be construed broadly to effectuate its purposes." *Caplan v. Budget Van Lines, Inc.*, No. 220CV130JCMVCF, 2020 WL 4430966, at *3 (D. Nev. July 31, 2020). Any ambiguities in the statutory text must be construed in the consumers' favor, under well-understood canons of construction. *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 58 (2d Cir. 2017). A remedial statute "is entitled to a broad interpretation so that its public purposes may be fully effectuated." *Marriott v. National Mut. Cas. Co.*, 195 F.2d 462, 466 (10th Cir. 1952).

The dueling dictionary definitions as to the term "voice" are such an

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the Sixth Circuit held, "Congress drew an explicit distinction between 'automated telephone calls that deliver an artificial or prerecorded voice message' on the one hand and 'calls placed by 'live' persons' on the other." *Ashland Hosp. Corp. v. Serv. Employees Int'l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737, 743 (6th Cir. 2013). Additionally, the FTC has observed that artificial and prerecorded voice calls are by their very nature one-sided conversations, and if there is no opportunity for consumers to ask questions, offers may not be sufficiently clear for consumers to make informed choices before pressing a button or saying yes to make a purchase. 73 FR 51164-01, 51167 (Aug. 29, 2008). Subway's SMS blasting platform accomplishes an identical goal of transmitting agentless one-sided messages.

ambiguity. Construing the ambiguity in Soliman's favor serves the policy underlying the prohibition on artificial communications. This is similar to analysis in *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 954 (9th Cir. 2009), where the Court found a "call" under the TCPA includes text messages because such definition "is consistent with the dictionary's definition of call in that it is defined as 'to communicate with or try to get into communication with a person by telephone' " and because it "is also consistent with the purpose of the TCPA—to protect the privacy interests of telephone subscribers."

Thus, voice should apply to any telephonic communication covered by the statute pursuant to 47 U.S.C. § 227(b)(1)(A). Clearly, the emphasis of the statute was on prohibiting one-sided conversations. SMS blasts are just that. Soliman could only slam the phone down on a robot, just like the consumers Mr. Hamm pled with Congress to protect from such indignity when they enacted the TCPA. The dictionary supports this as a possible interpretation, and the legislative history contemplates any agentless communication being an artificial voice. Accordingly, canons of construction strongly support Plaintiff's reading of the statute.

## CONCLUSION

For the foregoing reasons, the District Court erred in granting Subway's motion to dismiss Soliman's claims. Soliman respectfully requests that this Court

reverse the District Court ruling and order the District Court to reinstate Soliman's complaint.

Dated: December 27, 2022 Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE FOR BRIEFS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, according to the word-processing software used to generate the brief, it contains 13,966 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: December 27, 2022

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## CERTIFICATE OF SERVICE

I, Adrian R. Bacon, certify that on December 27th, 2022, the MARINA SOLIMAN'S OPENING BRIEF was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system

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