

No. _____

In the Supreme Court of the United States

LAWRENCE PASCAL,

Petitioner,

v.

CONCENTRA, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK L. JAVITCH
Counsel of Record
JAVITCH LAW OFFICE
3 East 3rd Ave
Ste. 200
San Mateo, CA 4401
(650) 781-8000
mark@javitchlawoffice.com

Thomas A. Zimmerman, Jr.
Counsel for Petitioner
ZIMMERMAN LAW
OFFICES, P.C.
77 W. Washington Street,
Suite 1220
Chicago, Illinois 60602

July 12, 2023

QUESTION PRESENTED

47 U.S.C. § 227(a)(1) of the Telephone Consumer Protection Act (“TCPA”) defines an automatic telephone dialing system (“autodialer”) 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.

The question presented is as follows:

Whether equipment that stores telephone numbers to be called using a random or sequential number generator and dials such numbers qualifies as an autodialer.

PARTIES TO THE PROCEEDING

Petitioner is Lawrence Pascal, who was Plaintiff-Appellant below.

Respondent is Concentra, Inc., who was Defendant-Appellee below.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

STATEMENT OF RELATED PROCEEDINGS

- *Pascal v. Concentra, Inc.*, No. 3:19-cv-02559-JSC
U.S. District Court for the Northern District of
California. Judgment entered December 14, 2021.
- *Pascal v. Concentra, Inc.*, No. 22-15033, U.S. Court
of Appeals for the Ninth Circuit. Summary
Judgment affirmed and entered April 13, 2023.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	iii
STATEMENT OF RELATED PROCEEDINGS.....	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
ARGUMENT.....	10
I. The Plain Meaning of the Term Random or Sequential Number Generator is Not Limited to Generation of Telephone Numbers	11
II. The Common Usage of Sequential Number Generators in Database Applications Supports Plaintiff’s Interpretation of an Autodialer....	17

III.	<i>Facebook, Inc. v. Duguid</i> Endorses a Meaning of Number Generation that is Not Restricted to Telephone Numbers.....	19
IV.	<i>Borden</i> Was Wrongly Decided.....	21
V.	Textedly Dialed Telephone Numbers in the Order Determined by the Sequential Number Generator	24
VI.	Concentra Did Not Use a Customer List, But Instead Obtained Plaintiff’s Information from Third Parties	25
	CONCLUSION	26
	APPENDIX	1a
	APPENDIX A, Court of Appeals Decision	1a
	APPENDIX B, Order Granting Concentra’s Motion for Summary Judgment, Denying Plaintiff’s Motion for Summary Judgment, and Dismissing Plaintiff’s Complaint With Prejudice	3a
	APPENDIX C, Judgment	28a

TABLE OF AUTHORITIES

Cases

<i>Allison v. Wells Fargo</i> , No. 22-cv-0510-BAS-AHG, 2022 WL 10756885 (S.D. Cal. Oct. 17, 2022)	26
<i>Austria v. Alorica, Inc.</i> , No. 2:20-cv-05019-ODW (PVCx), 2021 WL 5968404 (C.D. Cal. Dec. 16, 2021)	25-26
<i>BFP v. Resolution Tr. Corp.</i> , 511 U.S. 531 (1994)	15
<i>Borden v. eFinancial, LLC</i> , 53 F.4th 1230 (9th Cir.)	6-7, 21-23
<i>Bostock v. Clayton Cnty., Ga.</i> , 140 S. Ct. 1731 (2020)	11
<i>Conn. Nat'l Bank v. Germain</i> 503 U.S. 249 (1992)	11
<i>Facebook, Inc. v. Duguid</i> , 141 S. Ct. 1163 (2021)	7-10, 19-21, 23-24
<i>Franco v. Alorica, Inc.</i> No. 2:20-CV-05035, 2021 U.S. Dist. LEXIS 164438, 2021 WL 3812872 (C.D. Cal. July 27, 2021).....	26
<i>Gadelhak v. AT & T Servs., Inc.</i> , 950 F.3d 458 (7th Cir. 2020)	7-8, 14

<i>Hufnus v. Donotpay, Inc.</i> , No. 20-0701, 2021 WL 2585488 (N.D. Cal. Jun 24, 2021).....	26
<i>In re Portfolio Recovery Assocs., LLC</i> , No. 11-md-02295, 2021 WL 5203299 (S.D. Cal. 2021).....	26
<i>Mehl v. Green</i> , No. 2:21-cv-01861, 2022 WL 4056269 (E.D. Cal. Sept. 2, 2022)	26
<i>Rotkiske v. Klemm</i> , 140 S. Ct. 355 (2019)	14-15
<i>United States v. Lopez</i> , 998 F.3d 431 (9th Cir. 2021)	11
<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	21
<i>Van Patten v. Vertical Fitness Grp. LLC</i> , 847 F.3d 1037 (9th Cir. 2017)	15
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	21
Rules & Statutes	
28 U.S.C. § 1254	1
28 U.S.C. § 1331	1
47 U.S.C. § 227	1, 10, 12-13, 15-16, 18-19

*In Re Rules & Regulations Implementing the
TCPA*, 7 F.C.C. Rcd 8752 (1992).....16

S. Rep. No. 102-177 (1991)16-17

Sup. Ct. R. 14.1(f)1

PETITION FOR WRIT OF CERTIORARI

Petitioner Lawrence Pascal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is found at No. 22-15033, ECF No. 46-1 (9th Cir. Apr. 13, 2023) and reproduced at App. A., 1a-2a. The district court's decision granting Concentra's motion for summary judgment and denying Plaintiff's partial motion for summary judgment is found at No. 3:19-cv-02559 (N.D. Cal. December 14, 2021) and reproduced at App. B., 3a-27a. The district court's judgment is found at No. 3:19-cv-02559 (N.D. Cal. April 9, 2021) and reproduced at App. C., 28a.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 13, 2023. App. A., 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 14.1(f), this case involves the Telephone Consumer Protection Act, 47 U.S.C. § 227, which is reproduced in full in the appendix because of its length. The section on which the lower courts issued their opinions reads as follows:

47 U.S. Code § 227 - Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) 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; and (B) to dial such numbers.

STATEMENT OF THE CASE

A. Concentra Sent an Unwanted Text Message to Plaintiff

Concentra is a nationwide provider of occupational health and physical therapy services. For employment recruiting purposes, Concentra used a telecommunications platform called Textedly to send boilerplate job advertisement-text messages to thousands of phone numbers, which were collected from third parties. Second Amended Complaint (“SAC”), ¶¶ 14-15, 4-ER-806. In the case of the text message to Plaintiff’s phone number, Concentra used public databases of licensed physical therapists to collect phone numbers, and used Textedly to send the same text message to thousands of these phone numbers.

Plaintiff—who is not a physical therapist and who had never had any contact with or awareness of Concentra—received an unwanted text message from Concentra’s Textedly Short Code 333-22 on May 13, 2019, at 7:55 a.m. stating:

Are you looking for a new career? Concentra is inviting physical therapists to interview for o/p ortho positions across CA and offering up to \$10k in

incentives for select locations. Grow your skills with opps for leadership, manual therapy cert. and student teaching. Let's talk today! Text STOP to end.

SAC ¶¶ 17-18, 4-ER-808. *See* Declaration of Lawrence Pascal ¶ 12, 2-ER-177. Plaintiff never consented to receive text messages from Concentra. *Id.*

B. Concentra Used Textedly to Send the Unwanted Text Messages

Concentra entered telephone numbers into Textedly through its online interface by uploading Excel files into Textedly's database, and in Plaintiff's case, composed and sent the same spam text message to 3,595 phone numbers simultaneously, including Plaintiff's phone number. CONCENTRA 00057-58, 2-ER-179-180. In all, Concentra used Textedly to send 60,289 text messages to the cellular telephones of 17,031 persons. *See* Amended Declaration of Randall A. Snyder, ¶¶ 84-86 ("Snyder Decl."), 2-ER-206.

C. Textedly Uses a Sequential Number Generator to Store Telephone Numbers in its Database

Textedly provides a web-based application to its customers, enabling them to send text messages en masse using its application and system. Snyder Decl. ¶ 39, 2-ER-197; *see also* Deposition Transcript of Ken Sponsler ("Sponsler Dep.") Dep. 68:15-17, 3-ER-482 (testifying that en masse means "more than one message"). Textedly integrated into its platform Twilio's API, which enables text message communications between Textedly's automatic system and cellular telephone subscribers. Snyder Decl. ¶¶

41–46, 2-ER-198-199.

Prerecorded text message content is entered and stored in Textedly, and automatically replicated and used to create text messages to be sent en masse to cellular subscribers. Snyder Decl. ¶ 51, 2-ER-200-201. From the perspective of a user of Textedly, the essential steps are as follows: (1) store the list of telephone numbers; (2) enter the text message content; (3) select the time that the messages are to be broadcast to the stored list of cellular telephone numbers; and (4) activate the automatic message transmission process to send the messages automatically. *Id.* ¶ 56, 2-ER-201-202.

Textedly uses the Microsoft MySQL relational database as its internal storage for stored cellular telephone numbers. Snyder Decl. ¶ 75, 2-ER-205. The cellular telephone numbers listed in Column K of the Subscribers Table in the Textedly Messaging Log are stored in the MySQL database in order according to the descending value of the “id” field in Column A of the Subscribers Table in that log, which is an integer that increases sequentially and is assigned to phone numbers as they are added to the database. Snyder Decl. ¶ 76, 2-ER-205.

The database identification values are sequential numbers that appear with the largest sequential number generated most recently at the top of the list and in descending order. Snyder Decl. ¶¶ 76–78 and Exhibit F attached thereto, 2-ER-205. This function of using a sequential number generator to store telephone numbers and create a unique identifier for

each entry is inherent and built into Textedly's MySQL database. *Id.*

D. Procedural History

On December 14, 2021, the district court granted Concentra's motion for summary judgment, denied Plaintiff's motion for summary judgment, and dismissed Plaintiff's complaint with prejudice. App. B., 3a-27a. The district court found that "[it] is undisputed that [t]he way in which [Concentra] used . . . Textedly . . . require[d] a database file to first be uploaded and stored in the application." App. B. at 6a. Further, Textedly "uses the Microsoft MySQL relational database as its internal storage for uploaded cellular telephone numbers." *Id.* The database stores cellular telephone numbers "in descending order by the value of the 'id' field," which "are assigned to telephone numbers sequentially as they are uploaded to or entered manually into Textedly and they are stored in that order." *Id.* at 7a. Further, the Textedly Message Log "reflects that Plaintiff's telephone number (found at Row 865 of the Subscribers Table in the message log) was assigned such a sequential identifier in connection with its storage in the MySQL database and that it was also dialed in sequential order." *Id.*

The district court held that Textedly was not an autodialer because the telephone numbers Concentra texted were obtained in a non-random way. *Id.* at 22a-24a. The district court also concluded that Textedly was not an autodialer because it stored and called telephone numbers in the same order they were

uploaded or input into Textedly. *Id.* at 24a.

Plaintiff appealed on January 6, 2022. 4-ER-803. The Ninth Circuit panel affirmed the opinion of the district court, on the authority of *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022). The court reasoned, that “[b]ecause Textedly did not store or produce randomly or sequentially generated telephone numbers, Concentra’s text message was not sent to Pascal via use of an autodialer in violation of the TCPA.” Plaintiff timely filed this petition for writ of certiorari on July 12, 2023.

REASONS FOR GRANTING THE WRIT

Guidance from the Supreme Court is necessary to resolve a Circuit split on an important question of statutory interpretation that impacts significant amounts of commerce and telecommunications. In *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir.), the Ninth Circuit misread this Court’s opinion in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), and created a split with the Seventh Circuit on the question whether equipment is categorically exempted from the definition of an autodialer when it calls phone numbers that are not themselves randomly or sequentially generated.

The Ninth Circuit in *Borden* held that “an autodialer must randomly or sequentially generate *telephone* numbers, not just any number.” *Borden*, 53 F.4th 1230 (emphasis in original). On the other hand, the Seventh Circuit in *Gadelhak v. AT&T Services, Inc.*, held to the contrary on this specific question of statutory interpretation, rejecting the interpretation where the adverbial phrase “using a random or sequential number generator” modified telephone numbers that are dialed, because “[t]he words of Congress, as written, do not permit” such an interpretation. 950 F.3d 458, 465 (7th Cir. 2020).

In addition to the fact that Congress did not write the additional limitations into the statute that *Borden* espouses, the interpretation required by *Borden* severely restricts the effectiveness of TCPA and relegates autodialers to obscure equipment that are relics of the distant past, if they were ever used at all.

The Telephone Consumer Protection Act defines an

“automatic telephone dialing system” (i.e., autodialer) 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). In *Duguid*, the U.S. Supreme Court was asked to consider a matter of syntax: did the term “random or sequential number generator” modify both “store” and “produce” or did it only modify “produce”? 141 S. Ct. at 1163.

After a close analysis of the statutory text, the Court decided that the phrase “using a random or sequential number generator” modified both “store” and “produce.” Accordingly, anyone seeking to establish that they were called by an autodialer under the Act must show that the equipment had the capacity to use a random or sequential number generator to either store or produce telephone numbers to be called. That is the extent of the Supreme Court’s holding in *Duguid*.

However, the courts below unduly expanded *Duguid*’s narrow holding into something far different, reading *Duguid* and the Act as requiring that the “random or sequential number generator” be used for one purpose: to produce telephone numbers.

That conclusion is entirely unsupported by the text of the Act and directly conflicts with the Supreme Court’s holding in *Duguid*. Moreover, the Ninth Circuit’s interpretation conflicts with the decision of the Seventh Circuit, *Gadelhak*, 950 F.3d at 464, 466 (Barrett, J.) (rejecting interpretation that the autodialer definition “captures only equipment that dials randomly or sequentially generated numbers” because doing so would “insert a significant word into

the statute that simply isn't there”).

Duguid held that one way a device can be an autodialer is if it “store[s] a telephone number using a random or sequential generator.” The plain text of the statute, as well as the common and technical understanding of how sequential number generators are used to store data, both at the time of the Act’s enactment and now, strongly support the view that equipment that uses a sequential number generator in a relational database to organize and process large quantities of telephone numbers to be called satisfy the requirement that an autodialer must store or produce telephone numbers to be called, using a random or sequential number generator. The Act itself requires telephone numbers to be stored or produced, and it omits any limitation that telephone numbers be randomly or sequentially generated. The Ninth Circuit’s exclusion of Textedly as an autodialer was not justified by anything stated in the Act.

Random number generators and sequential number generators are used in a wide variety of contexts beyond telephone number generation, and are simply pieces of code that generate random or sequential numbers. Random and sequential number generators are what make it possible for mass dialers to automatically call large quantities of telephone numbers in a short amount of time with little human intervention. Random and sequential number generators are used to automate data access and execute the same code over and over—a necessary feature of a dialer that automatically queues and dials more than one telephone number at a time.

The literal interpretation of the statutory

definition of autodialer does not sweep in the kinds of legitimate conduct that the Supreme Court was concerned about in *Duguid* such as smartphones, speed dialers, autoresponders, and dialers that merely store telephone numbers and dial them. Not all equipment that “dials automatically” or “without human intervention” falls under this definition. Auto-trigger dialers, like the one Facebook used to send login messages in *Duguid*, do not use random or sequential number generators to store or produce telephone numbers to be called. Only dialers that use random or sequential number generators to produce or store telephone numbers to be called are autodialers. Textedly stores telephone numbers using a sequential number generator and dials those stored telephone numbers. Therefore, Textedly is an autodialer under the Act.

ARGUMENT

The Act defines an autodialer 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).

As shown below, a program that uses a sequential number generator to assign unique identification values to records of telephone numbers stored in a database to be called qualifies as an autodialer under this definition. This conclusion is supported by the plain text and context of the Act, the commonly understood application of sequential number generators in the context of data storage, the decisions of the Supreme Court and this Court, and lastly, the legislative purposes for including cellular lines in the Act’s autodialer prohibition.

I. The Plain Meaning of the Term Random or Sequential Number Generator Is Not Limited To Generation of Telephone Numbers

There is no dispute of material fact concerning the manner in which Textedly functions, and that it uses a sequential number generator to store telephone numbers to be called. Mr. Snyder's Amended Declaration provides the unrebutted factual basis that compels the conclusion that Concentra used Textedly to store telephone numbers using a sequential number generator and then dialed those stored telephone numbers. Under both the plain meaning and the common technical understanding of the terms, random and sequential number generators execute processes that generate any type of number, including unique identification numbers in relational databases. Therefore, Plaintiff established on summary judgment that Concentra used an autodialer.

“[I]n interpreting a statute[,] a court should always turn first to one cardinal canon before all others, plain meaning, because ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’” *United States v. Lopez*, 998 F.3d 431, 441 (9th Cir. 2021) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Unless defined in the statute, a statutory term receives its ordinary, contemporary, common meaning unencumbered by “the limits of the drafters’ imagination.” *Lopez*, 998 F.3d at 435 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020)) (noting that the drafters of the Civil Rights Act of 1964 might not have anticipated that its clear statutory text would prohibit discrimination based on sexual orientation and gender identity).

The phrase under consideration is “random or sequential number generator”; not “random or sequential telephone number generator.” There is no reason to insert the word “telephone” into the phrase, nor any reason to believe that use of the word “number” in “random or sequential number generator” refers only to “telephone numbers to be called.” Congress used specific language in the Act when it wished to refer to telephone numbers. The references in the autodialer definition itself to “telephone numbers to be called” is one example: the phrase explicitly includes the term “telephone,” while the phrase “random or sequential number generator” does not.

When the Act refers to telephone numbers or facsimile numbers, as opposed to other numbers, it clearly states so. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (“to any telephone number assigned to a paging service”); 47 U.S.C. § 227(b)(1)(C)(ii) (“the sender obtained the number of the telephone facsimile machine”); 47 U.S.C. § 227(b)(2)(C) (“may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party”); 47 U.S.C. § 227(b)(2)(D)(iv)(I) (“a domestic contact telephone and facsimile machine number”); 47 U.S.C. § 227(b)(2)(E)(i) (“the request identifies the telephone number or numbers of the telephone facsimile machine or machines”); 47 U.S.C. § 227(b)(2)(H) (“may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service”); 47 U.S.C. § 227(c)(3) (“a single national database to compile a list of telephone numbers”); 47 U.S.C. § 227(c)(3)(F)–(G)

(“telephone number[s] of [any] subscribers included in such database”).

However, when the Act uses “number,” it means number more broadly. See 47 U.S.C. § 227(b)(2)(G)(I) (“a significant number of complaints”); 47 U.S.C. § 227(b)(2)(G)(II) (“a significant number of any such complaints”); 47 U.S.C. § 227(b)(2)(H) (“may restrict or limit the number and duration of calls”); 47 U.S.C. § 227(D)(iii) (“the number of such calls”); 47 U.S.C. § 227(h)(2)(A)–(G) (referring to the number of complaints, citations, notices, final orders and calls).

In only a few instances, the statute omits “telephone” when it likely means telephone number, but only where it clearly refers back to an antecedent use of the phrase “telephone numbers” by use of the word “such” or in a context where there is no doubt it can only mean telephone numbers. See 47 U.S.C. § 227(a)(1)(A)–(B) (“to store or produce telephone numbers to be called” and “to dial such numbers”); 47 U.S.C. § 227(b)(1)(C)(ii)(I) (“the sender obtained the number of the telephone facsimile machine through [] the voluntary communication of such number”); 47 U.S.C. § 227(c)(3)(K) (“a single national database to compile a list of telephone numbers” and “specify methods for protection of the privacy rights of persons whose numbers are included in such database”). Only telephone numbers can be dialed and be included in the Do Not Call database.

To contrast, random or sequential number generators can be and often are used to generate many kinds of numbers for a multitude of tasks. And, Concentra’s own expert, Mr. Sponsler, concedes, “There’s many definitions of ‘sequential.’” Sponsler Dep. 72:24–25, 3-ER-483. For these reasons, the text and context of the Act show that the definition of an

autodialer includes the use of a sequential number generator to store telephone numbers without necessarily generating or producing the telephone numbers themselves randomly or sequentially.

The Seventh Circuit came to the same conclusion in *Gadelhak*, concluding that interpreting the autodialer definition to capture only equipment that dials randomly or sequentially generated numbers was not permitted because adding to the words of Congress was not a valid exercise in statutory interpretation. 950 F.3d at 465-66. Thus, limiting the autodialer definition to equipment that “stores or produces telephone numbers to be called, generated using a random or sequential number generator” was not permitted by the Act as written. *Id.*

The phrase “such numbers” in “to dial such numbers” refers to “telephone numbers to be called”, but that is because the term “such” requires an antecedent to give “numbers” meaning—and that antecedent is “telephone numbers to be called.” That is because phone numbers “to be called” are “dialed.” However, the term “number” in “random or sequential number generator” does not require an antecedent, nor are there any other referential terms in “random or sequential number generator” that must be filled in with an antecedent. Note also that “telephone numbers to be called” and “such numbers” are both plural, while “number” in “random or sequential number generator” is singular. In sum, nothing about the phrase “random or sequential number generator” demands a reference for “number” or added words to provide meaning.

It is a fundamental principle of statutory interpretation that “absent provision[s] cannot be supplied by the courts.” *Rotkiske v. Klemm*, 140 S. Ct.

355, 360–61 (2019). Here too, judicially grafting extra requirements onto statutes would be unsound and unwarranted. *See Gadelhak*, 950 F.3d at 466. This is especially true in this case because the grafted language the Ninth Circuit adopted would render the disjunctive “to store or” vestigial. The Ninth Circuit’s interpretation would require in every case that telephone numbers be produced using a random or sequential number generator.

Furthermore, “it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994). “Atextual judicial supplementation is particularly inappropriate when . . . Congress has shown that it knows how to adopt the omitted language or provision.” *Rotkiske*, 140 S. Ct. at 361. Additionally, “[b]ecause 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).

Inserting “telephone” into “random or sequential number generator” would also make the prior express consent exception to the autodialer prohibition superfluous. The TCPA makes it “unlawful . . . 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” to several different types of telephone lines, including emergency lines, hospital patient lines, and cell phone and pager lines. 47 U.S.C. § 227(b)(1)(A). Prior express consent requires that a caller obtain permission before using an autodialer to call the

telephone number. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992). In practice, obtaining prior express consent requires a caller to keep records of the telephone numbers that have consented to receive autodialed calls. The caller would then call from the list of telephone numbers that have consented to receive autodialed calls and not from lists of generated phone numbers. The provision thus envisions a scenario where callers are not using autodialers to indiscriminately dial randomly or sequentially generated telephone numbers, but instead to call only telephone numbers which were previously identified as consenting to autodialer use. That the prior express consent exception is written so as to apply to the autodialer prohibition shows that Congress did not want to limit the definition of autodialer to random, sequential, or indiscriminate calling. It also would make no sense to randomly or sequentially dial phone numbers to collect a debt owed to or guaranteed by the United States. See 47 U.S.C. § 227(b)(1)(A)(iii). Congress envisioned that autodialers would be used for targeted calling, and required users of autodialers to obtain prior express consent before making such targeted phone calls.

Congress did not intend to ban autodialers altogether, but instead to allow autodialer use in certain circumstances when the caller had permission to use the device. Congress likely did this to allow responsible callers to take advantage of the cost savings afforded by autodialers. Autodialers reduced the cost of making calls, even using a “live” person to speak with the customer, because they “reduce[d] the amount of time that each person [had to] spend dialing numbers and waiting for the call to be answered.” S.

Rep. No. 102–177, 3 (1991). At the time the TCPA was passed, “major American corporations” were using autodialers to “call[] consumers at a rate of 5 to 7 million times per month.” *Id.* If the autodialer restriction only protected against indiscriminate dialing, the consent exception would have been superfluous: Congress could have achieved the same effect by banning autodialers except for emergency purposes, or writing the prior express consent exception to apply only to the other prohibitions in the Act.

The structure of the Act shows that Congress intended the prior express consent exception to apply in the same way to the autodialer prohibition and prerecorded call prohibition, and courts should not read implicit conditions to statutory definitions to do otherwise.

II. The Common Usage of Sequential Number Generators in Database Applications Supports Plaintiff’s Interpretation of an Autodialer

When the Act was enacted and signed into law, as now, it was generally known that sequential number generators were effective tools in data storage and data management. “Generating unique integers is a very common task in database systems” so that each row in a given table holds a unique value. 2-ER-159-160. At a reference site on MySQL databases, mysqldata.com/mysql-tutorial/mysql-sequences/, it is explained that “In MySQL, a sequence is a list of integers generated in the ascending order i.e., 1,2,3...[] Many applications need sequences to generate unique numbers mainly for identification e.g., customer ID in CRM, employee numbers in HR, and equipment numbers in the services management system.” 2-ER-

160. Data analysis and processing are complicated and can be error prone if the possibility of duplicate values is introduced into the data set, especially very large data sets. *Id.*

For example, Patent 5,307,484, application submitted on March 6, 1991 (prior to the effective date of the Act), explains that relational databases use sequential numbers to create unique identifiers to accomplish “referential integrity” across one or more tables:

Referential integrity provides a set of rules for defining the relationship between two tables, a “parent” and a “dependent” table. The parent table defines the domain of the dependent table. The first rule of referential integrity dictates how to define the parent table. Step (1) Include an attribute in the parent table that uniquely identifies each row in the table. Sequentially assigned numbers achieve uniqueness. The assigned number becomes a unique identifier. *See* Patent No. 5,307,484 Column 3:59–67, 3-ER-505.

47 U.S.C. § 227(a)(1)(A) specifies that an autodialer can be used to store phone numbers to be called using a sequential number generator. The foregoing discussion and the cited patent show a prevailing view of how sequential number generators were used, and continue to be used, to store data, including phone number records to be called. That same functionality exists today in the Textedly platform.

This application of a sequential number generator in database applications is not novel. In fact, it might be the first thing to enter the mind of a person knowledgeable in what constitutes equipment that

has the capacity to store telephone numbers to be called using a sequential number generator.

III. *Facebook, Inc. v. Duguid* Endorses a Meaning of Number Generation that Is Not Restricted to Telephone Numbers

In *Duguid*, the Supreme Court granted certiorari to answer the question “Whether the definition of ATDS [autodialer] in the TCPA encompasses any device that can ‘store’ and ‘automatically dial’ telephone numbers, even if the device does not ‘us[e] a random or sequential number generator.’” *See Facebook, Inc. v. Duguid*, No. 19-511, Question Presented, 3-ER-512. As this shows, *Duguid* accepted at the start that the device at issue did not use a random or sequential number generator.

Yet, the decision is instructive because *Duguid* “h[eld] 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.” *Duguid*, 141 S. Ct. at 1173 (emphasis added)

Plaintiff’s interpretation of the Act is entirely consistent with *Duguid’s* analysis of the autodialer definition. *Duguid* employed rules of statutory interpretation, primarily relying on the series qualifier canon to conclude that the phrase “using a random or sequential number generator” modified the verb “store” as well as “produce.” Thus, systems that did not use a random or sequential number generator did not qualify as an autodialer.

As shown above, autodialers are capable of using sequential number generators to store telephone numbers in other ways not advanced in *Duguid*, as the *Duguid* Court was asked to assume that no random or

sequential number generator was used in that case. Yet, the plaintiff in *Duguid* argued that this interpretation was illogical because (according to Duguid) sequential or random number generators do not store telephone numbers to be called without also producing them. 141 S. Ct. at 1172. The Supreme Court disagreed that the Act was redundant and resolved the asserted paradox by reasoning that, as a technical matter “[f]or instance,” an autodialer “might use a random number generator to determine the order in which to pick phone numbers from a preproduced list to be stored for later dialing.” *Id.*, n.7. In pointing out that “the storing and producing functions often merge,” the Court observed and approved of the possibility that there are instances and possibilities, such as the instance cited, where storage and production do not merge, and thus, storage of telephone numbers using a sequential number generator can have significance independent of telephone number production or generation. The Court said “often,” not “always.” And, the Court rejected Duguid’s contention that storing telephone numbers using a random or sequential number generator was illogical.

Consistent with this interpretation, the Supreme Court cited with approval an amicus brief submitted by the Professional Association for Customer Engagement and Noble Systems Corporation (“PACE Amicus Brief”) explaining that a patent issued in the 1980s described equipment that used a random number generator—not to produce phone numbers to be called—but in a way that “determine[d] the order in which phone numbers” were to be called. *Duguid*, 141 S. Ct. at 1172 n.7. (citing PACE Amicus Brief, at 19) 3-ER-536. That is, the numbers being randomly

generated need not be the phone numbers, but instead, can be random assignments of phone numbers from an existing data set of phone numbers to be called into a queue. In the very example used by the PACE Amicus Brief, the autodialer used a random number generator that generated as the unique ID value of 13 to be assigned to correspond to a stored telephone number to be called. *See* PACE Amicus Brief at 19–20, 3-ER-536-537 (describing one application of a random number generator to “retrieve a corresponding telephone number from the [preexisting] array”).

According to *Duguid*, this interpretation of assigning a phone number as ID #13 renders the inclusion of storage of telephone numbers using a random or sequential number generator coherent and not redundant or superfluous. It satisfies the “cardinal principle of statutory construction” that a court “give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

Thus, *Duguid* makes clear that it did not cast doubt on, but in fact endorsed, an interpretation of autodialer that includes the storage of telephone numbers using non-phone number sequential or random number generation. This interpretation is supported by the plain text of the Act and common technical meaning when the Act was passed, and the meaning of the technical terms have not changed since then. A consistent interpretation is still warranted under the text of the Act today.

IV. *Borden* Was Wrongly Decided

The Ninth Circuit’s decision in *Borden* makes four

arguments in support of its holding that “an ‘automatic telephone dialing system’ must generate and dial random or sequential *telephone* numbers under the TCPA’s plain text.” *Borden*, 53 F.4th at 1231 (emphasis in original).

First, *Borden* reasons that “using a random or sequential number generator” modifies “telephone numbers to be called” and it “makes the most sense” that the number generator be used to generate phone numbers. *Id.* at 1233. But, the phrase “using a random or sequential number generator” modifies the verbs “store or produce,” not telephone numbers to be called. And, even if *Borden* is correct about what makes the most sense, there is no indication that the statutory definition should be narrowed to regulate only to what makes the “most sense” when other possibilities are reasonable.

Next, *Borden* considers the location of the phrase “using a random or sequential number generator” between the phrase “to store or produce telephone numbers to be called” and “to dial such numbers.” *Id.* According to *Borden*, “[i]t would be illogical, or very poor legislative drafting, first explicitly to invoke phone numbers, then next to refer to other non-telephone numbers, and then finally to go back to phone numbers by calling them “such numbers.” *Id.* In coming to this conclusion, *Borden* overlooks the structure and punctuation of the statute. The two elements of an autodialer are set apart by infinitive verbs: the equipment must have the capacity (A) to store or produce telephone numbers to be called; and (B) to dial such numbers. The first element (A) is further modified with an adverbial phrase set apart with a comma, to clarify how the telephone numbers to be called must be stored *or* produced, i.e., “using a

random or sequential number generator.” “Using a random or sequential number generator” comes before and does not modify “dial such numbers,” and it applies equally to “store” and “produce,” and should be given this effect. Moreover, one can easily make the opposite inference from the fact that “using a random or sequential number generator” does not have a referential phrase like “such” when “to dial such numbers” in fact does. The omission of the word “such” from “using a random or sequential number generator” suggests that Congress did not intend to limit the definition to random or sequential telephone number generation.

Third, *Borden* cited specific instances in the TCPA where the word “number” was used as a shorthand for “telephone number.” *Id.* at 1233-34. But, as shown above, “number” is used to refer to other numbers. To suggest that “number” can mean “telephone number” is not to say that it must mean “telephone number.” As a general matter, “number” does not have only one meaning, and the noun-phrase “number generator” appears only once.

Fourth, *Borden* concluded that “[n]othing in [*Duguid*] suggests that the Court intended to define an autodialer to include generation of any random or sequential number.” *Id.* at 1236. However, as discussed above, *Duguid’s* express holding encompassed equipment that stores telephone numbers to be called using a sequential number generator, and *Duguid* confirmed in its footnote 7 that a system was an autodialer *because* it used a random number generator to assign the order in which numbers from a preproduced list were to be dialed. To dismiss footnote 7, as *Borden* does by pointing out that the preproduced list was compiled with a sequential

number generator misses the point of footnote 7, which was to identify an instance where a random number generator could be used in a system to store phone numbers to be called that was distinct from random or sequential phone number production.

V. Textedly Dialed Telephone Numbers in the Order Determined by the Sequential Number Generator

Under a proper interpretation of the autodialer definition, as endorsed by *Duguid*, a sufficient but not necessary condition of an autodialer is the use of the sequential number generator to determine the sequence in which telephone numbers are dialed. *See Duguid*, 141 S. Ct. at 1172, n.7. Here, the Call Activity Table of the Textedly Messaging Log and Mr. Snyder's test established that Textedly not only stores telephone numbers using a sequential number generator, but that Textedly dials the phone numbers using the sequential number to determine which phone numbers meet the criteria to be called and also the sequence that the phone numbers are dialed. Snyder Decl. ¶¶ 58-69.

The district court erroneously concluded that “[e]ven if the use of a random or sequential number generator to determine the order the messages would be sent could qualify a platform as an autodialer where the telephone numbers on the list were collected non-randomly, the definition would not apply to the facts here because it is undisputed that the numbers were stored and called in the same order they were uploaded or input into Textedly.” App. B., 24a.

The undisputed evidence shows that Textedly's sequential number generator was doing the work of

determining the order in which the telephone numbers were dialed, rather than the data field associated with the time the record was uploaded. Snyder Decl. ¶¶ 58–69; *see also* Order, App. B., 7a (finding that Plaintiff’s phone number was dialed in sequential order). That the sequentially unique identification number generally corresponds with the chronological order in which the data was entered into the database does nothing to change the fact that the sequential numbers were doing the work of ordering the sequence. Again, the autodialer definition includes random number generators and sequential number generators. There is no requirement that the autodialer randomly reorder the dialing order to call the telephone numbers.

VI. Concentra Did Not Use a Customer List, but Instead Obtained Plaintiff’s Information from a Third Party

Here, Concentra acquired a list of phone numbers of licensed physical therapists from third parties who scraped public databases and erroneously attributed Plaintiff’s phone number to a California physical therapist. App. B., 8a-9a. Plaintiff had no relationship with Concentra prior to the text message being sent. 2-ER-177. Accordingly, the preproduced list was not a customer list and was not a list of persons who voluntarily sought to communicate with Concentra. Plaintiff was contacted haphazardly and erroneously, which sharply contrasts with cases involving legitimately compiled preproduced lists of customers or other persons who voluntarily interacted with Concentra where “[n]one of these concerns are present[.]” *Austria v. Alorica, Inc.*, No. 2:20-cv-05019-ODW (PVCx), 2021 WL 5968404, at *1 (C.D. Cal. Dec.

16, 2021); *see also In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11-md-02295 JAH-BGS, 2021 WL 5203299, at *2-4 (S.D. Cal. 2021) (“plaintiff was called to collect on a debt he owed.”); *Hufnus v. Donotpay, Inc.*, No. 20-0701, 2021 WL 2585488, at *1-2 (N.D. Cal. June 24, 2021) (“the ‘preproduced list’ ...was created by consumers providing their numbers while signing up for [defendant’s] services...” which “differentiat[es]” it from a “‘preproduced list’ that was itself created through a random of sequential number generator[.]”); *Mehl v. Green*, No. 2:21-cv-01861, 2022 WL 4056269 (E.D. Cal. Sep. 2, 2022) (“[When a plaintiff provides their number...a TCPA claim does not lie[.]”); *Allison v. Wells Fargo*, No. 22-cv-0510-BAS-AHG, 2022 WL 10756885 (S. D. Cal. Oct. 17, 2022) (“[P]laintiff’s connection to the defendant as a debtor heavily weighed against the plausibility of the defendant using an ATDS.”); *Franco v. Alorica, Inc.*, No. 2:20-CV-05035-DOC-(KESx), 2021 U.S. Dist. LEXIS 164438, 2021 WL 3812872, at *3 (C.D. Cal. July 27, 2021) (“Plaintiff had a pre-existing relationship with Defendant: Plaintiff allegedly owed a debt, and Defendant was calling to collect.”).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK L. JAVITCH
Counsel of Record
JAVITCH LAW OFFICE
3 East 3rd Ave
Ste. 200
San Mateo, CA 4401
(650) 781-8000
mark@javitchlawoffice.com

Thomas A. Zimmerman, Jr.
Counsel for Petitioner
ZIMMERMAN LAW
OFFICES, P.C.
77 W. Washington Street,
Suite 1220
Chicago, Illinois 60602

APPENDIX

TABLE OF APPENDICES

APPENDIX 1a

 APPENDIX A, Court of Appeals Decision .. 1a

 APPENDIX B, Order Granting Concentra’s
 Motion for Summary Judgment, Denying
 Plaintiff’s Motion for Summary Judgment,
 and Dismissing Plaintiff’s Complaint With
 Prejudice 3a

 APPENDIX C, Judgment 28a

1a

APPENDIX A

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

No. 22-15033

D.C. Docket No. 3:19-cv-02559-JCS

LAWRENCE PASCAL,
PLAINTIFF-APPELLANT

v.

CONCENTRA, INC.
DEFENDANT-APPELLEE

April 13, 2023

Appeal From The United States District Court
For the Northern District of California

Submitted April 11, 2023**
San Francisco, California

Before: PAEZ, CLIFTON, and H.A. THOMAS,
Circuit Judges

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Lawrence Pascal appeals the district court's grant of summary judgment to Concentra, Inc. in a putative class action lawsuit brought under the Telephone Consumer Protection Act (TCPA). We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo. *Duarte v. City of Stockton*, 60 F.4th 566, 570 (9th Cir. 2023). We affirm.

Pascal's argument that Concentra violated the TCPA when it messaged him using Textedly, an online text-messaging service, is foreclosed by our decision in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022). In *Borden*, we held that a system constitutes an autodialer regulated by the TCPA only if it "generate[s] random or sequential telephone numbers." *Id.* at 1231; *see also Brickman v. United States*, 56 F.4th 688, 690 (9th Cir. 2022). Because Textedly did not store or produce randomly or sequentially generated telephone numbers, Concentra's text message was not sent to Pascal via use of an autodialer in violation of the TCPA.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Lawrence Pascal,)
)
Plaintiff,)
)
v.) Civil Action
) 3:19-cv-02559
Concentra, Inc.,)
)
Defendant.)

**ORDER GRANTING CONCENTRA'S
MOTION FOR SUMMARY
JUDGMENT, DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING
PLAINTIFF'S COMPLAINT WITH
PREJUDICE**

Re: Dkt. Nos. 133, 135, 138, 142

I. INTRODUCTION

Plaintiff Lawrence Pascal brings a putative class action against Defendant Concentra, Inc. ("Concentra") under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Presently before the Court are the parties' cross-motions for summary judgment on the dispositive issue of whether the text message that Pascal received was

sent using an automatic telephone dialing system (“ATDS” or “autodialer”) within the meaning of the TCPA under *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021) (“*Duguid*”). Based on the undisputed facts, the Court finds that it was not and therefore GRANTS Concentra’s summary judgment motion and DENIES Pascal’s summary judgment motion. The Court does not reach the parties’ *Daubert* motions.¹

II. BACKGROUND

A. Factual Background

This case involves a text message (“the Text”) that was sent by Concentra on May 13, 2019 and received by Pascal on his mobile telephone without his consent. Second Amended Complaint (“SAC”) ¶¶ 17-18. The Text stated:

“Are you looking for a new career? Concentra is inviting physical therapists to interview for o/p ortho positions across CA and offering up to \$10k in incentives for select locations. Grow your skills with opps for leadership, manual therapy cert. and student teaching. Let’s talk today! Text STOP to end.” SAC ¶ 18.

According to Pascal, “[t]he message that was sent to [him] was also sent simultaneously to 3,596 phone numbers that Concentra identified as belonging to physical therapists in California.” Motion to Certify Class (dkt. 108) at 3.

The relevant facts relating to how Pascal came to receive the Text are undisputed. At all relevant times,

¹ The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

Concentra used Textedly (www.textedly.com), a messaging application that allowed Concentra to conduct marketing campaigns whereby it sent identical recruiting text messages to groups of potential job applicants. Amended Declaration of Randall A. Snyder (“Amended Snyder Decl.”) ¶¶ 53-54. Textedly is described in its Terms of Service as follows:

Through the Platform and Services, Textedly provides notification and messaging services that allows paid subscribers to contact and send information to their user database through mobile text messaging services and other mobile communication systems. After purchasing a subscription to the Platform, you can create and send text marketing campaigns to advertise your various products and services or send informational alerts, reminders, notifications or confirmations. As part of the Services and Platform, Textedly provides businesses and organizations with a variety of tools to collect names, mobile phone numbers, email addresses, and other information on an opt-in basis and to help you import subscriber data. However, contact information may be imported only if your users have given you consent to receive a specified type of messaging from you. Further, Textedly does not initiate, send, or generate any messages for you; rather, the messages are initiated by you using our Platform at your sole discretion, subject to these Terms. For example, Textedly does not draft the content of your messages, control when the messages are sent or to whom, or

provide or generate any phone numbers to be messaged through the Platform or Site. All of these functions must be manually performed by you and are not automated. Textedly cannot send any messages randomly or send recurring messages.

Declaration of Amy L. Pierce in Support of Concentra, Inc.'s Motion for Summary Judgment ("Pierce Decl."), Ex. A (TEXTEDLY00001).

As used by Concentra, there were four "essential steps" involved in using Textedly: "(1) store the list of telephone numbers; (2) enter the text message content; (3) select the time that the messages are to be broadcast to the stored list of cellular telephone numbers; and (4) activate the automatic message transmission process to send the messages en masse." Amended Snyder Decl. ¶ 56. It is undisputed that "[t]he way in which [Concentra] used . . . Textedly . . . require[d] a database file to first be uploaded and stored in the application." *Id.* ¶ 70. Thus, "Concentra uploaded large lists of phone numbers as .csv files to Textedly, and then shortly thereafter, sent the same spam text message to hundreds or thousands of people based on their professional credentials and geographic location." Motion for Class Certification at 2-3. "For example, the message that was sent to Plaintiff was also sent simultaneously to 3,596 phone numbers that

Concentra identified as belonging to physical therapists in California." *Id.* at 3 (citing Declaration of Mark Javitch in Support of Motion for Class Certification, Ex. 2 (Screenshot of Textedly Campaign View Page (CONCENTRA 00137)). "Textedly Messaging Application uses the Microsoft® MySQL® relational database as its internal storage for

uploaded cellular telephone numbers.” Amended Snyder Decl. ¶ 75. “The cellular telephone numbers . . . are stored in the MySQL database in descending order by the value of the ‘id’ field . . . , which relates directly to the time the cellular number was added to the database.” Id. ¶ 76. In other words, id numbers are assigned to telephone numbers sequentially as they are uploaded to or entered manually into Textedly and they are stored in that order. Plaintiff’s Motion for Summary Judgment at 4 (citing Amended Snyder Decl. ¶¶ 75-78 & Ex. F thereto; Javitch Summary Judgment Decl., Ex. 10 (Textedly Messaging Log)). It is undisputed that Textedly does not change the order of the telephone numbers or determine when any number will be called. Further, the Textedly Message Log reflects that Plaintiff’s telephone number (found at Row 865 of the Subscribers Table in the message log) was assigned such a sequential identifier in connection with its storage in the MySQL database and that it was also dialed in sequential order. See Plaintiff’s Summary Judgment Motion at 17-18 (citing Javitch Summary Judgment Decl., Ex. 10).

B. Contentions of the Parties

Concentra seeks summary judgment in its favor on the basis that the undisputed facts establish that it did not use an ATDS within the meaning of the TCPA under the Supreme Court’s recent decision in Duguid. Pascal disagrees and seeks summary judgment that an ATDS was used because telephone numbers are assigned unique ids that are sequential when they are uploaded or manually added to Textedly and therefore, Textedly used a random or sequential number generator to store telephone numbers within the meaning of the TCPA.

III. ANALYSIS

A. Legal Standards Under Rule 56

Summary judgment on a claim or defense is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party’s claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant has made this showing, the burden shifts to the party opposing summary judgment to designate “specific facts showing there is a genuine issue for trial.” *Id.* (citation omitted); *see also* Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . .”). “[T]he inquiry involved in a ruling on a motion for summary judgment . . . implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.” *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). The non-moving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

A party need not present evidence to support or oppose a motion for summary judgment in a form that would be admissible at trial, but the contents of the parties’ evidence must be amenable to presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d

1032, 1036–37 (9th Cir. 2003). Neither conclusory, speculative testimony in affidavits nor arguments in moving papers are sufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant, *Scott v. Harris*, 550 U.S. 372, 378 (2007), but where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no “genuine issue for trial” and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

B. The TCPA and *Duguid*

Pascal brings this action under 47 U.S.C. § 227(b)(1)(A)(iii), which makes it unlawful 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 . . . to any telephone number assigned to a . . . cellular telephone service . . . unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]”

The term “automatic telephone dialing system” is defined as “equipment which has the capacity--(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1).

Prior to the Supreme Court’s decision in *Duguid*, there was a split of authority as to “whether an autodialer must have the capacity to generate random or sequential phone numbers.” *Duguid*, 141 S. Ct. at 1168. In *Duguid*, the Court held that it must. The plaintiff in *Duguid* brought a claim under the TCPA

based on several login notification text messages he received from Facebook, which offers an “optional security feature that sends users ‘login notification’ text messages when an attempt is made to access their Facebook account from an unknown device or browser.” *Id.* at 1168. The plaintiff, however, did not have a Facebook account and had not provided Facebook with his telephone number. *Id.* The plaintiff alleged that “Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated account was accessed by an unrecognized device or web browser.” *Id.* In support of this position, the plaintiff argued that the phrase “using a random or sequential number generator” in Section 227(a)(1)(A) modified only the verb closest to it – i.e., “produce,” and therefore, the fact that Facebook used a system that could both store telephone numbers and send messages to those numbers was sufficient to establish the use of an autodialer. *Id.* Facebook, on the other hand, took the position that the phrase modified both verbs that preceded it, that is, both “produce” and “store.” *Id.* at 1169.

The Supreme Court agreed with Facebook, holding that “[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.” *Id.* at 1167. The Court looked first to “conventional rules of grammar,” reasoning that “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,’ a modifier at the end of the list ‘normally

applies to the entire series.’ ” Id. at 1169 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) (Scalia & Garner) (quotation modified)). The Court noted that it “often applies this interpretative rule[,]” which “generally reflects the most natural reading of a sentence.” Id. It concluded that applying this rule to Section 227(a)(1)(A) “produces the most natural construction, as confirmed by other aspects” of its text, including the fact that “the modifier at issue immediately follows a concise, integrated clause” and that the modifying phrase follows a comma after “store or produce telephone numbers to be called.” Id. at 1169-1170.

The Court further found that “[t]he statutory context” confirms that the autodialer definition excludes equipment that does not “us[e] a random or sequential number generator.” Id. at 1171. It pointed to prohibitions in Section 227(b)(1) “target[ing] a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity.” Id. It reasoned further, “[e]xpanding the definition of 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.” Id. For example, the Court explained, a broad definition of autodialer “would capture virtually all modern cell phones, which have the capacity to ‘store . . . telephone numbers to be called’ and ‘dial such numbers.’ ” Id.

The Court acknowledged 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 explained that “it is less

odd as a technical matter[.]” pointing out that “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).” *Id.* at 1171-72. It then stated in a footnote as follows:

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. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544, n. 7, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). 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. *Atlantic Richfield Co. v. Christian*, 590 U. S. —, —, n. 5, 140 S.Ct. 1335, 1350, n. 5, 206 L.Ed.2d 516 (2020).

Id. at 1172 n. 7 (“Footnote 7”).²

² The portion of the amicus brief cited in Footnote 7 describes “a dialer that the TCPA was presumably intended to encompass” set forth in U.S. Patent 4,741,028 (“’028 Patent”). It summarized that technology as follows:

The Court rejected Duguid’s argument that a broad definition of autodialer was consistent with Congress’s intent in adopting the TCPA. *Id.* at 1172. It observed, “[t]hat Congress was broadly concerned about intrusive telemarketing practices . . . does not mean it adopted a broad autodialer definition.” *Id.* Rather, “Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines” and therefore, “the autodialer definition Congress employed includes only devices that use such technology, and the autodialer prohibitions target calls made to such lines.” *Id.* (citing 47 U.S.C. § 227(b)(1)(A)).

C. Cases Applying Duguid in this District

To recap, the '028 Patent discloses generating a sequence of telephone numbers that are stored in an array. Next, a random number generator is used to retrieve a corresponding telephone number from the array. That number produced from memory can be used to create a record for immediate dialing or stored in longer term memory for subsequent dialing. Consequently, a dialer implementing this technology could use a sequential number generator for storing 10,000 telephone numbers in an array in RAM. The dialer then uses a random number generator to produce the numbers (i.e., select, retrieve, and provide the number from memory) for immediate or subsequent dialing. The random number generator may also be involved in further storing the number (albeit in a different manner, i.e., in a file) for dialing at a later time.

FACEBOOK, INC., Petitioner, v. Noah DUGUID, et al., Respondents., 2020 WL 5549320 (U.S.), 20-21 at 20 (“PACE Amicus Brief”).

In the wake of *Duguid*, courts in this district have addressed what constitutes an autodialer:

Under the TCPA in various factual contexts. For example, in *Hufnus v. DoNotPay, Inc.*, the plaintiff asserted TCPA claims based on text messages sent to him by defendant DoNotPay, but “[t]he platform DoNotPay used to contact Hufnus merely processe[d] phone numbers supplied by consumers while signing up for DoNotPay’s services” and then store[d] these numbers in a random and/or sequential way; use[d] a random and/or sequential generator to pull from the list of numbers to send targeted text messages; and use[d] a random and/or sequential generator to determine the sequence in which to send messages.” No. 20-CV-08701-VC, 2021 WL 2585488, at *1 (N.D. Cal. June 24, 2021). The court concluded that under *Duguid*, this was not sufficient to establish that an ATDS was used because “the platform only contact[ed] phone numbers specifically provided by consumers during DoNotPay’s registration process, and not phone numbers identified in a random or sequential fashion.” *Id.*

The court in *Hufnus* rejected the plaintiff’s reliance on the statement in Footnote 7 that “an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list.” *Id.* (quoting 141 S. Ct. at 1172 n.7). It found that the plaintiff’s argument “relie[d] on an acontextual reading of this line, both with respect to the footnote specifically and the opinion more generally.” *Id.* In particular, the court in *Hufnus* found that “[a]s to the footnote, the Court employed the quoted line to explain how an autodialer might both

‘store’ and ‘produce’ randomly or sequentially generated phone numbers, citing to an amicus curiae brief from the Professional Association for Customer Engagement for support. That brief makes clear that the ‘preproduced list’ of phone numbers referenced in the footnote was itself created through a random or sequential number generator, differentiating it from the ‘preproduced list’ of phone numbers used by DoNotPay, which was created by consumers providing their numbers while signing up for DoNotPay’s services.” *Id.*

The *Hufnus* court found, “[m]ore generally, [that] *Hufnus’s* reading of [F]ootnote 7 conflict[ed] with Duguid’s holding and rationale.” *Id.* According to the court in *Hufnus*:

The Supreme Court explained in Duguid that the TCPA’s definition of autodialer concerns devices that allow companies “to dial random or sequential blocks of telephone numbers automatically,” not systems, such as DoNotPay’s, that randomly or sequentially dial numbers from a list that was itself created in a non-random, non sequential way. 141 S. Ct. at 1167. The Supreme Court also explicitly stated that its opinion in Duguid was intended “to resolve a conflict among the Courts of Appeals” about the types of devices that qualify as autodialers. *Id.* at 1168. And DoNotPay’s platform is akin to the systems deemed to not qualify as autodialers by the Courts of Appeals with which the Supreme Court sided, because DoNotPay’s system targets phone numbers that were obtained in a non-random way

(specifically, from consumers who provided them). *See, e.g., Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 460 (7th Cir. 2020) (Barrett, J.) (holding that a system that “exclusively dials numbers stored in a customer database” does not qualify as an autodialer); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020) (adopting a definition of autodialer that excludes equipment that “target[s] a list of debtors” or “target[s] individuals likely to be interested in buying vacation properties”).

Id. Based on the court’s conclusion that the platform DoNotPay used to contact Hufnus did not qualify as an autodialer under the TCPA, the court found that Hufnus’s claim failed as a matter of law and dismissed his complaint without leave to amend. *Id.*

Similarly, in *Tehrani v. Joie de Vivre Hosp., LLC*, Judge Chen rejected the plaintiff’s reliance on Footnote 7 in support of his claim that text messages he received from the defendant were sent with the use of an autodialer for the purposes of the TCPA. No. 19-CV-08168-EMC, 2021 WL 3886043, at *5 (N.D. Cal. Aug. 31, 2021). In that case, the plaintiff’s claim that the messages he received were sent using an autodialer was based on the following theory:

According to Mr. Tehrani, the italicized language above from [F]ootnote 7 recognizes that there is an autodialer in the following circumstance: [A] system uses a list of preexisting phone numbers (e.g., marketing contacts). It generates an index number using either a sequential number generator (e.g., 1001, 1002, 1003, etc.), or a random number

generator, assigns the generated numbers to phone numbers from the list, and stores the information. The system can then select sets of numbers to automatically dial (e.g., calling numbers 1,001-2,000). . . . In other words, according to Mr. Tehrani, the number generator in the autodialing system (whether random or sequential) does not have to “create the phone numbers themselves.”

Mot. at 2 (*italics in original*); see also Mot. at 5 (contending that “the TCPA does not solely protect the public from autodialer devices that use number generators to create the phone numbers – the statute protects the public from autodialers that randomly or sequentially generate numbers ‘to determine the order in which to pick phone numbers from a preproduced list’ and ‘then store those numbers to be dialed at a later time’”).

Based on this autodialer theory, Mr. Tehrani asserts that an autodialer was used in his case, even though it is undisputed that the alleged autodialer used by Defendants did not have the capacity to generate random telephone numbers to call. In his proposed TAC, Mr. Tehrani alleges as follows: To send text messages, “Defendants used TrustYou software.” Prop. TAC ¶ 14.

- “The TrustYou system includes [an existing] contacts database that can store names, phone numbers, and other information.” Prop. TAC ¶ 15.

- “The TrustYou system can generate sequential numbers and store these numbers in its customer database, to index contacts. When

a mass texting campaign is initiated, the system can then automatically text customers in the stored, sequential order. In addition, or in the alternative, when a group of contacts is selected for a mass texting campaign, the system can generate sequential numbers to indicate the texting order, store the selected contacts in this sequential order, and then text the contacts in the stored order.” Compl. ¶ 17 (emphasis added).

Id. at *2-3.

The court in *Tehrani* rejected the plaintiff’s interpretation of *Duguid* for several reasons.

First, it found that “as a textual matter, the ‘number generator’ (whether random or sequential) specified in § 227(a)(1)(A) implicitly refers back to a ‘telephone number[.]’ – i.e., the preceding phrase – and not to an index number.” *Id.* at *4. In support of this reading of the provision, the court points to “subsection (B) which refers to the capacity to dial ‘such numbers.’ ” *Id.* Therefore, the court concluded, “throughout § 227(a)(1), the term ‘number[s]’ refers to telephone numbers.” *Id.*

Next, the court in *Tehrani* cited the fact that the Supreme Court in *Duguid* rejected not only the Ninth Circuit’s reading of the TCPA but also that of the Second Circuit, which in *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020) “rejected the position that there is no autodialer if the system dials numbers from ‘prepared lists – that is, from lists that had been generated and uploaded to the programs by humans.’ ” *Id.* (quoting *Duran v. La Boom Disco, Inc.*, 955 F.3d at 283 (emphasis added in *Tehrani*)). The *Tehrani* court found that “[i]n rejecting the Second and Ninth Circuit

holdings, the Supreme Court implicitly rejected Mr. Tehrani's interpretation of [*Duguid*]." *Id.*

The court in *Tehrani* found further support for its conclusion by looking to the circuit authority with which the Court agreed in *Duguid*. *Id.* According to the Tehrani court, "[t]hat authority indicates that the number generator must in fact create telephone numbers." *Id.* (citing *Glasser v. Hilton Grand Vacations Co.*, 948 F. 3d 1301, 1307-09 (11th Cir. 2020) (noting that, "[a]t the time of enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing"; adding that it was not until 2003 that the FCC "issued a new order that interpreted § 227 to extend to equipment that merely dialed numbers 'from a database of numbers' – that merely stored numbers and called them") (emphasis added in *Tehrani*); *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 460 (7th Cir. 2020) (noting that defendant's system "neither stores nor produces numbers using a random or sequential number generator; instead, it exclusively dials numbers stored in a customer database," and, therefore is not an autodialer for purposes of the TCPA)).

The court in *Tehrani* also found that the plaintiff's theory made "little sense when one takes into account the harms that the TCPA was intended to address" as described in *Duguid*, including "seizing the telephone lines of public emergency services [and] dangerously preventing those lines from being utilized to receive calls from those needing emergency services" and "simultaneously tie[ing] up all the lines of any business with sequentially numbered phone lines."

Id. (quoting 141 S. Ct. at 1167). In light of these harms, the court found, “little would be gained by finding a TCPA violation based on a preexisting customer database.” *Id.* at *5. For example, the court noted, “it is unlikely that a preexisting customer database would contain an emergency number; similarly, it is unlikely that a customer database would pose a danger to tying up business with sequentially numbered phone lines.” *Id.*

Next, the *Tehrani* court rejected the plaintiff’s reliance on the legislative history, finding that the history he cited was “not that informative” and pointing to the Supreme Court’s conclusion in *Duguid* that “just because ‘Congress was broadly concerned about intrusive telemarketing practices . . . does not mean it adopted a broad autodialer definition.’” *Id.* (quoting 141 S. Ct. at 1172).

The court in *Tehrani* also rejected the plaintiff’s reliance on Footnote 7. It found the plaintiff’s argument “problematic based simply on the fact that the Supreme Court did not take a clear-cut stance, with its final sentence in the footnote reading: ‘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.* (citing 141 S. Ct. at 1172 n.7 (emphasis added in *Tehrani*)).

More importantly, the court in *Tehrani*, like the *Hufnuss* court, pointed out that the discussion in the amicus brief upon which the *Duguid* Court relied in Footnote 7 made clear that the “preproduced list” referenced in the footnote “was not some kind of pre-existing list but rather a list of phone numbers that was generated by a number generator.” *Id.* (citing PACE Amicus Brief).

The court in *Tehrani* also pointed to a number of other district court cases in which courts have interpreted Footnote 7 in a similar manner. *Id.* at *6-7 (citing *Hufnus; Barry v. Ally Fin., Inc.*, No. 20-12378, 2021 WL 2936636 at *6 (E.D. Mich. July 13, 2021) (stating that “Plaintiff takes footnote 7 out of context”; “the ‘preproduced list’ of phone numbers referenced in the footnote was itself created through a random or sequential number generator”); *Borden v. efinancial, LLC*, No. C19-1430JLR, 2021 WL 3602479 at *5 (W.D. Wash. Aug. 13, 2021) (stating that “Mr. Borden’s argument relies on a selective reading of one line within footnote 7 and ignores the greater context of that footnote and the opinion”); *Timms v. USAA Fed. Sav. Bank*, No. 3:18-cv-01495-SAL, 2021 WL 2354931 at *7 (D.S.C. June 9, 2021) (holding that “footnote 7 does not support Plaintiff’s argument”; “the Supreme Court’s statement – that an ‘autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list’ and ‘then store those numbers to be dialed at a later time’ – refers to the process as explained by PACE on page 19 of its amicus brief”)).

D. Discussion

Based on the undisputed facts relating to Textedly’s functionality, Plaintiff does not dispute that the text messages at issue in this case were not “produced” “using a random or sequential number generator.” Instead, he contends the numbers were “stored” “using a random or sequential number generator” by virtue of the fact that Textedly’s MySQL database uses “a sequential number generator to store telephone numbers and create[es] a unique identifier

for each entry.” The Court rejects Plaintiff’s theory, which it finds to be inconsistent with the reasoning and holding of *Duguid*.

As discussed above, the court in *Tehrani* set forth a number of reasons for rejecting a similar argument where the plaintiff argued that a feature that assigned sequential index numbers to telephone numbers that were input into the system for the purposes of storing the numbers in a database met the TCPA’s definition of an autodialer. In particular, it found that under Section 227(a)(1), the requirement that a “number” must be stored or produced by an autodialer implicitly refers to a telephone number, citing the reference in subsection (B) to the capacity to dial “such numbers.” 2021 WL 3886043, at *4. It pointed to other circuit authority cited with approval in

Duguid reaching the same conclusion as further support for its conclusion. *Id.* (citing *Glasser v. Hilton Grand Vacations Co.*, 948 F. 3d 1301, 1307-09 (11th Cir. 2020); *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 460 (7th Cir. 2020)). The undersigned agrees with the reasoning of *Tehrani* on this point and therefore concludes that the generation and assignment of random or sequential *id.* numbers to telephone numbers that were uploaded or manually input into Textedly, including Plaintiff’s telephone number, is not sufficient to establish that an autodialer was used in sending the Text to Plaintiff.

More broadly, the Court agrees with both the *Hufnus* and *Tehrani* courts that under *Duguid*, a platform that merely targets telephone numbers that were obtained in a non-random way is not an autodialer for the purposes of the TCPA. *See Hufnus*, 2021 WL 2585488, at *1 (holding that use of an

autodialer was not alleged where “the platform only contact[ed] phone numbers specifically provided by consumers during DoNotPay’s registration process, and not phone numbers identified in a random or sequential fashion.”); *Tehrani*, 2021 WL 3886043, at *4 (finding that *Duguid* Court implicitly rejected Second Circuit’s holding in *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020) concluding that autodialer definition can be met by a system that dials numbers from “prepared lists – that is, from lists that had been generated and uploaded to the programs by humans.”). This conclusion is supported by *Duguid*’s discussion of the purposes of the TCPA, as reflected in the language of the statute, which describes the specific harms associated with the use of autodialers; as the Court stated in *Duguid*, the “prohibitions [in Section 227(b)] target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity.” 141 S. Ct. at 1171. Those harms are not implicated by the system that was used here, where the messages were sent to telephone numbers that were selected based on the geographical location and qualifications of the recipients.

Likewise, the undersigned agrees with the *Hufnus* and *Tehrani* courts that Footnote 7 does not support a contrary reading of *Duguid* and the TCPA. Read out of context, the statement in Footnote 7 referencing an autodialer that “use[s] a random number generator to determine the order in which to pick phone numbers from a preproduced list” might suggest that even where a platform sends messages to a list of telephone numbers that was created in a non-random fashion, as is the case here, an autodialer is used if the order in which they are contacted relies on

a random or sequential number generator. As many courts have observed, however, the reference to a “preproduced list” in Footnote 7 was based on a specific technology described in the PACE Amicus Brief and that brief makes clear that the preproduced list was itself randomly generated. *See Hufnus*, 2021 WL 2585488, at *1; *Tehrani*, 2021 WL 3886043, at *5; 2020 WL 5549320 (U.S.) (PACE Amicus Brief) at 19-21. Moreover, even if the use of a random or sequential number generator to determine the order the messages would be sent could qualify a platform as an autodialer where the telephone numbers on the list were collected non-randomly, the definition would not apply to the facts here because it is undisputed that the numbers were stored and called in the same order they were uploaded or input into Textedly.

The Court further finds that Plaintiff’s reliance on a handful of cases in which courts have denied motions to dismiss based on failure to allege use of an ATDS is misplaced. *See* Plaintiff’s Motion for Summary Judgment at 12 (citing *Miles v. Medicredit, Inc.*, No. 4:20-cv-01186 JAR, 2021 WL 2949565, at *4 (E.D. Mich. July 14, 2021); *Gross v. GG Homes, Inc.*, No. 3:21-cv00271-DMS-BGS, 2021 WL 2863623, at *1 (S.D. Cal. July 8, 2021); *Callier v. GreenSky, Inc.*, EP-20-CV-00304-KC, 2021 WL 2688622, at *5 (W.D. Tex. May 10, 2021)). In these cases, the courts simply found that this issue was more appropriately addressed at the summary judgment stage of the case.

In *Miles v. Medicredit*, for example, the court found that the “newly clarified definition of an ATDS is more relevant to a summary judgment motion than at the pleading stage.” 2021 WL 2949565, at *4 (quoting *Gross v. GG Homes, Inc.*, No. 3:32-cv-00271-DMS-BGS, 2021WL 2863623, at *7 (S.D. Cal. July 8,

2021) (citing *Montanez v. Future Vision Brain Bank, LLC*, 20-CV-02959-CMA-MEH, 2021 WL 1697928, at *7 (D. Colo. Apr. 29, 2021)). The court denied the defendant's motion to dismiss under Rule 12(b)(6), finding that the plaintiff had "pled enough facts to proceed with discovery, at which time he will have the opportunity to discover the precise technology that was used at the time of the alleged TCPA violation." *Id.* It noted, however, that if the technology did not meet the statutory definition of an ATDS under Duguid, the defendant could move for summary judgment on that basis. *Id.*

Similarly, the court in *Gross v. GG Homes, Inc.*, declined to decide whether the defendant had used an ATDS, finding the question was more suitable for a decision on summary judgment. No. 321CV00271DMSBGS, 2021 WL 2863623, at *7 (S.D. Cal. July 8, 2021), on reconsideration, sub nom. KIMBERLY GROSS, Plaintiff, v. GG HOMES, INC., Defendant., No. 321CV00271DMSBGS, 2021 WL 4804464 (S.D. Cal. Oct. 14, 2021). The court observed, "Plaintiff need not describe the technical details of Defendant's alleged ATDS at this stage. This issue is appropriately addressed following discovery and on a motion for summary judgment." *Id.*; see also *Callier v. GreenSky, Inc.*, EP-20-CV-00304-KC, 2021 WL 2688622, at *11-12 (W.D. Tex. May 10, 2021) (holding that a pro se plaintiff's TCPA claim was sufficient at the pleading stage where he alleged that he received multiple calls, that there were several seconds of silence at the beginning of each call, that the same script was used for each call, and that an ATDS was used to place the calls).

Carl v. First Nat'l Bank of Omaha, No. 2:19-cv-00504-GZS, 2021 WL 2444162 (D. Me. June 15, 2021)

and *Heard v. Nationstar Mortgage LLC*, No. 2:16-cv-00694-MHH, 2018 WL 4028116 (N.D. Ala. Aug. 22, 2018), cited by Plaintiff in his summary judgment motion, also do not support Plaintiff's position. In *Carl*, the court declined to enter summary judgment on the ATDS question, concluding that there were factual disputes as to whether some of the calls received by the plaintiff were placed by an ATDS even though there was evidence that the platform at issue called numbers on a list that was provided by the defendant and was not randomly generated. 2021 WL 2444162, at *3, 9. In a footnote, the court noted that "*Duguid* suggested that an ATDS could potentially fall under [the] TCPA if it "use[s] a random number generator to determine the order in which to pick phone numbers from a preproduced list [and] then store[s] those numbers to be dialed at a later time." *Id.* (citing *Duguid*, 141 S. Ct. at 1172 n.7). The court did not actually decide that question, however. In any event, the undersigned rejects this interpretation of Footnote 7 for the reasons discussed above. In *Heard*, the court found that debt collection calls placed by the defendant fell within the definition of an ATDS where the defendant input call data from its loan files and the system software then sequenced and dialed the calls "according to a borrower's predicted availability to receive calls." 2018 U.S. Dist. LEXIS 143175, at *16 (N.D. Ala. Aug. 22, 2018). The court granted summary judgment in the plaintiff's favor, reasoning that "the fact that Nationstar employees 'scrub' and input loan data for the system's use does not obviate the role that Nationstar's iAssist software plays in selecting the numbers to call and initiating each call." *Id.* at *17. But *Heard* was decided before *Duguid* and it is likely that it is no longer good law. In any event, it is

distinguishable from the facts here because it is undisputed that Textedly does not select the numbers to be messaged, change the sequence of the numbers that are entered into Textedly or determine the timing of the messages sent through its system.

Accordingly, the Court concludes, as a matter of law, that Concentra did not send the Text using an ATDS within the meaning of Duguid and the TCPA.

IV. CONCLUSION

For the reasons stated above, Defendant's summary judgment motion is GRANTED. Plaintiff's summary judgment motion is DENIED. The case is dismissed with prejudice.

IT IS SO ORDERED.

Dated: December 14, 2021

/s/ Joseph C. Spero
Joseph C. Spero
Chief Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Lawrence Pascal,)
)
Plaintiff,)
)
v.) Civil Action
) 3:19-cv-02559
Concentra, Inc.,)
)
Defendant.)

JUDGMENT IN A CIVIL CASE

Re: Dkt. No. 155

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that judgment is entered in favor of the Defendant.

Dated: December 14, 2021

Mark B. Busby, Clerk

/s/ Karen L. Hom

Karen L. Hom
Deputy Clerk