

“PLEAS” DON’T HANG UP: THE VIABILITY OF TELEPHONE  
CONSUMER PROTECTION ACT CLAIMS BASED ON CALLS  
BY AUTOMATIC TELEPHONE DIALING SYSTEMS AFTER  
*FACEBOOK V. DUGUID*

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ABSTRACT

*Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 in part to protect consumers from “automated telephone dialing systems” (ATDS)—new telemarketing technology that automatically generated and called phone numbers at random or in numerical sequence. The Federal Communications Commission and many courts then responded to rapid evolution of automatic dialers by interpreting the definition of ATDS broadly to bring emerging technologies within the TCPA’s scope. In 2021, the Supreme Court halted this interpretive expansion in Facebook, Inc. v. Duguid. After reviewing the history of regulatory and judicial interpretation of ATDS and Duguid itself, this Article analyzes a sample of seventy-five decisions issued in cases with ATDS-based TCPA claims ongoing, during, or after Duguid. It argues that Duguid has foreclosed victory for most ATDS claims on their merits but has not significantly altered their existing low, plaintiff-friendly pleading standard. It explores the sample decisions categories of factual allegations that courts have found sufficient or insufficient to support ATDS claims and the types of evidence that may contribute to defendant victory on summary judgment.*

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## TABLE OF CONTENTS

INTRODUCTION .....	413
I. A BRIEF HISTORY OF THE INTERPRETATION OF “AUTOMATIC TELEPHONE DIALING SYSTEM” (ATDS) UNDER THE TELEPHONE CONSUMER PROTECTION ACT (TCPA).....	414
A. <i>FCC Interpretations</i> .....	415
B. <i>2018 D.C. Circuit Decision ACA International Sets Aside FCC “Capacity” Definition and Description of ATDS Functionality</i> .....	416
C. <i>The Supreme Court Resolves Circuit Split with Narrow ATDS Definition in Facebook v. Duguid</i> .....	417
II. STATUS OF ONGOING ATDS CLAIMS AFTER <i>DUGUID</i> .....	418
A. <i>Summary of Sample Cases</i> .....	419
1. Sample Decisions at the Pleading Stage .....	420
2. Claims at Summary Judgment .....	422
3. Full Summary Table.....	423
III. ANALYSIS OF THE POST- <i>DUGUID</i> PLEADING STANDARD .....	424
A. <i>Is the New Standard a Route to Settlement?</i> .....	425
1. Alleging ATDS Use .....	425
2. Alleging Supporting Facts .....	429
3. Summary Judgment.....	437
CONCLUSION .....	438
APPENDIX .....	440

## INTRODUCTION

Congress enacted the Telephone Consumer Protection Act<sup>1</sup> (TCPA) in 1991 in response to mushrooming constituent complaints about the use of new telemarketing technology that automatically generated and called phone numbers at random or in numerical sequence and often delivered pre-recorded voice messages without the assistance of a live caller.<sup>2</sup> This technology sometimes interrupted the operation of emergency lines, tied up whole business phone systems through sequential dialing, or created costs for nonconsenting recipients whose cellular phone and paging services charged them for the incoming calls, and created a nuisance for families and individuals whose home life was interrupted by such calls.<sup>3</sup>

The TCPA prohibited transmitting unsolicited advertising faxes,<sup>4</sup> leaving unconsented pre-recorded messages on residential telephone lines,<sup>5</sup> and—most consequentially—using “automated telephone dialing systems” (ATDS) to call emergency or cellular telephone lines.<sup>6</sup> However, telemarketing technology quickly moved beyond the random and sequential dialers addressed by the statutory ATDS definition. The Federal Communications Commission (FCC) and many courts responded by interpreting the definition of ATDS broadly to allow actions against telemarketers using new dialing technologies.<sup>7</sup> In 2021, the Supreme Court finally stepped in to resolve a circuit split and, in its landmark *Facebook, Inc. v. Duguid*<sup>8</sup> decision, pared back the interpretive scope of ATDS in the TCPA, requiring the narrow application of ATDS to random and sequential number generators, as written.<sup>9</sup>

Has *Duguid*’s clear interpretive guidance for ATDS under the TCPA rendered the Act a dead letter for protecting consumers against modern telemarketing technology? Not so far. This Article examines a sample of cases with ATDS-based TCPA claims ongoing during or after the *Duguid* decision to determine to what extent ATDS claims may be successfully pursued under the

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1. 47 U.S.C. § 227.
  2. See S. REP. NO. 102-178, at 1 (1991).
  3. *Id.* at 1–2.
  4. 47 U.S.C. § 227(b)(1)(C).
  5. *Id.* § 227(b)(1)(B).
  6. *Id.* §§ 227(b)(1)(A)(i), (iii).
  7. See, e.g., *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), *abrogated by Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) (concluding that “the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a ‘random or sequential number generator,’ but also includes devices with the capacity to dial stored numbers automatically”).
  8. 141 S. Ct. 1163 (2021).
  9. *Id.* at 1169–71.

clarified ATDS definition. Part I reviews the history of regulatory and judicial interpretation of ATDS and examines the *Duguid* decision. Part II summarizes and provides preliminary analysis of the most recent post-*Duguid* decisions involving the definition of ATDS in a sample of lawsuits against alleged telemarketers based on ATDS claims. Part III analyzes what the outcomes in those sample cases might mean for the success of future ATDS-based TCPA claims. Part III then argues that *Duguid* has not significantly altered the existing low, plaintiff-friendly pleading standard for ATDS claims. Finally, Part III explores categories of factual allegations that courts have found sufficient—or not—to survive dismissal. This Article concludes that *Duguid* appears to have compensated defendants by providing a clearer and quicker route to summary judgment for those who do not use ATDS.

I. A BRIEF HISTORY OF THE INTERPRETATION OF “AUTOMATIC TELEPHONE DIALING SYSTEM” (ATDS) UNDER THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits “mak[ing] any call” not for emergency purposes or without prior consent by “using any automatic telephone dialing system or an artificial or prerecorded voice”<sup>10</sup> to an emergency line,<sup>11</sup> a line of a room in a hospital or similar facility,<sup>12</sup> or to a list of other communications services including cellular telephones.<sup>13</sup> The statute defines an “automatic telephone dialing system” (ATDS) as “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.”<sup>14</sup>

Federal courts have universally followed FCC interpretations<sup>15</sup> construing the prohibited act “to make a call” as including the transmission of text messages.<sup>16</sup> This application is important to the evolution of the ATDS definition

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10. 47 U.S.C. § 227(b)(1)(A).

11. *Id.* § 227(b)(1)(A)(i).

12. *Id.* § 227(b)(1)(A)(ii).

13. *Id.* § 227(b)(1)(A)(iii).

14. *Id.* § 227(a)(1).

15. *See, e.g.*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14115 (2003) [hereinafter FCC 2003 Ruling] (declaring “it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number”).

16. *See, e.g.*, *Keating v. Peterson’s Nelnet, LLC*, 615 F. App’x 365, 370–71 (6th Cir. 2015) (discussing whether text messages are calls under the TCPA and then “unhesitatingly afford[ing] deference to the [FCC’s interpretation that] a text message should be treated as a ‘call’ for purposes of the TCPA”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“[W]e find that the FCC’s interpretation of the TCPA is reasonable, and therefore afford it deference to hold that a text message is a ‘call’ within the TCPA.”).

because many of the claims leading to the litigation shaping the definition, including those of *Duguid*,<sup>17</sup> have arisen from text messaging. Despite contrary language from lower courts,<sup>18</sup> the Supreme Court has never squarely addressed the validity of this assumption.<sup>19</sup> This Article, like the Court in *Duguid*, agrees with the conclusions of the circuit courts in that sending text messages is equivalent to making calls under the TCPA; therefore “call” and related words throughout this Article simultaneously refer to both (making) a conventional call or (sending) a text message.

#### A. *FCC Interpretations*

In 2003, the FCC issued a declarative order broadly interpreting the statute so as to find predictive dialers<sup>20</sup> to fall within the TCPA definition of ATDS.<sup>21</sup> The FCC justified this interpretation by noting that the statute required only the *capacity* to store or reproduce telephone numbers,<sup>22</sup> that the legislative history evidenced Congressional intent that the FCC used its TCPA rulemaking authority to consider evolving telemarketing technology,<sup>23</sup> and that a result of

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17. See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168–69 (2021) (giving factual background).

18. See, e.g., *Hand v. ARB KC, LLC*, No. 4:19-cv-00108-NKL, 2019 WL 6497432, at \*1 (W.D. Mo. Dec. 3, 2019) (incorrectly citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016) as directly supporting the proposition that “[a] text message qualifies as a ‘call’ within the scope of the Act”); *Barton v. Temescal Wellness, LLC*, 525 F. Supp. 3d 195, 198 (D. Mass. 2021) (perhaps less-controversially citing *Campbell-Ewald Co.*, 577 U.S. 153, for the proposition that the Supreme Court “ratified the FCC’s interpretation that a text message was a call for the purposes of the TCPA”).

19. For example, in *Campbell-Ewald*, the Supreme Court merely cited the lower court’s decision to note that *none of the parties dispute that* a text is a call under the TCPA. 577 U.S. at 156. In *Duguid*, citing *Campbell-Ewald*, the Court again merely noted that the prohibition of text messages under the TCPA is *undisputed by both parties* and that it “therefore assume[s] that it does *without considering or resolving the issue.*” 141 S. Ct. at 1175 n.2 (emphasis added).

20. The order defined a “predictive dialer” as “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.” FCC 2003 Ruling, *supra* note 15, at 14091.

21. *Id.* at 14091–93.

22. *Id.* at 14091–92.

23. *Id.* at 14091–92, 14092 n.436 (“The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.” (quoting 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings))).

excluding predictive dialers from the ATDS definition only because it drew its numbers from a list would go against the Congressional intent behind the law.<sup>24</sup>

The FCC reaffirmed its decision and reasoning regarding predictive dialers in another declaratory ruling in 2008.<sup>25</sup> In 2015, the FCC yet again reiterated its broad interpretation of “capacity” under the TCPA definition of ATDS and its reasoning for it and tried to clarify that “capacity” in defining ATDS referred not to a device’s “current configuration” but to its “potential functionalities.”<sup>26</sup>

B. *2018 D.C. Circuit Decision ACA International Sets Aside FCC “Capacity” Definition and Description of ATDS Functionality*

In *ACA International v. Federal Communications Commission*,<sup>27</sup> the D.C. Circuit “set aside the [FCC’s 2015] explanation of which devices qualify as an ATDS.”<sup>28</sup> The *ACA International* court concluded that the FCC’s approach in its 2015 ruling to the questions of (i) whether a device has the “capacity” to perform the functions of storing or producing telephone numbers using a random or sequential number generator and to dial those numbers and (ii) what specifically are those functions could not be sustained, at least given the FCC’s assumption that a device can function as an ATDS even when it makes calls without using ATDS features as defined by the statute.<sup>29</sup>

The court found that the FCC’s determination of “capacity” as including “potential functionalities” and not just “present ability” was an “unreasonable, and impermissible interpretation of the statute’s reach” that would lead to “anomalous” sorts of outcomes like liability under the TCPA for a consumer who sends a text message on her cell phone to invite a friend to a social gathering using a number she obtained from a mutual friend.<sup>30</sup>

The court further found that the FCC’s description of the functions a device must perform to qualify as an ATDS “fail[ed] to satisfy the requirement of reasoned decision making.”<sup>31</sup> The court noted that the 2015 ruling took two contradictory positions: it indicated in places that an ATDS must be able to

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24. *Id.* at 14092–93.

25. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 23 FCC Rcd. 559, 566–67 (2008) (declaratory ruling in response to *ACA Int’l’s* request for clarification).

26. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 30 FCC Rcd. 7961, 7974–76 (2015) (declaratory ruling and clarification).

27. 885 F.3d 687 (D.C. Cir. 2018).

28. *Id.* at 695.

29. *Id.*

30. *Id.* at 695–97.

31. *Id.* at 703.

2022/23

“PLEAS” DON’T HANG UP

417

generate and dial random or sequential numbers, but elsewhere it reaffirmed the position from the 2003 Ruling that “predictive dialers” could still satisfy the statutory definition of an ATDS despite having no capacity of themselves to generate random or sequential numbers.<sup>32</sup>

After *ACA International*, a three-three circuit split developed as courts divided over whether to interpret the TCPA definition of ATDS narrowly, as in *ACA International*, or broadly, which would achieve substantially the same outcome as decisions relying on the original FCC interpretations.<sup>33</sup> The Seventh and Eleventh Circuits adopted narrow readings consistent with the Supreme Court’s forthcoming *Duguid* interpretation, while the Second, Sixth, and Ninth Circuits interpreted the statutory ATDS definition broadly.<sup>34</sup>

C. *The Supreme Court Resolves Circuit Split with Narrow ATDS Definition in Facebook v. Duguid*

In 2014, Noah Duguid brought a putative class action against Facebook, alleging that Facebook had violated the TCPA when it used ATDS to text him several times saying that someone had attempted to access the Facebook account associated with his phone number, even though he had never had a Facebook account.<sup>35</sup> Facebook moved for dismissal arguing “that Duguid failed to allege that Facebook used an [ATDS] because he did not claim Facebook sent text messages to numbers that were randomly or sequentially generated,” and the District Court granted Facebook’s motion.<sup>36</sup> The Ninth Circuit reversed, holding that an ATDS “need not be able to use a random or sequential generator to store numbers; it need only have the capacity to ‘store numbers to be called’ and ‘to dial such numbers automatically.’”<sup>37</sup>

The Supreme Court unanimously reversed the Ninth Circuit’s judgment, holding that “a necessary feature of an [ATDS] under § 227(a)(1)(A) [the TCPA] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.”<sup>38</sup> The Court reached this conclusion through analyses of the grammar of the statutory text<sup>39</sup> and the

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32. *Id.* at 701–03.

33. *See generally* Zachary D. Miller & Rachel R. Friedman, *TCPA Update: Circuit Split on Automatic Dialer Definition Sets the Stage for Back-to-Back Supreme Court Rulings*, 76 *BUS. LAW.* 729, 732–36 (2021).

34. *Id.* at 734.

35. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168 (2021).

36. *Id.*

37. *Id.* (quoting *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019), *rev’d*, 141 S. Ct. 1163 (2021)).

38. *Id.* at 1173.

39. *Id.* at 1169–70.

statutory context.<sup>40</sup> The Court also rejected a “human intervention test” to determine ATDS<sup>41</sup> that had been considered by lower courts.<sup>42</sup> Anticipating the Court’s fear that a broad definition of ATDS might sweep in cell phones, Duguid had contended that cell phones were not ATDS because they relied on human intervention to dial stored numbers.<sup>43</sup> Noting that all devices require some human intervention, the Court “decline[d] to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much.”<sup>44</sup>

Yet, ambiguities remained. The Supreme Court narrowed the interpretation of ATDS by *functionality*, but it did not address a standard of interpretation for “capacity,” the term the FCC had originally exploited to broaden its definition of ATDS.<sup>45</sup> The Court also seemed to leave open a route to broader interpretation of ATDS functionality in Footnote 7 of its opinion: “[A]n [ATDS] 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.”<sup>46</sup> Part II’s analysis of post-*Duguid* ATDS pleading shows how the jurisdictions represented among the sample cases have converged on a common understanding that (1) claims of mere capacity to randomly or sequentially generate phone numbers and (2) claims of somehow using a random or sequential number generator to dial numbers from a prepared list of numbers that are not themselves randomly or sequentially generated are both insufficient to allege the use of ATDS for the offending calls.

## II. STATUS OF ONGOING ATDS CLAIMS AFTER *DUGUID*

Weeks after unanimously rejecting the Ninth Circuit’s broad interpretation of ATDS, the Court vacated affirmations of summary judgment for TCPA

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40. *Id.* at 1171.

41. *Id.* at 1171 n.6.

42. *See, e.g.,* Duran v. La Boom Disco, Inc., 955 F.3d 279, 288–90 (2d Cir. 2020) (acknowledging and “developing some criteria” for a “human intervention test”), *vacated*, 141 S. Ct. 2509 (2021).

43. *See Duguid*, 141 S. Ct. at 1171 n.6.

44. *Id.*

45. *Id.* at 1173 (explicitly holding that “a necessary feature of [ATDS] under [the TCPA] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called” but without previously expanding on the required scope of that “capacity”).

46. *Id.* at 1172 n.7 (citing Brief of Amici Curiae Professional Association for Customer Engagement and Noble Systems Corporation in Support of Petitioner at 19, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511)).



plaintiffs with ATDS claims from the Second<sup>47</sup> and Sixth<sup>48</sup> Circuit Courts of Appeals that were based on reasoning in accord with the Ninth Circuit’s pre-*Duguid* ATDS definition and remanded to the trial courts for further proceedings in light of *Duguid*.<sup>49</sup> Litigation in the Second Circuit case continued as of September 2, 2022,<sup>50</sup> and the Sixth Circuit case ended in a joint stipulation for dismissal.<sup>51</sup>

This Part summarizes the status of a sample of the remaining cases that had ATDS-based claims outstanding during and after the *Duguid* decision. This Part concludes with a table containing a full summary of the sample cases and details of case subsets. Part III uses the summary of sample cases to assess the viability of future ATDS claims at the pleading stage.

#### A. Summary of Sample Cases

In the year before the *Duguid* decision, from March 31, 2020 to March 31, 2021, 925 suits based on the TCPA were filed in federal district courts.<sup>52</sup> Since *Duguid* was decided in April 2021, 1,691 TCPA cases were filed in federal district courts as of September 2, 2022.<sup>53</sup> This broad universe of cases includes actions brought under all provisions of the TCPA at all stages of litigation, not only those including ATDS claims. Of those, this Article examines a sample of seventy-five federal district and appellate decisions available in the Westlaw database as of September 2, 2022 that cite *Facebook v. Duguid* and evaluate

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47. *Duran*, 955 F.3d at 281 (noting that the decision follows the Ninth Circuit’s pre-*Duguid* ATDS definition).

48. *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 574 (2020) (agreeing with the Ninth Circuit’s pre-*Duguid* “assessment and approach” to the ATDS definition), *vacated*, 141 S. Ct. 2509 (2021).

49. *See id.*

50. *See Duran v. La Boom Disco, Inc.*, No. 1:17-CV-06331 (E.D.N.Y.).

51. Order Granting Stipulation to Dismiss, *Allan v. Pa. Higher Educ. Assistance Agency*, No. 2:14-cv-00054-GJQ (W.D. Mich. Sept. 2, 2021), ECF No 64.

52. This data was collected using the PACER case locator. Search Criteria: Case Search; Date Filed From (On or After): [03/31/2020]; Date Filed To (On or Before): [03/31/2021]; Jurisdiction Type: [Civil]; Nature of Suit: [485]; Sort: [Date Filed, Ascending].

53. This data was collected using the PACER case locator. Search Criteria: Case Search; Date Filed From (On or After): [04/01/2021]; Date Filed To (On or Before): [09/02/2022]; Jurisdiction Type: [Civil]; Nature of Suit: [485]; Sort: [Date Filed, Ascending]. This total does not include some cases with ATDS claims that are not added to the federal index because of procedural posture. *See, e.g., Creech v. Navient*, No. 2:21-cv-00118-PPS-JEM, 2022 WL 541230 (N.D. Ind. Feb. 23, 2022) (originally filed in state court and then removed to federal district court).

claims of the use of ATDS under the TCPA.<sup>54</sup> Fifty-three of the seventy decisions (76%) were on motions to dismiss ATDS claims for failure to state a claim.<sup>55</sup> Twenty-two (29%) dismissed motions for summary judgment of ATDS claims. There are no sample cases where ATDS claims were adjudicated at trial.

### 1. Sample Decisions at the Pleading Stage

Of the fifty-three sample decisions at the pleading stage, over half of these (thirty-one) resulted in dismissal of the plaintiff's ATDS claim.<sup>56</sup> In twenty-two of the cases, the ATDS claim survived. Of the twenty-two cases with surviving

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54. This sample excludes decisions on claims alleging the use of ATDS but wholly relying on allegations of the use of an artificial or pre-recorded voice, which is a separate ground for a TCPA challenge independent of the use of ATDS. *See* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1173 (2021) (“The statute separately prohibits calls using ‘an artificial or prerecorded voice’ . . . . Our decision [clarifying the definition of ATDS] does not affect that prohibition.”). This sample also excludes cases decided solely on grounds other than the sufficiency of a plaintiff's ATDS claims and cases where the decision was not reached on an ATDS definitional dispute. It further excludes four of the remaining cases as irrelevant to its analysis: Williams v. Schanck, No. 5:15-cv-01434-MHH, 2021 WL 2555290 (N.D. Ala. June 22, 2021) (excluded because case involves unusual circumstances specific to the litigation that are not generalizable); Renford v. Cap. One Auto Fin., No. 1:21-cv-02382-RC, 2022 WL 1211193 (D.D.C. Apr. 25, 2022) (excluded because pro se TCPA pleading alleged no facts that the court could evaluate for sufficiency); Oparaji v. Home Retention Corp., No. 21 CV 2758-ENV-LB, 2022 WL 987560 (E.D.N.Y. Jan. 11, 2022) (excluded for same reason); Douglas v. TD Bank USA, Nat'l Ass'n, No. 3:20-cv-395-JR, 2021 WL 4524155 (D. Or. Oct. 4, 2021) (excluded because defendant unsuccessfully challenged plaintiff's ATDS claim unconventionally through a Rule 11 sanction, invoking a standard much lower than would normally—and properly—apply to such a challenge).

55. *See infra* Appendix Part I. For simplicity, this subset includes decisions on motions for judgment on the pleadings because the disposition of a motion for dismissal for failure to state a claim and a motion for judgment on the pleadings are both based on the sufficiency of the plaintiff's pleading. *See* FED. R. CIV. P. 12(b)(6), 12(c); Matthew Kreiser, *Judgment on the Pleadings: An Underutilized and Potentially Devastating Tool in the Litigator's Pre-Trial Arsenal*, JD SUPRA (May 15, 2020), <https://www.jdsupra.com/legalnews/judgment-on-the-pleadings-an-57148/> (“Motions for judgment on the pleadings are governed by the same standard as a motion to dismiss for failure to state a claim.”).

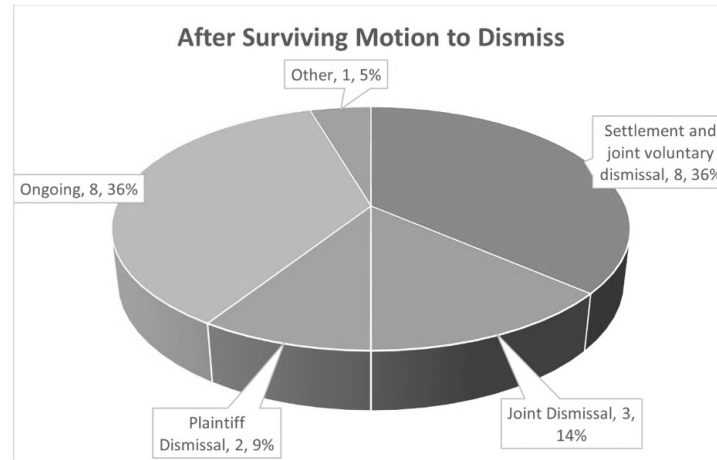
56. As of September 2, 2022, one of these cases continues on ATDS claims because the plaintiff was granted leave to and has since amended his complaint. *Champion v. Credit Pros Int'l Corp.*, No. 21-10814-JXN-JBC (D.N.J. filed May 6, 2021). Another continues as of September 2, 2022 because the plaintiff filed an amended complaint after the dismissal, *see* First Amended Complaint, *Anthony v. Pro Custom Solar, LLC*, No. 5:20-cv-01968-JAK-KK (C.D. Cal. Jan. 21, 2022), ECF No. 27, and the defendant's motion to dismiss remains pending. *See* Motion to Dismiss, *Anthony v. Pro Custom Solar, LLC*, No. 5:20-cv-01968-JAK-KK (C.D. Cal. Jan. 21, 2022), ECF No. 34.

2022/23

“PLEAS” DON’T HANG UP

421

ATDS claims, eight resulted in known<sup>57</sup> settlements with at least one defendant,<sup>58</sup> three in joint voluntary dismissal,<sup>59</sup> and one in default judgment for the plaintiff.<sup>60</sup> Eight remain ongoing,<sup>61</sup> and two resulted in voluntary dismissals by the plaintiffs.<sup>62</sup>



57. I.e., these settlements are noted in docket filings.

58. See Motion to Dismiss, *Callier v. Multiplan, Inc.*, No. 3:-cv-00318-FM (W.D. Tex. Dec. 21, 2021), ECF No. 48; Notice of Settlement, *Callier v. Greensky, Inc.*, No. 3:20-cv-00304-KC (W.D. Tex. June 8, 2021), ECF No. 32; Notice of Settlement, *Garner v. Allstate Ins. Co.*, No. 1:20-cv-04693 (N.D. Ill. Dec. 16, 2021), ECF No. 54; Joint Notice of Settlement, *Poonja v. Kelly Servs., Inc.*, No. 20-cv-4388 (N.D. Ill. Nov. 10, 2021), ECF No. 50; Order Preliminarily Approving Class Settlement, *Miles v. Medicredit, Inc.*, No. 4:20-CV-01186 JAR (E.D. Mo. Aug. 23, 2022), ECF No. 71; Notice of Settlement, *MacDonald v. Brian Gubernick PLLC*, No. 2:20-cv-00138-MTL (D. Ariz. Aug. 17, 2022), ECF No. 117; Settlement Conference, *Jance v. Homerun Offer LLC*, No. 4:20-cv-00482-JGZ (D. Ariz. Dec. 13, 2021), ECF No. 27; Notice of Dismissal, Joint Motion Entering Consent Order, Stipulation of Dismissal, *Mey v. All Access Telecom, Inc.*, No. 5:19-cv-00237-JPB-JPM (N.D. W. Va. Apr. 16, 2021), ECF Nos. 123, 307, 458 (effecting settlements between plaintiff and various defendants).

59. Stipulation of Dismissal, *Garcia v. Pro Custom Solar LLC*, No. 4:21-cv-00392-ALM (E.D. Tex. Jul. 13, 2022), ECF No. 25; Joint Motion to Vacate Memorandum and Order and Stipulation Dismissal with Prejudice, *Laccinole v. Navient Sols., LLC*, No. 1:21-cv-00045 (D.R.I. Aug. 26, 2022), ECF No. 37; Joint Stipulation to Dismiss with Prejudice, *Smith v. Direct Bldg. Supplies LLC*, No. 2:20-cv-03583-BMS (E.D. Pa. Mar. 25, 2022), ECF No. 31.

60. *Perrong v. MLA Int’l, Inc.*, No. 6:20-cv-01606-RBD-EJK (M.D. Fla. Mar. 21, 2022), ECF No. 38.

61. See *infra* Appendix Section I.B.3.

62. Notice of Voluntary Dismissal, *Montanez v. Future Vision Brain Bank, LLC*, No. 1:20-cv-02959 (D. Colo. May 18, 2021), ECF No. 41; Notice of Voluntary Dismissal, *Libby v. Nat’l Republican Senatorial Comm.*, No. 5:21-cv-00197 (W.D. Tex. Dec. 12, 2021), ECF No. 30.

## 2. Claims at Summary Judgment

Of the twenty-two decisions on motions for summary judgment among the sample cases, the courts granted twenty in favor of the defendants, and the remaining two have no generalizable value. In one of those two, the court granted a motion for summary judgment in favor of the defendant but the case is counted in the sample as denied because the court decided on grounds unrelated to the ATDS claim and the judge found and noted an issue of triable fact as to whether an ATDS was used.<sup>63</sup> However, the judge supported that finding with a reference to *Duguid's* Footnote 7 as possibly allowing that dialing from a list qualifies a device as ATDS,<sup>64</sup> which, as discussed *infra* in Section III.A, goes against the current interjurisdictional consensus. The other denial appears to have been based on the defendant's supporting its claim of not using an ATDS only with two sworn declarations, neither of which was credited: the first because the declarant had not been disclosed as a potential witness, and the second because of insufficient foundation.<sup>65</sup> Therefore, the analysis *infra* in Section III.A.2 considers only the twenty decisions granting defendants' motions for summary judgment.

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63. Carl v. First Nat'l Bank of Omaha, No. 2:19-cv-00504-GZS, 2021 WL 2444162, at \*9 (D. Me. June 15, 2021).

64. *Id.* at \*12 n.7.

65. Kuch v. PHH Mortg. Corp., No. 16-CV-00056V(F), 2021 WL 6424638, at \*7 (W.D.N.Y. Sept. 1, 2021).

2022/23

“PLEAS” DON’T HANG UP

423

## 3. Full Summary Table

This table contains a full summary of the sample cases and details of case subsets with associated cases and Appendix sections listed in the notes.

Summary of all Sample Cases							
		Total	Known Settlement <sup>66</sup>	Voluntary Dismissal		On-going <sup>67</sup>	Other
				Joint <sup>69</sup>	Plaintiff <sup>670</sup>		
Pleading Stage	Claims Dismissed <sup>71</sup>	31				8	1 <sup>68</sup>
	Claims Survived <sup>72</sup>	22	8	3	2		
	Total	53					
Summary Judgment	Summary Judgment for Defendant <sup>73</sup>	20					
	Survived Summary Judgment <sup>74</sup>	2					
	Total	22					
Total Sample Cases		75					

66. See *infra* Appendix Section I.B.1; *supra* note 58.

67. See *infra* Appendix Section I.B.3.

68. *Perrong v. MLA International, Inc.* ended in default judgment for the plaintiff. No. 6:20-cv-01606-RBD-EJK, 2021 WL 3036462, at \*1–2 (M.D. Fla. July 2, 2021). It is categorized as surviving a motion for summary judgment because the minimum pleading standard must be met to receive a default judgment. Here, the judge dismissed Perrong’s first motion for summary judgment for insufficient pleading, *see id.*, but granted it in part after Perrong amended his complaint. See Report and Recommendation, *Perrong v. MLA Int’l, Inc.*, No. 6:20-cv-1606-RBD-EJK (M.D. Fla. Mar. 2, 2022), ECF No. 36.

69. See *supra* note 59.

70. See *supra* note 62.

71. See *infra* Appendix Section I.A.

72. See *infra* Appendix Section I.B.

73. See *infra* Appendix Section II.A.

74. These are not considered in the analysis in Part III for the reasons stated *supra* Section II.A. See *supra* notes 63–65 and accompanying text; *infra* Appendix Section II.B.

III. ANALYSIS OF THE POST-*DUGUID* PLEADING STANDARD

Today, most telemarketer dialing equipment intentionally does not include random or sequential number generators, and other methods of obtaining potential customer data in the big-data economy are more precise and productive.<sup>75</sup> Thus, the narrow ATDS definition of *Duguid* should foreclose the chance of a judgment for a plaintiff on an ATDS claim. The sample cases that have progressed beyond the pleading stage reflect this: none of their ATDS claims have reached trial, the courts granted twenty-one out of twenty-two defendant motions for summary judgment, and in the one case where the definitional aspect of the ATDS claim survived summary judgment, the judge indicated in a footnote doubt that a *Duguid*-defined ATDS had been used.<sup>76</sup>

The effect of *Duguid* seems less preclusive of ATDS claims at the pleading stage. Within the sample, almost one half (twenty-two) of ATDS claims survived motions to dismiss decided after *Duguid*,<sup>77</sup> and half of those claims (eleven), almost 20% of all claims with decisions at the pleading stage, resulted in known settlement<sup>78</sup> or joint voluntary dismissal.<sup>79</sup> The sample cases indicate that the preclusive effect of *Duguid* is limited by the information asymmetry between callers and the called that remains unaffected by any Supreme Court decision and which originally precipitated a lenient pleading standard for ATDS claims.

Section A of this Part focuses on what constitutes an adequate plea alleging the use of ATDS after *Duguid*. It concludes that, although *Duguid* has narrowed the scope for the type of dialing equipment a plaintiff may successfully allege to be an ATDS, the already low standard for factual allegations to support a claim of ATDS use remains largely unchanged. It then identifies categories of common factual allegations and compares their effectiveness within the sample cases.

Section B examines the disposition of motions for summary judgment among the sample cases. It confirms the vanishing prospects of success on the merits of an ATDS claim after *Duguid* and identifies types of defendants'

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75. David Klein, *Court Clarifies What a TCPA Number Generator Is*, KLEIN MOYNIHAN TURCO (June 30, 2021), <https://kleinmoynihan.com/court-clarifies-what-a-tcpa-number-generator-is-telemarketing-lawyer/> (“Now, telemarketers often rely on advanced analytics, algorithms, and other methods of precision to create a particular contact list for a particular campaign.”).

76. *Carl v. First Nat’l Bank of Omaha*, No. 2:19-cv-00504-GZS, 2021 WL 2444162, at \*12 n.10 (D. Me. June 15, 2021) (noting that although a “trialworthy question” existed as to whether the defendant’s system met the narrowed definition of ATDS, it was “less clear that the ‘campaigns’ [defendant used] . . . involved the actual *use* of a random or sequential generator”).

77. *See infra* Appendix Section I.B.

78. *See supra* note 58; *infra* Appendix Section I.B.1.

79. *See supra* note 59 and accompanying text.

2022/23

“PLEAS” DON’T HANG UP

425

evidence the sample-case courts tend to cite as the basis for their grants of summary judgment.

A. *Is the New Standard a Route to Settlement?*

To state a claim, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>80</sup> However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>81</sup> To survive a motion to dismiss, a claim must include (1) an allegation of defendant misconduct accompanied by (2) supporting factual allegations from which the court can reasonably infer the defendant’s liability for the alleged misconduct.<sup>82</sup>

The sample cases show that the *Duguid* ATDS definition has changed the first element of this pleading standard across most jurisdictions, which had not already adopted a narrow interpretation of ATDS. Although the scope of possible factual allegations has correspondingly narrowed somewhat, the sample cases show that plaintiffs maintain their pre-*Duguid* advantage of being able to force defendants into discovery if the plaintiff can meet the low pleading standard to survive a motion to dismiss.

1. Alleging ATDS Use

Before *Duguid*, TCPA plaintiffs took advantage of many courts’ broad interpretation of the definition of ATDS<sup>83</sup> to allege the use of any of a range of possibly contemplated calling systems supported by the particular facts of their cases. Pleadings in the sample cases reflect some of these previously common allegations: for example, use of a random or sequential number generator *to select phone numbers from a list*,<sup>84</sup> *storage of numbers* of people who had not given or who had withdrawn consent to be called,<sup>85</sup> and use of an “*automated*

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80. FED. R. CIV. P. 8(a)(2).

81. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

82. *Id.*

83. For example, the Ninth Circuit concluded that the statutory definition of ATDS did not require even the presence of a random or sequential number generator but included “devices with the capacity to dial stored numbers automatically.” *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), *abrogated by Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

84. *Camunas v. Nat’l Republican Senatorial Comm.*, 570 F. Supp. 3d 288, 294 (E.D. Pa. 2021) (quoting second amended complaint).

85. *Watts v. Emergency Twenty Four, Inc.*, No. 20-cv-1820, 2021 WL 2529613, at \*1 (N.D. Ill. June 21, 2021) (summarizing complaint).

*system*” to “*automatically dial*” numbers.<sup>86</sup> None of these example allegations from the sample cases sufficiently allege the use of ATDS as defined by the Supreme Court, a “necessary feature” of which “is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.”<sup>87</sup> The courts accordingly dismissed those complaints for failure to state a claim.<sup>88</sup>

The sample cases show some inconsistency in federal courts’ initial application of the new ATDS definition in evaluating the sufficiency of pleas, particularly in whether the courts would accept allegations of dialing equipment selecting and dialing numbers from a list. After *Duguid*, current and prospective TCPA litigants and some judges seized on Footnote 7 of the opinion to support allegations that dialing equipment somehow using random or sequential number generators in the process of dialing from existing lists of numbers constituted ATDS.<sup>89</sup> On its face, the following text from the footnote seems to support this interpretation:

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.<sup>90</sup>

Indeed, district courts under the jurisdictions of the First, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals have accepted such allegations to

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86. *Guglielmo v. CVS Pharmacy, Inc.*, No. 3:20-cv-01560-JBA, 2021 WL 3291532, at \*2 (D. Conn. Aug. 2, 2021) (summarizing complaint).

87. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021).

88. *Camunas*, 570 F. Supp. 3d at 301; *Watts*, 2021 WL 2529613, at \*6; *Guglielmo*, 2021 WL 3291532, at \*2.

89. *See, e.g.*, Third Amended Complaint at 3, *Eggleston v. Reward Zone USA LLC*, No. 2:20-cv-01027-SVW-KS (C.D. Cal. Nov. 15, 2021), ECF No. 33 (citing *Duguid*’s Footnote 7 in support of plaintiff’s ATDS claim); *McEwen v. Nat’l Rifle Ass’n of Am.*, No. 2:20-cv-00153-LEW, 2021 WL 5999274, at \*4 (D. Me. Dec. 20, 2021) (citing to Footnote 7 in finding sufficient plaintiff’s pleading that defendant’s equipment used a random number generator to dial from a list).

90. *Duguid*, 141 S. Ct. at 1172 n.7 (citing Brief of Amici Curiae Professional Association for Customer Engagement and Noble Systems Corporation in Support of Petitioner at 19, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) (No. 19-511)).



deny defendants’ motions to dismiss.<sup>91</sup> The decision from the District of Maine even cited Footnote 7 in justifying its decision.<sup>92</sup>

These decisions—all from 2021—turn out to be the exceptions that prove the post-*Duguid* rule. Courts that analyzed the text of Footnote 7 in the context of the Amici Curiae brief in which the footnote example is couched have universally found that the example refers specifically to a stored list of randomly or sequentially generated phone numbers, and so the footnote does not apply to situations of equipment dialing from prepared lists.<sup>93</sup> Even courts that did not directly address the footnote argument<sup>94</sup> or found it ambiguous<sup>95</sup> have interpreted ATDS after *Duguid* not to apply to equipment dialing from a list. The Eighth Circuit has explicitly adopted this interpretation,<sup>96</sup> and the Ninth Circuit is hearing two cases<sup>97</sup> in which it may adopt this position, perhaps foreshadowed by a memorandum decision in January rejecting an appellant’s Footnote-7 argument alleging “sequential storage” by a system that dialed from a prepared list.<sup>98</sup> All decisions from the sample cases made after the exceptions above (and some before, in the case of the Ninth Circuit) under the jurisdiction of the same

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91. *McEwen*, 2021 WL 5999274, at \*4 (First Circuit); *Libby v. Nat’l Republican Senatorial Comm.*, 551 F. Supp. 3d 724, 729 (W.D. Tex. 2021) (Fifth Circuit); *Miles v. Mediacredit, Inc.*, No. 4:20-cv-01186-JAR, 2021 WL 2949565, at \*4–5 (E.D. Mo. July 14, 2021) (Eighth Circuit); *Stewart v. Network Cap. Funding Corp.*, No. 2:21-cv-00368-MWF-MAA, 2021 WL 6618544, at \*2 (C.D. Cal. Dec. 9, 2021) (Ninth Circuit); *MacDonald v. Brian Gubernick PLLC*, No. 2:20-cv-00138-MTL, 2021 WL 5203107, at \*2–3 (D. Ariz. Nov. 9, 2021) (Ninth Circuit); *Montanez v. Future Vision Brain Bank, LLC*, 536 F. Supp. 3d 828, 837 (D. Colo. 2021) (Tenth Circuit).

92. *McEwen*, 2021 WL 5999274, at \*4 (on appeal on different issues).

93. *See, e.g., Mey v. DirectTV*, No. 5:17-cv-00179-JPB-JPM, 2021 WL 6882400, at \*3–4 (N.D. W. Va. Aug. 18, 2021) (quoting *Timms v. USAA Fed. Sav. Bank*, 543 F. Supp. 3d 294, 299–302 (D.S.C. 2021)); *Samataro v. Keller Williams Realty, Inc.*, No. 1:18-CV-775-RP, 2021 WL 4927422, at \*4 (W.D. Tex. Sept. 27, 2021).

94. *See Champion v. Credit Pros Int’l Corp.*, No. 21-10814-JXN-JBC, 2022 WL 3152657, at \*4 (D.N.J. Aug. 5, 2022).

95. *See Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, No. 3:19-cv-592-JAM, 2022 WL 2802347, at \*3–4 (D. Conn. July 18, 2022) (on appeal).

96. *Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 395–97 (8th Cir. 2022).

97. These cases were decided between writing and publishing this Article and show the Ninth Circuit has indeed adopted this position. *See Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022) (holding that an autodialer must be able to generate and dial random or sequential phone numbers, not just any number, and citing *Duguid* for support); *Brickman v. United States*, 56 F.4th 688 (9th Cir. 2022) (following *Borden* as binding precedent).

98. *Meier v. Allied Interstate, LLC*, No. 20-55286, 2022 WL 171933, at \*1 (9th Cir. Jan. 19, 2022) (“The LiveVox system does not qualify as an ATDS merely because it stores pre-produced lists of telephone numbers in the order in which they are uploaded. Meier’s TCPA claims therefore fail.”).

Circuit Courts<sup>99</sup> adopted the consensus that equipment that randomly or sequentially dials from a list of numbers that are not themselves randomly or sequentially generated is not ATDS: among the thirty-one decisions in the sample cases dismissing ATDS claims, twenty cited the insufficiency of allegations of dialing from a prepared list.<sup>100</sup>

A similar consensus developed more rapidly around the insufficiency of alleging equipment with the mere “capacity” to randomly or sequentially store or call numbers.<sup>101</sup> Judges granted motions to dismiss in all four sample decisions in which they discussed plaintiffs’ allegations of capacity alone to allege ATDS use.<sup>102</sup> Relatedly, the Third Circuit Court of Appeals recently interpreted the TCPA provision that prohibits the use of ATDS<sup>103</sup> specifically to prohibit the

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99. The First Circuit excepted, because none of the other sample cases from courts under its jurisdiction have based decisions on “footnote-7” arguments. *See* Laccinole v. Navient Sols., LLC, 589 F. Supp. 3d 261 (D.R.I. 2022); Laccinole v. Rocket Mortg., LLC, 609 F. Supp. 3d 68 (D.R.I. June 30, 2022); Laccinole v. Students for Life Action Inc., No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211 (D.R.I. Aug. 4, 2022).

100. *See infra* bolded cases in Appendix Section I.A.

101. *See* 47 U.S.C. § 227(a)(1) (defining ATDS); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1173 (2021) (“We hold that a necessary feature of an [ATDS] . . . is the *capacity* to use a random or sequential number generator to either store or produce phone numbers to be called.”) (emphasis added).

102. *Barry v. Ally Fin., Inc.*, No. 2:20-cv-12378-PDB-RSW, 2021 WL 2936636 (E.D. Mich. July 13, 2021); *Thorington v. Pro Custom Solar, LLC*, No. 3:21-cv-00187-MPS, 2021 WL 7286283 (D. Conn. Nov. 23, 2021); *Deleo v. Nat’l Republican Senatorial Comm.*, No. 2:21-cv-03807-BRM-ESK, 2021 WL 5083831 (D.N.J. Nov. 1, 2021); *Evans v. Ocwen Loan Servicing, LLC*, No. 9:18-cv-81394-RLR, 2021 WL 7366534 (S.D. Fla. Oct. 21, 2021), *vacated and remanded*, No. 21-14045, 2022 WL 17259718 (11th Cir. Nov. 29, 2022). The *Barry* court’s strong rejection of the plaintiff’s reliance on capacity alone to allege ATDS is instructive:

The TCPA prohibits the unlawful “use” of an ATDS to “make any call,” *see* 47 U.S.C. § 227[(b)(1)(A)], not simply the existence of such systems. . . . To accept Plaintiff’s argument that she only has to show that the autodialing system used by Defendant has the capacity to use a random or sequential number generator, even though she concedes that such alleged capacity was *not used* to make the calls to her . . . would have the effect of imposing liability on a defendant whenever it has such a system, with admittedly no nexus to the alleged harm to the plaintiff. The Supreme Court in *Facebook* emphasized that “Congress’ definition of an autodialer requires that, *in all cases*, whether storing or producing numbers to be called, the equipment in question *must use* a random or sequential number generator.” *Facebook*, 141 S. Ct. at 1170 (emphases added) (noting that “[t]his definition excludes equipment like Facebook’s login notification system, which does not use such technology”) . . . .

*Barry*, 2021 WL 2936636, at \*4.

103. 47 U.S.C. § 227(b)(1)(A).

dialing of randomly or sequentially generated telephone numbers,<sup>104</sup> precluding any plaintiffs in its jurisdiction from relying on capacity alone to adequately allege an ATDS-based claim.

After *Duguid*, plaintiffs must allege the use of ATDS as defined by the Supreme Court,<sup>105</sup> a “necessary feature” of which “is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.”<sup>106</sup> The sample cases show that the capacity to sequentially or randomly call numbers from a prepared list will not meet this pleading standard. Further, plaintiffs within Third Circuit jurisdiction must allege that defendants’ dialing equipment used that capacity to make the offending calls,<sup>107</sup> and the sample cases indicate that plaintiffs across other jurisdictions will be similarly unlikely to rely successfully on alleged-ATDS’ capacity alone to adequately plead an ATDS claim.

## 2. Alleging Supporting Facts

The narrower definition of ATDS correspondingly limits the range of facts that may be alleged to support an ATDS claim. For example, courts in the sample cases have dismissed ATDS allegations for failure to state a claim when alleged facts indicate the challenged calls appear to be specifically directed to or targeted at the prospective plaintiff,<sup>108</sup> the plaintiff’s number is known to be provided by

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104. *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 879–80 (3d Cir. 2022) (interpreting “making any call . . . using any [ATDS] to mean *making any call using any ATDS’s ability to use a random or sequential number generator to produce or store telephone numbers . . .*” (internal quotation marks and citation omitted)).

105. *See, e.g., Guglielmo v. CVS Pharmacy, Inc.*, No. 3:20-cv-01560-JBA, 2021 WL 3291532, at \*2 (D. Conn. Aug. 2, 2021) (dismissing ATDS claim because allegations of “automatically dialed” calls made by “an automated system” failed to allege storage or production of the plaintiff’s number with a random or sequential number generator as required by *Duguid*); *Edwards v. Alorica, Inc.*, No. 8:19-cv-02124-JWH-DFM, 2021 WL 4622390, at \*2 (C.D. Cal. Aug. 30, 2021) (dismissing ATDS claim because allegations that calls were made “automatically” by a device that can “store” numbers failed to allege that the calling system “created [the plaintiff’s] number randomly or sequentially”).

106. *Duguid*, 141 S. Ct. at 1173.

107. *See supra* note 104 and accompanying text.

108. *See, e.g., Watts v. Emergency Twenty Four, Inc.*, No. 20-cv-1820, 2021 WL 2529613, at \*3 (N.D. Ill. June 21, 2021); *Jovanovic v. SRP Invs., LLC*, No. 2:21-cv-00393-JJT, 2021 WL 4198163, at \*3–4 (D. Ariz. Sept. 15, 2021); *Gross v. GG Homes, Inc.*, No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464, at \*3 (S.D. Cal. Oct. 14, 2021); *Wilson v. Rater8, LLC*, No. 20-cv-1515-DMS-LL, 2021 WL 4865930, at \*3 (S.D. Cal. Oct. 18, 2021); *Barry v. Ally Fin., Inc.*, No. 2:20-cv-12378-PDB-RSW, 2021 WL 2936636, at \*3–4, \*6 (E.D. Mich. July 13, 2021); *Hufnus v. DoNotPay, Inc.*, No. 20-cv-08701-VC, 2021 WL 2585488, at \*1 (N.D. Cal. June 24, 2021); *Hunsinger v. Alpha Cash Buyers LLC*, No. 3:21-cv-01598-D, 2021 WL 5040228, at \*3–4 (N.D. Tex. Oct. 29, 2021).

some source (perhaps the plaintiff),<sup>109</sup> or the plaintiff has a prior relationship with the defendant.<sup>110</sup> Each of these circumstances belies the possibility that a defendant actually obtained a plaintiff's phone number by randomly or sequentially generating it. As one judge remarked in a sample case, "[i]t is implausible to suggest that the Plaintiffs were dialed using a random or sequential number generator . . . when the Plaintiffs concede in their complaint that the Defendant, a loan servicer, called them to collect upon a debt."<sup>111</sup> In the sample cases, these particular factual allegations tended to sink ATDS pleadings even when plaintiffs alleged multiple other supporting facts.<sup>112</sup>

However, this narrowing of possible factual allegations has not significantly increased plaintiffs' burden for pleading ATDS claims in the common situations where they have received generic, non-targeted calls and messages. A person receiving a phone call has no way to know for certain whether the caller used an ATDS to make the call. Many courts among the sample cases have acknowledged the challenge of alleging facts supporting an ATDS claim given the information asymmetry between caller and called.<sup>113</sup> Even before *Duguid*,

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109. *See, e.g.*, *Samataro v. Keller Williams Realty, Inc.*, No. 1:18-CV-775-RP, 2021 WL 4927422, at \*1, \*4 (W.D. Tex. Sept. 27, 2021); *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-cv-01047, 2022 WL 193016, at \*8–9 (W.D. Ark. Jan. 20, 2022); *Brickman v. Facebook, Inc.*, No. 16-cv-00751-WHO, 2021 WL 4198512, at \*2 (N.D. Cal. Sept. 15, 2021); *Austria v. Alorica, Inc.*, No. 2:20-cv-05019-ODW-PVC, 2021 WL 5968404, at \*6 (C.D. Cal. Dec. 16, 2021); *Mina v. Red Robin Int'l, Inc.*, No. 20-cv-00612-RM-NYW, 2022 WL 2105897, at \*8 (D. Colo. June 10, 2022); *Evans v. Ocwen Loan Servicing, LLC*, No. 9:18-cv-81394, 2021 WL 7366534, at \*3 (S.D. Fla. Oct. 21, 2021), *vacated and remanded*, No. 21-14045, 2022 WL 17259718 (11th Cir. Nov. 29, 2022).

110. *Watts*, 2021 WL 2529613, at \*3; *Franco v. Alorica Inc.*, No. 2:20-cv-05035-DOC-KES, 2021 WL 3812872, at \*3 (C.D. Cal. July 27, 2021); *see* *Anderson v. Wells Fargo Bank*, No. 3:20-cv-738-YY, 2022 WL 595736, at \*1 (D. Or. Feb. 28, 2022).

111. *Evans*, 2021 WL 7366534, at \*3.

112. *See, e.g.*, *Gross v. GG Homes, Inc.*, No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464, at \*3 (S.D. Cal. Oct. 14, 2021) (granting motion to dismiss on reconsideration after defendant emphasized that the challenged text messages addressed the plaintiff directly, neutralizing the inferential effectiveness of factual allegations of frequency of calls and non-consent of the plaintiff); *see also supra* notes 108–10.

113. *See, e.g.*, *Atkinson v. Pro Custom Solar LLC*, No. 5:21-cv-00178-OLG, 2021 WL 2669558, at \*1 (W.D. Tex. June 16, 2021) (“As a practical matter, no plaintiff will have personal knowledge of the defendant’s telephone system at the pleadings stage. Only the defendant has that knowledge.”); *Jance v. Homerun Offer LLC*, No. 4:20-cv-00482-JGZ, 2021 WL 3270318, at \*3 (D. Ariz. Jul. 30, 2021) (noting that whether a defendant used an ATDS is often only known by the defendant, and collecting cases in which courts observed this same difficulty TCPA plaintiffs face).

pleadings alleging mere circumstantial facts indicating the possible use of an ATDS survived motions to dismiss.<sup>114</sup>

The sample cases indicate that *Duguid* has not raised this standard.<sup>115</sup> Courts across the country have found that the “newly clarified definition of an ATDS [from *Duguid*] is more relevant to a summary judgment motion than at the pleading stage”<sup>116</sup> and ruled accordingly. Plaintiffs can drag defendants into time and resource-intensive discovery simply by limiting their pleading allegations to the suspected use of random or sequential number generators and avoid any factual allegations that contradict the *Duguid* definition of ATDS.

All courts in the sample cases rely to some extent on the information asymmetry to justify a lower standard for factual allegations, even after *Duguid*, but they differ on the quantity and quality of factual allegations they accept to support an ATDS claim as plausible. Nevertheless, the sample decisions denying motions to dismiss tend to repeatedly cite certain factual allegations as sufficient to support surviving ATDS claims. Similarly, sample decisions granting motions to dismiss provide some insight about factual allegations that might weaken an ATDS claim.

Unfortunately, the number of sample cases useful to this analysis is limited. As discussed in the previous subsection, six of the decisions denying motions to dismiss among the sample cases relied in part on allegations of dialing from a prepared list.<sup>117</sup> Because the plaintiffs’ factual allegations in those pleadings supported the alleged use of equipment that is now agreed not to be an ATDS, those cases are excluded from this portion of the analysis. That leaves sixteen remaining cases in which the last relevant decision denied a motion to dismiss.<sup>118</sup> The analytically useful decisions granting motions to dismiss are even more limited. Twenty-five sample decisions granting motions to dismiss are excluded from this analysis because the associated ATDS claims rely in part on now-

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114. See, e.g., *Martin v. Direct Wines, Inc.*, No. 1:15-cv-00757, 2015 WL 4148704, at \*2 (N.D. Ill. July 9, 2015) (listing facts courts have found that allow a plausible inference of ATDS usage, including “anything . . . about the circumstances of the call that led [courts] to believe . . . [the call] was made with an ATDS”).

115. *Mey v. All Access Telecom, Inc.*, No. 5:19-cv-00237-JPB-JPM, 2021 WL 8892198, at \*1 (N.D. W. Va. Sept. 7, 2021) (“[*Duguid*] was a statutory interpretation decision that clarified the definition of an ATDS under the TCPA, but it did not impose or even discuss the pleading standard, let alone a heightened one.”).

116. *Miles v. Mediacredit, Inc.*, No. 4:20-CV-01186 JAR, 2021 WL 2949565, at \*4 (E.D. Mo. July 14, 2021) (first quoting *Gross*, 2021 WL 2863623, at \*7; then citing *Montanez v. Future Vision Brain Bank, LLC*, 20-CV-02959-CMA-MEH, 2021 WL 1697928, at \*7 (D. Colo. Apr. 29, 2021)).

117. See *supra* note 91 and accompanying text.

118. See *infra* Appendix Section I.C.

invalid pleadings of dialing from a list,<sup>119</sup> merely having ATDS capacity,<sup>120</sup> or otherwise failing to allege a *Duguid* ATDS,<sup>121</sup> leaving only six analytically useful cases in which the last relevant decision granted a motion to dismiss.<sup>122</sup>

Of the sixteen relevant decisions denying motions to dismiss, nine (56%) cited as part of the basis for their decision allegations that the plaintiffs had no prior relationship with the defendant and/or had never provided their contact information to the defendant.<sup>123</sup> Seven (44%) cited allegations of a lack of indication that the calls specifically targeted plaintiffs, such as addressing them by name.<sup>124</sup> Five (31%) cited allegations that plaintiffs had never consented or requested to be called.<sup>125</sup> Three (19%) cited allegations that the calls continued even after requests to stop.<sup>126</sup> These “first-tier” allegations increase the

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119. See *infra* bolded cases in Appendix Section I.A.

120. See *supra* note 102 and accompanying text.

121. *Guglielmo v. CVS Pharmacy, Inc.*, No. 3:20-cv-01560-JBA, 2021 WL 3291532, at \*2 (D. Conn. Aug. 2, 2021); *Edwards v. Alorica, Inc.*, No. 8:19-cv-02124-JWH-DFM, 2021 WL 4622390, at \*2 (C.D. Cal. Aug. 30, 2021).

122. *Watts v. Emergency Twenty Four, Inc.*, No. 20-cv-1820, 2021 WL 2529613, at \*6 (N.D. Ill. June 21, 2021); *Jovanovic v. SRP Invs. LLC*, No. 2:21-cv-00393-JJT, 2021 WL 4198163, at \*4 (D. Ariz. Sept. 15, 2021); *Gross v. GG Homes, Inc.*, No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464 (S.D. Cal. Oct. 14, 2021); *Wilson v. Rater8, LLC*, No. 20-cv-1515-DMS-LL, 2021 WL 4865930, at \*5 (S.D. Cal. Oct. 18, 2021); see *DeClements v. Americana Holdings LLC*, No. 2:20-cv-00166-DLR, 2021 WL 5138279, at \*1 (D. Ariz. Nov. 4, 2021); *Anthony v. Pro Custom Solar, LLC*, No. 5:20-cv-01968-JAK-KK, 2022 WL 1634870, at \*1 (C.D. Cal. Jan. 21, 2022).

123. *Niemczyk v. Pro Custom Solar LLC*, No. 2:19-cv-07846-ES-MAH, 2022 WL 884359, at \*1 (D.N.J. Mar. 25, 2022); *Smith v. Direct Bldg. Supplies LLC*, No. 2:20-cv-03583-BMS, 2021 WL 4623275, at \*1 (E.D. Pa. Oct. 7, 2021); *Mey v. All Access Telecom, Inc.*, No. 5:19-cv-00237-JPB-JPM, 2021 WL 8892198, at \*2 (N.D. W. Va. Sept. 7, 2021); *Callier v. Multiplan, Inc.*, No. 3:20-cv-00318-FM, 2021 WL 8053527, at \*1 (W.D. Tex. Aug. 26, 2021); *Garner v. Allstate Ins. Co.*, No. 1:20-cv-04693, 2021 WL 3857786, at \*1 (N.D. Ill. Aug. 30, 2021); *Jance v. Homerun Offer LLC*, No. 4:20-cv-00482-JGZ, 2021 WL 3270318, at \*4 (D. Ariz. July 30, 2021); *Escano v. Symmetry Fin. Grp. of N.C., LLC*, No. 2:21-cv-00884-RB-GBW, 2022 WL 2072875, at \*2 (D.N.M. June 9, 2022); *Underwood v. IFA Holdings, LLC*, No. 1:21-cv-00830-ACA, 2022 WL 2307738, at \*2 (N.D. Ala. June 27, 2022); *Perrong v. MLA Int'l, Inc.*, No. 6:20-cv-01606-RBD-EJK, 2021 WL 3036462, at \*2 (M.D. Fla. July 2, 2021).

124. *Laccinole v. Students for Life Action Inc.*, No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211, at \*4 (D.R.I. Aug. 4, 2022); *Mey*, 2021 WL 8892198, at \*2–4; *Multiplan*, 2021 WL 8053527, at \*17; *Shank v. Givesurance Ins. Servs., Inc.*, No. 3:19-cv-00136-TMR-PBS, 2022 WL 561596, at \*6 (S.D. Ohio Feb. 24, 2022); *Jance*, 2021 WL 3270318, at \*4; *Underwood*, 2022 WL 2307738, at \*4; *Perrong*, 2021 WL 3036462, at \*2.

125. *Laccinole v. Rocket Mortg., LLC*, 609 F. Supp. 3d 68, 74 (D.R.I. June 30, 2022); *Niemczyk*, 2022 WL 884359, at \*1; *Multiplan*, 2021 WL 8053527, at \*1; *Shank*, 2022 WL 561596, at \*2; *Jance*, 2021 WL 3270318, at \*4.

126. *Rocket Mortg., LLC*, 609 F. Supp. 3d at 74; *Multiplan*, 2021 WL 8053527, at \*2; *Jance*, 2021 WL 3270318, at \*1.

plausibility of an inference of ATDS use because they rule out possible ways and reasons that defendants might be calling plaintiffs other than by randomly or sequentially generating their numbers. Three quarters (twelve) of the relevant decisions cited allegations of at least one of these first-tier facts as a basis for the decision,<sup>127</sup> and two thirds of those cite two or more.<sup>128</sup>

Evidence of non-targeted messaging appears to be the strongest among first-tier factual allegations because no decisions to dismiss cited non-targeted messaging as part of a finding of insufficient factual allegations. On the other hand, among the relevant dismissal decisions, the negative inferential power of allegations of messages targeted with the plaintiff’s first name overpowered an allegation of no consent in one case<sup>129</sup> and even combined allegations of no consent, no prior relationship, and interactive automated text options (see below) in another.<sup>130</sup>

The factual allegations most frequently cited in decisions denying dismissal related to technical aspects of the calls. Nine (56%) of the relevant decisions denying dismissal cited allegations of manipulated caller ID or text “short codes”;<sup>131</sup> eight (50%) a beeping, delay,<sup>132</sup> or callers’ failure to respond to the

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127. See *infra* Appendix Section I.C.2.

128. See *infra* Appendix Section I.C.3.

129. Gross v. GG Homes, Inc., No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464, at \*3 (S.D. Cal. Oct. 14, 2021).

130. Jovanovic v. SRP Invs. LLC, No. CV-21-003930PHX-JJT, 2021 WL 4198163, at \*3–4 (D. Ariz. Sept. 15, 2021).

131. Shank v. Givesurance Ins. Servs., Inc., No. 3:19-cv-00136-TMR-PBS, 2022 WL 561596, at \*1 (S.D. Ohio Feb. 24, 2022); Poonja v. Kelly Servs., Inc., No. 20-cv-4388, 2021 WL 4459526, at \*3 (N.D. Ill. Sept. 29, 2021); Garner v. Allstate Ins. Co., No. 1:20-cv-04693, 2021 WL 3857786, at \*3 (N.D. Ill. Aug. 30, 2021); Escano v. Symmetry Fin. Grp. of N.C., LLC, No. 2:21-cv-00884-RB-GBW, 2022 WL 2072875, at \*3 (D.N.M. June 9, 2022); see Niemczyk v. Pro Custom Solar LLC, No. 2:19-cv-07846-ES-MAH, 2022 WL 884359, at \*4 (D.N.J. Mar. 25, 2022); Mey v. All Access Telecom, Inc., No. 5:19-cv-00237-JPB-JPM, 2021 WL 8892198, at \*2–3 (N.D. W. Va. Sept. 7, 2021); Perrong v. MLA Int’l, Inc., No. 6:20-cv-01606-RBD-EJK, 2021 WL 3036462, at \*1 (M.D. Fla. July 2, 2021); *Jance*, 2021 WL 3270318, at \*1; *MultiPlan*, 2021 WL 8053527, at \*1. “Short codes” are the sequence of numbers shown as the source of a text when they are shorter than the typical length of an actual phone number.

132. Many courts humorously refer to this delay as the “telltale pause” indicative of an ATDS, a common decisional expression that may have originated from a quote of the plaintiff’s complaint in *Peters v. Credit Protection Ass’n LP*, No. 2:13-cv-767, 2014 WL 6687146, at \*6 (S.D. Ohio Nov. 26, 2014), but which seems to have taken off through inter-court citations after it was quoted from the plaintiff’s complaint in *Lofton v. Verizon Wireless (VAW) LLC*, No. 13-cv-05665, 2015 WL 1254681, at \*2, \*5 (N.D. Cal. Mar. 18, 2015). This is perhaps unsurprising; among just the sample cases, only two come out of the Sixth Circuit, while twenty-four come out of the Ninth Circuit, and most of those from California district courts.

plaintiff when the plaintiff received the calls;<sup>133</sup> six (38%) high frequency, volume, or repetition of calls—to plaintiffs themselves (four)<sup>134</sup> and/or everyone allegedly targeted by the calls (2);<sup>135</sup> four (25%) the use of a prerecorded voice;<sup>136</sup> and two (13%) of an automatic interactive functionality<sup>137</sup> to the call or plaintiff's inability to interact normally as one would with a human caller.<sup>138</sup> Only one of the relevant decisions did not cite one of these technical allegations.<sup>139</sup>

Remarkably, one court within the jurisdiction of the First Circuit<sup>140</sup> and two within the jurisdiction of the Fifth Circuit<sup>141</sup> denied motions to dismiss for ATDS claims based solely on a factual allegation of a delay on pick-up. Although these are clearly national outliers, given the recency of the First Circuit (March 2022)<sup>142</sup> and one of the Fifth Circuit (July 2022)<sup>143</sup> decisions, these may evidence a more favorable pleading environment for plaintiffs in those jurisdictions. In every other jurisdiction represented among the sample cases, successful plaintiff pleadings always included at least one first-tier factual allegation in addition to any technical factual allegations.

Within the slim sample subset of relevant decisions granting dismissal, negative inferences from factual allegations of a prior relationship of the plaintiff

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133. *Escano*, 2022 WL 2072875, at \*5; *Niemczyk*, 2022 WL 884359, at \*4; *Mey*, 2021 WL 8892198, at \*2; *Jance*, 2021 WL 3270318, at \*4; *Laccinole v. Navient Sols., LLC*, 589 F. Supp. 3d 261, 261 (D.R.I. 2022); *Smith v. Direct Bldg. Supplies LLC*, No. 2:20-cv-03583-BMS, 2021 WL 4623275, at \*1 (E.D. Pa. Oct. 7, 2021); *Garcia v. Pro Custom Solar LLC*, No. 4:21-cv-00392-ALM, 2022 WL 95281, at \*2 (E.D. Tex. Jan. 10, 2022); *Callier v. Greensky, Inc.*, No. 3:20-cv-00304-KC, 2021 WL 2688622, at \*1 (W.D. Tex. May 10, 2021).

134. *Niemczyk*, 2022 WL 884359, at \*1; *All Access Telecom*, 2021 WL 8892198, at \*2; *Laccinole v. Rocket Mortg., LLC*, 609 F. Supp. 3d 68, 68 (2022); *Laccinole v. Students for Life Action Inc.*, No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211, at \*4 (D.R.I. Aug. 4, 2022).

135. *Shank*, 2022 WL 561596, at \*1–2; *Garner*, 2021 WL 3857786, at \*1.

136. *Rocket Mortg., LLC*, 609 F. Supp. 3d at 73; *Escano*, 2022 WL 2072875, at \*2; *Perrong*, 2021 WL 3036462, at \*1; *Multiplan*, 2021 WL 8053527, at \*2. These allegations were made specifically in support of ATDS claims. *See supra* note 54.

137. In the case of a text, for example, this could include presentation of an option to text “STOP” to opt out.

138. *Student for Life Action, Inc.*, 2022 WL 3099211, at \*1; *see, e.g., Poonja v. Kelly Servs., Inc.*, No. 20-cv-4388, 2021 WL 4459526, at \*2–3 (N.D. Ill. Sept. 29, 2021).

139. *Underwood v. IFA Holdings, LLC*, No. 1:21-cv-00830-ACA, 2022 WL 2307738, at \*6 (N.D. Ala. June 27, 2022).

140. *Laccinole v. Navient Sols., LLC*, 589 F. Supp. 3d 261, 267–68 (D.R.I. 2022).

141. *Garcia v. Pro Custom Solar LLC*, No. 4:21-cv-00392-ALM, 2022 WL 95281, at \*2 (E.D. Tex. Jan. 10, 2022); *Callier v. Greensky, Inc.*, No. 3:20-cv-00304-KC, 2021 WL 2688622, at \*5 (W.D. Tex. May 10, 2021).

142. *Navient Sols., LLC*, 589 F. Supp. 3d at 261.

143. *Garcia*, 2022 WL 95281, at \*1.



with the defendant and targeted messaging outweighed the technical factual allegations of mass-call capability and high frequency/volume.<sup>144</sup> And, the following combinations of technical and miscellaneous factual allegations were found insufficient alone to survive a motion to dismiss, even without countervailing negative first-tier facts: interactive text options and short code,<sup>145</sup> interactive text options and a disclaimer on the defendant’s website indicating that the defendant used ATDS,<sup>146</sup> and high frequency/volume of calls and a website ATDS disclaimer.<sup>147</sup>

Finally, relevant sample decisions cited some other miscellaneous factual allegations as part of their basis for denying dismissal. Eight (50%) of the relevant successful pleadings alleged generic, pre-written, scripted, or promotional content,<sup>148</sup> and two (13%) alleged repeated calls despite the plaintiffs’ registration on the national do-not-call registry.<sup>149</sup> The decisions citing these allegations also cited multiple other first-tier and technical allegations, but none of the relevant dismissal decisions cite any of these as insufficient supporting factual allegations. The limited sample thus suggests these are effective factual allegations, but it does not indicate that they are comparatively more or less effective than the first-tier or technical allegations.

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144. *See, e.g.*, *Watts v. Emergency Twenty Four, Inc.*, No. 20-cv-1820, 2021 WL 2529613, at \*1, \*3 (N.D. Ill. June 21, 2021).

145. *Wilson v. Rater8, LLC*, No. 20-cv-1515-DMS-LL, 2021 WL 4865930, at \*1–3 (S.D. Cal. Oct. 18, 2021).

146. *DeClements v. Americana Holdings LLC*, No. 2:20-cv-00166-DLR, 2021 WL 5138279, at \*1–3 (D. Ariz. Nov. 4, 2021).

147. *Anthony v. Pro Custom Solar, LLC*, No. 5:20-cv-01968-JAK-KK, 2022 WL 1634870, at \*3–4 (C.D. Cal. Jan. 21, 2022).

148. *Shank v. Givesurance Ins. Servs., Inc.*, No. 3:19-cv-00136-TMR-PBS, 2022 WL 561596, at \*1, \*5–6 (S.D. Ohio Feb. 24, 2022); *Garner v. Allstate Ins. Co.*, No. 1:20-cv-04693, 2021 WL 3857786, at \*1–3 (N.D. Ill. Aug. 30, 2021); *Mey v. All Access Telecom, Inc.*, No. 5:19-cv-00237-JPB-JPM, 2021 WL 8892198, at \*2–3 (N.D. W. Va. Sept. 7, 2021); *Laccinole v. Students for Life Action Inc.*, No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211, at \*1, \*3–5 (D.R.I. Aug. 4, 2022); *Poonja v. Kelly Servs., Inc.*, No. 20-cv-4388, 2021 WL 4459526, at \*1–2 (N.D. Ill. Sept. 29, 2021); *Escano v. Symmetry Fin. Grp. of N.C., LLC*, No. 2:21-cv-00884-RB-GBW, 2022 WL 2072875, at \*1–3 (D.N.M. June 9, 2022); *Jance v. Homerun Offer LLC*, No. 4:20-cv-00482-JGZ, 2021 WL 3270318, at \*2, \*4 (D. Ariz. July 30, 2021).

149. *Garner*, 2021 WL 3857786, at \*1–2; *Callier v. Multiplan, Inc.*, No. 3:20-cv-00318-FM, 2021 WL 8053527, at \*1 (W.D. Tex. Aug. 26, 2021). Similar to calls utilizing an “artificial or pre-recorded voice,” calls to potential plaintiffs in defiance of their having registered on the national do-not-call (“DNC”) registry comprise a cause of action independent of the ATDS provisions of the TCPA. *See* 47 U.S.C. § 227(b)(2) (authorizing promulgation of regulations for creating a DNC); *id.* § 227(b)(3) (providing a private right of action for violation of those regulations). The allegations referenced here are specifically in support of ATDS claims.

The decisions on motions to dismiss from the sample that were based on factual allegations or the nature of the alleged ATDS break down as follows by appellate jurisdiction:

Motions to Dismiss Granted / Denied, by Circuit Court Jurisdiction										
First	Sec- ond	Third	Fourth	Fifth	Sixth	Sev- enth	Eighth	Ninth	Tenth	Elev- enth
0/4	3/0	3 3/2	1/4	2 / 4	1 / 1	1 / 2	2 / 1	16 / 3	1 / 2	1 / 2

Courts within the jurisdiction of the Ninth Circuit have been the strictest in applying the general pleading requirements for ATDS claims. Of the analytically relevant decisions granting motions to dismiss, i.e. those based only on the sufficiency of factual allegations supporting an inference of ATDS use, one dismissal decision came out of the jurisdiction of the Seventh Circuit and the other five from the Ninth. Of the relevant decisions denying dismissal, three came out of the jurisdiction of the Ninth Circuit; two, the Third; one, the Fourth; three, the Fifth; one, the Sixth; two, the Seventh; one, the Ninth; one, the Tenth; and two, the Eleventh.

Three of the four denials of dismissal within the jurisdiction of the First Circuit were in favor of the same pro se plaintiff,<sup>150</sup> and all were decided just in 2022.<sup>151</sup> One of the denials of dismissal within the jurisdiction of the Fifth Circuit was also decided in 2022.<sup>152</sup> Those numbers combined with the relevant courts' willingness to accept pleas on the basis of a single technical factual allegation suggest that these jurisdictions may be relatively plaintiff-friendly for ATDS claims.

Courts within the Ninth Circuit, on the other hand, have been at the forefront of the development of the *Duguid* pleading standard<sup>153</sup> and have consistently and

150. *Laccinole v. Rocket Mortg., LLC*, 609 F. Supp. 3d 68 (D.R.I. 2022); *Students for Life Action Inc.*, 2022 WL 3099211; *Laccinole v. Navient Sols., LLC*, 589 F. Supp. 3d 261 (D.R.I. 2022).

151. *Rocket Mortg., LLC*, 609 F. Supp. 3d 68; *Students for Life Action, Inc.*, 2022 WL 3099211; *Navient Sols., LLC*, 589 F. Supp. 3d 261.

152. *See Garcia v. Pro Custom Solar LLC*, No. 4:21-cv-00392-ALM, 2022 WL 95281 (E.D. Tex. Jan. 10, 2022).

153. For example, only two months after *Duguid*, a Northern District of California court decided that *Duguid* precluded as insufficient to plead the use of an ATDS allegations of dialing from a prepared list, mostly settling the "Footnote 7" issue within the Ninth Circuit. *Hufnus v. DoNotPay, Inc.*, No. 20-cv-08701-VC, 2021 WL 2585488, at \*1 (N.D. Cal. June 24, 2021). *But see MacDonal v. Brian Gubernick PLLC*, No. 2:20-cv-00138-MTL, 2021 WL 5203107, at \*2 (D. Ariz. Nov. 9, 2021) (crediting a Footnote 7 claim as sufficient). The *Hufnus* court's analysis has been widely cited in subsequent sample cases across the nation as

strictly applied the now-consensus of the ATDS definition and granted dismissals where plaintiffs have pled ATDS-contradicting facts of targeted messages<sup>154</sup> or relied solely on technical factual allegations.<sup>155</sup> There are too few sample cases to draw similar tentative conclusions about the relative plaintiff- or defendant-friendliness of other jurisdictions at the pleading stage, but the sheer volume of decisions out of the Ninth Circuit suggests that its approach might carry more weight than the so-far lenient approach of the First and Fifth Circuit courts when judges in other jurisdictions face ATDS claims and search for persuasive authority to guide their decisions.

### 3. Summary Judgment

The sample case decisions involving motions for summary judgment show dire prospects for ATDS claims adjudicated on their merits after *Duguid*.

The twenty sample decisions granting defendants’ motions for summary judgment reinforce how courts have reached consensus that the post-*Duguid* definition of ATDS does not include devices that only dial from prepared lists,<sup>156</sup> merely have unused capacity to randomly or sequentially generate numbers,<sup>157</sup> are “predictive dialers” as formerly defined by the FCC,<sup>158</sup> or simply do not rely on human intervention.<sup>159</sup>

Most importantly, they indicate the types of evidence that courts may consider important when an ATDS claim reaches judgment on the merits. Removing the sample grants of summary judgment decided based on plaintiffs evidencing ATDS contradicting their *Duguid* definition leaves seven decisions each decided in a different jurisdiction across a smattering of Circuit Court

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jurisdictions converged on their current consensus. *See, e.g.*, *Mina v. Red Robin Int’l Inc.*, No. 20-cv-00612-RM-NYW, 2022 WL 2105897, at \*4–5 (D. Colo. June 10, 2022); *Barlow v. NewRez, LLC*, No. 8:20-cv-2451-KKM-AEP, 2022 WL 1619592, at \*7 (M.D. Fla. Mar. 7, 2022); *Barnett v. First Nat’l Bank of Omaha*, No. 3:20-cv-337-CHB, 2022 WL 627028, at \*3–4 (W.D. Ky. Mar. 3, 2022); *Camunas v. Nat’l Republican Senatorial Comm.*, 570 F. Supp. 3d 288, 293–96 (E.D. Pa. 2021).

154. *Jovanovic v. SRP Invs. LLC*, No. CV-21-003930PHX-JJT, 2021 WL 4198163, at \*2–4 (D. Ariz. Sept. 15, 2021); *Gross v. GG Homes, Inc.*, No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464, at \*2–3 (S.D. Cal. Oct. 14, 2021).

155. *Wilson v. Rater8, LLC*, No. 20-cv-1515-DMS-LL, 2021 WL 4865930, at \*2–3 (S.D. Cal. Oct. 18, 2021); *DeClements v. Americana Holdings LLC*, No. 2:20-cv-00166-DLR, 2021 WL 5138279, at \*1–2 (D. Ariz. Nov. 4, 2021); *Anthony v. Pro Custom Solar, LLC*, No. 5:20-cv-01968-JAK-KK, 2022 WL 1634870, at \*3–4 (C.D. Cal. Jan. 21, 2022).

156. *See infra* Appendix Section II.A.2.

157. *Timms v. USAA Fed. Sav. Bank*, 543 F. Supp. 3d 294, 297–99 (D.S.C. 2021); *Grome v. USAA Sav. Bank*, 557 F. Supp. 3d 931, 935–37 (D. Neb. 2021).

158. *In re Portfolio Recovery Assocs., LLC*, No. 3:11-md-02295-JAH-BGS, 2021 WL 5203299, at \*1 (S.D. Cal. Nov. 9, 2021).

159. *Id.* at \*4.

jurisdictions.<sup>160</sup> In six of these decisions, judges cited sworn declarations from defendant representatives about the nature of their dialing systems against which plaintiffs could not adduce evidence to establish a dispute over the material fact of whether the devices involved were actually ATDS.<sup>161</sup> In the remaining case, evidence—also from a defendant declaration—that the defendant had contacted the plaintiff based on an existing relationship rather than “random contact” induced by an ATDS.<sup>162</sup>

The relatively unchanged post-*Duguid* ATDS pleading standard may allow plaintiffs to drag defendants into litigation over ATDS claims, but the sample cases indicate that for defendants who do not actually use ATDS, a motion for summary judgment may be a quick route to escape: unless a local rule or order requires otherwise, a defendant may move for summary judgment at any time before thirty days after the close of discovery.<sup>163</sup> Defendants who do not use ATDS but are facing ATDS claims should move for summary judgment as soon as possible and provide supporting sworn affidavits from knowledgeable party representatives who can state that they do not use ATDS, and perhaps documentary evidence from their systems showing that they do not operate as ATDS.<sup>164</sup>

#### CONCLUSION

The Supreme Court’s holding in *Duguid* that “a necessary feature of an [ATDS] under [the TCPA] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called”<sup>165</sup> doomed the ultimate litigation prospects of current and potential ATDS claims under the

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160. *Gentner v. Navient Sols., Inc.*, No. 1:20-cv-00747-LJV-JJM, 2022 WL 3334269 (W.D.N.Y. Aug. 12, 2022); *Guthrie v. PHH Mortg. Corp.*, No. 7:20-cv-0043-BO, 2022 WL 706923 (E.D.N.C. Mar. 4, 2022); *Friend v. Taylor Law, PLLC*, No. 4:17-cv-00029-TLS-JPK, 2021 WL 5015096 (N.D. Ind. Oct. 27, 2021); *Creech v. Navient*, No. 2:21-cv-00118-PPS-JEM, 2022 WL 541230 (N.D. Ind. Feb. 23, 2022); *Basham v. Midland Funding, LLC*, No. 4:15-cv-00030-CDP, 2022 WL 1125500 (E.D. Mo. Apr. 15, 2022); *Barlow v. NewRez, LLC*, No. 8:20-cv-2451-KKM-AEP, 2022 WL 1619592 (M.D. Fla. Mar. 7, 2022); *Franklin v. Ga. Power Co.*, No. 1:19-cv-3853-MLB, 2022 WL 1682517 (N.D. Ga. Mar. 29, 2022).

161. *Gentner*, 2022 WL 3334269, at \*10; *Friend*, 2021 WL 5015096, at \*2; *Creech*, 2022 WL 541230, at \*4; *Basham*, 2022 WL 1125500, at \*6, \*10; *Barlow*, 2022 WL 1619592, at \*8; *Franklin*, 2022 WL 1682517, at \*1–2.

162. *Guthrie*, 2022 WL 706923, at \*10.

163. FED. R. CIV. P. 56(b).

164. Among the decisions granting summary judgment to defendants outside of the six analyzed above, two cited dialing system documentation as establishing the nonuse of ATDS as material fact that plaintiffs could not counter with their own evidence. *See Timms v. USAA Fed. Sav. Bank*, 543 F. Supp. 3d 294, 301–02 (D.S.C. 2021); *Atkinson v. Pro Custom Solar LLC*, No. 5:21-cv-00178-OLG, 2022 WL 4071998, at \*8 (W.D. Tex. Sept. 1, 2022).

165. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021).

2022/23

“PLEAS” DON’T HANG UP

439

TCPA. Plaintiffs cannot prove that a defendant used a device it did not, and most telemarketers do not use ATDS as defined in *Duguid*. The sample cases, however, show that the decision had little effect on the plaintiff-friendly ATDS pleading standard, keeping open the doors to discovery. Still, defendants may take comfort in the sample cases’ indication that *Duguid* may have compensated those of them who do not use ATDS by opening a clearer and quicker path to summary judgment.

The courts in the sample cases remain sympathetic to plaintiffs’ lack of information at the pleading stage about defendants’ calling systems. Their decisions indicate that plaintiffs need only specifically allege a defendant’s use of a random or sequential number generator—a *Duguid* ATDS—to make the offending calls and provide consistent supporting factual allegations to survive a motion to dismiss. The sample cases indicate that “first-tier” factual allegations that rule out means other than random or sequential number generation that the defendant may have obtained the plaintiff’s phone number are the most effective: including no prior relationship with the defendant, no consent or request to be called, and—most effectively—indications that the message was not targeted to the plaintiff. Conversely, factual allegations that suggest means other than ATDS by which defendants might have acquired a plaintiff’s phone number, especially allegations of targeted messages, will likely neutralize the positive inferential effect of other factual allegations and result in dismissal. The inferential support of these first-tier facts may be productively buttressed by technical factual allegations and allegations of generic content.

Once discovery has opened, the advantage shifts to defendants who do not use ATDS. The sample cases indicate that those defendants may be able to establish beyond dispute they did not use ATDS and prevail on summary judgment by providing sworn declarations from knowledgeable persons denying ATDS use or dialing system documentation confirming nonuse. Therefore, defendants who do not use ATDS but are facing ATDS claims should prepare such evidence and move for summary judgment as soon as possible.

Only time and further litigation will prove whether this new advantage for defendants will stem ATDS-claim litigation or whether the basically unchanged plaintiff-friendly ATDS pleading standard will keep ATDS claims in the arsenals of litigators seeking redress for offensive unwanted calls.

## APPENDIX

This appendix includes citations to the seventy-five decisions included in the sample summarized in Section II.A.

## I. DECISIONS AT THE PLEADING STAGE (53)

A. *ATDS Claims Dismissed* (31)

\* Decisions (20) citing insufficiency of alleging dialing from prepared list (the “Footnote 7 Consensus”) are **bolded**.

Second Circuit

Guglielmo v. CVS Pharmacy, Inc., No. 3:20-cv-01560-JBA, 2021 WL 3291532 (D. Conn. Aug. 2, 2021)

**Soliman v. Subway Franchisee Advert. Fund Tr., Ltd., No. 3:19-cv-592-JAM, 2022 WL 2802347 (D. Conn. July 18, 2022)**

Thorington v. Pro Custom Solar, LLC, No. 3:21-cv-00187-MPS, 2021 WL 7286283 (D. Conn. Nov. 23, 2021)

Third Circuit

**Camunas v. Nat’l Republican Senatorial Comm., 570 F. Supp. 3d 288 (E.D. Pa. 2021)**

**Champion v. Credit Pros Int’l Corp., No. 21-10814-JXN-JBC (D.N.J. filed May 6, 2021)**

Deleo v. Nat’l Republican Senatorial Comm., No. 2:21-cv-03807-BRM-ESK, 2021 WL 5083831 (D.N.J. Nov. 1, 2021)

Fourth Circuit

**Mey v. DirecTV, LLC, No. 5:17-cv-00179-JPB-JPM, 2021 WL 6882400 (N.D. W. Va. Aug. 18, 2021)**

Fifth Circuit

**Hunsinger v. Alpha Cash Buyers LLC, No. 3:21-cv-01598-D, 2021 WL 5040228 (N.D. Tex. Oct. 29, 2021)**

**Samataro v. Keller Williams Realty, Inc., No. 1:18-CV-775-RP, 2021 WL 4927422 (W.D. Tex. Sept. 27, 2021)**

Sixth Circuit

Barry v. Ally Fin., Inc., No. 2:20-cv-12378-PDB-RSW, 2021 WL 2936636 (E.D. Mich. July 13, 2021)

2022/23

“PLEAS” DON’T HANG UP

441

Seventh Circuit

Watts v. Emergency Twenty Four, Inc., No. 20-cv-1820, 2021 WL 2529613 (N.D. Ill. June 21, 2021)

Eighth Circuit

**Beal v. Outfield Brew House, LLC, 29 F.4th 391 (8th Cir. 2022)**

**Cross v. State Farm Mut. Auto. Ins. Co., No. 1:20-cv-01047, 2022 WL 193016 (W.D. Ark. Jan. 20, 2022)**

Ninth Circuit

**Anderson v. Wells Fargo Bank, N.A., No. 3:20-cv-738-YY, 2022 WL 595736 (D. Or. Feb. 28, 2022)**

Anthony v. Pro Custom Solar, LLC, No. 5:20-cv-01968-JAK-KK, 2022 WL 1634870 (C.D. Cal. Jan. 21, 2022)

**Austria v. Alorica, Inc., No. 2:20-cv-05019-ODW-PVC, 2021 WL 5968404 (C.D. Cal. Dec. 16, 2021)**

**Borden v. eFinancial, LLC, No. C19-1430JLR, 2021 WL 3602479 (W.D. Wash. Aug. 13, 2021)**

**Brickman v. Facebook, Inc., No. 16-cv-00751-WHO, 2021 WL 4198512 (N.D. Cal. Sept. 15, 2021)**

DeClements v. Americana Holdings LLC, No. 2:20-cv-00166-DLR, 2021 WL 5138279 (D. Ariz. Nov. 4, 2021)

**DeMesa v. Treasure Island, LLC, No. 2:18-cv-02007-JAD-NJK, 2022 WL 1813858 (D. Nev. June 1, 2022)**

Edwards v. Alorica, Inc., No. 8:19-cv-02124-JWH-DFM, 2021 WL 4622390 (C.D. Cal. Aug. 30, 2021)

**Eggleston v. Reward Zone USA LLC, No. 2:20-cv-01027-SVW-KS, 2022 WL 886094 (C.D. Cal. Jan. 28, 2022)**

**Franco v. Alorica Inc., No. 2:20-cv-05035-DOC-KES, 2021 WL 3812872 (C.D. Cal. July 27, 2021)**

Gross v. GG Homes, Inc., No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464 (S.D. Cal. Oct. 14, 2021)

**Hufnus v. DoNotPay, Inc., No. 20-cv-08701-VC, 2021 WL 2585488 (N.D. Cal. June 24, 2021)**

Jovanovic v. SRP Invs. LLC, No. 2:21-cv-00393-JJT, 2021 WL 4198163 (D. Ariz. Sept. 15, 2021)

**Meier v. Allied Interstate LLC, No. 20-55286, 2022 WL 171933 (9th Cir. Jan. 19, 2022)**

**Tehrani v. Joie de Vivre Hosp., LLC, No. 19-cv-08168-EMC, 2021 WL 3886043 (N.D. Cal. Aug. 31, 2021)**

Wilson v. Rater8, LLC, No. 20-cv-1515-DMS-LL, 2021 WL 4865930 (S.D. Cal. Oct. 18, 2021)

Tenth Circuit

**Mina v. Red Robin Int'l Inc., No. 20-cv-00612-RM-NYW, 2022 WL 2105897 (D. Colo. June 10, 2022)**

Eleventh Circuit

**Evans v. Ocwen Loan Servicing, LLC, No. 9:18-cv-81394-RLR, 2021 WL 7366534 (S.D. Fla. Oct. 21, 2021), vacated and remanded, No. 21-14045, 2022 WL 17259718 (11th Cir. Nov. 29, 2022)**

B. *ATDS Claims Survive Motion to Dismiss* (22)

1. Claims Resulting in Known Settlement (8)

Fourth Circuit

**Mey v. All Access Telecom, Inc., No. 5:19-CV-00237-JPB-JPM, 2021 WL 8892198 (N.D. W. Va. Sept. 7, 2021)**

Fifth Circuit

**Callier v. Multiplan, Inc., 3:20-cv-00318-FM, 2021 WL 8053527 (W.D. Tex. Aug. 26, 2021)**

**Callier v. Greensky, Inc., 3:20-cv-00304-KC, 2021 WL 2688622 (W.D. Tex. May 10, 2021)**

Seventh Circuit

**Garner v. Allstate Ins. Co., No. 1:20-cv-04693, 2021 WL 3857786 (N.D. Ill. Aug. 30, 2021)**

**Poonja v. Kelly Servs., Inc., No. 20-cv-4388, 2021 WL 4459526 (N.D. Ill. Sept. 29, 2021)**

Eighth Circuit

**Miles v. Mediacredit, Inc., No. 4:20-cv-01186-JAR, 2021 WL 2949565 (E.D. Mo. July 14, 2021)**

Ninth Circuit

**MacDonald v. Brian Gubernick PLLC, No. 2:20-cv-00138-MTL, 2021 WL 5203107 (D. Ariz. Nov. 9, 2021)**

**Jance v. Homerun Offer LLC, No. 4:20-cv-00482-JGZ, 2021 WL 3270318 (D. Ariz. July 30, 2021)**

2. Claims Resulting in Voluntary Dismissal (5)

i. Joint Voluntary Dismissal



2022/23

“PLEAS” DON’T HANG UP

443

*See cases cited supra note 59.*

ii. Plaintiff Voluntary Dismissal

*See cases cited supra note 62.*

3. Ongoing Cases with ATDS Claims (8)

First Circuit

McEwen v. Nat’l Rifle Ass’n of Am., No. 2:20-cv-00153-LEW, 2021 WL 5999274 (D. Me. Dec. 20, 2021)

Laccinole v. Rocket Mortg., LLC, 609 F. Supp. 3d 68 (D.R.I. June 30, 2022)

Laccinole v. Students for Life Action Inc., No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211 (D.R.I. Aug. 4, 2022)

Third Circuit

Niemczyk v. Pro Custom Solar LLC, No. 2:19-cv-07846-ES-MAH, 2022 WL 884359 (D.N.J. Mar. 25, 2022)

Sixth Circuit

Shank v. Givesurance Ins. Servs., Inc., No. 3:19-cv-00136-TMR-PBS, 2022 WL 561596 (S.D. Ohio Feb. 24, 2022)

Ninth Circuit

Stewart v. Network Cap. Funding Corp., No. 2:21-cv-00368-MWF-MAA, 2021 WL 6618544 (C.D. Cal. Dec. 9, 2021)

Tenth Circuit

Escano v. Symmetry Fin. Grp. of N.C., LLC, No. 2:21-cv-00884-RB-GBW, 2022 WL 2072875 (D.N.M. June 9, 2022)

Eleventh Circuit

Underwood v. IFA Holdings, LLC, No. 1:21-cv-00830-ACA, 2022 WL 2307738 (N.D. Ala. June 27, 2022)

4. Claims Resulting in Outlier of Default Judgment for Plaintiff

*See case cited supra note 68 and accompanying text.*

C. *Decisions Denying Motions to Dismiss ATDS Claims that Do Not Rely on Incorrect “Footnote 7” Argument (16)*<sup>166</sup>

1. Cite No “First Tier” Factual Allegation (4)

Laccinole v. Navient Sols., LLC, 589 F. Supp. 3d 261 (D.R.I. 2022)  
Garcia v. Pro Custom Solar LLC, No. 4:21-cv-00392-ALM, 2022 WL 95281 (E.D. Tex. Jan. 10, 2022)  
Callier v. Greensky, Inc., 3:20-cv-00304-KC, 2021 WL 2688622 (W.D. Tex. May 10, 2021)  
Poonja v. Kelly Servs., Inc., No. 20-cv-4388, 2021 WL 4459526 (N.D. Ill. Sept. 29, 2021)

2. Cite Only One “First Tier” Factual Allegation (4)

Laccinole v. Students for Life Action Inc., No. 1:21-cv-00252-WES-PAS, 2022 WL 3099211 (D.R.I. Aug. 4, 2022)  
Smith v. Direct Bldg. Supplies LLC, No. 2:20-cv-03583-BMS, 2021 WL 4623275 (E.D. Pa. Oct. 7, 2021)  
Garner v. Allstate Ins. Co., No. 1:20-cv-04693, 2021 WL 3857786 (N.D. Ill. Aug. 30, 2021)  
Escano v. Symmetry Fin. Grp. of N.C., LLC, No. 2:21-cv-00884-RB-GBW, 2022 WL 2072875 (D.N.M. June 9, 2022)

3. Cite Two or More “First Tier” Factual Allegations (8)

Laccinole v. Rocket Mortg., LLC, 609 F. Supp. 3d 68 (D.R.I. June 30, 2022)  
Niemyzyk v. Pro Custom Solar LLC, No. 2:19-cv-07846-ES-MAH, 2022 WL 884359 (D.N.J. Mar. 25, 2022)  
Mey v. All Access Telecom, Inc., No. 5:19-CV-00237-JPB-JPM, 2021 WL 8892198 (N.D. W. Va. Sept. 7, 2021)  
Callier v. Multiplan, Inc., No. 3:20-cv-00318-FM, 2021 WL 8053527 (W.D. Tex. Aug. 26, 2021)  
Shank v. Givesurance Ins. Servs., Inc., No. 3:19-cv-00136-TMR-PBS, 2022 WL 561596 (S.D. Ohio Feb. 24, 2022)  
Jance v. Homerun Offer LLC, No. 4:20-cv-00482-JGZ, 2021 WL 3270318 (D. Ariz. July 30, 2021)  
Underwood v. IFA Holdings, LLC, No. 1:21-cv-00830-ACA, 2022 WL 2307738 (N.D. Ala. June 27, 2022)

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166. This is a subset of the cases listed *supra* Appendix Section I.B, noted separately here for an element of analysis rather than the outcome, as the cases are subdivided in Appendix Section I.B.

2022/23

“PLEAS” DON’T HANG UP

445

Perrong v. MLA Int’l, Inc., No. 6:20-cv-01606-RBD-EJK, 2021 WL 3036462 (M.D. Fla. July 2, 2021)

## II. DECISIONS ON MOTIONS FOR SUMMARY JUDGMENT OF ATDS CLAIMS

### A. *Summary Judgment Granted for Defendant (20)*

#### Second Circuit

Gentner v. Navient Sols., Inc., No. 1:20-cv-00747-LJV-JJM, 2022 WL 3334269 (W.D.N.Y. Aug. 12, 2022)

#### Third Circuit

Franklin v. Navient, Inc., No. 1:17-cv-1640-SB, 2021 WL 2915033 (D. Del. July 12, 2021)

Panzarella v. Navient Sols., Inc., 37 F.4th 867 (3d Cir. 2022)

#### Fourth Circuit

Guthrie v. PHH Mortg. Corp., No. 7:20-cv-0043-BO, 2022 WL 706923 (E.D.N.C. Mar. 4, 2022)

Timms v. USAA Fed. Sav. Bank, 543 F. Supp. 3d 294 (D.S.C. 2021)

#### Fifth Circuit

Atkinson v. Pro Custom Solar LLC, No. 5:21-cv-00178-OLG, 2022 WL 4071998 (W.D. Tex. Sept. 1, 2022)

#### Sixth Circuit

Barnett v. First Nat’l Bank of Omaha, No. 3:20-cv-337-CHB, 2022 WL 627028 (W.D. Ky. Mar. 3, 2022)

LaGuardia v. Designer Brands Inc., No. 2:20-cv-2311, 2021 WL 4125471 (S.D. Ohio Sept. 9, 2021)

#### Seventh Circuit

Creech v. Navient, No. 2:21-cv-00118-PPS-JEM, 2022 WL 541230 (N.D. Ind. Feb. 23, 2022)

Friend v. Taylor Law, PLLC, No. 4:17-cv-00029-TLS-JPK, 2021 WL 5015096 (N.D. Ind. Oct. 27, 2021)

#### Eighth Circuit

Basham v. Midland Funding, LLC, No. 4:15-cv-00030-CDP, 2022 WL 1125500 (E.D. Mo. Apr. 15, 2022)

Grome v. USAA Sav. Bank, 557 F. Supp. 3d 931 (D. Neb. 2021)

Zean v. SelectQuote Ins. Servs., No. 19-CV-2958, 2022 WL 126308 (D. Minn. Jan. 13, 2022)

Ninth Circuit

Cole, Sierra Pac. Mortg. Co., Inc., No. 18-cv-01692-JCS, 2021 WL 5919845 (N.D. Cal. Dec. 15, 2021)

*In re* Portfolio Recovery Assocs., LLC, No. 3:11-md-02295-JAH-BGS, 2021 WL 5203299 (S.D. Cal. Nov. 9, 2021)

Jackson v. First Nat'l Bank of Omaha, CV 20-1295 DSF, 2022 WL 423440 (C.D. Cal. Jan. 18, 2022)

Pascal v. Concentra, Inc., No. 19-cv-02559-JCS, 2021 WL 5906055 (N.D. Cal. Dec. 14, 2021)

Wilbor v. GG Homes, Inc., No.: 21cv226-LL-BGS, 2022 WL 867024 (S.D. Cal. Mar. 22, 2022)

Eleventh Circuit

Barlow v. NewRez, LLC, No. 8:20-cv-2451-KKM-AEP, 2022 WL 1619592 (M.D. Fla. Mar. 7, 2022)

Franklin v. Ga. Power Co., No. 1:19-cv-3853-MLB, 2022 WL 1682517 (N.D. Ga. Mar. 29, 2022)

1. Decisions Stating that an ATDS Does Not Merely Dial from a List but Must Generate Random or Sequential Phone Numbers ("Footnote 7" Consensus) (12)

Third Circuit

Franklin v. Navient, Inc., No. 1:17-cv-1640-SB, 2021 WL 2915033 (D. Del. July 12, 2021)

Panzarella v. Navient Sols., Inc., 37 F.4th 867 (3d Cir. 2022)

Fourth Circuit

Timms v. USAA Fed. Sav. Bank, 543 F. Supp. 3d 294 (D.S.C. 2021)

Fifth Circuit

Atkinson v. Pro Custom Solar LLC, No. 5:21-cv-00178-OLG, 2022 WL 4071998 (W.D. Tex. Sept. 1, 2022)

Sixth Circuit

Barnett v. First Nat'l Bank of Omaha, No. 3:20-cv-337-CHB, 2022 WL 627028 (W.D. Ky. Mar. 3, 2022)

LaGuardia v. Designer Brands Inc., No. 2:20-cv-2311, 2021 WL 4125471 (S.D. Ohio Sept. 9, 2021)

Eighth Circuit

Grome v. USAA Sav. Bank, 557 F. Supp. 3d 931 (D. Neb. 2021)

2022/23

“PLEAS” DON’T HANG UP

447

Ninth Circuit

Cole, Sierra Pac. Mortg. Co., Inc., No. 18-cv-01692-JCS, 2021 WL 5919845 (N.D. Cal. Dec. 15, 2021)

Jackson v. First Nat’l Bank of Omaha, No. CV 20-1295 DSF, 2022 WL 423440 (C.D. Cal. Jan. 18, 2022)

Pascal v. Concentra, Inc., No. 19-cv-02559-JCS, 2021 WL 5906055 (N.D. Cal. Dec. 14, 2021)

*In re* Portfolio Recovery Assocs., LLC, No. 3:11-md-02295-JAH-BGS, 2021 WL 5203299 (S.D. Cal. Nov. 9, 2021)

Wilbor v. GG Homes, Inc., No. 21cv226-LL-BGS, 2022 WL 867024 (S.D. Cal. Mar. 22, 2022)

B. *ATDS Claims that Survived Summary Judgment (2)*

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

Kuch v. PHH Mortg. Corp., No. 16-CV-00056V(F), 2021 WL 6424638 (W.D.N.Y. Sept. 1, 2021)