Aaron D. Radbil (*pro hac vice*)
Greenwald Davidson Radbil PLLC
106 East Sixth Street, Suite 913
Austin, Texas 78701
(512) 322-3912
(561) 961-5684 (Fax)
aradbil@gdrlawfirm.com

Michael L. Greenwald (*pro hac vice*)
Greenwald Davidson Radbil PLLC
5550 Glades Road, Suite 500
Boca Raton, Florida 33431
(561) 826-5477
(561) 961-5684 (Fax)
mgreenwald@gdrlawfirm.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joanne Knapper, *on behalf of herself and others similarly situated*,	Case No. 2:17-cv-00913-SPL
Plaintiff,	**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
v.	
Cox Communications, Inc.,	
Defendant.	

Introduction

The Telephone Consumer Protection Act ("TCPA") prohibits any person or entity from using an artificial or prerecorded voice, or an automatic telephone dialing system ("ATDS"), to place calls to a cellular telephone number absent express consent. Here, in an attempt to reach someone unknown to Joanne Knapper ("Plaintiff"), Cox Communications, Inc. ("Defendant") placed calls to Plaintiff's cellular telephone number by using both a prerecorded voice and an ATDS.

Significantly, at no point was Plaintiff a customer of Defendant. Rather, Defendant apparently intended to call a previous subscriber to Plaintiff's cellular telephone number—even though Plaintiff maintained her number, continuously, since 2006. And Defendant never obtained express consent from Plaintiff to place calls to her cellular telephone number by using a prerecorded voice or an ATDS. Accordingly, Plaintiff requests that this Court enter summary judgment in her favor.

Argument

I. Defendant violated the TCPA by using a prerecorded voice and an ATDS to place calls to Plaintiff's cellular telephone number absent express consent.

The TCPA reads, in relevant part:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) by using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> * * *
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is

> charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]

47 U.S.C. § 227(b)(1)(A)(iii).

In short, "[t]he TCPA prohibits persons from (1) making 'any call,' (2) 'using any automatic telephone dialing system or an artificial or prerecorded voice,' (3) 'to any telephone number assigned to a . . . cellular telephone service. . . .'" *Grant v. Capital Mgmt. Servs., L.P.*, 449 F. App'x 598, 600 (9th Cir. 2011)

A. Defendant did not have prior express consent from Plaintiff to place calls to her cellular telephone number by using a prerecorded voice or an ATDS.

"Express consent is not an element of a plaintiff's prima facie [TCPA] case but is an affirmative defense for which the defendant bears the burden of proof." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). Express consent is also not available as a protection against wrong or reassigned number calls. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (explaining that only the current subscriber to a cellular telephone number can provide valid consent to receive calls made by an ATDS); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 641 (7th Cir. 2012) (stating that "[c]onsent to call a given number must come from its current subscriber"); *McMillion v. Rash Curtis & Assocs.*, No. 4:16-cv-03396-YGR, 2018 WL 3023449, at *3 (N.D. Cal. Jun. 18, 2018) (rejecting as a ground for reconsideration the defendant's argument that a previous owner of the plaintiff's cellular telephone number provided the defendant express consent to call the number, and also noting that "even if *ACA International* did constitute controlling law, it does not change the Ninth Circuit's finding in *Meyer* that 'prior express consent is consent to call a particular telephone number in *connection with a particular debt* that is given before the call in question is placed.'"); *Jordan v. Nationstar Mortg. LLC*, No. 14-cv-00787-WHO, 2014 WL 5359000, at *11 (N.D. Cal. Oct. 20, 2014) ("The reasoning in *Soppet* is particularly helpful. There, the Seventh Circuit held that the TCPA requires consent from the person who was actually

called, not the person the caller asserts it was attempting to call."); *accord Michael Reid v. I.C. Sys., Inc.*, No. 12-02661-PHX-ROS, 2013 WL 11394251, at *2 (D. Ariz. Sept. 3, 2013) ("Defendant claims it had previously obtained consent from an individual named 'Vitek Kozlowski' to call Plaintiff's number. (Doc. 10-1 at 8, 14). It is not entirely clear why Defendant believes the consent of a third-party is relevant. *See Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640 ([7]th Cir. 2012) (consent must be the consent of the current subscriber, not the consent of some prior holder of the number))."). Put simply, "district courts in this circuit have generally rejected the 'intended recipient' definition proffered by defendant here." *McMillion*, 2018 WL 692105, at *5.

Here, Defendant suggests that in 2005 one of its customers—a third-party not named Knapper and unknown to Plaintiff, *see* Statement of Facts ("SOF"), ¶¶ 25, 28—opened an account with Defendant and provided what would become Plaintiff's cellular telephone number in doing so. *See id*. at ¶ 20. Defendant, however, has not "found any paperwork associated with the provision of [Plaintiff's cellular telephone number] in 2005." *Id*. at ¶ 21. It simply suggests that in 2005 its customer "likely" provided Plaintiff's cellular telephone number "over the phone." *Id*. at 60:13-15. Moreover, Defendant admits that "[w]e don't save paper—no agent would have been writing anything down," that it does not have a "time stamp or something on the field where the phone number was inputted," and that "there's no information there unless you change your data." *Id*. at 60:6-20.

No matter, Plaintiff has never been a customer of Defendant. *See* SOF at ¶¶ 26-27. And Defendant did not intend to reach Plaintiff by way of any of the eleven debt collection calls it placed to her cellular telephone number. *See id*. at ¶ 24. In fact, Defendant's own analysis of Plaintiff's cellular telephone number showed that it was "negatively linked" to the name (i.e., not Plaintiff's name) that Defendant attached to it. *See id*. at ¶¶ 29-30. Simply, at no point did Defendant obtain from Plaintiff express consent to place calls to her cellular telephone number by using a prerecorded voice or an ATDS.

B. Defendant delivered prerecorded voice messages to Plaintiff's cellular telephone number.

From October 2015 through February 2016—during which time Plaintiff was the user of, and subscriber to, her cellular telephone number, *see id*. at ¶ 15—Defendant placed no less than eleven virtual message calls to Plaintiff's cellular telephone number. *See id*. at ¶¶ 16-17. In other words, during the relevant time period, Defendant "made 11 outbound calls to [Plaintiff's cellular telephone number] and left a prerecorded voice message on that number on each of those 11 occasions." *See id*. at ¶¶ 18-19. Because Defendant placed calls to Plaintiff's cellular telephone number by using a prerecorded voice, and without her consent, it violated the TCPA.

C. Defendant placed calls to Plaintiff's cellular telephone number by using an ATDS.

While Plaintiff was the user of, and subscriber to, her cellular telephone number, Defendant placed no less than eleven calls to it by using Defendant's Avaya dialers. *See id*. at ¶¶ 15-16. Importantly, Defendant's Avaya dialers are predictive dialers. *See id*. at ¶¶ 7-9. And "predictive dialers fall squarely within the FCC's definition of an "automatic telephone dialing system." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).[1] This, of course, remains true even after the D.C. Circuit's ruling in *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018):

> First, *ACA International* invalidated only the 2015 FCC Order—the court discusses but does not rule on the validity of the 2003 FCC Order or the 2008 FCC Order. *See ACA International*, 885 F.3d at 703 (finding that the FCC's 2015 ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decision making and noting that it may be permissible for the FCC to adopt either interpretation). Second, even if the D.C. Circuit had vacated the 2003 and

[1] In *Meyer*, the Ninth Circuit found that the very dialers Defendant used to place the calls at issue—Avaya Proactive Contact Dialers—were ATDSs. *See* 707 F.3d at 1043.

> 2008 FCC Orders, *ACA International* has no bearing on preexisting Ninth Circuit precedent. In 2009, the Ninth Circuit held that for a dialing system to be an ATDS it "need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Ci. 2009). In 2012, the court held that "capacity" is not limited to present ability and that "predictive dialers fall squarely within the FCC's definition of 'automatic telephone dialing system.'" *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1043 (9th Cir. 2012).

McMillion, 2018 WL 3023449, at *4; *see also Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV, 2018 WL 2220417, at *4-13 (S.D. Fla. May 14, 2018) (explaining that the FCC's 2003 and 2008 orders, which hold that predictive dialers are ATDSs, remain valid, and bind district courts, even after the D.C. Circuit's ruling in *ACA Int'l), motion to certify appeal denied sub nom.*, No. 16-24077-CIV, 2018 WL 2849768 (S.D. Fla. June 8, 2018); *Swaney v. Regions Bank*, No. 2:13-CV-00544-JHE, 2018 WL 2316452, at *1-2 (N.D. Ala. May 22, 2018) (same); *Maddox v. CBE Group, Inc.*, No. 1:17-CV-1909-SCJ, 2018 WL 2327037, at *4 (N.D. Ga. May 22, 2018) (same).

And the decisions in *Marshall v. CBE Grp., Inc.*, No. 216CV02406GMNNJK, 2018 WL 1567852 (D. Nev. Mar. 30, 2018), and *Herrick v. GoDaddy.com LLC* No. CV-16-00254-PHX-DJH, 2018 WL 2229131, at *7 (D. Ariz. May 14, 2018), do not compel a finding otherwise. First, in *Marshall*, the court "did not squarely address whether the 2003 FCC Order remained binding. Instead, it reasoned that even if it remained binding, the plaintiff would still lose because 'the overwhelming weight of authority' that looked at point-and-click systems *before ACA International* found 'that 'point-and-click' dialing systems, paired with a cloud-based pass-through services, do not constitute an ATDS as a matter of law in light of the clicker agent's human intervention.'" *Reyes*, 2018 WL 2220417, at *12. Here, however, Defendant did not use a "point-and-click" dialing system—a system that requires significant human intervention to make calls, *see Marshall*, 2018 WL 1567852, at *7—to place the calls at issue. Quite contrary, Defendant's Avaya dialers function in an automated manner and involve no "human

intervention at all in terms of having [them] launch calls for accounts in—for residential accounts in collections." *See* SOF at ¶¶ 1-6.

Second, in *Herrick*, a case involving text messages and not telephone calls, the court affirmatively declined to follow the FCC's 2003 and 2008 orders—both of which held that predictive dialers are ATDSs—because "the FCC interpretations . . . were driven by policy considerations and not the plain language of the statute." 2018 WL 2229131, at *7. Stated otherwise, the court chose to ignore the FCC's 2003 and 2008 orders because it believed they were at odds with "the plain language of the statute." *Id*. But a district court cannot refuse to follow an FCC final order merely because it believes the order is not supported by the plain language of a statute. Indeed, in the TCPA context the Eleventh Circuit reversed a district court for doing just that. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (characterizing the district court's refusal to apply the FCC's 2008 interpretation of prior express consent as reversible error, and explaining "that the district court exceeded its jurisdiction by declaring the 2008 FCC Ruling to be inconsistent with the TCPA.").

Furthermore, the statutory interpretation on which the court in *Herrick* based its decision does not withstand reasoned scrutiny. Simply, the premise of the court's decision to ignore the FCC's 2003 and 2008 orders is that "[b]roadening the definition of an ATDS to include any equipment that merely stores or produces telephone numbers in a database would improperly render the limiting phrase 'using a random or sequential number generator' superfluous." *Herrick*, 2018 WL 2229131, at *8. But this is not true; the opposite is.

For instance, the TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). As such, interpreting this language to require that telephone numbers dialed be produced by a random or sequential number generator renders the word "store" superfluous, because the

disjunctive "or" means that an ATDS includes systems that *store* telephone numbers, regardless of whether they *produce* the numbers.

To be sure, the last antecedent rule, under which a limiting clause "should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), also mandates such an interpretation. And so does a review of other portions of the TCPA. For example, the TCPA specifically allows autodialed calls to cellular telephone numbers for which a caller has "prior express consent." 47 U.S.C. § 227(b)(1)(A)(iii). But if only telephone numbers produced randomly or sequentially from thin air give rise to liability under the TCPA—as opposed to stored numbers, which could ostensibly have account records reflecting prior express consent—what need is there for the "prior express consent" language? Put another way, if only randomly or sequentially generated numbers are actionable under the TCPA—numbers for which a caller would not have prior express consent except by pure random chance—the "express consent" language included in the TCPA would have no meaningful purpose.

Notwithstanding, even if predictive dialers were not ATDSs—they are—Defendant's Avaya dialers fall within the definition of an ATDS. Specifically, Defendant's Avaya dialers operate as follows: A "Daily Call List . . . is created and . . . loaded into the dialer each morning," and the Avaya dialers then automatically launch calls to telephone numbers on the Daily Call List, which are stored on the dialers. *See* SOF at ¶ 4. The process of "compiling the Daily Dialer List" is "automated." *Id.* at ¶ 5. And there is no "human intervention at all in terms of having the Avaya Dialers launch calls for accounts in—for residential accounts in collections." *Id.* at ¶ 6.

Significant, then, is that in considering a very similar factual scenario, and without reference to the FCC's orders regarding predictive dialers, the Third Circuit affirmed a district court's finding that the dialer at issue was an ATDS because it lacked the need for human intervention to place calls. *See Daubert v. NRA Grp., LLC*, 861 F.3d 382 (3d Cir.

2017) 861 F.3d 382, 391-93 (3d. Cir. 2017). And in the same spirit, the Northern District of Alabama explained that at bottom the TCPA simply prohibits the use of equipment that automatically dials cellular telephone numbers:

> The TCPA, at least before the wordy analysis of lawyers, courts, and agencies gets to it, simply prohibits "automatic" dialing. There is no need for deeply technical interpretations, such as the telemarketers' "predictive dialer" argument before the FCC, or for deeply hypothetical interpretations, such as plaintiff's argument before this court. If equipment automatically dials numbers, it cannot be used to call cell phones. If it cannot do so, the restriction does not apply.

Hunt v. 21st Mortg. Corp., No. 1:12-cv-02697-LSC, 2013 WL 12343953, at *4 (N.D. Ala. Oct. 28, 2013).

In the end, Defendant's Avaya dialers—which it used to place at least eleven calls to Plaintiff's cellular telephone number—fall within the definition of an ATDS not only because they are predictive dialers, but also (and independently) because they require no human intervention to automatically place calls.[2]

II. Defendant is liable to Plaintiff in the amount of at least $500 for each of twenty-two separate violations of the TCPA.

A TCPA plaintiff may bring "an action to recover for actual monetary loss from [a violation of the TCPA], or to receive $500 in damages for each such violation, whichever

---

[2] To be clear, even if Defendant's Avaya dialers were not ATDSs—they are—Defendant nonetheless violated the TCPA by delivering prerecorded voice messages to Plaintiff's cellular telephone number absent her express consent. *See, e.g.*, *Prater v. Medicredit, Inc.*, 45 F. Supp. 3d 1038, 1042 (E.D. Mo. 2014) ("From the plain text of the statute, each of these violations is independently actionable; plaintiff may recover damages for calls made using any automatic telephone dialing system *or* an artificial or prerecorded voice."); *accord Medina v. Nationstar Mortg. LLC*, No. 16-2036, 2017 WL 971919, at *3 (N.D. Ga. Mar. 13, 2017) ("The Court is not persuaded that any ruling from the D.C. Circuit will necessarily be favorable for Nationstar, and to the exten[t] that the D.C. Circuit issues such ruling, the decision will not be dispositive to Medina's claim. The decision will have no effect on whether Nationstar called Medina using a pre-recorded voice . . . .").

is greater." 47 U.S.C. § 227(b)(3)(B). A defendant is therefore liable for no less than $500 in damages for each of its violations of the TCPA. *See Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) ("§ 227(b)(3)(B) . . . provides for a minimum penalty of [$] 500 for each violation of the TCPA"); *see also Soppet*, 679 F.3d at 639 ("§ 227(b)(3) . . . authorizes an award of actual damages, or $500 per violation, whichever is greater"); *accord Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1105 (11th Cir. 2015) ("In plain terms, the statute allows a person to recover '$500 in damages for each' 'violation of this subsection.' Section 227(b)(1) has no language limiting the recovery to $500 per 'call' or 'fax.'") (internal citations omitted).

Here, Defendant committed at least twenty-two violations of the TCPA, stemming from its eleven calls to Plaintiff's cellular telephone number. In particular, Defendant violated the TCPA eleven times by delivering prerecorded voice messages to Plaintiff's cellular telephone number without express consent. And it also violated the TCPA eleven times by using an ATDS to place calls to Plaintiff's cellular telephone number absent express consent. *See Burns v. Halsted Fin. Services, LLC*, No. 1:15-cv-4287-LMM-JKL, 2016 WL 5417218, at *5 (N.D. Ga. Sept. 14, 2016) ("Although Plaintiff complains that he received two telephone calls from Defendant, he has identified four distinct violations of the TCPA—two for each call. In particular, each call used an automatic telephone dialing system and used an artificial or prerecorded message. At $500 per violation, Plaintiff is entitled to a total award of $2,000 in statutory damages under the TCPA.") (citing *Lary*, 780 F.3d at 1106 ("recognizing that one call can trigger multiple violations of the TCPA")); *accord JWD Auto., Inc. v. DJM Advisory Grp. LLC*, No. 215CV793FTM29MRM, 2017 WL 2875679, at *2 (M.D. Fla. July 6, 2017) ("[A] single junk fax can cause multiple violations."); *Bais Yaakov of Spring Valley v. ACT, Inc.*, 186 F. Supp. 3d 70, 76 (D. Mass. 2016) ("Plaintiff cites to recent cases in which courts have

ruled that multiple statutory damages for multiple violations per fax are recoverable under the TCPA.").[3]

Conclusion

The TCPA prohibits the use of a prerecorded voice or an ATDS to place calls to a cellular telephone number absent prior express consent. Here, lacking express consent, Defendant used both a prerecorded voice and an ATDS to place eleven calls to Plaintiff's cellular telephone number. Plaintiff, therefore, requests that this Court grant summary judgment in her favor, award her no less than $500 for each of Defendant's violations of the TCPA (or no less than $11,000), and reserve the issue of willfulness for the jury.

Dated: June 28, 2018

Respectfully submitted,

/s/ Aaron D. Radbil
Aaron D. Radbil (*pro hac vice*)
Greenwald Davidson Radbil PLLC
106 East Sixth Street, Suite 913
Austin, Texas 78701
(512) 322-3912
(561) 961-5684 (Fax)
aradbil@gdrlawfirm.com

Michael L. Greenwald (*pro hac vice*)
Greenwald Davidson Radbil PLLC
5550 Glades Road, Suite 500
Boca Raton, Florida 33431
(561) 826-5477
(561) 961-5684 (Fax)
mgreenwald@gdrlawfirm.com

Counsel for Plaintiff and the proposed class

[3] The TCPA permits a court to treble the mandatory $500 per-violation award "[i]f the court finds that the defendant willfully or knowingly violated" the TCPA. 47 U.S.C. § 227(b)(3)(C); *see also Soppet*, 679 F.3d at 639 (explaining that the $500 per violation awards are "trebled for willful violations"); *Burns*, 2016 WL 5417218, at *5 (trebling damages award for four TCPA violations stemming from two calls). Plaintiff does not, however, move for summary judgment on treble damages, as whether Plaintiff is entitled to treble damages is an issue of fact for a jury to decide.

CERTIFICATE OF SERVICE

I certify that on June 28, 2018, the foregoing document was filed with the Court using CM/ECF, which will send notification of such to counsel of record.

/s/ Aaron D. Radbil
Aaron D. Radbil