UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-4236(L), 19-4275(Con)

Caption [use short title]

Jiminez v. Credit One Bank, N.A. et al.

Motion for: LEAVE TO FILE BRIEF ON BEHALF OF ACA INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

Set forth below precise, complete statement of relief sought:

Movant and putative amicus ACA International, the Association of Credit and Collection, hereby moves the Court for leave to file its amicus brief in this matter.

MOVING PARTY: ACA International, the Association of Credit and Collection **OPPOSING PARTY:** Alejandro Jiminez

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Dylan O. Drummond **OPPOSING ATTORNEY:** Yitzchak Zelman

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Court- Judge/ Agency appealed from: S.D.N.Y. (Hon. Laura Taylor Swain, Judge Presiding)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Dylan O. Drummond **Date:** 04/30/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

19-4236(L)

19-4275 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEJANDRO JIMINEZ,
Plaintiff – Appellee

v.

CREDIT ONE BANK, N.A., NCO FINANCIAL SYSTEMS, INCORPORATED, AND ALORICA, INC.,
Defendants – Appellants

On appeal from No. 17-cv-2844
United States District Court for the Southern District of New York
Hon. Laura Taylor Swain, Judge Presiding

OPPOSED MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Dylan O. Drummond
Jim Moseley
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April 30, 2020

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IN THE UNITED STATES COURT OF APPEALS
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ALEJANDRO JIMINEZ,
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v.

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OPPOSED MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

TO THE HONORABLE COURT OF APPEALS FOR THE SECOND CIRCUIT:

Pursuant to 2D CIR. L.R. 27.1 and FED. R. APP. P. 27 and 29, movant and putative amicus ACA International, the Association of Credit and Collection ("ACA") hereby moves the Court for leave to file its brief as *amicus curiae* in support of Defendant-Appellant Credit One Bank, N.A. ("Credit One"), as well as Defendant-Appellant Alorica, Inc. and Expert Global Solutions Financial Care, Inc. ("EGS") f/k/a Defendant-

Appellant NCO Financial Systems, Incorporated ("NCO")[1] (collectively, "Alorica") and reversal (the "Motion"), attached hereto at **Exhibit A**.

Pursuant to 2D CIR. R. 27.1(b), ACA hereby states that its counsel has contacted counsel for all the parties to this matter, and counsel for Credit One and Alorica consent to ACA's *amicus curiae* filing. However, counsel for Plaintiff/Appellee Alejandro Jiminez has stated that his client is opposed to ACA's *amicus curiae* filing. ACA is unaware whether Mr. Jiminez intends to file a response to this Motion.

STATEMENT OF MOVANT'S INTEREST, AS WELL AS DESIRABILITY AND RELEVANCE OF MOVANT'S AMICUS BRIEF

Pursuant to FED. R. APP. P. 29(a)(3)(A), ACA presents: (1) the following statement of its interest as movant for leave to file its amicus brief in this matter; and (2) the reasons why this amicus brief is desirable and the matters asserted are relevant to

[1] NCO became EGS in 2015, and EGS was acquired by Alorica, Inc. the following year. *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 328 n.2 (S.D.N.Y. 2019).

the disposition of this case.

ACA is a not-for-profit corporation based in Minneapolis, Minnesota. Founded eighty years ago, ACA is now the largest trade association representing the debt-collection industry, with members located in every state. ACA brings together nearly 3,700 member organizations as well as their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. In the Second alone, ACA members employ more than 6,500 persons. The ACA-member workforce is incredibly diverse, with racial and ethnic minorities accounting for some 40% and women making up 70% of employees. In 2016, third-party debt collectors also donated some $17.7 million in charitable contributions. In addition, debt-collection agencies and their employees directly contributed more than $850 million of federal tax, $390 million of state tax, and $285 million of local tax in 2016 alone.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to large firms employing thousands of workers. These members include the very

smallest of businesses operating within a limited geographic range of a single state, as well as the very largest of multinational corporations operating in every state and outside the United States. About three-quarters of ACA's company members are small businesses with less than $15 million in annual revenue and fewer than twenty-five employees. Nearly half have fewer than nine employees. ACA members are not only small-businesses themselves, but they provide an essential service for their small-business clients as well—which comprise well over half of their clientele.

Through their attempts to recover outstanding accounts, ACA's members act as an extension of every community's businesses. ACA's members represent the family doctor, the local hardware store, and the retailer down the street. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. Each year, their combined effort results in the recovery of billions of dollars that are returned to businesses and reinvested in local communities. Without an effective collection process, these businesses'

economic viability—and, by extension, the local and national economies in general—are threatened. At the very least, absent effective and legal collections remedies, consumers would be forced to pay more for their purchases to compensate those businesses for the uncollected debts of others.

ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA provides its members with essential information, education, and guidance regarding how to comply with governing laws and regulations. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information. ACA also articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA regularly files briefs as an amicus curiae in cases of interest to its membership like this one. ACA and its member organizations enthusiastically support the full and fair enforcement of the Telephone Consumer Protection Act (the "TCPA"). *See* 47 U.S.C. § 227, *et seq*.

ACA's interest in this matter is to make the Court aware of the views and interests of the more than 6,500 persons employed by ACA-member organizations operating within the Second Circuit. ACA's putative amicus brief in this matter is desirable and relevant to the disposition of this matter because of ACA's significant expertise regarding the practical and deleterious impacts the decision below will have on creditors and debt collectors alike.

Specifically, because ACA's amicus brief contains the following arguments relevant to the disposition of the case, the Court should find it desirable to review. ACA supports Credit One and Alorica's request that the Court vacate or otherwise reverse the district court's judgment (ECF No. 148) for the following reasons:

(1) Alorica's dialing system cannot constitute an ATDS device under the TCPA because Alorica's collection calls were not placed to randomly or sequentially-generated numbers;

(2) Despite the D.C. Circuit expressly vacating the FCC's pronouncements in its 2015, 2008, and 2003 Orders that might subject Alorica's dialing system to regulation under the TCPA as

an ATDS, the District Court nevertheless improperly relied on the 2003 Order;

(3) Dialing systems like that used by Alorica, which merely dial telephone numbers acquired from an inputted database instead of as a result of generating random or sequential numbers, cannot constitute an ATDS;

(4) Predictively dialing inputted numbers from a database in random or sequential order is not equivalent to storing or producing numbers using a random or sequential number generator as required by the TCPA; and

(5) Because Alorica's dialing system requires human intervention to manually upload the database of numbers to be dialed each day, it cannot constitute an ATDS.

For all these reasons, ACA respectfully requests that the Court grant it leave to file its amicus brief attached to this Motion at **Exhibit A**.

Respectfully submitted,

/s/ Dylan O. Drummond

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April 30, 2020

Attorneys for Amicus Curiae *ACA International*

PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(b)–(d), ACA hereby certifies that its counsel electronically filed the foregoing document and electronically served it on the counsel of record below on April 30, 2020.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to FED. R. APP. P. 32(g), ACA certifies that this document complies with the type-volume limit prescribed by FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this Motion contains 1,038 words as tabulated by the "Word Count" function of Microsoft Word®.

This document also complies with the typeface and type-style requirements of FED. R. APP. P. 27(d)(1)(E), and 32(a)(5)–(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word® in Matthew Butterick's Century Supra serif font and Concourse sans serif font set in 14 point for text and 12 point for footnotes.

/s/ Dylan O. Drummond
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London R. England

Ex. A

19-4236(L)

19-4275 (Con)

IN THE UNITED STATES COURT OF APPEALS
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ALEJANDRO JIMINEZ,
Plaintiff – Appellee

v.

CREDIT ONE BANK, N.A., NCO FINANCIAL SYSTEMS, INCORPORATED, AND ALORICA, INC.,
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BRIEF ON BEHALF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Dylan O. Drummond
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April 30, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and 29(a)(4)(A), as well as Local Rule 29.1(b), ACA International, the Association of Credit and Collection ("ACA"), presents the following Corporate Disclosure Statement:

(1) ACA has no parent corporation nor does any publicly-held corporation own 10% or more of ACA stock.[1]

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), ACA confirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than ACA, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

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BRIEF ON BEHALF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

TO THE HONORABLE COURT OF APPEALS FOR THE SECOND CIRCUIT:

ACA files this Brief as *amicus curiae* in support of Defendant-Appellant Credit One Bank, N.A. ("Credit One"), as well as Defendant-Appellant Alorica, Inc. and Expert Global Solutions Financial Care, Inc. ("EGS") f/k/a Defendant-

Appellant NCO Financial Systems, Incorporated ("NCO")[2] (collectively, "Alorica").

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

Pursuant to FED. R. APP. P. 29(a)(D), ACA states that it is a not-for-profit corporation based in Minneapolis, Minnesota. Founded eighty years ago, ACA is now the largest trade association representing the debt-collection industry, with members located in every state. ACA brings together nearly 3,700 member organizations as well as their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. In the Second Circuit alone, ACA members employ more than 6,500 persons. The ACA-member workforce is incredibly diverse, with racial and ethnic minorities accounting for some 40% and women making up 70% of employees.

ACA's members include sole proprietorships, partnerships,

[2] NCO became EGS in 2015, and EGS was acquired by Alorica, Inc. the following year. *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 328 n.2 (S.D.N.Y. 2019).

and corporations ranging from small businesses to large firms employing thousands of workers. These members include the very smallest of businesses operating within a limited geographic range of a single state, as well as the very largest of multinational corporations operating in every state. About three-quarters of ACA's company members are small businesses with less than $15 million in annual revenue and fewer than twenty-five employees. Nearly half have fewer than nine employees. ACA members are not only small-businesses themselves, but they provide an essential service for their small-business clients as well—which comprise well over half of their clientele.

ACA regularly files briefs as an amicus curiae in cases of interest to its membership like this one. ACA and its member organizations enthusiastically support the full and fair enforcement of the Telephone Consumer Protection Act (the "TCPA"). *See* 47 U.S.C. § 227, *et seq*. ACA submits this amicus brief to share its significant expertise regarding the practical and deleterious impacts the judgment below (ECF No. 148) will have on creditors and debt collectors alike.

Credit One and EGS are ACA members, and ACA has authorized the filing of this amicus brief.

ACA's counsel has contacted each party to this matter. Credit One and Alorica consent to ACA's filing. However, Mr. Jiminez does not. As a result, ACA filed a motion under FED. R. APP. P. 29(a)(3)(A)–(B) seeking leave to file its amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Not everyone is a telemarketer, not even in America." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020). Yet the district court's decision below treats ACA members Credit One and EGS as if they were. Despite the evidence below showing the telephone-dialing system Alorica used to contact Credit One's customers relied on a telephone-number database supplied by Credit One that had to be manually uploaded each day, the district court found that Alorica's dialing system nevertheless constituted an automatic telephone dialing system ("ATDS") reliant on a random or sequential number generator prohibited by TCPA.

ACA's thousands of members located throughout the U.S.

need uniformity and consistency in how the TCPA is construed and enforced. It is simply not economically feasible for the half of ACA members who have fewer than nine employees to purchase and operate different dialing systems in varying jurisdictions so that they might comply with contrasting constructions of just what constitutes an ATDS in a given circuit.

Accordingly, ACA respectfully requests that the Court clarify that its recent telemarketing decision in *Duran v. La Boom Disco, Inc.*, No. 19-600-cv, 2020 WL 1682773 (2d Cir. Apr. 7, 2020) does not extend to the debt-collection context at issue here. In so doing, this Court will join with the three circuit courts—as well as eight district courts in as many states located in six circuits—that construe the TCPA's ATDS restrictions to not apply to dialing systems like Alorica's, which does not store or produce numbers using a random or sequential number generator. For the reasons explored in detail below, ACA supports Credit One and Alorica's request that the Court vacate or otherwise reverse the judgment below (ECF No. 148).

ARGUMENT

I. Alorica's Dialing System Cannot Constitute an ATDS under the TCPA Because Alorica's Collection Calls Were Not Placed to Randomly or Sequentially-Generated Numbers

The district court below failed to recognize the fundamental distinction between the collection calls made by Alorica to specific debtors at the behest of their creditor bank, Credit One, and telemarketing calls to randomly or sequentially-generated numbers prohibited by the TCPA. Given this crucial distinction, the Court should not extend to debt-collection such an unsupported and overbroad application of the TCPA, which do not utilize random or sequential number generation at all.

A. The TCPA mandates that ATDS must be able to generate random or sequential numbers

Congress enacted the TCPA nearly three decades ago in 1991. Pub. L. No. 102-243, 105 Stat. 2394. One of its chief purposes was to—among other things—prohibit the use of ATDS[3] to call or text any cellular telephone absent the prior consent of

[3] ATDS are sometimes referred to colloquially as "autodialers." *See, e.g.*, *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1305 (11th Cir. 2020).

the recipient. 47 U.S.C. § 227(b)(1); *see Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016) (clarifying that text messages are covered by the TCPA). The TCPA defines an ATDS to include dialing systems that have the capacity[4] to:

> (A) [S]tore or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) [D]ial such numbers.

§ 227(a)(1).

Congress appointed the FCC to administer the TCPA. *See Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1308 (11th Cir. 2020). Although the FCC oversees the enforcement the TCPA, including debt-collection telephone calls, such calls are also subject to regulation by the Federal Trade Commission under the auspices of the Fair Debt Collection Practices Act ("FDCPA"). *See* 15 U.S.C. § 1692 *et seq*. In this way, if an ACA member were to utilize abusive tactics in contacting a debtor, the

[4] Less than two years ago, this Court confirmed that "capacity," as used in the TCPA, "refer[s] to the functions a device is currently able to perform." *King v. Time Warner Cable Inc.*, 894 F.3d 473, 477 (2d Cir. 2018).

FDCPA provides ample protection and remedies to the aggrieved. *See id.*

B. By definition, collection calls are placed to specific persons who owe a debt, not randomly or sequentially selected recipients who do not

When the TCPA was passed, "telemarketers primarily used systems that randomly[-]generated numbers and dialed them, and everyone agrees that such systems meet the statutory definition" of an ATDS. *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020). But as even the FCC acknowledged in 1995, "debt collection calls are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12400, ¶ 19 (1995), *quoted in Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1308 (11th Cir. 2020).

In this way, debt collection is fundamentally different from telemarketing. ACA members attempting to contact singular debtors are not marketing anything at all. Instead, they are

attempting to reach specific persons at numbers those persons previously provided to their creditor. Indeed, the sole business purpose of the debt-collection industry is to reach ***particular debtors***—not ***random recipients***—on behalf of client creditors. For a debt collector, random or sequential calling is a colossal waste of both time and economic resources. It would be both inefficient and foolish for debt collectors to call people at random just to ask whether the person answering the telephone would be willing to pay another person's debt. *See Glasser*, 948 F.3d at 1309 ("[w]hy call random telephone numbers when you could target the consumers who … actually owed a debt?"). Without question, random or sequential calling by debt collectors would only serve to increase the risk of violating other federal laws specifically and unmistakably aimed at protecting consumers and their privacy. In addition, random or sequential calling by debt collectors would be undeniably inefficient, slow down the debt-collection process, and drive up the cost of debt collection—and, thus, the cost of debt itself. *See Duran v. La Boom Disco, Inc.*, No. 19-600-cv, 2020 WL 1682773, at *5 (2d Cir. Apr. 7, 2020) (observing "it

would be highly inefficient" to require debt collectors to "call numbers haphazardly until it luckily found someone who owed it money"). These are some of the many reasons why the debt-collection industry does not utilize random or sequential number generation to reach debtors.

This crucial and fundamental distinction was not addressed at all by the district court below. Nor was it examined by this Court's TCPA decision last month in *Duran*, which examined telemarketing communications—not debt-collection ones. *See id.* at *1–2 (acknowledging in the first paragraph of the opinion that the ill Congress sought to cure by passing the TCPA was telemarketing—not debt-collection).

It is uncontested here that the person who successfully applied for a credit card from Credit One provided her mobile telephone number, which Alorica later repeatedly called. *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 328 (S.D.N.Y. 2019). It is also undisputed that the Alorica telephone system only dialed specific numbers from a list of debtors manually provided each day to Alorica by the dialed debtors'

creditor bank, Credit One. *Id.* There was absolutely no evidence before the district court that Alorica ever dialed randomly- or sequentially-selected telephone numbers. Indeed, there is no evidence below that Alorica's dialing system even possessed the capacity to make random- or sequentially-generated calls. Absent any evidence that Alorica's dialing system utilized a "random or sequential number generator" as proscribed by the TCPA, it cannot constitute an ATDS. *See* § 227(a)(1)(A).

⁂

Consequently, this Court should decline to declare that Alorica's specifically-targeted collection dialing system—which utilizes neither random nor sequential number generation—qualifies nonetheless as an ATDS under the TCPA.

II. Despite the D.C. Circuit Expressly Vacating the FCC's 2015, 2008, and 2003 Orders that Might Subject Alorica's Dialing System Below to Regulation Under the TCPA as an ATDS, the District Court Nevertheless Improperly Relied on the 2003 Order

The Court should join with the ***three*** circuit courts, and ***eight*** district courts in as many states located in ***six*** circuits that have each confirmed that the D.C. Circuit's decision in *ACA Int'l v.*

FCC, 885 F.3d 687 (D.C. Cir. 2018) "wiped the slate clean" by invalidating the FCC's 2015, 2008, and 2003 Orders. In so doing, the Court will correct the district court's refusal to abide by the weight of authority disallowing its reliance on the 2003 Order, as well as any confusion caused by this Court's telemarketing decision last month in *Duran*.

A. Contrary to the TCPA, the FCC determined that dialing systems qualify as ATDS even if they do not generate random or sequential numbers but instead only dial telephone numbers from an inputted database

During the decade after the TCPA was passed, technological advances allowed companies to "switch from using machines that dialed a high volume of randomly or sequentially generated numbers to using" ones "that called a list of pre-determined potential customers." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1308–09 (11th Cir. 2020).

In response, the FCC extended § 227's definition of what constitutes an ATDS in 2003 (the "2003 Order") to include dialing systems—termed "predictive dialers"—that, "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." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091, ¶ 131 (2003); *see Glasser*, 948 F.3d at 1308 (describing how the FCC's 2003 Order "interpreted § 227 to extend to dialing systems that merely dialed numbers 'from a database of numbers'").

That is, despite the TCPA's express requirement that an ATDS must generate "random or sequential numbers," the FCC instead confusingly determined that predictive dialers unable to be "programmed to generate random or sequential phone numbers" nonetheless "still satisfy the statutory definition of an ATDS." *ACA Int'l v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018) (citing 2003 Order, 18 FCC Rcd. at 14091, ¶ 131 n.432); *see* 47 U.S.C. § 227(a)(1)(A). Indeed, the FCC acknowledged that it understood the "principal feature of predictive dialing software" to be "a timing function"—"not number storage or generation" as the TCPA requires. 2003 Order, 18 FCC Rcd. at 14091, ¶ 131. *Contra* 47 U.S.C. § 227(a)(1)(A). Notably, the

FCC incorrectly construed the TCPA's use of the phrase, "random or sequential number generator,"[5] to mean instead dialing numbers inputted from a database in a "random or sequential order"[6].

Five years later in 2008 (the "2008 Order"), ACA challenged whether a predictive dialer can constitute an ATDS under the TPCA because a "predictive dialer meets the definition of [an] autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists" as debt collectors do "to call specific numbers provided by established customers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566, ¶ 12 (2008). However, the FCC upheld its prior holding from the 2003 Order that a predictive dialer qualifies as an ATDS. *Id.*

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5 47 U.S.C. § 227(a)(1)(A).

6 2003 Order, 18 FCC Rcd. at 14091, ¶ 131.

Finally, in 2015 (the "2015 Order"), the FCC attempted to clarify the confusion caused by its 2003 and 2008 Orders. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015); *see Glasser*, 948 F.3d at 1309. But instead of clarifying, the FCC simultaneously advanced two contradictory interpretations of whether a dialing system that does not generate random or sequential numbers nevertheless constitutes an ATDS under the TCPA. *ACA Int'l*, 885 F.3d at 701. In "certain places," the 2015 Order "indicate[d] … that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer," but also allowed "that equipment can meet the statutory definition [of an ATDS] even if it lacks that capacity." *Id.* at 702. The FCC reaffirmed its holding from the 2003 Order that "while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS." *Id.* (citing 2015 Order, 30 FCC Rcd. at 7972–73, ¶¶ 12–14; 2003 Order, 18 FCC Rcd.at 14091, ¶ 131 n.432).

B. As the sole forum for determining the validity of the 2003, 2008 and 2015 Orders, the D.C. Circuit rejected the FCC's conclusion that a dialing system which does not generate random or sequential telephone numbers but instead merely dials telephone numbers from an inputted database nonetheless constitute an ATDS

Under the Hobbs Act, courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of all final orders of the [FCC]." 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a) (making § 2342(1) applicable to FCC regulations promulgated under the TCPA).

In 2016, ACA filed one of eleven Hobbs Act petitions in two circuits seeking review of the 2015 Order. *See Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932 (N.D. Ill. 2018); *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792, 797 n.5 (D. Ariz. 2018). When agency regulations are challenged in more than one court of appeals, the panel on multidistrict litigation may consolidate the petitions and assign them to a single circuit. 28 U.S.C. § 2112. Accordingly, the eleven Hobbs-Act petitions were consolidated into one proceeding before the D.C. Circuit in a case brought by ACA International. *ACA Int'l v. FCC. ACA Int'l v. FCC*,

885 F.3d 687 (D.C. Cir. 2018). As a result, the D.C. Circuit became the "sole forum for addressing ... the validity"[7] of the FCC's rules, making its decision in *ACA International* binding on other jurisdictions—including this one.[8]

The D.C. Circuit began its examination of the 2015 Order by confirming that the order's "reference to 'dialing random or sequential numbers' means ***generating those numbers and then dialing them***." *ACA Int'l*, 885 F.3d at 702 (emphasis added) (citing 2015 Order, 30 FCC Rcd. at 7972–94, ¶¶ 10, 13–15). Puzzled by the FCC's contradictory positions in its 2015 Order, the court asked, "[s]o which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed,

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[7] *See Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 961 (E.D. Mich. 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932 (N.D. Ill. 2018).

[8] *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1987); *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008). *Contra Duran v. La Boom Disco, Inc.*, No. 19-600-cv, 2020 WL 1682773, at *5 (2d Cir. Apr. 7, 2020). Therefore, to the extent the Court's recent telemarketing decision in *Duran* has any bearing on this debt-collection dispute, conflicts between *Duran* and *ACA International* regarding the validity of the 2003 and 2008 Orders must be resolved in accord with the D.C. Circuit's decision.

or can it so qualify even if it lacks that capacity?" *Id.* at 703. The court found the FCC "seems to give both answers." *Id.* The Eleventh Circuit recently put it more bluntly, describing the D.C. Circuit as finding the FCC was "talking out of both sides of its mouth." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020). Because the FCC was not permitted to "espouse both competing interpretations in the same order," *ACA International* held the FCC "fail[ed] to satisfy the requirement of reasoned decisionmaking." *ACA Int'l*, 885 F.3d at 703.

C. The D.C. Circuit vacated the FCC's holdings in its 2015, 2008, and 2003 Orders upon which the district court improperly bases its finding that the Alorica dialing system constitutes an ATDS

The district court incorrectly held below that the D.C. Circuit's invalidation of the FCC's 2015 Order did not necessarily also invalidate similar holdings in the FCC's 2008 and 2003 Orders. *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 332–33 (S.D.N.Y. 2019). In a telemarketing case distinct from this debt-collection dispute, this Court in *Duran* echoed the same error as the district court below. *See Duran v. La Boom Disco,*

Inc., No. 19-600-cv, 2020 WL 1682773, at *5 (2d Cir. Apr. 7, 2020). But this reasoning was expressly rejected by the *ACA International* court. *ACA Int'l v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018).

Therein, the FCC specifically challenged the D.C. Circuit's jurisdiction to review both the 2003 and 2008 Orders because they were not timely appealed. *Id.*; *see Pinkus*, 319 F. Supp. 3d at 936; *Sessions v. Barclays Bank Del.*, 317 F. Supp. 3d 1208, 1212 (N.D. Ga. 2018). In response, the court made clear it did possess jurisdiction to review the 2003 and 2008 orders, succinctly dismissing the FCC's jurisdictional argument by stating, "[w]e disagree." *ACA Int'l*, 885 F.3d at 701; *see Sessions*, 317 F. Supp. 3d at 1212; *see also DeNova v. Ocwen Loan Servicing*, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *2 (M.D. Fla. Sept. 24, 2019). It went on to note that the petitioners in the case "covered their bases by filing petitions for both a declaratory ruling and a rulemaking concerning that issue[—relating to whether a dialing system that does not generate random or sequential numbers nevertheless constitutes an ATDS—]and related ones." *ACA*

Int'l, 885 F.3d at 701; *see Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 960 (E.D. Mich. 2018).

The court also explained that the FCC's "pertinent pronouncements" in its "prior order***s***" were "***not shield[ed]*** … from review" because those orders "left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *ACA Int'l*, 885 F.3d at 701 (emphasis added); *see Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020); *Keyes*, 335 F. Supp. 3d at 960; *Pinkus*, 319 F. Supp. 3d at 936; *DeNova*, 2019 WL 4635552, at *2. The D.C. Circuit even explicitly tied the 2015 Order's "reaffirm[ation of] ***that conclusion***"—referencing the 2015 Order's confirmation of the 2003 Order's holding that some dialing systems would "still satisfy the statutory definition of an ATDS" even though they "cannot be programmed to generate random or sequential phone numbers"—in finding the FCC had "fail[ed] to satisfy the requirements of reasoned decisionmaking." *ACA Int'l*, 885 F.3d at 702–03 (emphasis added).

To this end, the "FCC's 2015 Order was based on the reasoning of its earlier decisions, which had 'already twice addressed the issue'" in the 2003 and 2008 Orders—"essentially ratif[ying]" them. *Adams v. Safe Home Sec. Inc.*, No. 3:18-cv-03098-M, 2019 WL 3428776, at *2 (N.D. Tex. 2019) (quoting 2015 Order, 30 FCC Rcd. at 7973–74, ¶¶ 10–15). Indeed, the "infirmity in the FCC's reasoning … is equally present in the FCC's two earlier 'pronouncements.'" *Pinkus*, 319 F. Supp. 3d at 936 (quoting *ACA Int'l*, 885 F.3d at 701). Therefore, "the D.C. Circuit necessarily determined" that the 2015 Order "was inextricably intertwined" with the 2003 and 2008 Orders. *Id.* Removing all doubt, the *ACA International* court expressly "set aside" the FCC's "treatment of those matters"—referring to the holdings of the 2015, 2008, and 2003 Orders that a dialing system which does not generate random or sequential numbers qualifies nonetheless as an ATDS under the TCPA. *ACA Int'l*, 885 F.3d at 703; *see Glasser*, 948 F.3d at 1310.

For these reasons, the three circuit courts to examine this issue in depth uniformly hold that the D.C. Circuit's decision in

ACA International essentially "wiped the slate clean" by invalidating not only the FCC's 2015 Order, but its 2008 and 2003 Orders as well. *Gadelhak*, 950 F.3d at 463 (7th Cir.) ("*ACA International* did not leave prior FCC Orders intact"); *Glasser*, 948 F.3d at 1309–10 (11th Cir.); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018) ("the FCC's prior orders on [the interpretation of an ATDS] are no longer binding on us"). In addition, some eight district courts in as many states located within six circuits have come to the same conclusion. *See, e.g.*, *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 621 (E.D. Iowa 2019) (8th Cir.); *Keyes*, 335 F. Supp. 3d at 960 (E.D. Mich.—6th Cir.); *Pinkus*, 319 F. Supp. 3d at 935 (N.D. Ill.—7th Cir.); *Sessions*, 317 F. Supp. 3d at 1212 (N.D. Ga.—11th Cir.); *Herrick*, 312 F. Supp. 3d at 797 n.5 (D. Ariz.—9th Cir.); *DeNova*, 2019 WL 4635552, at *2 (M.D. Fla.—11th Cir.);[9] *Adams*, 2019 WL 3428776, at *2 (N.D. Tex.—5th Cir.); *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-

[9] *See also Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1354 (S.D. Fla. 2018).

2406-GMN-NJK, 2018 WL 1567852, at *10–12 (D. Nev. Mar. 30, 2018) (9th Cir.).

But the district court's opinion below, handed down before either the Seventh Circuit's decision in *Gadelhak* or the Eleventh Circuit's decision in *Glasser*, goes directly against the weight of authority on this issue by recognizing instead only *ACA International*'s invalidation of the FCC's 2015 Order. *Jiminez*, 377 F. Supp. 3d at 333. *Contra Gadelhak*, 950 F.3d at 463; *Glasser*, 948 F.3d at 1309–10; *Marks*, 904 F.3d at 1049; *DeNova*, 2019 WL 4635552, at *2 (citing *Thompson-Harbach*, 359 F. Supp. 3d at 623; *Sessions*, 317 F. Supp. 3d at 1212; *Herrick*, 312 F. Supp. 3d at 799; *Marshall*, 2018 WL 1567852, at *5). The district court's decision to deem Alorica's dialing system an ATDS hinges on a definition of predictive dialer found in the FCC's 2003 Order and parroted in the 2008 and 2015 Orders—each of which *ACA International* vacated. *Jiminez*, 377 F. Supp. 3d at 334 (citing 2003 Order, 18 FCC Rcd. at 14022, ¶ 8 n.31, *cited in* 2008 Order, 23 FCC Rcd at 566–67, ¶¶ 14; 2015 Order, 30 FCC Rcd. at 7972–73, ¶¶ 12–14); *see ACA Int'l*, 885 F.3d

at 701–03. Absent the 2003 Order, *Jiminez* provides no other jurisprudential foothold from which to support its finding that Alorica's dialing system constituted a predictive dialer, and therefore an ATDS. *See Jiminez*, 377 F. Supp. 3d at 334.

Although this Court's telemarketing decision last month at least nominally appeared to hold that the FCC's 2003 and 2008 Orders survived *ACA International*, its pronouncement to that effect cannot bind the determination of this dispute because the *Duran* panel itself acknowledged that it decided the case under the text of the TCPA—not the FCC's 2003 and 2008 Orders. *Duran*, 2020 WL 1682773, at *5 n.21 ("[w]e need not decide what degree of deference, if any, we owe to FCC Orders interpreting the TCPA"); *see, e.g.*, *Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011) (per curiam) (holding versus dictum turns on "whether resolution of the question is necessary for the decision of the case").

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Considering three circuit and eight district courts have each held that *ACA International* vacated the FCC's 2003 and

2008 Orders, this Court should reject the district court's improper reliance on the 2003 Order.

III. Dialing Systems Like that Used by Alorica, Which Merely Dial Telephone Numbers Acquired from a Manually-Inputted Database Instead of From Generating Random or Sequential Numbers, Cannot Constitute an ATDS

In two exhaustively-reasoned recent decisions from the Seventh and Eleventh Circuits, both courts have held that systems which dial numbers from an inputted database instead of either storing or producing numbers using a random or sequential number generator do not constitute an ATDS under the TCPA. *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460, 463–64 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1304–07 (11th Cir. 2020). These decisions are in line with an earlier opinion from the Third Circuit similarly finding that dialing systems governed by the TCPA must actually "generat[e] random or sequential telephone numbers." *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018). Because the system used by Alorica below relied exclusively on the manual daily upload of a list of debtors' telephone numbers

and did not use a random or sequential number generator, ACA agrees with Credit One and Alorica that the Court should vacate or otherwise reverse the judgment below (ECF No. 148).

The TCPA defines an ATDS to include "equipment which has the capacity[10]… to "***store or produce*** telephone numbers to be called, using a ***random or sequential*** number generator." 47 U.S.C. § 227(a)(1)(A) (emphasis added). Both the Seventh and Eleventh Circuits have analyzed the grammatical structure of this provision in great detail under the series-qualifier canon of construction—concluding that the phrase, "random or sequential number generator," must modify the preceding two conjoined verbs, "store or produce," which share the direct object, "telephone numbers to be called." *Gadelhak*, 950 F.3d at 464 (citing HON. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW:

[10] Although not directly at issue in the district court below, the D.C. Circuit also found "untenable" and unreasonable under *Chevron* the "eye-popping sweep" of the FCC's "capacious" construction of the term, "capacity," to potentially include the "most ubiquitous type of phone equipment known" and "most commonplace phone device used every day by the overwhelming majority of Americans"—the smartphone. *ACA Int'l v. FCC*, 885 F.3d 687, 697–99 (D.C. Cir. 2018); *see Glasser*, 948 F.3d at 1309 (incredulously noting that, under the FCC's sweeping construction of "capacity," "even a rotary telephone … now counted under the [TCPA]").

THE INTERPRETATION OF LEGAL TEXTS 150 (2012) ("READING LAW")); *Glasser*, 948 F.3d at 1306–07 (citing READING LAW, at 148, 150). The Seventh Circuit reasoned that, because Congress placed the comma in § 227(a)(1)(A) before the phrase, "using a random or sequential number generator," it could only have been meant to modify the entire preceding clause, "store or produce telephone numbers to be called." *Gadelhak*, 950 F.3d at 464. Therefore, a dialing system "must be capable of performing at least one of those functions[—that is, storing or producing—]using a random or sequential number generator to qualify as an [ATDS]." *Gadelhak*, 950 F.3d at 463. Put another way, dialing systems that "neither store[] nor produce[] numbers using a random or sequential number generator" are "not an [ATDS] as defined by the [TCPA]." *Id.* at 460.

The Third Circuit in *Dominguez v. Yahoo, Inc.* also followed this approach, holding that dialing systems subject to the TCPA must "generat[e] random or sequential telephone numbers"—not merely store them. *Yahoo*, 894 F.3d at 121.

Before the Court issued its opinion in *Duran* a few weeks ago, this Circuit also followed the grammatical construction the Seventh and Eleventh Circuits employed to analyze the TCPA. *Compare Duran v. La Boom Disco, Inc.*, No. 19-600-cv, 2020 WL 1682773, at *4–5 (2d Cir. Apr. 7, 2020), *with Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013) ("[w]hen a comma is included …, the modifier is generally understood to apply to the entire series"); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999) ("[w]hen a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents").

But, in a decision that preceded both *Gadelhak* and *Glasser*, the Ninth Circuit in *Marks v. Crunch San Diego, LLC* found that § 227(a)(1)(A)'s phrase, "using a random or sequential number generator," somehow modified only one of the preceding verb pair—"produce" but not "store." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018). The Seventh Circuit rejected this precise approach in *Gadelhak*, finding that, "because 'produce' is not set off from 'store' in the text … either with the

infinitive "to" or with a comma," construing the TCPA in such a fashion would constitute a "significant judicial rewrite," thereby "contort[ing] the statutory text almost beyond recognition." *Gadelhak*, 950 F.3d at 466.

Yet—at least confined to the telemarketing context—that is precisely what this Court purported to do last month in *Duran*. *Duran*, 2020 WL 1682773, at *4–5. Therein, the Court elected to follow *Marks*'s minority approach of construing the phrase, "using a random or sequential number generator," to modify only one of the statute's unbroken verb pair—"produce" but not "store."[11] *Id.* (citing *Marks*, 904 F.3d at 1052). Neither *Duran* nor *Marks* identify any judicial canon or grammatical rule

[11] Notably, *Duran* justifies aligning with *Marks*'s minority approach because doing so reduces the surplusage between "store" and "produce" created by the majority's proffered construction. *Duran*, 2020 WL 1682773, at *4. The Seventh Circuit resolved this concern by explaining that not all redundancy is a "deal-breaker"—at times "'drafters ***do*** repeat themselves and ***do*** include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.'" *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 465 (7th Cir. 2020) (quoting READING LAW, at 176–77). The Supreme Court agrees. *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 385 (2013) ("[t]he canon against surplusage is not an absolute rule"); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[r]edundancies across statutes are not unusual events in drafting").

permitting the construction each apply to the TCPA. Under this approach, the *Duran* Court allowed that a dialing system can constitute an ATDS merely "if it can 'store' numbers, even if those numbers are generated elsewhere, including by a non-random- or nonsequential-number generator—such as a person." *Duran*, 2020 WL 1682773, at *5–6. *Duran*'s construction of the TCPA as it applies to telemarketers "read[s the] key clause ('using a random or sequential number generator') out of the statute." *Glasser*, 948 F.3d at 1307; *see* 47 U.S.C. § 227(a)(1)(A). *Contra Duran*, 2020 WL 1682773, at *5–6.

Here, there is no evidence below that the Alorica dialing system either stored or produced numbers using a random or sequential number generator. Nor is there evidence below that Alorica's dialing system was capable of making random- or sequentially-generated calls. Instead, it is undisputed that the Alorica dialing system only dialed numbers from a list "provided by Credit One" that had to be manually "uploaded … into the system each morning." *Jiminez*, 377 F. Supp. 3d at 328. Consequently, the Alorica dialing system had no numbers to

automatically dial unless it was manually fed them daily from a list provided by Credit One. *See id.* It had no capability of generating—either randomly or sequentially—its own numbers to dial. This is critical because "numbers that are 'randomly or sequentially generated' differ from numbers that 'come from a calling list.'" *ACA Int'l v. FCC*, 885 F.3d 687, 702 (D.C. Cir. 2018) (quoting *In re Implementation of the Middle Class Tax Relief and Job Creation Act of 2012*, 27 FCC Rcd. 13615, 13629 ¶ 29 (2012), *quoted in* 2015 Order, 30 FCC Rcd. at 8077 (Pai, Comm'r, dissenting).

In this way, the Alorica dialing system is functionally identical to that the *Gadelhak* court found did not constitute an ATDS—it exclusively dials numbers acquired from a customer database but "neither stores nor produces numbers using a random or sequential number generator." *Gadelhak*, 950 F.3d at 460.

Because the Alorica dialing system below did not use "randomly or sequentially[-]generated numbers"[12] or "store[] or produce[] numbers using a random or sequential number generator,"[13] it cannot constitute an ATDS under the TCPA. *See* § 227(a)(1)(A).

IV. Predictively Dialing Inputted Numbers from a Database in Random or Sequential Order is Not Equivalent to Storing or Producing Numbers Using a Random or Sequential Number Generator as Required by the TCPA

Yet another reason why the D.C. Circuit in *ACA International* overturned the FCC's 2003, 2008, and 2015 Orders was because they administratively created out of whole cloth an unworkable and improper rewrite of the TCPA. This Court should follow suit and decline to apply to the debt-collection context a discredited doctrine its sister circuits have already rejected.

In its 2003 Order, and later reaffirmed in its 2008 and 2015 Orders, the FCC defined predictive dialers to mean "an automated dialing system that uses a complex set of algorithms to

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12 *Glasser*, 948 F.3d at 1304–05.

13 *Gadelhak*, 950 F.3d at 460.

automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call,"[14] or that otherwise "assists telemarketers in predicting when a sales agent will be available to take calls."[15] *See* 2015 Order, 30 FCC Rcd. at 7973, ¶ 13; 2008 Order, 23 FCC Rcd at 566, ¶ 12.

The district court below relied on this definition of "predictive dialer" found in the vacated 2003 Order and held that, because the Alorica dialing system possessed the ability to dial and route calls to ensure that customer service representatives were "fully occupied at all times," it constituted an ATDS. *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 334 (S.D.N.Y. 2019). This holding reveals one of the central flaws in the vacated 2003 Order—it incorrectly construed the TCPA's use of the phrase, "random or sequential number ***generator***,"[16] to mean instead dialing numbers inputted from a database in a

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[14] 2003 Order, 18 FCC Rcd. at 14022, ¶ 8 n.31.

[15] *Id.* at 14091, ¶ 131.

[16] 47 U.S.C. § 227(a)(1)(A) (emphasis added).

"random or sequential ***order***"[17]. That is—contrary to the plain language of the TCPA—the 2003 Order determined that a dialing system which does not randomly or sequentially generate numbers to be called but instead only automatically dials numbers inputted from an outside database nevertheless constitutes an ATDS merely because it dials the uploaded numbers in a random or sequential order. *See* 2003 Order, 18 FCC Rcd. at 14091, ¶ 131. *Contra* § 227(a)(1)(A). Indeed, the FCC even acknowledged that it viewed the "principal feature of predictive dialing software" to be "a timing function"—"not number storage or generation" as the TCPA requires. 2003 Order, 18 FCC Rcd. at 14091, ¶ 131. *Contra* 47 U.S.C. § 227(a)(1)(A) ("to store or produce telephone numbers to be called, using a random or sequential number generator").

In overturning this holding in the 2015, 2008, and 2003 Orders, D.C. Circuit specifically rejected the FCC's strained interpretation of § 227(a)(1)(A), reasoning that "'dialing random

[17] 2003 Order, 18 FCC Rcd. at 14091, ¶ 131 (emphasis added).

or sequential numbers' cannot simply mean dialing from a set list of numbers in random or other sequential order." *ACA Int'l v. FCC*, 885 F.3d 687, 702 (D.C. Cir. 2018) (quoting 2015 Order, 30 FCC Rcd. at 7972 ¶ 10). Instead, the court explained, it can only mean "the ability to generate and then dial 'random or sequential numbers.'" *Id.* (quoting 2015 Order, 30 FCC Rcd. at 7972 ¶ 10). Accordingly, the mere fact that the Alorica dialing system below—or any system for that matter—is able to adjust the flow of outbound calls to match the number of available operators is completely irrelevant to whether—as the TCPA expressly requires—telephone numbers were "store[d] or produce[d] … using a random or sequential number generator." *See* § 227(a)(1)(A).

The Court should decline to apply to debt-collection dialing the reasoning of the district court below, which improperly relies not on random or sequential number generation as the TCPA envisioned but instead exclusively on the 2003 Order's vacated holding regarding mere timing of call routing.

V. Because Alorica's Dialing System Requires Human Intervention to Manually Upload the Database of Numbers to be Dialed Each Day, it Cannot Constitute an ATDS

Because the Alorica dialing system required daily manual human intervention in order to dial any number, the Court should reject the district court's holding to the contrary that mere dialing is sufficient to warrant regulation under the TCPA as an ATDS.

As the Eleventh Circuit recently confirmed, telephone-dialing systems that require "human intervention" are—by definition—not "automatic." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1304–05, 1312 (11th Cir. 2020). Therefore, such systems can't meet the "automatic" requirement to qualify as an ***A***TDS. *See id.*; *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (finding the TCPA did not govern a dialing system that "sent messages only to numbers that had been individually and manually inputted into its system by a user").

District courts too have found that a system's need to be manually fed telephone numbers from an external database before such numbers can be dialed makes such systems too reliant on human agency to be considered "automatic" under the TCPA. *See*,

e.g., *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792, 797 n.5 (D. Ariz. 2018) ("GoDaddy provided 3Seventy with a list of customer phone numbers via its FTP site, which 3Seventy then uploaded to the Platform"); *Luna v. Shac, LLC*, 122 F. Supp. 3d 936, 937, 940 (N.D. Cal. 2015) ("an employee … would input telephone numbers into CallFire's web-based platform"); *Glauser v. GroupMe, Inc.*, No. C 11–2584 PJH, 2015 WL 475111, at *6 (N.D. Cal. Feb. 4, 2015) ("GroupMe obtained those numbers through the actions of the group's creator"); *McKenna v. WhisperText*, No. 5:14–cv–00424–PSG, 2015 WL 428728, at *3 (N.D. Cal. Jan. 20, 2015) ("the Whisper App can send SMS invitations only … to recipients selected by the user").

Although it does not bear directly on debt collection like that at issue here, nor does it involve a dispute as to whether the dialing system was predictive, the Court's recent telemarketing decision in *Duran* ranges far afield from the majority of TCPA decisions examining the limits of what can be considered to be "automatic." *Duran v. La Boom Disco, Inc.*, No. 19-600-cv, 2020 WL 1682773, at *6–8 (2d Cir. Apr. 7, 2020) (the dialing

systems "used … here are not predictive dialers, a fact that the [d]istrict [c]ourt readily acknowledges"). Indeed, the *Duran* Court is alone in finding that a dialing system that required a "human to upload the message to be sent, to determine the time at which the message gets sent, and to manually initiate the sending" was nevertheless sufficiently automatic to constitute an ATDS. *Id.* at 6.

Here, it is undisputed that Alorica's dialing system required "an Alorica manager [to] upload[] a list of telephone numbers provided by Credit One into the system each morning." *Jiminez v. Credit One Bank, NA*, 377 F. Supp. 3d 324, 328 (S.D.N.Y. 2019). As a result, the system had no capability of dialing a single number until Credit One's database of debtors' telephone numbers was manually uploaded by an Alorica manager each day. *See id.* This dependence on human agency is similar to that found wanting under the TCPA by *Glasser*, where that "system require[d] a human' involvement before it places any calls." *Glasser*, 948 F.3d at 1312.

Particularly in light of *ACA International*'s binding determination that "'dial[ing] random or sequential numbers'" must mean "the ability to generate and then dial 'random or sequential numbers,'" the Alorica dialing system's exclusive reliance on manual human intervention to upload the numbers to be dialed disqualifies it from constituting an ATDS.

CONCLUSION

For the foregoing reasons, ACA supports Credit One and Alorica's request that the Court vacate or otherwise reverse the judgment below (ECF No. 148).

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(b)–(d), ACA hereby certifies that its counsel electronically filed the foregoing document and electronically served it on the counsel of record below on April 30, 2020.

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