IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

DENISE BAKER, for herself and on behalf of all similarly situated individuals, Plaintiff, v. NAVIENT SOLUTIONS, LLC, Defendant.	No. 1:17-cv-1160 (LMB/JFA)

DEFENDANT NAVIENT SOLUTIONS, LLC'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

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I. INTRODUCTION

In her Class Action Complaint (the "Complaint"), named plaintiff Denise Baker ("Baker") asserts claims against defendant Navient Solutions, LLC ("NSL") for herself and two proposed classes based on alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). The TCPA prohibits the making of "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system [(an "ATDS")] or an artificial or prerecorded voice" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A)(iii). Under the TCPA, a plaintiff may recover actual damages or (if greater) statutory damages in the amount of $500 for negligent violations or up to $1,500 for willful or knowing violations on a per-call basis. Importantly, the fundamental objective of the TCPA is the protection of privacy rights. Indeed, the TCPA was enacted in 1991 based on Congressional findings that the "use of the telephone to market goods and services to the home and other businesses" had become "pervasive due to the increased use of cost-effective telemarketing techniques." 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394. "Many consumers," Congress observed, were "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Id. § 2(6)-(7). Thus, Congress enacted the TCPA to address consumers' concerns with unwanted autodialed calls.

The purpose and intent of the TCPA are notable here because the calls made by NSL to Baker in no way resemble the pervasive, invasive and automated calls that were meant to be restricted. Instead, Baker purports to challenge four telephone calls that NSL made to her cell phone, using live customer service agents and a manual dialing system, over a nearly nine-month period. As detailed below, NSL is a servicer of student loans, including a private student loan taken out by Baker's brother, DeShun Beard ("Beard"). Beard provided Baker's cell phone number to NSL when he listed her as a credit reference on his student loan application. After Beard's loan became delinquent, NSL made the four calls to Baker in attempts to locate Beard and, thus, bring the loan current. These occasional calls -- launched and handled by live

customer service agents -- simply do not square with the concerns underlying the TCPA (and, likewise, do not justify the pursuit of class-action litigation). But, more importantly for purposes of this Motion, Baker's claims also fail entirely based on the undisputed facts and applicable law.

As an initial matter, contemporaneously with this Motion, NSL seeks leave to deposit $15,000 with the Clerk of Court under Federal Rule of Civil Procedure 67. See Dkt. #39 (the "Rule 67 Motion"). This amount is more than enough to fully satisfy Baker's individual claim for statutory damages, which could not total more than $6,000. After depositing this amount with the Clerk, NSL will consent to a judgment in Baker's favor, along with an injunction barring NSL from calling her. In so doing, NSL will fully satisfy Baker's claim, and will have followed the procedure contemplated by the United States Supreme Court in Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016), for addressing proposed class action litigation. In fact, once Baker's claim is satisfied, pursuant to the reasoning of the majority of Justices in Campbell-Ewald and following decisions, the Court should dismiss the class claims without prejudice, and this action will be concluded.

Alternatively, the Court should grant summary judgment in favor of NSL because Baker cannot make a sufficient showing to establish an essential element of her TCPA claim -- i.e., the use of an ATDS. Under the TCPA, an ATDS is defined as "equipment which has the capacity -- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). On March 16, 2018, the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") issued its long-awaited decision in ACA International v. Federal Communications Commission, 885 F.3d 687 (D.C. Cir. 2018). The D.C. Circuit rejected a vague and grossly overbroad definition of "capacity" that had been formulated by the Federal Communications Commission (the "FCC"). As explained below, ACA International now governs analysis of the issue, and Baker cannot succeed in demonstrating NSL's use of an ATDS here. Moreover, because Baker did not retain an expert to examine the technology used to call her or to opine on the system at all, she cannot offer "sufficient proof in the form of admissible evidence" that the technology meets the

definition of an ATDS. Further, and importantly, the undisputed facts demonstrate that the technology NSL used to call Baker requires direct human intervention to initiate and handle each call, which also defeats any contention of using an ATDS.

Nevertheless, if Baker's claims were allowed to proceed, the Court should find that any claims related to federally owned or guaranteed loans -- which are encompassed within Baker's proposed class definitions -- fail for two reasons. First, in making calls on federal loans, NSL acts pursuant to instructions from the United States Department of Education ("ED") -- in the form of regulations -- and, thus, acts as ED's agent. As a matter of law, the TCPA does not apply to calls made by agents of the federal government. Second, through the Bipartisan Budget Act of 2015 (the "Budget Act"), effective as of November 2, 2015, Congress amended the TCPA to exempt calls made for the collection of federally guaranteed or owned loans from the prior express consent requirement. Thus, calls made by NSL after that time on such loans are not actionable.

Finally, the Court should find that NSL cannot possibly be liable for "willfully or knowingly" violating the TCPA. Quite simply, Baker cannot establish that NSL knew it was performing "conduct that violates" the TCPA. To the contrary, NSL made the calls in conformance with law and, following ACA International, the FCC's definition of "capacity" is vacated. Given the lack of a clear legal standard to be violated, no trebling could apply here.

II. LISTING OF UNDISPUTED FACTS

1. Baker filed the Complaint on October 16, 2017, alleging a single count, on behalf of herself and a putative class and subclass of individuals, against NSL for violation of the TCPA. Compl. (Dkt. #1) ¶¶ 88-99.

2. Baker prays for relief in the form of "statutory damages as provided for under 47 U.S.C. § 227(b)(3), trebled as may be appropriate" and "a permanent injunction restraining [NSL] from making or having made on its behalf any additional . . . calls to cellular phones using

an automatic telephone dialing system without first obtaining the prior express consent of the called party."[1] Id. at 22, ¶¶ b.-c.

3. Baker's brother, Beard, is the borrower of a private student loan serviced by NSL. Joint Stip. of Uncontested Facts (Dkt. #31) ("Stip.") ¶ 4; Decl. of Patricia Peterson in Supp. of Mot. for Summ. J. ¶ 3.

4. Beard provided Baker's cellular telephone number (ending in -0503) to NSL on his student loan application when he listed her as a credit reference. Stip. ¶ 4; see also Compl. ¶ 57.

5. NSL made four calls to Baker, on November 7, 2016, February 23, 2017, June 15, 2017 and July 17, 2017, respectively, in connection with servicing Beard's student loan. See Stip. ¶¶ 3-4.

6. Baker alleges that these four calls were made in violation of the TCPA and seeks statutory damages only for each of the four calls. See Decl. of Lisa M. Simonetti ("Simonetti Decl.") at ¶ 2, Ex. A, p. 4. She does not seek actual damages. See id.

7. None of the four calls to Baker involved the use of an artificial or prerecorded voice. Stip. ¶ 13.

8. NSL made the four calls to Baker using "Dial Now" technology. Decl. of Joshua Dries ("Dries Decl.") in Supp. of Mot. for Summ J. ¶ 2.

9. Calls placed using Dial Now technology require human intervention for the initiation and placement of each call -- i.e., live customer service agents launch and handle the calls. Dries Decl. ¶ 3.

10. When placing a call using Dial Now technology, a customer service agent not only physically initiates each call, but he or she also monitors the call attempt as it progresses through the telephony system to the public switched telephone network, as the target telephone rings and as a live called party or voice mail system answers the call. Dries Decl. ¶¶ 4-5. Thus, this process necessarily involves a one-to-one relationship between a live human being (i.e., the

[1] Baker also requests pre-judgment interest and costs of suit. Compl. at 22, ¶¶ d.-f.

agent) and a call attempt such that the number of initiated calls pending can never exceed the number of customer service agents participating in the manual call campaign -- i.e., for each initiated call pending, a customer service agent is on the line. Id.

11. NSL's Dial Now technology does not have the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, or to dial such numbers. Dries Decl. ¶ 6.

12. NSL's Dial Now technology does not use any predictive or other kind of algorithm to engage in predictive dialing of any kind. Dries Decl. ¶ 7.

13. Baker has neither retained a telephony expert nor physically inspected the Dial Now technology in question. Simonetti Decl. ¶ 3.

14. NSL services private loans and also federally owned or guaranteed loans, pursuant to a servicing agreement with ED and federal regulations. Peterson Decl. ¶ 2.

15. The parties agree that the proposed classes in this action consist of references on student loans serviced by NSL. Simonetti Decl. ¶ 4.

III. ARGUMENT

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if the non-movant "present[s] evidence from which a [trier of fact] might return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986); see also Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 568 (4th Cir. 2015). "A fact is material if it might affect the outcome of the suit under the governing law." Id. (quotation marks omitted). However, mere "speculation" by the non-moving party does not create a genuine issue of material fact. Cox v. Cty. of Prince William, 249 F.3d 295, 299 (4th Cir. 2001). Nor do conclusory allegations, the building of one inference upon another or the existence of a scintilla of evidence. Dash v. Mayweather, 731 F.3d 303, 311 (4th Cir. 2013).

On issues where the movant bears the burden of proof at trial, it discharges its initial burden by offering evidence that, if undisputed, would entitle it to judgment. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 614 (4th Cir. 1999). But, on issues where the nonmoving party bears the burden of proof, the movant can meet its burden by presenting evidence to negate an essential element of the nonmoving party's case, or by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Pleasurecraft Marine Engine Co. v. Thermo Power Corp., 272 F.3d 654, 658 (4th Cir. 2001). Once the movant makes its showing, "[t]he burden is on the nonmoving party to show that there is a genuine issue of material fact for trial . . . by offering 'sufficient proof in the form of admissible evidence . . . .'" Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 216 (4th Cir. 2016) (quoting Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993)).

Here, as explained below, NSL meets the standard for summary judgment on Baker's claims for multiple reasons. Accordingly, the Court should grant the Motion in its entirety.

A. The Court Should Permit NSL's Tender Of Complete Relief To Baker And Enter Judgment In Her Favor.

It is fundamental that Article III of the Constitution limits federal courts to deciding "cases" and "controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Thus, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed." Genesis Healthcare v. Symczyk, 569 U.S. 66, 72 (2013). These standards do not differ in a proposed class action. A named plaintiff must have standing to represent a class throughout the proceedings. See Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 343 (4th Cir. 2017) ("Without a sufficient allegation of harm to the named plaintiff in particular, [he] cannot meet [his] burden of establishing standing.") (quoting Beck v. McDonald, 848 F.3d 262, 269-70 (4th Cir. 2017)) (quoting Doe v. Obama, 631 F.3d 157, 160 (4th Cir. 2011)); see also Wooden v. Board of Regents of University System of Georgia, 247 F.3d 1262, 1287 (11th Cir. 2001) ("[T]here cannot be adequate typicality

between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class.").

Here, through the Rule 67 Motion, NSL seeks to satisfy Baker's own claims by tendering more than she could recover -- $15,000 -- and by asking the Court to enter a judgment in Baker's favor, along with an injunction barring further calls to her.[2] See Listing of Undisputed Facts ("LUF") ¶¶ 2, 5. As noted above, in so doing, NSL will have perfected the hypothetical contemplated by the Supreme Court in Campbell-Ewald. In Campbell-Ewald, the plaintiff filed a putative class action under the TCPA related to allegedly unsolicited text messages. Id. at 667. The defendant sought to resolve the matter by serving a Federal Rule of Civil Procedure 68 offer of judgment that included "costs, excluding attorney's fees, and $1,503 per message," as well as "a stipulated injunction in which [the defendant] agreed to be barred from sending text messages in violation of the TCPA." Id. at 667-68. After the plaintiff allowed the offer to expire, the defendant moved for judgment under Federal Rule of Civil Procedure 12(b)(1) and the district court dismissed the case after finding that no case or controversy remained, leaving the plaintiff without any recovery. Id. at 667. However, the Supreme Court concluded that an Article III "case" or "controversy" remained because "[a]n unaccepted settlement offer -- like any unaccepted contract offer -- is a legal nullity, with no operative effect." Id. at 670. Moreover, and importantly, the majority in Campbell-Ewald expressed concern with the fact that the plaintiff "remained emptyhanded" when the case was dismissed. Id. at 672. "When a plaintiff rejects [a Rule 68] offer -- however good the terms -- her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief." Id. at 670.

But, in a well-reasoned dissent, Chief Justice Roberts, joined by Justices Scalia and Alito, specifically noted that "[t]he majority does not say that payment of complete relief leads to the

[2] Notably, NSL does not contend that Baker's claim would be rendered moot by NSL's mere offer of relief. Rather, NSL is seeking to tender more than complete relief to Baker and, therefore, satisfy her claim. Indeed, the amount takes into account the maximum statutory damages that might apply, $6,000 (4 calls x $1,500), plus any pre-judgment interest and costs of suit.

same result. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the [d]istrict [c]ourt." Id. at 683 (emphasis in original); see also id. at 684 (Alito, J. dissenting) ("[A] defendant might deposit the money with the district court (or another trusted intermediary) on the condition that the money be released to the plaintiff when the court dismisses the case as moot.") Id. Justice Alito further stated that "I am heartened that the Court appears to endorse the proposition that a plaintiff's claim is moot once he has 'received full redress' from the defendant for the injuries he has asserted." Id. at 685 (Alito, J., dissenting) (emphasis in original).

Notably, the opinions by Chief Justice Roberts and Justice Alito find support in Justice Kagan's dissent in Genesis, 569 U.S. at 85, which was adopted by the majority in Campbell-Ewald. Campbell-Ewald, 136 S. Ct. at 669. Justice Kagan (joined in her dissent by Justices Ginsburg, Breyer and Sotomayor) acknowledged that "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." Genesis, 569 U.S. at 85. Thus, at a minimum, six of the nine current Supreme Court Justices agree that it is appropriate for a court to evaluate the amount of a tender and to enter judgment and terminate a case after the court determines that the plaintiff has been given full relief -- i.e., precisely the situation here. Further, other courts in this circuit and elsewhere have concurred. See, e.g., Gray v. Kern, 143 F. Supp. 3d 363, 367 (D. Md. 2016) ("[I]f Defendant Kern or the City of Baltimore acting on Defendant Kern's behalf, upon Court order, deposits the full amount recoverable with the Clerk of the Court, and the Court then enters judgment in that amount, the case is moot."), rev'd on other grounds, 702 Fed. App'x 132 (4th Cir. 2017); Price v. Berman's Auto., Inc., No. 14-763-JMC, 2016 WL 1089417, *6 (D. Md. Mar. 21, 2016) (holding that plaintiff's individual claims against defendant would be moot if defendant tendered full relief in the form of a cashier's check because the "Supreme Court in Campbell-Ewald appeared to concede that cases involving offers of settlement or judgment might be critically distinguishable from those involving actual payment of a plaintiff's claimed damages"); Geismann v. ZocDoc, Inc., 268 F.

Supp. 3d 599, 605 (S.D.N.Y. July 28, 2017) ("[W]hen ZocDoc has deposited with the Clerk of Court an additional $13,900.00[] comprising an amount securing a judgment satisfying all of Geismann's monetary claims, and an unconditional consent to a proper form of injunction, it can make a cognizable, good-faith argument that this case should be terminated. The relevant law will no longer be that of contract, offer and acceptance, or Rule 68; it will be the Constitutional requirement of a case or controversy.").

In her Opposition to this Motion, Baker may contend that, even if the Court takes the tender and enters the requested judgment, she is entitled to continue litigating the proposed class claims because Campbell-Ewald allows her a "fair opportunity" to pursue class certification. This is not so. Baker must herself have a "live claim" before she is permitted to pursue class certification. See Campbell-Ewald, 136 S. Ct. at 672. Once the Court enters the judgment in her favor, Baker will no longer have a "live claim."[3]

Similarly, Baker may also contend that she may proceed with the putative class claims under the "relation back" doctrine, which would allow her to rely upon standing that existed when the Complaint was filed, even though her own claims, in fact, now would be satisfied. Importantly, the Fourth Circuit has not adopted the "relation back" rule in the class-action context, nor should it, for a simple reason: An individual whose claims have been satisfied clearly cannot be an adequate or typical class representative under Federal Rule of Civil Procedure 23. Baker must demonstrate that her claims are "typical of the claims or defenses of the class" both "at the time the complaint is filed," and at the time of certification. See Doctor v. Seaboard Coast Line R. Co., 540 F.2d 699, 706-07 (4th Cir. 1976). "[A] representative's claim is 'typical'" when she is "'part of the class and possess[es] the same interest and suffer[s] the same injury as the class members.'" Shiring v. Tier Techs., Inc., 244 F.R.D. 307, 312-13 (E.D. Va. 2007) (quoting Lienhart v. Dryvit Sys., 255 F.3d 138, 147 (4th Cir. 2001) (alteration in original)). However, if "a putative class representative is subject to unique defenses which

[3] The different procedural posture makes this case distinguishable from Campbell-Ewald. There, the claimant would have been left emptyhanded by an unaccepted offer of judgment (i.e., still possessing a live claim), but would have had no opportunity to pursue class certification. Id.

threaten to become the focus of the litigation," "class certification is inappropriate." Id. (quotation marks omitted); see also CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 726 (7th Cir. 2011) ("The presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation.").

Moreover, Baker cannot rely on the class allegation to "relate back" because, as a matter of law, the proposed classes do not have, and never had, independent legal standing. For nearly 40 years, the Supreme Court has emphasized that the actual certification decision (rather than plaintiff's filing of a motion for class certification) confers standing on a class. See Genesis, 569 U.S. at 75 ("[A] putative class acquires an independent legal status once it is certified under Rule 23."). Beginning with its decision in Sosna v. Iowa, the Supreme Court emphasized that a named plaintiff does not lose standing once a class is certified, even if the circumstances of the named plaintiff change. See 419 U.S. 393, 394 (1975) (evaluating whether a named plaintiff's claim was moot because she satisfied the challenged residency requirements after class certification, but during the pendency of the case).[4] Likewise, in U.S. Parole Commission v. Geraghty, 445 U.S. 388 (1980), the Supreme Court held that a plaintiff may only litigate class certification issues, despite having lost his own personal stake in his claims, when "certification of a class [occurred] prior to expiration of the named plaintiff's personal claim" or "[w]hen the claim on the merits is 'capable of repetition, yet evading review.'"[5] Id. at 398.

In addition, more recently, the Supreme Court in Genesis reaffirmed that the standards set forth in Sosna and Geraghty still govern. See Genesis, 569 U.S. at 75. The Supreme Court

[4] Hence, although Baker filed an early "placeholder" class certification motion (Dkt. ##3-7), which remains pending pursuant to a stay granted by the Court (Dkt. #9), it is of no consequence in this analysis.

[5] In this case, Baker cannot reasonably argue that her claim is "capable of repetition, yet evading review." No class has been certified in this case, so this exception to the standing requirement is reserved for "exceptional situations" in which "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." Kingdomware Technologies, Inc. v. U.S., 136 S. Ct. 1969, 1976 (2016).

explained: "[E]ssential to our decisions in Sosna and Geraghty was the fact that a putative class acquires an independent legal status once it is certified under Rule 23." Id. (emphasis added). Hence, while the Supreme Court continues to recognize a narrow "relation back" rule where a named plaintiff's claim expired after certification (as in Sosna), Article III standing limitations require dismissal where -- as is true here -- "[t]here is simply no certification decision to which respondent's claim could have related back." Id. Thus, the Court should find that the "relation-back" rule does not apply, and dismiss the class allegations without prejudice at the same time that it enters a judgment in favor of Baker.

B. The Court Should Grant Summary Judgment In Favor Of NSL Because Baker Cannot Carry Her Burden On Use Of An ATDS.

As noted above, the TCPA prohibits the making of "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using [an ATDS] or an artificial or prerecorded voice" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A)(iii). Under the TCPA, an ATDS is "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." Id. § 227(a)(1). Thus, to sustain her claim, Baker must establish: (1) a call by NSL[6]; (2) using an ATDS; (3) to her cellular phone. See Worsham v. Travel Options, Inc., No. JKB-14-2749, 2016 WL 4592373, at *6 (D. Md. Sept. 2, 2016), aff'd, 678 F. App'x 165 (4th Cir. 2017); 47 U.S.C. § 227(b)(1)(A)(iii). Baker bears the burden of proof on each of these elements, including the use of an ATDS. See Vanover v. NCO Fin. Sys., Inc., No. 8:14-cv-964-MSS-EAJ, 2015 WL 12696108, at *2 (M.D. Fla. Nov. 17, 2015) ("The plaintiff bears the burden of proof on each element of her prima facie case.") (citing Buslepp v. Improv Miami, Inc., No. 12-60171-CIV, 2012 WL 4932692, *2 (S.D. Fla. Oct. 16, 2012) ("It is Plaintiff who must show, as an element of his claim, that Defendant used an ATDS.")). Here, because Baker cannot make "'a showing sufficient to establish the existence of an element essential to'" her case -- i.e., that the

[6] NSL does not contend that it had Baker's consent to call her using an ATDS. Rather, NSL called her through the manual Dial Now process because it was aware she was a non-borrower, who had not consented.

Dial Now technology somehow is an ATDS -- the Court must grant summary judgment for NSL. See Pleasurecraft, 272 F.3d at 658 (quoting Celotex, 477 U.S. at 322).

As stated above, until recently, courts were bound by an unreasonably expansive interpretation of "capacity" for purposes of the definition of an ATDS. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) (the "2015 Order"). This interpretation, which the FCC formulated in the 2015 Order, expanded a system's "capacity" to operate as an ATDS beyond its "present use" to also include its "potential functionalities" or "future possibility." See id. at 7974 ¶ 16, 7975 ¶ 20. In the 2015 Order, the FCC stated that technology could "'possess the requisite "capacity" to satisfy the statutory definition of an "autodialer" even if, for example, it require[d] the addition of software to actually perform the functions described in the [TCPA's] definition.'" Id. at 696 (quoting 2015 Order, 30 FCC Rcd. at 7975 ¶ 18). This was stunningly broad, bringing within the TCPA's scope even "ordinary calls from any conventional smartphone" -- and, in fact, the only example offered by the FCC of technology that would not be encompassed was a rotary phone. Id. at 700.

In ACA International, however, the D.C. Circuit rejected the FCC's definition of "capacity," holding that it could not "be sustained, at least given the [FCC's] unchallenged assumption that a call made with a device having the capacity to function as an autodialer can violate the [TCPA] even if autodialer features are not used to make the call." 885 F.3d at 695.[7] As the D.C. Circuit explained, a "basic question raised by the statutory definition" of an ATDS "is whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?" Id. at 701. In the 2015 Order, the FCC gave "no clear answer (and in fact seem[ed] to give both answers)." Id. at 702-03. The D.C. Circuit found that the

[7] ACA International is binding on this Court because appellate courts have exclusive jurisdiction to determine the validity of all FCC final orders and the Judicial Panel on Multidistrict Litigation consolidated the various appeals in that case in the D.C. Circuit. See 28 U.S.C. § 2342(1); FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 468 (1987); Marshall v. CBE Grp., Inc., No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *5 n. 4 (D. Nev. Mar. 30, 2018).

FCC could not "espouse both competing interpretations in the [the 2015 Order]," and it was also "untenable to construe the term 'capacity' . . . in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known." Id. at 692, 697-98, 700-01. Thus, the D.C. Circuit vacated the portion of the 2015 Order that addressed "capacity." Id. at 700-01.

Accordingly, at this juncture, Baker plainly cannot meet her burden of demonstrating that NSL called her using an ATDS. Because the FCC's interpretation of "capacity" has been set aside, the Court should rely on the language of the TCPA itself, which "mandates that the focus be on whether [NSL's] equipment has the 'capacity "to store or produce telephone numbers to be called, using a random or sequential number generator."'" See Marshall, 2018 WL 1567852, at *5-6. Here, Baker cannot offer sufficient proof in the form of admissible evidence that the Dial Now technology used to call her "has the capacity to randomly or sequentially generate telephone numbers to be stored, produced, or called." See Gragg v. Orange Cab Co., 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) ("'Random number generation' means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on.'") (quoting Griffith v. Consumer Portfolio Serv., Inc., 838 F. Supp. 2d 723, 725 (N.D. Ill. 2011)); Dominguez v. Yahoo!, Inc., 8 F. Supp. 3d 637, 644 (E.D. Pa. 2014) (explaining that the statutory definition of an ATDS required plaintiff to "show that Yahoo's system had the capacity to randomly or sequentially generate telephone numbers"), rev'd on other grounds, 629 F. App'x 369 (3d Cir. 2015). To the contrary, no such evidence exists in the record.

Nor can Baker establish that the Dial Now technology meets the TCPA's definition of an ATDS because it can dial from a fixed list of numbers, as the record is devoid of any such evidence, too. However, even if it were not, in ACA International, the D.C. Circuit expressly rejected prior orders by the FCC concluding that technology that dials from "a fixed set of numbers," rather than only a system that could dial randomly or sequentially, constitutes an ATDS. See 885 F.3d at 702-03; see also Marshall, 2018 WL 1567852, at *7 (citing 2015 Order,

30 F.C.C.R. at 7973; In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14092-93 (2003) ("2003 FCC Order")).

Additionally, there is no dispute that the Dial Now technology requires live customer service agents to launch and handle telephone calls. The FCC has repeatedly recognized that the hallmark of an ATDS is "the capacity to dial numbers without human intervention," and it has never wavered from this position. See, e.g., 2003 FCC Order, 18 FCC Rcd. at 14092 (emphasis added). Rather, the FCC has reiterated that the placement of calls without the involvement of a live person remains central to determining whether a given system is an ATDS. See, e.g., In re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 566 (2008); In re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15392 n. 5 (2012); 2015 Order, 30 FCC Rcd. at 7975 ("[T]he [FCC] has . . . long held that the basic functions of an autodialer are to dial numbers without human intervention and to dial thousands of numbers in a short period of time." (quotation marks omitted)). Indeed, in ACA International, the D.C. Circuit criticized the FCC's refusal to "'clarify[ ] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention" and "set aside" the FCC's "treatment" of that matter, as well. 885 F.3d at 703 (quoting 2015 Order, 30 FCC Rcd. at 7973 ¶ 14, 7975 ¶ 17, 7976 ¶ 20).[8]

[8] Even before the decision in ACA International, courts consistently held that calls made using the type of technology at issue here were not made with an ATDS. See, e.g., Strauss v. CBE Grp., Inc., 173 F. Supp. 3d 1302, 1310-11 (S.D. Fla. 2016) (granting summary judgment because there was "substantial evidence that human intervention [was] essential at the point and time that the number [was] dialed . . . and that the Noble equipment used [did] not have the functionalities required to classify it as a predictive dialer"); Pozo v. Stellar Recovery Collection Agency, Inc., No. 8:15-cv-929-T-AEP, 2016 WL 7851415, at *4 (M.D. Fla. Sept. 2, 2016) (granting summary judgment because "clicker agents initiate[d] all calls by clicking a dialogue box" and the technology did "not allow any calls to be made without a[n] . . . agent clicking the dialogue box to initiate the call"); Smith v. Stellar Recovery, Inc., No. 2:15-cv-11717, 2017 WL 955128, at *3 (E.D. Mich. Mar. 13, 2017) (explaining that the technology at issue was "characterized by one key factor that separates it from autodialers; it require[d] human intervention -- the clicker agent -- to launch an outgoing call" and, therefore, it was "not an autodialer"); Arora v. Transworld Sys., Inc., No. 15-cv-4941, 2017 WL 3620742, at *1, *3 (N.D. Ill. Aug. 23, 2017) (concluding that TCPA claim failed as a matter of law because calls were "initiated by a human 'clicker agent'" and, hence, "were made with human intervention, and not with an ATDS").

Further, as noted above, Baker never inspected the Dial Now technology, nor did she retain a telephony expert. Given the nature of the technology at issue, Baker was required to do so, including to guide her through the discovery process. See, e.g., United States v. Offill, 666 F.3d 168, 175 (4th Cir. 2011) (noting that Federal Rule of Evidence 702 allows an expert to opine on "technical matters" or other "specialized knowledge" so as to assist the trier of fact). Indeed, courts routinely reject attempts to create a disputed issue of fact on summary judgment where, as here, the plaintiff or her expert did not physically examine the relevant dialing infrastructure. See, e.g., Marshall, 2018 WL 1567852, at *8; Pozo, 2016 WL 7851415, at *5 ("Again, LiveVox offers multiple telephone dialing systems. There is no indication that Parker actually examined the . . . system."). These decisions make sense because the functionality of any technology depends on, among other things, its specific components and how they are configured. The Court should, thus, refuse to find that Baker is able to raise any genuine issue of material fact as to whether the Dial Now technology constitutes an ATDS. See Marshall, 2018 WL 1567852, at *8; Pozo, 2016 WL 7851415, at *5 (granting summary judgment for defendant where there was "no indication" that the defendant's system was "actually examined"); see also Mohamed v. Am. Motor Co., LLC, No. 15-23352-CIV, 2017 WL 4310757, at *3 (S.D. Fla. Sept. 28, 2017) (excluding expert testimony because purported expert "did not test, review, or inspect the actual platform or system"); Legg v. Voice Media Grp., Inc., No. 13-62044-CIV-COHN, 2014 WL 1767097, at *5 (S.D. Fla. May 2, 2014) (excluding expert testimony where purported expert reviewed "over 1000 pages of discovery including hundreds of pages of emails discussing sending text messages and the legal issues contingent thereto, screen shots and detailed instructions for how" defendant operated the systems, "and even the contract detailing the relationship between" the defendant and the system's manufacturer, but not the system itself (brackets and ellipsis omitted)).[9]

[9] In contrast, and even though Baker bears the burden of proof on the supposed use of an ATDS, NSL did retain a telephony expert, Ray Horak ("Horak"). As reflected in Horak's deposition, he has inspected systems used by NSL and also has consulted with Joshua Dries, a declarant on this Motion and NSL's corporate representative under Federal Rule of Civil

C. The Court Should Grant Summary Adjudication On Any Calls Related To Federal Loans.

In the event Baker's claims are allowed to proceed, the Court should grant summary judgment in favor of NSL regarding any calls made on federal loans.

Although Baker's own claims involve only calls made on her brother's private loan, her proposed class definitions encompass calls on federal loans, too. As detailed below, however, calls on federal loans are subject to unique defenses, and Baker cannot pursue claims on those calls for the putative classes.

1. NSL Was An Agent Of ED For Purposes Of Calls On Federal Loans, And It Cannot Incur Liability Under The TCPA For Such Calls.

On July 5, 2016, the FCC issued a ruling in In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling, et al., CG Docket No. 02-278, Declaratory Ruling at 5, FCC 16-72 (July 5, 2016) (the "Broadnet Ruling"), which interpreted the meaning of the term "person" as used in the TCPA. The Broadnet Ruling clarified that "the federal government or agents acting within the scope of their agency under common-law principles of agency" are not "persons" as that term is defined in the TCPA. Id. at 5 ¶ 10. Based on this conclusion that the federal government and its agents are not "persons" under the TCPA, the FCC explained that the TCPA "does not apply to calls made by or on behalf of the federal government in the conduct of official business, except when a call made by a contractor does not comply with the government's instructions." Id. at ¶ 1.

Accordingly, this TCPA immunity, granted to agents of the federal government, exists "where (1) the call [i]s placed pursuant to authority that was 'validly conferred' by the federal government, and (2) the third party complie[s] with the government's instructions and otherwise act[s] within the scope of his or her agency, in accord with federal common-law principles of agency." Id. at 6 ¶ 11. In the Broadnet Ruling, the FCC discussed its historical application of

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Procedure 30(b)(6) on the Dial Now process and other system issues. (Simonetti Decl.,¶ 3, Ex. B.)

agency principles to allow for claims of vicarious liability based on calls made by third-party vendors. Id. at 9 ¶ 16 (citing In re DISH Network, LLC, Declaratory Ruling, 28 FCC Rcd. 6574, 6587, ¶ 35 (2013) ("DISH Declaratory Ruling")). Such agency principles, the FCC concluded, should apply with equal weight to calls made for the government:

> Indeed, subjecting contractors operating on behalf of the government to liability under the TCPA, even though the federal government itself would not be liable, would be difficult to reconcile with the DISH Declaratory Ruling. There, the Commission ruled that a principal can be held vicariously liable for telephone calls placed by third-party agents acting within the scope of their actual authority. If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be held vicariously liable for the conduct in which the TCPA allows the government to engage. That would be an untenable result.

Id.

The FCC thus determined that, based on the federal common law of agency, "a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens." Id. at 9 ¶ 17. In reaching this conclusion, the FCC stated its belief that "we have reached the best interpretation of Congress's intent to exempt the federal government from the prohibitions in section 227(b)(1), even if that interpretation might lead to more unwanted calls than would otherwise be the case." Id. at 13 ¶ 22.

Critically, here, ED's instructions to call references on federal student loans are stated in regulations promulgated by ED under the Higher Education Act of 1965, as amended (the "HEA"), 20 U.S.C. §§ 1071-1087. The regulations require that servicers of federal student loans, such as NSL, engage in diligent efforts to collect delinquent debts by, for example, contacting each reference identified in the borrower's loan file. See 34 C.F.R. § 682.411. The

rationale underlying these regulations is obvious and important -- i.e., to enhance the ability to collect what is, at the end of the day, taxpayers' money. See Wilson v. Navient/ECMC Student Loan Providers, No. 1:17-CV-02012-VEH, 2018 WL 835102, at *3 (N.D. Ala. Feb. 13, 2018) ("Because the United States guarantees these loans, [ED] has an interest in protecting the United States against the risk of unreasonable loss by ensuring that lenders employ due diligence in the collection of these loans."). As a result, in making calls related to federal loans, NSL plainly was acting pursuant to instructions from ED, and was an agent for ED. NSL therefore cannot incur liability under the TCPA for those calls.

2. In Addition, Pursuant To The Budget Act, No TCPA Liability Exists For Any Calls Made By NSL On Federally Owned Or Guaranteed Loans After November 1, 2015.

On November 2, 2015, Congress amended the TCPA with respect to debts owed to or guaranteed by the United States -- such as the federal loans included within Baker's proposed class definitions here -- by passing the Budget Act. See Compl. ¶¶ 89-90. Specifically, Section 301 of the Budget Act (the "Amendment") provides that autodialed calls are exempt from the TCPA's prior express consent requirement where they are made solely to collect a debt owed to or guaranteed by the United States. See 47 U.S.C. § 227(b)(1)(A), (B). The FCC has acknowledged that, following the Amendment, "Section[s] 227(b)(1)(A) and (B) of the TCPA now explicitly do not make it unlawful for anyone to make autodialed" calls to cellular phones "without the prior express consent of the called party, if the calls are made solely to collect a debt owed to or guaranteed by the United States." In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 31 F.C.C. Rcd. 5134 (2016) (quotation marks omitted); see also Galbreath v. Time Warner Cable, Inc., No. 7:14-CV-61-D, 2015 WL 9450593, at *2 n. 2 (E.D.N.C. Dec. 22, 2015) (explaining the Amendment).

Here, as stated, Baker's proposed class definitions include persons who were called in connection with federal loans serviced by NSL, including, for example, loans made under the Federal Family Education Loan Program ("FFELP") and the Direct Loan Program, as authorized

under the HEA.[10] Such calls, however, would plainly have been made "solely to collect a debt owed to or guaranteed by the United States" and, as a result, are exempt from the prior express consent requirement under the TCPA. See Hassert v. Navient Sols., Inc., 232 F. Supp. 3d 1049, 1050 (W.D. Wis. 2017) ("Because [FFELP] loans are debts guaranteed by the United States subject to the 2015 amendment's exception, the TCPA does not prohibit [NSL's] alleged calls to Hassert, and Hassert's complaint does not state a claim for relief."); Whalen v. Navient Solutions, LLC, No. 4:17-cv-00056-TWP-DML, 2018 WL 1242020, at *4 (S.D. Ind. Mar. 9, 2018) ("[T]he Court concludes that Whalen's claims must be dismissed because [NSL's] phone calls were exempt from the TCPA's prohibition."); Weaver v. Navient Sols., Inc., No. 5:16-CV1304, 2017 WL 3456325, at *4 (N.D. Ohio Aug. 11, 2017) (holding that calls were not actionable under the TCPA because plaintiff's loans were "debt[s] owed to or guaranteed by the United States" (alteration in original)). Further, as noted above, not only are such calls lawful, they are mandated by HEA regulations.

D. Under No Circumstance Can Baker Establish Willful Or Knowing Violations Of The TCPA.

If a defendant "willfully or knowingly" violates the TCPA, a court may, in its discretion, award treble damages. 47 U.S.C. § 227(b)(3)(C). However, a violation is not willful or knowing unless the defendant "knows" it is performing "conduct that violates" the TCPA. Lary v. Trinity Physician Fin. & Ins. Servs., 780 F.3d 1101, 1107 (11th Cir. 2015).[11] Thus, a violation of the

[10] The FFELP was designed to encourage private lenders to make student loans to qualified borrowers of limited means, which were in turn guaranteed by the federal government. See Morgan v. Markerdowne Corp., 976 F. Supp. 301, 308 (D.N.J. 1997). The FFELP encompassed a variety of student loans including: the Robert T. Stafford Federal Student Loan Program, 20 U.S.C. § 1071; the Federal Supplemental Loans for Students Program, 20 U.S.C. § 1078-1; the Federal PLUS Loan Program, 20 U.S.C. § 1078-2; and the Federal Consolidation Loan Program, 20 U.S.C. § 1078-3. Id. at 308 n. 4. These were previously referred to as "Guaranteed Student Loans." Id.

[11] The only Court of Appeals to have addressed the meaning of the phrase "willfully or knowingly" is the Eleventh Circuit in Lary. See 780 F.3d at 1107; see also Krakauer v. Dish Network L.L.C., No. 1:14-CV-333, 2017 WL 2242952, at *12 (M.D.N.C. May 22, 2017) (acknowledging that the "Fourth Circuit has not weighed in" on the meaning of the phrase "willfully or knowingly"). While some lower courts have interpreted the phrase to merely require that the defendant know a call is being made (see Krakauer, 2017 WL 2242952, at *12 n.

TCPA's restriction on the use of an ATDS to call a cellular telephone is only willful or knowing if the defendant intended to perform or knew that it was performing each of the elements of the claim -- i.e., that it was making a call to a cellular phone, to a person who did not provide "prior express consent," using an ATDS. See id. ("For example, to violate section 227(b)(1)(A)(i), a defendant must know that he is using an 'automatic telephone dialing system' to place a 'call,' and that the call is directed toward an 'emergency' line.").

Here, in the Complaint, Baker offers only threadbare allegations that NSL willfully or knowingly violated the TCPA. See Compl. ¶¶ 87. But conclusory allegations, the building of one inference upon another or the mere existence of a scintilla of evidence will not prevent summary judgment. See Dash, 731 F.3d at 311; see also Adamcik v. Credit Control Servs., Inc., 832 F. Supp. 2d 744, 755 (W.D. Tex. 2011) (holding that a claim for willful or knowing violations failed as a matter of law because "there was no evidence . . . [defendant] knew or should have known it was violating the TCPA").

Moreover, and importantly, NSL's Dial Now technology does not bear the hallmarks of an ATDS. Setting aside all of the deficiencies in Baker's ability to prove this issue, the Dial Now technology requires live customer service agents to launch and handle calls. As even the FCC has stated, "the basic functions of an autodialer are to dial numbers without human intervention and to dial thousands of numbers in a short period of time." 2015 Order, 30 FCC Rcd. at 7975 (quotation marks omitted). Indeed, Dial Now relies entirely upon using live agents to make calls, and only as many calls can be made at a given time as agents are working. On this basis alone, it would be absurd to conclude that NSL made the challenged calls in knowing or

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17 (citing Bridgeview Health Care Ctr. Ltd. v. Clark, No. 09 C 5601, 2013 WL 1154206, at *7 (N.D. Ill. Mar. 19, 2013), aff'd on other grounds, 816 F.3d 935 (7th Cir. 2016)), this Court should follow the more cogent position adopted in Lary. As the court in Lary explained, if "willfully or knowingly" were interpreted "to require only that the violator knew he was making a 'call' or sending a fax, the statute would have almost no room for violations that are not 'willful [ ] or knowing[ ].'" Lary, 780 F.3d at 1107 (citing Harris v. World Fin. Network Nat'l Bank, 867 F. Supp. 2d 888, 895 (E.D. Mich. 2012) ("Such a broad application of 'willful [ ]' or 'knowing' would significantly diminish the statute's distinction between violations that do not require an intent, and those willful[ ] and knowing violations that [C]ongress intended to punish more severely.")).

willful violation of the TCPA. In addition, as the recent ruling in ACA International plainly demonstrates, there is considerable uncertainty as to what technologies satisfy the TCPA's definition of an ATDS. See 885 F.3d at 702 ("So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity?"). In fact, prior to ACA International, the FCC proclaimed that an "ATDS could include technology that dials from 'a fixed set of numbers,' rather than only systems that have the capacity to dial randomly or sequentially." See Marshall, 2018 WL 1567852, at *7 (citing 2015 Order, 30 F.C.C.R. at 7973; 2003 FCC Order, 18 F.C.C.R. at 14092-93). ACA International, however, set aside this "'expansive' interpretation of the [TCPA]," particularly as it "pertained to systems that may not, in fact, have the capacity to dial randomly or sequentially." Marshall, 2018 WL 1567852, at *7 (citing ACA Int'l,885 F.3d at 702-03). Against this background, NSL could not be found to have knowingly or willfully used an ATDS in violation of the TCPA.

In analogous contexts, courts have refused to find that an arguable violation of a statutory command is willful. See Stancil v. Bradley Investments, LLC, 487 B.R. 331, 343 (Bankr. D.D.C. 2013) ("[W]hen the law regarding whether an act violates [a statute] is sufficiently unsettled to permit a reasonable belief that the [statute] did not bar the act at issue, 'willfulness' is not present.") (discussing arguable violation of automatic bankruptcy stay). This principle, as Stancil explained, "is similar to the rule that civil contempt requires that the order or statute violated have been clear and unambiguous." Id. (citing Armstrong v. Exec. Office of the President, Office of Admin., 1 F.3d 1274, 1289 (D.C. Cir. 1993)). "'A party should not be held in contempt unless a court first gives fair warning that certain acts are forbidden; any ambiguity in the law should be resolved in favor of the party charged with contempt.'" Id. (quoting U.S. ex rel. I.R.S. v. Norton, 717 F.2d 767, 774 (3d Cir. 1983)). This defense to a finding of "willfulness" is not rooted in "good faith," but rather in the notion that "the offending party has not acted in violation of a command of which it had fair notice." Id. (emphasis added).

Similarly, here, NSL cannot be liable for willfully or knowingly violating the TCPA given the opacity in the law concerning what technologies constitute an ATDS. As explained above, Baker cannot meet her burden to establish that Dial Now meets the TCPA's definition of an ATDS -- i.e., that it can "generate and then dial 'random or sequential numbers.'" See ACA Int'l, 885 F.3d at 702. And Baker cannot rely on the FCC's now-rejected interpretation of "capacity" to establish that NSL knew its calls to Baker were made with an ATDS, either. See Marshall, 2018 WL 1567852, at *5 ("In light of [ACA International], the [court] will not stray from the statute's language which mandates that the focus be on whether the equipment has the capacity 'to store or produce telephone numbers to be called, using a random or sequential number generator.'" (quotation marks omitted)).

In short, even if Baker somehow could meet her burden of proving that the Dial Now technology constitutes an ATDS, NSL could not have known that, by calling in Dial Now, it was using an ATDS, given the uncertainty in the law concerning these technologies. See Marshall, 2018 WL 1567852, at *7 (holding that "point-and-click" system did not constitute an ATDS and collecting cases holding similarly). Consequently, NSL could not have known that it was performing "conduct that violates" the TCPA, as required to establish willful or knowing violations. See Lary, 780 F.3d at 1107; see also United States v. Critzer, 498 F.2d 1160, 1162-63 (4th Cir. 1974) (reversing conviction for willful tax evasion where the law was "so uncertain" that, "[e]ven if [the defendant] had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required" and finding that, as a result, "the element of willfulness could not be proven"); United States v. Ward, No. CRIM. 00-681, 2001 WL 1160168, at *1 (E.D. Pa. Sept. 5, 2001) (finding that Occupational Safety and Health Administration regulation was "so ambiguous that a reasonable person in [the defendant's] position could not have determined whether" or not it applied and, therefore, holding that the defendant "could not have willfully violated" the regulation). As a result, the Court should find that, as a matter of law, NSL cannot be liable for willfully or knowingly violating the TCPA here.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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