

1
2 **UNITED STATES DISTRICT COURT**
3 **SOUTHERN DISTRICT OF FLORIDA**

4 S. RYAN STRAUSS,

Case No. 15-62026-CIV-COHN/SELTZER

5
6 v.

**RULE 26(a)(2)(b) WRITTEN REPORT
OF JEFFREY A. HANSEN**

7 THE CBE GROUP, INC. and

8 JOHN DOE,
9

10
11 *Defendants.*
12

1 related to outbound calls and other electronic data associated with computer
2 systems and/or telephone dialing systems that may have been used by Defendant
3 and/or its agents. In that respect, I have extensive experience with data
4 warehousing, including data warehousing related to telemarketing and autodialers
5 in general. I am familiar with the procedures involved in such practices, and I
6 have personally engaged in data warehousing regarding the compilation of
7 certain lists, including demographic and target audience lists for telemarketing,
8 and have personally repaired defective lists to eliminate improperly formatted
9 and corrupted data.

10 I also frequently act as a consultant to companies that engage in the use of
11 autodialers, and I am familiar with their use and procedures, and the technical
12 aspects of that business. In that capacity, I have assembled, configured,
13 maintained, operated all aspects of autodialers, and interfaced with the
14 telecommunications providers through whose networks the autodialers operate.

15 I have set up and maintained all aspects of predictive dialers and
16 autodialers, from predictive dialers operating with just three telephone lines to
17 outbound call centers capable of generating over 1 million calls per hour. When
18 building these systems, I have used various software and hardware solutions for
19 predictive and autodialers, both proprietary and open source, and customized
20 those systems for their particular uses. I myself have used and maintained
21 predictive and autodialers, and trained others to do the same.

22 Further, I am familiar with the manner in which outbound dial lists are
23 used and maintained in the debt collection industry in which The CBE Group,
24 Inc. operates. Similarly, I am familiar and have experience with, and know how
25 to use, databases containing cell block identifiers and ported number lists, both of
26 which identify cellular type telephone numbers and are typically used in these
27 industries.
28

1 Over the last twenty-six (26) years, I have also had extensive experience in
2 a broad range of other areas in the electronic and information technology fields
3 and obtained many certifications such as MCP 4.0, A+, Network+, MCP 2000,
4 MCSA, MCSE, Linux+, I-Net+, Security+, CIW Security Analyst. From the
5 hardware perspective, I have extensive experience in troubleshooting and
6 repairing at the component level, and building various systems for various
7 purposes. I have designed, built and maintained computer networks in a variety
8 of environments from commercial businesses to very large DoD networks. I have
9 taught approximately 1,000 others the skills to become computer network
10 engineers themselves. I have had extensive experience in dealing with security
11 breaches and hardening computer networks against those breaches. I have
12 handled many computer forensic and E-Discovery matters, including internal
13 investigations in companies, working at the FBI sponsored Regional Computer
14 Forensics Laboratory, and founding a computer forensics and E-Discovery firm
15 over 8 years ago. I have also had extensive experience with the set-up and use of
16 predictive and auto dialers. (See Exhibit A – Resume of Jeffrey A. Hansen).
17

18 I have been called to testify in the following civil matters: *Craig Casey v.*
19 *Valley Center Insurance Agency Inc.*, Case No. 37-2008-00004378-SC-SC-CTL
20 (San Diego Superior Court); *Stemple v. QC Holdings, Inc.*, Case No. 12-CV-
21 1997-CAB-WVG (S.D. Cal.); *Hahn v. Massage Envy Franchising*, Case No:
22 3:12-cv-00153-DMS-BGS (S.D. Cal.), *Abdeljalil v. General Electric Capital*
23 *Corporation*, Case No: 12-cv-02078-JAH-MDD (S.D. Cal.), *Jasminda Webb v.*
24 *Healthcare Revenue Recovery Group, LLC* Case No: C 13-0737 JD (N.D. Cal.),
25 *Balschmiter v TD Auto Finance, LLC*, Case No: 2:13-cv-01186 (E.D. Wisc.),
26 *Jordan Marks v Crunch San Diego, LLC*, Case No. 14-CV-0348-BAS (BLM)
27 (S.D.Cal.), *Peter Olney v Job.com*, Case No: 1:12-cv-01724-LJO-SKO (E.D.
28 Cal.), *Carlos Guarisma v ADCAHB Medical Coverages, Inc. and Blue Cross and*

1 *Blue Shield of Florida, Inc.*, Case No: 1:13-cv-21016-JLK (S.D. Fla.), *Farid*
2 *Mashiri v Ocwen Loan Servicing, LLC*, Case No: 3:12-cv-02838 (S.D. Cal.),
3 *Monty J. Booth, Attorney at Law, P.S. v Appstack, Inc.*, Case No. 2:13-cv-01533-
4 JLR (W.D. Wash.), *Rinky Dink, Inc. d/b/a Pet Stop v World Business Lenders,*
5 *LLC*, Case No. 2:14-cv-00268-JCC (W.D. Wash.), *Michael Reid and Dave*
6 *Vacarro v. I.C. Sytems, Inc.*, Case No. 2:12-cv-02661-ROS (D. Ariz.), *Jeffrey*
7 *Molar v NCO Financial Systems* Case No. 3:13-cv-00131-BAS-JLB (S.D. Cal.),
8 *Latonya Simms v Simply Fashion Stores LTD, and ExactTarget, Inc.*, Case No.
9 1:14-CV-00737-WTL-DKL (D. Ind.), *Sueann Swaney v Regions Bank*, Case No.
10 CV-13-RRA-0544-S (N.D. Ala.); *Hooker v SiriusXM*, Case No. 4:13-cv-00003
11 (AWA) (E.D. Va.), *Diana Mey v Frontier Communications*, Case No. 13-cv-
12 01191-RNC (D. Conn.), *Rachel Johnson v Yahoo! Zenaida Calderin v Yahoo!*
13 *Case No. 14-cv-2028 14-cv-2753 (N.D. IL).*

15 *Work and Analyses in this Case Regarding Use of Automatic Telephone Dialing*
16 *Systems.*

17
18 I have been retained in part to evaluate whether telephone dialing systems
19 used by Defendant to place calls at issue in this case meet the definition of an
20 “automatic telephone dialing system” (“ATDS”) as defined by the Telephone
21 Consumer Protection Act, 47 U.S.C. § 227. (“TCPA”). The FCC defines an ATDS
22 as follows:

23 “The TCPA defines an ‘automatic telephone dialing system’ as ‘equipment
24 which has the capacity (A) to store or produce telephone numbers to be
25 called, using a random or sequential number generator; and (B) to dial such
26 numbers.’ The statutory definition contemplates autodialing equipment that
27 either stores or produces numbers. It also provides that, in order to be
28 considered an ‘automatic telephone dialing system,’ the equipment need
only have ‘the *capacity* to store or produce telephone numbers (emphasis
added)’....”

1 (See Exhibit B attached hereto - FCC Order 03-153 at ¶ 131-134).
2

3 I have reviewed various documents and evidence from this case relating to
4 Defendant's placement of telephone calls to Plaintiff's cellular telephone.
5 Specifically, I have reviewed the following documents: 1) Exhibit B - FCC Order
6 03-153; 2) Exhibit C – Noble Systems - Management Desktop; 3) Exhibit D -
7 Noble Systems - IVR; 4) Exhibit E - Noble Systems - Messaging; 5) Exhibit F -
8 Noble Systems - Outbound; 6) Exhibit G - The Big 2 Myths You Probably
9 Believe About Manual Dialing - Part 1; 7) Exhibit H - The Big 2 Myths You
10 Probably Believe About Manual Dialing - Part 2; 8) Exhibit I - US patent
11 3,943,289; 9) Exhibit J - US patent 4,933,964; 10) Exhibit K - Noble TCPA
12 Compliance Solution; 11) Exhibit L - ATDS and predictive dialers 1970-1992;
13 12) Exhibit M - Davox Marketing; 13) Exhibit N - US Patent 3229042; 14)
14 Exhibit O - US Patent 3317678; 15) Exhibit P - CBE patent application; 16)
15 Exhibit Q - Account Notes; 17) Exhibit R - Deposition transcript of Terry
16 Johnson; 18) Exhibit S - Response from Livevox; 19) Exhibit T - FCC-15-
17 72A1; 20) Exhibit U - FCC response to ACA. Additionally, I have read Noble
18 Systems predictive dialer manuals in numerous other matters, including *Almaraz*
19 *v. CBE Group* Case No. 2:14-cv-00699-GMN-GWF (D. Nevada), and spoken
20 with Noble Systems representatives when shopping for predictive dialers myself.
21 While not produced yet in this case, I have reviewed The CBE Group's Manual
22 for the clicker application manual in *Lucille Miller v The CBE Group* Case No.
23 3:15-cv-00033-JAJ-RAW (E.D. IOWA) and *Paul Stemple v The CBE Group* Case
24 No. 5:15-CV-00279-VAP-KK (C.D. Cal). I have also offered an opinion in the
25 form of a written report on CBE Group's predictive dialing systems in *Almaraz v.*
26 *CBE Group* Case No. 2:14-cv-00699-GMN-GWF (D. Nevada). Also, in addition
27 to this case, I have also reviewed deposition transcripts regarding CBE Groups
28

1 predictive dialing systems in *Lucille Miller v The CBE Group* Case No. 3:15-cv-
2 00033-JAJ-RAW (E.D. IOWA) and *Linda Blair and Diane Deal v The CBE*
3 *Group* Case No. 13-cv-134-MMA(WVG)(S.D. Cal).

4 I have reviewed a patent application for a clicker program, attached as
5 Exhibit P - CBE patent application.

6 Based upon the review of the patent application for this “clicker” program,
7 this program is not an ATDS by itself. In fact, it is not a dialer. There is no
8 evidence that this program is capable of placing a telephone call. It has no
9 connection to any phone lines of any kind according to the patent application.
10 My conclusion, this “clicker” application is not what was used to initiate the
11 phone calls to the plaintiff. This “clicker” application is no more than a common
12 interface used by CBE for each of the dialers. (*See Exhibit P - CBE patent*
13 *application; Exhibit R - Deposition transcript of Terry Johnson p. 116:14-18*)
14 The question of whether the system can automatically call a list of numbers has
15 nothing to do with how the list of numbers was acquired or assembled, or in the
16 case of the “Clicker” application, passing the phone numbers to the dialer. This
17 patent application only address the building of the list, by passing the phone
18 numbers to the dialer, and nothing about how the list is called. The patent
19 application however does give clues that there is a system, apart from the
20 “clicker” application that was used to initiate calls to the plaintiff’s cellular
21 phone, calling the a list that the “clicker” application was used to build. The
22 dialer that was used to initiate the calls is either the Noble Systems predictive
23 dialer or the Livevox HCI dialer. (*Exhibit P - CBE patent application; Exhibit R -*
24 *Deposition transcript of Terry Johnson pp. 16:17, 19:22:24, 20:17-21, 22:4-12,*
25 *23:9-20, 25:25, 26:1-15, 61:4-5, 101:20-25, 102:1-2, 103, 10-25, 104:14-25,*
26 *105:1-25, 106:1-25, 108:8-25, 110:1-25, 111:1-11, 112:1-25, 120:3-4, 121:1-25,*
27 *122:1-25, 125:117-21, 128:1-25, 129:1-25, 130:1-17, 131:12-25*)
28

1 The patent application the “Abstract” reads:

2 “A method for manual intervention in a dialing process
3 includes maintaining a list of records containing phone numbers in a
4 database stored on a computer readable storage medium, receiving at
5 a computer and from the user a click for each of the records within
6 the list of records in the database stored on the computer readable
7 storage medium, and storing on a computer readable storage
8 medium a record of the click, an identity of the user performing the
9 click, and an association between the click and one of the records
10 within the list of records. For each click, the method provides for
11 electronically communicating the corresponding phone number of
12 one of the records within the list to a dialing device for dialing the
13 phone number. The method may further include dialing the phone
14 number using the dialing device.” (*Exhibit P - CBE patent*
15 *application p. 1*)
16

17 Note, “The method may further include dialing the phone number using
18 the dialing device.” The question of Automatic Telephone Dialing System is for
19 the “dialing device” which is not a part of the “clicker” application.

20 This abstract is defining a program that adds a column to a table of phone
21 numbers within a database and places a value in that column indicating that a
22 user clicked a button. Figure 1A of the application shows that a click is recorded
23 into the list, a comment is added, and the resulting number is passed to the
24 dialing device (*See Exhibit P - CBE patent application – Figure 1A*). My interest
25 in this case is the “dialing device” which is not a part of the “clicker” application.

26 Figure 1B of the patent application for the “clicker” application shows the
27 “clicker” application as a web based UI interacting with the database in which it
28 is manipulating. Outside of that is the dialing system (*See Exhibit P - CBE patent*

1 *application – Figure 1B*). A typical predictive dialer, or any automatic telephone
2 dialing system, has several components to make up the storage of the list and the
3 calling of the list. There is the database or list of numbers to call, the connection
4 to a telephone carrier, and the terminal which the operator sits at with a headset or
5 telephone. The database, the dialer, and the terminal may be on the same
6 computer or may be spread across several computers working together as one
7 system. I will illustrate in this case, the “dialing” device contains all the
8 capabilities of either storing or generating a list of numbers and calling those
9 numbers on it's own without the use of the “clicker” application. This
10 illustration, Figure 1B, shows that the dialer is in no way connected with the
11 “clicker” application, but that the dialer will call whatever numbers are passed to
12 it from the “clicker” application. (*See Exhibit P - CBE patent application -*
13 *Figure 1B*).

14
15 The patent application, Figures 2, 3 and 4 show that the user will select a
16 list of numbers – contained in a database, click until all the records have an entry
17 of the user’s clicks, then the user will repeat this process for other lists. This
18 process is described in detail in paragraphs 0016, 0044, 0048-0050. (*See Exhibit*
19 *P - CBE patent application Figures 2, 3, 4 and ¶¶ 0016, 0044, 0048-0050*)

20 Figures 5A, 5B, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of
21 the patent application for the “clicker” program has a series of what the user
22 would be presented with on the screen of his/her computer. As illustrated, no
23 screen of this application has anything with the initiating of telephone calls
24 further indicating that this application is not the system that actually places a
25 telephone call (*See Exhibit P - CBE patent application Figures 5A, 5B, 6, 7, 8, 9,*
26 *10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20*).

27 Paragraph 0044 makes very clear that this “clicker” application does not
28 initiate phone calls:

1 “... The manual dial application allows for a human being to
2 enter unauthorized cell phone numbers into a list by clicking on an
3 icon, ... Once selected by the user through the clicking process, each
4 of the cell phone numbers may then be dialed. The manual clicker
5 application is preferably dialing device agnostic.” (*See Exhibit P -*
6 *CBE patent application page ¶0044*)

7 The user clicks each phone number, passing the phone number to the
8 “dialing device.” The “clicker” program is not associated with the dialer, in fact,
9 it is “dialer agnostic.” This “clicker” program is simply a program to provide the
10 same interface to calling agents whether they use the Noble Systems predictive
11 dialer or the Livevox HCI dialer as highlighted by Terry Johnson. (*See Exhibit R*
12 - *Deposition transcript of Terry Johnson p. 116:14-18*) Highlighting that clicking
13 numbers in this “clicker” application does not initiate phone calls (*See Exhibit P -*
14 *CBE patent application ¶0044*). In paragraph 0057 on page 27, the applicant
15 points out that while waiting for a call to come through, a user can spend that idle
16 time clicking. The applicant points out that the person clicking does not need to
17 be anywhere near a telephone or dialing system (*Exhibit P - CBE patent*
18 *application ¶0057*).

19 This “clicker” program by itself is not an ATDS because it does not initiate
20 phone calls. If I were to relate the “clicker” application to something more
21 familiar such as a cell phone, the “clicker” application would be the bluetooth
22 earpiece. To say that the “clicker” application is the dialing device would be the
23 same as saying the bluetooth earpiece is the phone because one could press the
24 button on it to call the last number. The reality is neither the earpiece nor the
25 “clicker” application are connected to the phone service provider and provide
26 nothing more than a human interface to the actual phone system. In this case, the
27 “clicker” application selects the phone number and the dialer will dial the phone
28

1 number. The system at issue, in this case, is the system that calls the phone
2 numbers, not the “clicker” application.

3 During his deposition, Terry Johnson, attempted to cause confusion in this
4 area by redefining the “clicker” application as the “dialing device” and the Noble
5 Systems dialer and Livevox dialer as the “carrier.” (See Exhibit R - Deposition
6 transcript of Terry Johnson pp. 23:25, 24:1-4, 61:8-25, 62:1-25, 108:8-25,
7 109:1-25, 111:1-11, 122:10-18, 122:24-25). In my previous example, that would
8 be the same as calling the bluetooth earpiece the “phone or dialing device”, the
9 phone itself calling it the “carrier” But doing so would require leaving Sprint or
10 AT&T out of the picture – who is really the “carrier.” For the last 16 years, I
11 have worked with “autodialers” and have only seen names used by those in the
12 industry to be “Automatic Telephone Dialing System” or “autodialer” for short,
13 and “predictive dialer” for a specific type of “autodialer.” I have never seen the
14 name “carrier” attributed to any type of phone system, but that name was
15 reserved for the phone company, as Merriam-Webster defines “carrier” - “a
16 telecommunication company.” I will note that during his deposition, Terry
17 Johnson admitted that the “clicker” application is not a phone system. (See
18 Exhibit R - Deposition transcript of Terry Johnson pp. 61:16) I would also note
19 that when referring to landline calls, Terry Johnson referred to the Noble Systems
20 and Livevox dialers as a “dialing device” (See Exhibit R - Deposition transcript
21 of Terry Johnson pp. 14:15-21, 16:9-17, 20:17-21, 21:25, 22:1-25, 23:1-11,
22 25:25, 26:1, 121:3-25), but when referring to cell phone calls, he attributed
23 “dialing device” to the “clicker” application although the calls were still made
24 through the Noble or Livevox dialers making Noble Systems and Livevox dialers
25 the “carrier.” (See Exhibit R - Deposition transcript of Terry Johnson pp. 61:17-
26 25, 108:8-25, 110:1-25, 111:1-11, 122:10-25) The Noble Systems predictive
27 dialer is a predictive dialer regardless of the human interface device used to
28

1 interact with that dialer. A typical operation of the Noble Systems predictive
2 dialer uses either a physical telephone with a handset or a headset attached to the
3 computer and a software interface to interact with the dialer. Changing that
4 interface to a “clicker” application changes nothing about the Noble Systems
5 predictive dialer. The same applies to the Livevox dialers.

6 The CBE group uses three Livevox dialers and one Noble Systems dialer,
7 all of which I am very familiar with. (See Exhibit R - Deposition transcript of
8 Terry Johnson pp. 16:17, 19:22-24, 20:17-21, 22:4-12, 23:9-20, 25:25, 26:1-15,
9 61:4-5, 101:20-25, 102:1-2, 103, 10-25, 104:14-25, 105:1-25, 106:1-25, 108:8-
10 25, 110:1-25, 111:1-11, 112:1-25, 120:3-4, 121:1-25, 122:1-25, 125:117-21,
11 128:1-25, 129:1-25, 130:1-17, 131:12-25) I am familiar with the products
12 provided by Livevox. Livevox has four dialers: HCI, Manual, Preview-all and
13 Automated. Each of these four dialers are separated and do not interact with each
14 other. Terry Johnson confirmed that CBE uses three of the four Livevox
15 products: Manual, Automated (“Outbound”), and HCI (See Exhibit R -
16 Deposition transcript of Terry Johnson pp. 128:13-25, 129:1-25, 130:1-17) Of
17 the three Livevox dialers, Automated (“Outbound”) is the only predictive dialer.
18 Terry Johnson also confirmed that CBE uses the Noble Systems predictive dialer.
19 (See Exhibit R - Deposition transcript of Terry Johnson pp. 16:9-17, 19:11-24,
20 20:17-21, 21:9-25, 22:1-20, 23:9-11, 25:25, 26:1-15, 61:4-5, 103:10-25, 104:14-
21 25, 105:7-25, 106:1-25, 108:8-25, 110:1-25, 111-1-11, 112:1-16) Terry Johnson
22 also confirmed that the Noble Systems dialer is a predictive dialer (See Exhibit R
23 - Deposition transcript of Terry Johnson pp. 24:12-21, 113:22-25, 114:1-9)

24 The CBE Group called the phone number ending in 4379 a total of 26
25 times. (See Exhibit R - Deposition transcript of Terry Johnson pp. 54:7-13;
26 Exhibit Q - Account Notes). The calls on 04-14-2014 and 04-15-2014 were made
27 through the predictive dialer and dialed predictively. (See Exhibit R - Deposition
28

1 transcript of Terry Johnson pp. 75:8-17, 76:11-16, 104:8-12; Exhibit Q - Account
2 Notes p. 9).

3 All the calls from 04-14-2014 to 06-04-2014 where manually dialed
4 through the Noble Systems predictive dialer (See Exhibit R - Deposition
5 transcript of Terry Johnson 104:14-25, 105:1-25, 106:1-25; Exhibit Q - Account
6 Notes)

7 All the calls from 06-12-2014 onward where made using the Livevox HCI
8 dialer (See Exhibit R - Deposition transcript of Terry Johnson pp. 105:12-14;
9 Exhibit Q - Account Notes; Exhibit S - Response from Livevox)

10 While The CBE Group uses three dialers from Livevox (See Exhibit R -
11 Deposition transcript of Terry Johnson pp. 128:13-25, 129:1-25, 130:1-17), the
12 one Livevox dialer used to call the phone number ending in 4379, Livevox HCI,
13 is not an ATDS. Therefore I will limit my opinion to the Noble Systems
14 predictive dialer.

15 To determine which calls were made using the Noble Systems predictive
16 dialer, I first compared the Livevox HCI dialer records with the account notes to
17 identify which calls were placed with the Livevox HCI dialer. (See Exhibit S -
18 Response from Livevox; Exhibit Q - Account Notes). Terry Johnson testified in
19 his deposition that all the calls from June 12, 2014 onward were placed using the
20 Livevox HCI dialer, and all the calls before June 12, 2014 were placed with the
21 Noble Systems predictive dialer. (See Exhibit R - Deposition transcript of Terry
22 Johnson pp. 103:10-25, 104:8-25, 105:1-25, 106:1-25, 108:8-25, 110: 1-25,
23 111:1-11, 112:1-16, 114:1-19) This was verified with Livevox dialing records
24 (See Exhibit S - Response from Livevox) The following 18 calls, at issue, were
25 placed with the Noble Systems predictive dialer: 04/14/14 at 2244, 04/14/14 at
26 1456, 04/15/14 at 1238, 04/18/14 at 1124, 04/19/14 at 839, 04/21/14 at 1107,
27 04/22/14 at 1501, 04/22/14 at 944, 04/23/14 at 937, 04/28/14 at 921, 04/30/14 at
28

1 1131, 05/05/14 at 809, 05/08/14 at 1254, 05/12/14 at 1417, 05/15/14 at 1308,
2 05/20/14 at 1636, 05/29/14 at 1926, 06/04/14 at 1850.

3 Based upon the documents and evidence I have reviewed, all the calls at
4 issue that were made to Plaintiff using the Noble Systems Predictive Dialer. As
5 explained further below, in my expert opinion, this dialing system satisfies the
6 requirements of an “automatic telephone dialing system” (“ATDS”) as defined by
7 the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”).

8 Noble Systems PDS is a predictive dialer that, like other predictive dialers,
9 calls lists of numbers organized as “campaigns.” Noble PDS is the predictive
10 dialer itself, Noble IVR is the interactive voice response system as an optional
11 add on, Noble Messenger gives Noble PDS the ability to send pre-recorded
12 messages to telephone numbers, and Noble Maestro is the software to manage the
13 calling lists and dialer. (*See Exhibit C – Noble Systems - Management Desktop;*
14 *Exhibit D - Noble Systems - IVR; Exhibit E - Noble Systems - Messaging; Exhibit*
15 *F - Noble Systems - Outbound; Exhibit R - Deposition transcript of Terry*
16 *Johnson pp. 24:12-21, 113:22-25, 114:1-9) The Noble Systems predictive dialer*
17 *is capable of dialing a list of numbers loaded into a “campaign” or “pool”¹ on the*
18 *dialer. The Noble Systems predictive dialer then can automatically dial those*
19 *numbers and deliver predictive dialed calls or agent-less calls delivering pre-*
20 *recorded messages. (Id.) For predictive dialed calls, the Noble Systems predictive*
21 *dialer will call using multiple telephone lines per agent, and it will use all*
22 *available telephone lines when making agent-less calls. (Id.) All phone calls,*
23 *regardless of how dialed are called using the same equipment, terminals, phone,*
24 *PBX, and Noble Systems predictive dialer before going to the PSTN (public*
25 *switched telephone network). (Id.)*

26
27
28 ¹ A “pool” is, like a “campaign,” in that it is calling a list of phone numbers organized
by some predefined criteria for a specific purpose.

1 After reviewing the above documents, and based on my experience with
2 predictive dialers and autodialers, I am of the opinion that Defendant used an
3 Automatic Telephone Dialing System to place telephone calls to Plaintiff, or
4 more specifically, that the characteristics of the telephone dialing system
5 described above meet the definition of equipment that has the capacity to store or
6 produce numbers to be called, using a random or sequential number generator,
7 and the capacity to call such numbers. Specifically, the dialer calls numbers that
8 are stored as a list, which itself is stored in a table of a database.

9 The term “Predictive dialer” is a technical term used to describe the type of
10 dialing system. Predictive dialers all work under the same guiding principle: they
11 transfer telephone numbers to be called to a list or “campaign.” This list of
12 numbers is then dialed without human intervention. The calls are made, using
13 multiple telephone lines, in advance of being connected to a live operator. Using
14 a complex computer algorithm, the dialing system will “predict” how far in
15 advance to make the calls in attempt to prevent time wasted in listening to rings,
16 answering machines, disconnected phone numbers and calls that are not
17 answered. This functionality has not changed since Davox marketed their
18 predictive dialers in the 1980's. (*See Exhibit M - Davox Marketing*)

19 The term “Predictive dialer” was not created by the FCC in their 2003
20 Order. Nor was the term “automatic telephone dialing system” created by
21 Congress. These are terms that have been used to describe such equipment, by
22 those in the industry for decades. Norman A. Sheldon filed a patent (*Exhibit I -*
23 *US patent 3,943,289*) on July 12, 1974 for what he called a “automatic telephone
24 dialing system” (*Exhibit I - US patent 3,943,289 page 4 column 2 line 63*) which
25 dialed numbers from a sequential number generator and delivered pre-recorded
26 messages to telephone subscribers. He chose to use a sequential number
27 generator because at that time computer storage was very expensive (*Exhibit F -*
28

1 U.S. Patent 3,943,289 page 4 column 2 lines 2-11). Although he chose to use a
2 sequential number generator, stored lists of numbers had been used for many
3 years prior to his patent. (See Exhibit N - US Patent 3229042; Exhibit O - US
4 Patent 3317678) In July 25, 1989, Bassem M. Girgis filed a patent (Exhibit J -
5 US patent 4,933,964) for a “predictive outbound dialing system” (Exhibit J - US
6 patent 4,933,964 page 19 column 2 line 53) which used an "input call list"
7 (Exhibit J - US patent 4,933,964 figure 3) stored in the system to call those
8 numbers in advance predicting when a live agent would be available using a
9 predictive algorithm. This system was designed to call out on more lines than
10 available agents from a list of numbers, listen for rings, busy, and answered calls,
11 and connect the calls to agents by predicting when they would be available. This
12 is the precise capability of the Predictive dialers used today and the Noble
13 Systems predictive dialer used by The CBE Group, Inc. The functionality of the
14 autodialers and predictive dialers has not changed since long before the TCPA
15 until now with the exception that modern dialers can make more calls in a shorter
16 period of time. Attached as Exhibit L are examples of articles and job postings
17 illustrating that the exact same type of equipment was used over the last four
18 decades, along with the terms “Automatic Telephone Dialing System” and
19 “Predictive Dialer,” long before Congress or the FCC considered the equipment.
20 (See Exhibit L - ATDS and predictive dialers 1970-1992; also see Exhibit U -
21 FCC response to ACA pp. 13-14 footnote 3) The equipment described in the
22 TCPA and the FCC 2003 Order is the same equipment that is in use today and
23 used by The CBE Group, Inc.
24

25 The fact that the dialer places calls to numbers stored by the dialing system
26 and delivers predictive dialed calls indicates that the dialer meets the definition of
27 an ATDS, as it relates to predictive dialers, as clarified in the Federal
28 Communications Commission’s (“FCC”) 2003 Order:

1
2 The record demonstrates that a predictive dialer is equipment that dials
3 numbers and, when certain computer software is attached, also assists
4 telemarketers in predicting when a sales agent will be available to take
5 calls. The hardware, when paired with certain software, has the capacity to
6 store or produce numbers and dial those numbers at random, in sequential
7 order, or from a database of numbers. As commenters point out, in most
8 cases, telemarketers program the numbers to be called into the equipment,
9 and the dialer calls them at a rate to ensure that when a consumer answers
10 the phone, a sales person is available to take the call. The principal feature
11 of predictive dialing software is a timing function, not number storage or
12 generation. ...[T]hese machines are not conceptually different from dialing
13 machines without the predictive computer program attached.”

14

15 The TCPA defines an “automatic telephone dialing system” as “equipment
16 which has the capacity (A) to store or produce telephone numbers to be
17 called, using a random or sequential number generator; and (B) to dial such
18 numbers.” The statutory definition contemplates autodialing equipment
19 that either stores or produces numbers. It also provides that, in order to be
20 considered an “automatic telephone dialing system,” the equipment need
21 only have the “capacity to store or produce telephone numbers (emphasis
22 added). . . .” It is clear from the statutory language and the legislative
23 history that Congress anticipated that the FCC, under its TCPA rulemaking
24 authority, might need to consider changes in technologies. In the past,
25 telemarketers may have used dialing equipment to create and dial 10-digit
26 telephone numbers arbitrarily. As one commenter points out, the evolution
27 of the teleservices industry has progressed to the point where using lists of
28 numbers is far more cost effective. The basic function of such equipment,
however, has not changed—the capacity to dial numbers without human
intervention. We fully expect automated dialing technology to continue to
develop.

....

[T]o exclude from these restrictions equipment that use predictive dialing
software from the definition of ‘automated telephone dialing equipment’
simply because it relies on a given set of numbers would lead to an
unintended result. ...We believe the purpose of the requirement that
equipment have the ‘capacity to store or produce telephone numbers to be
called’ is to ensure that the prohibition on autodialed calls not be
circumvented. Therefore, the Commission finds that a predictive dialer
falls within the meaning and statutory definition of ‘automatic telephone
dialing equipment’ and the intent of Congress.

1
2 (Exhibit B - FCC Order 03-153 ¶¶ 131-134 (finding that a predictive dialer falls within
3 the TCPA's definition of "automatic telephone dialing system").)

4
5 The FCC 2008 Order resulted from a petition by a consortium of debt
6 collectors to the FCC requesting that the FCC reconsider its 2003 Order. In
7 response, the FCC affirmed the 2003 Order. *See In the Matter of Rules and*
8 *Regulations Implementing the Telephone Consumer Protection Act of 1991,*
9 *Request of ACA International for Clarification and Declaratory Ruling, CG*
10 *Docket No. 02-278, FCC Docket No. 07-232.*

11 Additionally, the properties of the dialing system have the precise
12 capabilities of an ATDS as further clarified by FCC Order 12-56 (May 21, 2012),
13 wherein, the FCC stated:

14
15 Under the TCPA, the term "automatic telephone dialing system" is defined
16 as "equipment which has the capacity (A) to store or produce telephone
17 numbers to be called, using a random or sequential number generator; and
18 (B) to dial such numbers." *Id.* at § 227(a)(1). The Commission has
19 emphasized that this definition covers any equipment that has the specified
20 capacity to generate numbers and dial them without human intervention
whether or not the numbers called are randomly or sequentially generated
or come from calling lists.

21 *Rules and Regulations Implementing the Telephone Consumer Protection*
22 *Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd.*
23 *14014 at 14092 ¶ 133 (2003).*

24 Thus, in my expert opinion, the dialing system (as outlined above)
25 constitute an ATDS as contemplated by the TCPA and clarified by the FCC,
26 because the systems have the capacity to either call numbers stored or to call
27 numbers generated by a number generator:
28

1 The TCPA defines an “automatic telephone dialing system” as “equipment
2 which has the capacity (A) to store or produce telephone numbers to be
3 called, using a random or sequential number generator; and (B) to dial such
4 numbers.” The statutory definition contemplates autodialing equipment
5 that either stores or produces numbers. It also provides that, in order to be
6 considered an “automatic telephone dialing system,” the equipment need
7 only have “the *capacity* to store or produce telephone numbers (emphasis
8 added). . . .”

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(See *Exhibit B - FCC Order 03-153 at ¶ 132*).

A predictive dialer has the capacity of an ATDS, not because it
predicatively dials calls, but simply that it has the capacity to automatically call
numbers stored in a list. The predictive algorithm in a predictive dialer predicts
when agents would be available and is no way related to the storage or
production of numbers. With all the predictive dialers with which I have worked
in the last 15 years, the predictive algorithm was in no way related to the storage
or production of numbers. The FCC correctly stated this, “The principal feature
of predictive dialing software is a timing function, not number storage or
generation.” (See *Exhibit B - FCC Order 03-153 ¶ 131*)

All predictive dialers are indeed an ATDS, but not all ATDS's are
predictive dialers. As the FCC stated, “The principal feature of predictive dialing
software is a timing function, not number storage or generation.... [T]hese
machines are not conceptually different from dialing machines without the
predictive computer program attached.” (See *Exhibit B - FCC Order 03-153 ¶
131*). I myself use the example of predictive dialers when explaining what
capacities are in view in the FCC 2003 Order. I do this because there are many
more features than just storing numbers in a list and automatically calling them,
and using the example of the predictive dialer I can highlight that none of those
other features have anything to do with computer storage or the generation of
numbers. Systems that only call lists of numbers to deliver a pre-recorded

1 message or systems that call numbers to deliver a text or SMS message have no
2 live agents involved, therefore there is little confusion on their capacity to store or
3 produce numbers and to call them. But all those other features in a predictive
4 dialer are in addition to storing numbers and automatically calling them. Other
5 features found in predictive dialers such as ACD routing, AMD detection,
6 preview mode and other dialing modes, predictive algorithms, abandon rate,
7 cloud based, skills based routing, blended campaigns, CRM integration, types of
8 databases used by the system, VoIP, POTS lines, T1 lines, PRI lines, operating
9 systems, computer hardware all have nothing to do with the systems capacity to
10 store a list of numbers and to automatically call them. For these reasons, I use
11 the example of predictive dialers to explain what features make it an ATDS,
12 because at the same time I can explain what features do not make it an ATDS.

13
14 It is my understanding that The CBE Group, Inc. placed calls to the
15 Plaintiff in both predictive mode and manual mode. (*See Exhibit R - Deposition*
16 *transcript of Terry Johnson p. 75:8-17, 114:1-9*) The mode of operation however
17 does not change the capacity of the system. Changing the mode of dialing is
18 done by clicking a radio button and clicking “save.” The FCC considered this
19 when clarifying “capacity.” (*See Exhibit U - FCC response to ACA pp. 31-36*)
20 The administrator of a predictive dialer is not capable of taking away any
21 functionality of the system. The administrator can only choose to not use it. The
22 fact that one campaign can be configured to use preview mode and another
23 campaign configured to use predictive, while other agents place calls manually,
24 all occurring at the same time, illustrates the system has the current capacity
25 regardless of the dialing mode selected for a particular campaign.

26 All Predictive Dialers, which I have seen, also employ a “manual” mode
27 and a “preview” mode, which presents the calling agent with information about
28 the to-be-called party before the number is actually dialed. The agent then has the

1 ability to accept that lead based on the information presented, or reject it and
2 await the dialer to present a new lead to be called. Because a dialer has a preview
3 mode or a manual mode and the calling party may have used those modes,
4 however, does not mean that the dialer fails to qualify as an ATDS.

5 I am not alone in my understanding of whether manual mode has any
6 effect on the capacity of the predictive dialer. Recently, Ontario Systems (the
7 creators of the popular Guaranteed Contacts predictive dialer and the FACS
8 system) published a two part article on the subject of dialing modes and their
9 impact on the predictive dialer's capacity as defined by the FCC. Using the
10 example of manually dialed calls through the predictive dialer, Ontario Systems
11 highlights that a Predictive dialer is a predictive dialer regardless how it is used.
12 Manually dialed is when one presses all ten digits of the phone number to place
13 the call, not a number stored on the list. Preview mode calls the numbers from
14 the list stored in the predictive dialers database. The FCC clarified that predictive
15 dialers are an ATDS because of their capacity not how the operator uses it. The
16 two articles from Ontario Systems are relevant in their entirety (*See Exhibit G -*
17 *The Big 2 Myths You Probably Believe About Manual Dialing - Part 1; Exhibit*
18 *H - The Big 2 Myths You Probably Believe About Manual Dialing - Part 2*),
19 however, the summary highlights the main point:
20

21
22 In other words, if the technology you use to contact
23 consumers has any capacity to dial predictively, or pull from a
24 database of numbers and dial them, current judicial opinion indicates
25 it is an autodialer. Period. This is true whether you launch the call
26 manually by pressing a field, or if you enter 10 digits on a keypad.
27 On the other hand, it opined such a call is a manual dial if it's made
28 using a system to contact consumers that is not tied, routed from or

1 to, or in any way connected to your autodialer. If it's not, it is
2 unlikely you are contacting consumers using an automatic telephone
3 dialing system as defined by the FCC. (*Exhibit H - The Big 2 Myths*
4 *You Probably Believe About Manual Dialing - Part 2*)
5

6 In other words, to call cell phones, one should use a separate PBX entirely.

7 Another manufacturer of a popular predictive dialer agrees, which is also
8 the manufacturer of the predictive dialer used by The CBE Group, Inc. Sighting
9 the Nelson decision, Noble Systems does offer a solution which routes calls to
10 wireless numbers through a separate PBX entirely. (*See Exhibit K - Noble TCPA*
11 *Compliance Solution*) There is no indication however that the The CBE Group,
12 Inc. had such a solution in place. On the contrary, all “manual” and preview calls
13 are still going through the Noble predictive dialer. (*See Exhibit R - Deposition*
14 *transcript of Terry Johnson pp. 103:10-25, 104:8-25, 105:1-25, 106:1-25, 108:8-*
15 *25, 110: 1-25, 111:1-11, 112:1-16, 114:1-19*)
16

17 As stated above, the FCC relies upon the following definition of an
18 “automatic telephone dialing system”:

19 The TCPA defines an “automatic telephone dialing system” as
20 “equipment which has the capacity (A) to store or produce telephone
21 numbers to be called, using a random or sequential number
22 generator; and (B) to dial such numbers.” The statutory definition
23 contemplates autodialing equipment that either stores or produces
24 numbers. It also provides that, in order to be considered an
25 “automatic telephone dialing system,” the equipment need only have
26 “the capacity to store or produce telephone numbers (emphasis
27 added). . . .”
28

1
2
3 (See *Exhibit B - FCC Order 03-153 at ¶ 132*). This definition is consistent
4 with the definition used by those in the industry long before adopted by Congress
5 or the FCC.

6 Even more recently, July 10, 2015, the FCC issued a Declaratory Ruling
7 and Order in which the FCC clarified the term “capacity,” whether the system
8 needs to have currently installed ability to generate numbers sequentially or
9 randomly, whether calling from a predetermined list of consumers satisfies the
10 statute, whether multiple systems making up the entire dialing system are viewed
11 individually or as a complete system, and whether the system system needs to be
12 operated using such capacity to be considered an autodialer. While the
13 Defendant's system has the current “capacity” to automatically dial a list of
14 numbers, the FCC, in their July 10, 2015 Declaratory Ruling and Order, the FCC
15 has taken the more broader understanding of the term capacity to include systems
16 that could have the capacity added easily:
17

18
19 We reaffirm our previous statements that dialing equipment
20 generally has the capacity to store or produce, and dial random or
21 sequential numbers (and thus meets the TCPA’s definition of
22 “autodialer”) even if it is not presently used for that purpose,
23 including when the caller is calling a set list of consumers. We also
24 reiterate that predictive dialers, as previously described by the
25 Commission, satisfy the TCPA’s definition of “autodialer” for the
26 same reason. We also find that callers cannot avoid obtaining
27 consent by dividing ownership of pieces of dialing equipment that
28 work in concert among multiple entities.

1 Glide, PACE, and TextMe ask whether dialing equipment is
2 an autodialer under the TCPA when it does not have the “current
3 capacity” or “present ability” to generate or store random or
4 sequential numbers or to dial sequentially or randomly at the time
5 the call is made. Glide asks the Commission to clarify that
6 “equipment used to make a call is an autodialer subject to the TCPA
7 only if it is capable of storing or generating sequential or
8 randomized numbers at the time of the call.” PACE seeks
9 clarification that a dialing system’s “capacity” is “limited to what it
10 is capable of doing, without further modification, at the time the call
11 is placed.” TextMe asks the Commission to clarify that “capacity”
12 “encompasses only equipment that, at the time of use, could in fact
13 perform the functions described in the TCPA without human
14 intervention and without first being technologically altered.”
15

16 The TCPA defines “automatic telephone dialing system” as
17 “equipment which has the capacity—(A) to store or produce
18 telephone numbers to be called, using a random or sequential
19 number generator; and (B) to dial such numbers.” In the 2003 TCPA
20 Order, the Commission found that, in order to be considered an
21 “automatic telephone dialing system,” the “equipment need only
22 have the ‘capacity to store or produce telephone numbers.’” The
23 Commission stated that, even when dialing a fixed set of numbers,
24 equipment may nevertheless meet the autodialer definition.

25 In the 2003 TCPA Order, the Commission described a
26 predictive dialer as “equipment that dials numbers and, when certain
27 computer software is attached, also assists telemarketers in
28 predicting when a sales agent will be available to take calls. The

1 hardware, when paired with certain software, has the capacity to
2 store or produce numbers and dial those numbers at random, in
3 sequential order, or from a database of numbers.” In the 2008 ACA
4 Declaratory Ruling, the Commission “affirm[ed] that a predictive
5 dialer constitutes an automatic telephone dialing system and is
6 subject to the TCPA’s restrictions on the use of autodialers.” The
7 Commission considered ACA’s argument that a predictive dialer is
8 an autodialer “only when it randomly or sequentially generates
9 telephone numbers, not when it dials numbers from customer
10 telephone lists,” and stated that ACA raised “no new information
11 about predictive dialers that warrant[ed] reconsideration of these
12 findings” regarding the prohibited uses of autodialers—and therefore
13 predictive dialers—under the TCPA.
14

15 The Commission declined to distinguish between calls to
16 wireless telephone numbers made by dialing equipment “paired with
17 predictive dialing software and a database of numbers” and calls
18 made “when the equipment operates independently of such lists and
19 software packages.” Recognizing the developments in calling
20 technology, the Commission found that “[t]he basic function of such
21 equipment, however, has not changed—the capacity to dial numbers
22 without human intervention.” The Commission found it troubling
23 that predictive dialers, like dialers that utilize random or sequential
24 numbers instead of a list of numbers, retain the capacity to dial
25 thousands of numbers in a short period of time and that construing
26 the autodialer definition to exclude predictive dialers could harm
27 public safety by allowing such equipment to be used to place
28 potentially large numbers of non-emergency calls to emergency

1 numbers, a result the TCPA was intended to prevent. The
2 Commission concluded that the TCPA's unqualified use of the term
3 "capacity" was intended to prevent circumvention of the restriction
4 on making autodialed calls to wireless phones and emergency
5 numbers and found that "a predictive dialer falls within the meaning
6 and statutory definition of 'automatic telephone dialing equipment'
7 and the intent of Congress."

8 We agree with commenters who argue that the TCPA's use of
9 "capacity" does not exempt equipment that lacks the "present
10 ability" to dial randomly or sequentially. We agree that Congress
11 intended a broad definition of autodialer, and that the Commission
12 has already twice addressed the issue in 2003 and 2008, stating that
13 autodialers need only have the "capacity" to dial random and
14 sequential numbers, rather than the "present ability" to do so. Hence,
15 any equipment that has the requisite "capacity" is an autodialer and
16 is therefore subject to the TCPA.
17

18 In the 1992 TCPA Order, the Commission stated that it was
19 rejecting definitions that fit "only a narrow set of circumstances" in
20 favor of "broad definitions which best reflect[ed] legislative intent
21 by accommodating the full range of telephone services and
22 telemarketing practices." The Commission rejected the narrower
23 interpretation of "capacity" (as "current ability") when it held that
24 predictive dialer equipment meets the autodialer definition. In the
25 2003 TCPA Order, the Commission held that predictive dialers met
26 the definition of an autodialer because that "hardware, when paired
27 with certain software, has the capacity to store or produce numbers
28 and dial those numbers at random, in sequential order, or from a

1 database of numbers.” By finding that, even when the equipment
2 presently lacked the necessary software, it nevertheless had the
3 requisite capacity to be an autodialer, the Commission implicitly
4 rejected any “present use” or “current capacity” test. In other words,
5 the capacity of an autodialer is not limited to its current
6 configuration but also includes its potential functionalities. One
7 dissent argues that our reading of “capacity” is flawed in the same
8 way that saying an 80,000 seat stadium has the capacity to hold
9 104,000. But that is an inapt analogy—modern dialing equipment
10 can often be modified remotely without the effort and cost of adding
11 physical space to an existing structure. Indeed, adding space to
12 accommodate 25 percent more people to a building is the type of
13 mere “theoretical” modification that is insufficient to sweep it into
14 our interpretation of “capacity.”

15
16 Given the scope of the Petitioners’ requests, we do not at this
17 time address the exact contours of the “autodialer” definition or seek
18 to determine comprehensively each type of equipment that falls
19 within that definition that would be administrable industry-wide.
20 Rather, we reiterate what the Commission has previously stated
21 regarding the parameters of the definition of “autodialer.” First, the
22 Commission found in its original TCPA proceeding that the
23 “prohibitions of [section] 227(b)(1) clearly do not apply to functions
24 like ‘speed dialing.’” Second, the Commission has also long held
25 that the basic functions of an autodialer are to “dial numbers without
26 human intervention” and to “dial thousands of numbers in a short
27 period of time.” How the human intervention element applies to a
28 particular piece of equipment is specific to each individual piece of

1 equipment, based on how the equipment functions and depends on
2 human intervention, and is therefore a case-by-case determination.

3 We do, however, acknowledge that there are outer limits to the
4 capacity of equipment to be an autodialer. As is demonstrated by
5 these precedents, the outer contours of the definition of “autodialer”
6 do not extend to every piece of malleable and modifiable dialing
7 equipment that conceivably could be considered to have some
8 capacity, however small, to store and dial telephone numbers—
9 otherwise, a handset with the mere addition of a speed dial button
10 would be an autodialer. Further, although the Commission has found
11 that a piece of equipment can possess the requisite “capacity” to
12 satisfy the statutory definition of “autodialer” even if, for example, it
13 requires the addition of software to actually perform the functions
14 described in the definition, there must be more than a theoretical
15 potential that the equipment could be modified to satisfy the
16 “autodialer” definition. Thus, for example, it might be theoretically
17 possible to modify a rotary-dial phone to such an extreme that it
18 would satisfy the definition of “autodialer,” but such a possibility is
19 too attenuated for us to find that a rotary-dial phone has the requisite
20 “capacity” and therefore is an autodialer.
21

22 This broad interpretation of “capacity” to include “potential
23 ability” is consistent with formal definitions of “capacity,” one of
24 which defines “capacity” as “the potential or suitability for holding,
25 storing, or accommodating.” Furthermore, interpreting “capacity” as
26 limited to “current capacity” or “present ability,” for which
27 Petitioners and some commenters here argue, could create problems
28 for enforcing the TCPA’s privacy protections with regard to proving

1 how a system with multiple functions was actually used for multiple
2 calls. As the Commission has previously recognized, “the purpose of
3 the requirement that equipment have the ‘capacity to store or
4 produce telephone numbers to be called’ is to ensure that the
5 restriction on autodialed calls not be circumvented.”

6 In light of our precedent and determination that Congress
7 intended a broad definition of autodialer, we reject arguments that:
8 the TCPA’s language on its face does not support the claim that the
9 TCPA was meant to apply to devices that need to be configured to
10 store numbers or call sequentially; a narrow reading of the TCPA is
11 necessary to eliminate a lack of clarity regarding what constitutes an
12 autodialer; and the term “capacity” implies present ability rather
13 than future possibility. We reiterate that a present use or present
14 capacity test could render the TCPA’s protections largely
15 meaningless by ensuring that little or no modern dialing equipment
16 would fit the statutory definition of an autodialer. We also reject
17 PACE’s argument that the Commission should adopt a “human
18 intervention” test by clarifying that a dialer is not an autodialer
19 unless it has the capacity to dial numbers without human
20 intervention. Because the Commission has previously rejected a
21 restrictive interpretation of autodialer in favor of one based on a
22 piece of equipment’s potential ability, we find that PACE’s argument
23 amounts to a simple variation on the “present ability” arguments we
24 reject above.
25

26 PACE, TextMe, and others argue that a broad interpretation of
27 “capacity” could potentially sweep in smartphones because they
28 may have the capacity to store telephone numbers to be called and to

1 dial such numbers through the use of an app or other software. Even
2 though the Commission has interpreted “capacity” broadly since
3 well before consumers’ widespread use of smartphones, there is no
4 evidence in the record that individual consumers have been sued
5 based on typical use of smartphone technology. Nor have these
6 commenters offered any scenarios under which unwanted calls are
7 likely to result from consumers’ typical use of smartphones. We have
8 no evidence that friends, relatives, and companies with which
9 consumers do business find those calls unwanted and take legal
10 action against the calling consumer. We will continue to monitor our
11 consumer complaints and other feedback, as well as private
12 litigation, regarding atypical uses of smartphones, and provide
13 additional clarification if necessary.
14

15 Because our decision is based on the TCPA’s terms and past
16 Commission interpretation, we need not reach the policy arguments
17 from Glide and other commenters, such as claims related to class-
18 action lawsuits, that could be viewed as being offered to support
19 reversing the Commission’s prior decisions; in a declaratory ruling
20 we only clarify existing law or resolve controversy regarding
21 the interpretation or application of existing law, rules, and
22 precedents.

23 We also find that parties cannot circumvent the TCPA by
24 dividing ownership of dialing equipment. In their Petition, Fried and
25 Evans seek a ruling that a combination of equipment used by
26 separate entities to send text messages constitutes an autodialer
27 under the TCPA. The Petitioners in this case received text messages
28 from a beauty salon that had contracted with another party,

1 Textmunications, Inc. (Textmunications), to transmit advertisements
2 in the form of text messages to their current and former customers.
3 Textmunications, in turn, contracted with Air2Web, a mobile
4 messaging aggregator, to transmit the messages. As described in the
5 Fried Petition and the Referral Order, the beauty salon provided
6 customer data to Textmunications, who stored this information on its
7 own equipment and databases. Textmunications then entered into an
8 agreement with Air2Web to use its equipment to transmit the text
9 messages to the recipients. 84 In effect, the separate equipment
10 divided the storage and calling functions between these two
11 companies. As a result, Air2Web and Textmunications allege that
12 their equipment should not be considered an autodialer because
13 neither system, acting independently, has the capacity both to store
14 or produce numbers, and dial those numbers as required by the
15 TCPA.
16

17 We conclude that such equipment can be deemed an
18 autodialer if the net result of such voluntary combination enables the
19 equipment to have the capacity to store or produce telephone
20 numbers to be called, using a random or sequential number
21 generator, and to dial such numbers. The fact that two separate
22 entities have voluntarily entered into an agreement to provide such
23 functionality does not alter this analysis. As one commenter notes,
24 this conclusion is consistent with the statutory language and prior
25 Commission interpretations of the TCPA. The TCPA uses the word
26 “system” to describe the automated dialing equipment that is defined
27 in section 227(a)(1) of the Act. The Commission noted, in
28 concluding that a predictive dialer meets the definition of an

1 autodialer, that “[t]he hardware, when paired with certain software,
2 has the capacity to store or produce numbers and dial those
3 numbers.” As a result, the Commission has recognized that various
4 pieces of different equipment and software can be combined to form
5 an autodialer, as contemplated by the TCPA. The fact that these
6 individual pieces of equipment and software might be separately
7 owned does not change this analysis.
8

9 *(See Exhibit T - FCC-15-72A1 ¶¶ 10-24)*

10 Previously I have held a more narrow definition of “capacity” in regards to
11 the generation of phone numbers, however, that had no effect in determining
12 whether predictive dialers were an ATDS, because predictive dialers retain the
13 capacity to automatically dial a list of numbers regardless of the dialing mode a
14 campaign may be set at. In light of the FCC's July 10, 2015 Declaratory Ruling
15 and Order where they take a broad definition of “capacity” as it relates to
16 autodialing numbers and the generation of numbers, I would point out that
17 making a computer generate a list of 10 digit numbers, is a relatively trivial task.
18 Computers are designed to do math and counting i.e. “to compute.” For example,
19 typing “seq 6192486000 6192486999 > sequential_numbers_to_call.txt” creates
20 a list of 1000 Sprint Wireless Numbers to be called (this was done on my regular
21 laptop with no additional software installed. In other words, my laptop running
22 Linux has natively installed a “sequential number generator” that can produce a
23 list of phone numbers. Windows computers have a similar command line
24 function as well. Typing “for /L %i in (2480000,1,2489999) do @echo 619%i >>
25 sequential_numbers_to_call.txt” generates the same list on a Windows computer.
26 The Noble systems predictive dialer runs on Windows and therefore has a
27 sequential number generator. Of course storage of numbers does not discriminate
28

1 on how the numbers were produced as computer storage can store any kind of
2 data regardless of how it was produced whether loaded from a list of known
3 numbers or a list of sequentially generated numbers. (*See Exhibit U - FCC*
4 *response to ACA pp. 6, 12, 13, 24, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48,*
5 *49, 52)*

6 Those FCC orders and rulings provide me with the information that assists
7 me in forming an opinion about whether The CBE Group's system has the
8 capacity as required by the TCPA's definition of an ATDS. Based on those orders
9 and rulings, based upon my review of the documents and evidence provided in
10 this case, based on my knowledge of computer storage and computer processing,
11 and based on my knowledge of autodialers and predictive dialers, it is also my
12 expert opinion that all of the calls, at issue, made to Plaintiff in this case were
13 made using an automatic telephone dialing system.
14

15 The process of analyzing the Noble Systems predictive dialer used was a
16 simple process. To satisfy the question of whether or not the system has the
17 technical capabilities described in the FCC's clarification of the TCPA in the 2003
18 report, all I had to do was investigate what the dialing equipment is capable of
19 doing, and using my knowledge of predictive dialers, determine if in fact those
20 capabilities are indeed those defined in the 2003 FCC order.

21 Additionally, no other physical inspection was required in determining the
22 capabilities of these systems. The physical attributes of the systems have nothing
23 to do with the functionality of the system. A physical inspection of these systems
24 would not show anything more than the predictive dialer is a standard computer
25 in which I have over two decades of experience with.

26 After studying the manuals for the Noble Systems predictive dialer and my
27 own experience with predictive dialers and my experience with Noble Systems, I
28 had far more knowledge than what was required to make an informed and

1 reliable determination of whether or not the system was able to store numbers
2 and call them automatically, or whether the system can generate numbers and call
3 them automatically. In the case of the Noble Systems predictive dialer used by
4 The CBE Group, the system is capable of doing both.

5 In this case, the Noble Systems predictive dialer has the capacity to store
6 those numbers in a database and call them without human intervention, even if
7 the operator of the computer walks away, the dialer would continue to make those
8 calls; and it will continue to make those calls until the list of phone numbers is
9 exhausted. All that was required was a simple and short process to determine if
10 the dialer had such capabilities. I have studied the manual, for the Noble Systems
11 predictive dialer to obtain a full understanding of the dialer, however, all that
12 study goes far beyond answering the pertinent questions of whether or not the
13 predictive dialer stores or produces numbers and calls them automatically.
14

15 *Additional Work and Analysis.*
16

17
18 Additionally, I will be examining future discovery responses and will be
19 formulating additional expert opinions on the topics raised in those discovery
20 responses as requested and appropriate.

21 I reserve the right to amend, modify or supplement the statements and
22 opinions set forth herein as appropriate.

23 I declare that the foregoing is true and correct, subject to the laws of
24 perjury of the United States. Executed in Spring Valley, CA on this 29th day of
25 January 2016.

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27 Jeffrey A. Hansen
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