IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02959-CMA-MEH

JESSICA MONTANEZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

FUTURE VISION BRAIN BANK, LLC d/b/a The Green Solution,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

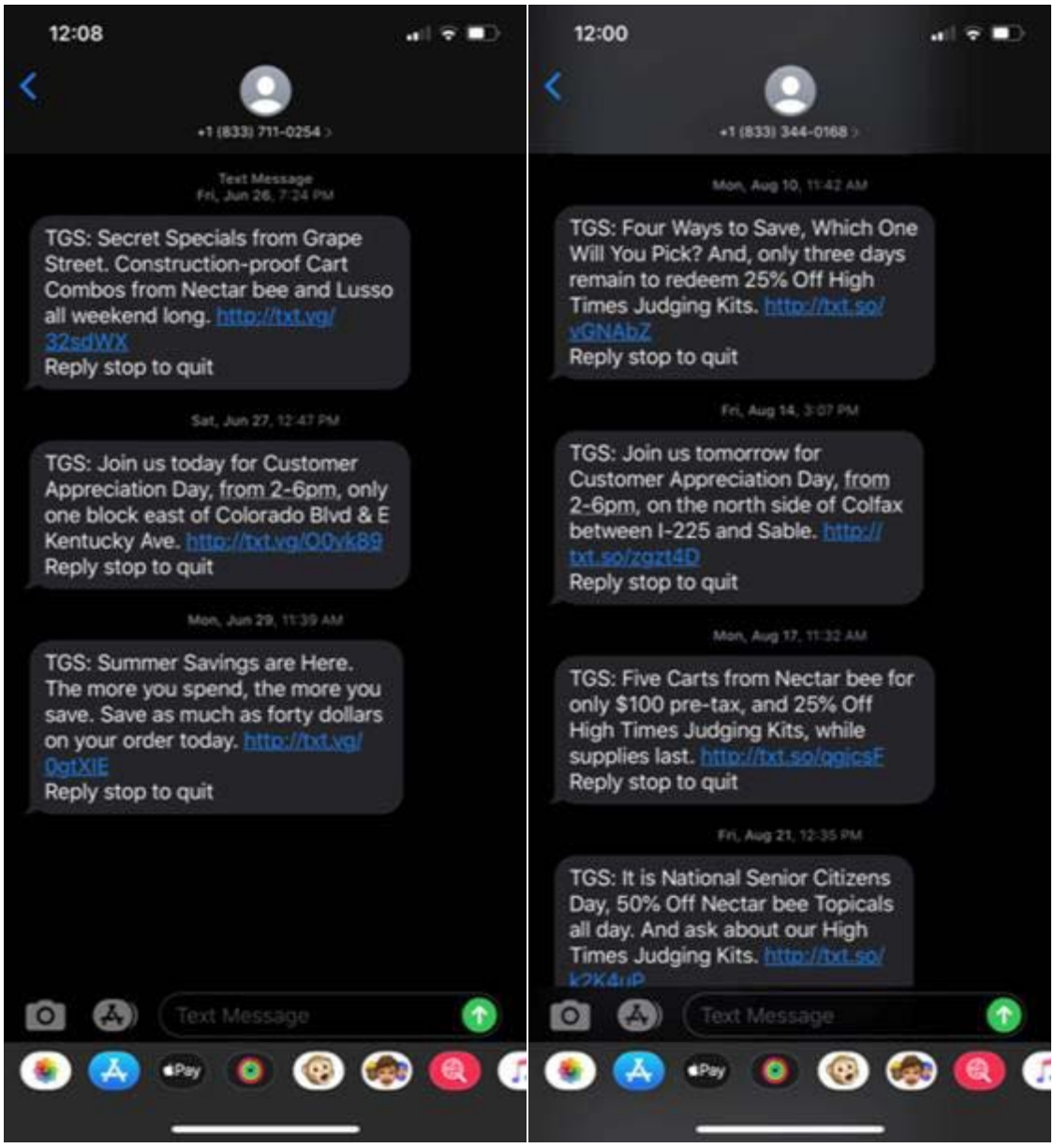
Plaintiff Jessica Montanez ("Plaintiff") asserts two claims against Defendant Future Vision Brain Bank d/b/a The Green Solution ("Defendant") pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*., concerning alleged unwanted automated text messages. ECF 25. Defendant has filed the present motion to dismiss ("Motion"), seeking dismissal of the claims for lack of standing, pursuant to Fed. R. Civ. P. 12(b)(1), and failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). ECF 33. The Motion is fully briefed and has been referred to this Court for a recommendation by District Judge Christine M. Arguello. As set forth below, this Court respectfully recommends denying the Motion.

BACKGROUND

The following are material, factual allegations (as opposed to legal conclusions, bare assertions, or conclusory allegations) made by Plaintiff in her Amended Complaint, which are

taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendant is a cannabis dispensary. Am. Compl. ¶ 3. Starting around June 26, 2020, Defendant "sent numerous telemarketing text messages" to Plaintiff's cellphone. *Id.* ¶ 23. The following are examples of these text messages:



None of the messages were addressed specifically to Plaintiff. *Id.* ¶ 26. The subject matter of these text messages involved promotional material; for example, as can be seen above, on June 29, 2020, a text message stated, "Summer Savings are Here. The more you spend, the more you save. Save as much as forty dollars on your order today." *Id.* ¶ 23. The messages originated from telephone numbers 833-711-0254 and 833-344-0168, numbers operated and owned by Defendant. *Id.* ¶ 31. Those telephone numbers are referred to as "long code," namely a standard ten-digit telephone number that enables Defendant to send voluminous text messages while indicating to the recipients that such a message was sent by an individual. *Id.* ¶ 32. Plaintiff alleges that Defendant "utilized a combination of hardware and software systems to send the text messages at issue in this case." *Id.* ¶ 34. These systems allegedly "have the capacity to store telephone numbers using a random or sequential generator, and to dial such numbers from a list without human intervention." *Id.*

To send the text messages, Defendant used a messaging platform that provides for the transmission of automated text messages without human involvement, has the capacity to store telephone numbers, has the ability to generate sequential numbers and dial numbers in sequential order, and has the capability of scheduling the time and date of future transmission of text messages. *Id.* ¶¶ 35–41.

LEGAL STANDARDS

I. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are

courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso*, 495 F.2d at 909. Accordingly, Plaintiff in this case bears the burden of establishing that this Court has jurisdiction to hear her claims.

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

> First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. at 1002–03 (citations omitted). The present Motion purports to launch a factual attack on this Court's subject matter jurisdiction; normally, such an attack prevents the Court from accepting the truth of the Amended Complaint's factual allegations for its Rule 12(b)(1) analysis. Moreover, the Court generally may consider other documents to resolve disputed jurisdictional facts. As the Court describes later, however, the Court will not consider extrinsic evidence at this stage.

II. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

The purpose of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 680. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Plausibility refers "'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1192. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not

suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation marks and citation omitted).

ANALYSIS

Defendant makes two general arguments for dismissal. First, Plaintiff lacks standing. On this issue, Defendant asserts that Plaintiff fails to allege an injury-in-fact because of either her prior consent to receiving messages or adequately pleading the existence of an automatic telephone dialing system ("ATDS"). Second, even if Plaintiff has standing, the failure to plausibly allege the use of an ATDS warrants dismissal of the claims. Plaintiff responds that she has standing to bring her claims and has sufficiently pleaded the existence of an ATDS. Because issues of standing concern this Court's subject matter jurisdiction, the Court will address those arguments first before proceeding to the merits.

I. Fed. R. Civ. P. 12(b)(1)

The subject matter jurisdiction of federal courts is limited to "cases in which the plaintiff can demonstrate that '(1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision.'" *Winsness v. Yocom*, 433 F.3d 727, 731–32 (10th Cir. 2006)

(quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)). These three elements "*must* exist before federal courts will exercise jurisdiction." *Schutz v. Thorne*, 415 F.d 1128, 1133 (10th Cir. 2005) (emphasis added). Defendant challenges Plaintiff's standing and thus whether this Court has jurisdiction. Specifically, Defendant argues both that Plaintiff's consent to be contacted shows that she did not suffer an injury-in-fact and that the lack of use of an ATDS also defeats standing. Plaintiff responds that Defendant's arguments are actually merits-based arguments and do not affect her standing.

Defendant contends that because it is making a factual attack as to subject matter jurisdiction, the Court may consider evidence beyond the four corners of the complaint. Mot. at 5 (citing *Porco by Porco v. Lewis Palmer Sch. Dist. 38*, No. 16-cv-01584-RBJ, 2017 WL 835159, at *3 (D. Colo. Mar. 2, 2017)). To that end, Defendant has attached an affidavit from Eric Russel Legg, the Digital Systems Engineer at TGS Global, LLC ("TGS"). ECF 33-1 ¶ 1. As stated in the affidavit, TGS is apparently the "corporate arm" of Defendant. *Id.* ¶ 3. In his role, Mr. Legg helps manage and support Defendant's customer loyalty program. *Id.* ¶ 6. He avers that participation in Defendant's loyalty program is "voluntary and only commences after a customer first signs up and provides their birth date and e-mail address." *Id.* ¶ 12. Customers are given the option of providing a telephone number, but it is not mandatory. *Id.* ¶ 13. Additionally, once signed up, the default method of communication to loyalty program members is through email, and members must specifically elect to receive communications via text message. *Id.* ¶ 14. Reviewing Defendant's electronic records (a screen shot of which is attached to the affidavit as Exhibit A), Mr. Legg contends that Plaintiff enrolled in Defendant's customer loyalty program on March 17, 2016. *Id.* ¶ 25. When she did so, Plaintiff provided her phone number, *id.* ¶ 26, and authorized communication through text messages, *id.* ¶ 28.

Defendant points to this affidavit as evidence that Plaintiff expressly consented to receiving the text messages at issue and therefore lacks any concrete injury sufficient to bestow standing. Mot. at 6. Plaintiff cautions the Court against permitting such evidence at this stage since the issue of consent goes to the merits of the claim and not the jurisdiction of the Court. Resp. at 5. As an initial matter, the Court notes that Plaintiff "moves to strike the Affidavit of Eric Russel Legg . . . and the purported Consent Record attached to the Affidavit as Exhibit." *Id.* As Defendant asserts, such a request is presented to the Court in violation of the Local Rules. D.C.Colo.LCivR 7.1(d) ("A motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document."). On that ground, Plaintiff's request must be denied. Regardless, both this Court and Judge Arguello are capable of evaluating whether extrinsic evidence attached to a motion to dismiss can properly be considered without converting the motion to one for summary judgment without the need to strike such evidence.

The parties spend considerable time in their briefing comparing the facts and procedural posture of this case to others in order to confirm or rebut the presence of consent. More immediate for the Court, however, is whether consent is properly framed as an issue of the merits or jurisdiction. On this topic, Plaintiff cites two principal cases. In *Van Patten v. Vertical Fitness Grp., LLC*, the Ninth Circuit held that "[e]xpress consent is not an element of a plaintiff's prima facie case but is an affirmative defense for which the defendant bears the burden of proof." 847 F.3d 1037, 1044 (9th Cir. 2017). In a later case, the Ninth Circuit clarified that "[d]isputes regarding whether [the plaintiff] gave prior express consent to receive calls from the [defendant] or revoked that consent go to the merits of [the] TCPA claim, not to [the plaintiff's] standing." *Romero v. Dep't of Stores Nat. Bank*, 725 F. App'x 537, 539 (9th Cir. 2018).

In contrast, Defendant has cited cases in which courts have found consent relevant to the standing inquiry. In *Winner v. Kohl's Dep't Stores, Inc.*, the District Court for the Eastern District of Pennsylvania found that when the plaintiffs stipulated to receiving text messages, the plaintiffs failed to show they suffered an injury-in-fact. No. 16-1541, 2017 WL 3535038, at *8 (E.D. Pa. Aug. 17, 2017). In *St. Louis Heart Center, Inc. v. Nomax, Inc.*, the Eight Circuit held that although the plaintiff may have alleged an injury-in-fact, the plaintiff's consent to receiving faxes meant that the plaintiff did not establish traceability of the harm to the defendant. 899 F.3d 500, 504 (8th Cir. 2018). In *Stoops v. Wells Fargo Bank, N.A.*, the District Court for the Western District of Pennsylvania held that a plaintiff who "admitted that she files TCPA actions as a business" lacked the requisite "legally protected interest" established by the TCPA to demonstrate an injury-in-fact. 197 F. Supp. 3d 782, 800–02 (W.D. Pa. 2016).

Whether consent is relevant to standing is crucially important to adjudication of the Motion since the answer dictates whether the Court may consider Defendant's extrinsic evidence. After all, Plaintiff alleges in the Amended Complaint that she never provided Defendant with "express written consent, or any other form of permission." Am. Compl. ¶ 28. The Court must take this allegation as true unless Defendant's argument is correct that consent goes to standing and thus the heart of this Court's subject matter jurisdiction.

To answer this question, the Court relies on Tenth Circuit precedent not cited by the parties. The Tenth Circuit has held that "[i]f the jurisdictional question is intertwined with the merits of the case, the issue should be resolved under 12(b)(6) or Rule 56." *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) (citing cases).[1] "When subject matter jurisdiction is dependent upon the

[1] In *Wheeler*, the Court held that an employee's status was both a merits-based and jurisdiction question for a Title VII claim. 825 F.2d at 259. In light of *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Tenth Circuit overruled that holding in *Wheeler* and concluded that an employee's

same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined." *Id.* "The underlying concern, however, is 'not merely . . . whether the merits and the jurisdictional issue arise under the same statute,' but instead 'whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.'" *Gabriel v. United States*, 683 F. App'x 671, 673–74 (10th Cir. 2017).

The Court sees no way in which to resolve the question of whether consent eliminates an injury-in-fact without getting into the merits of the claim. On the one hand, someone who has requested to be contacted through text messaging by a company cannot later claim that she is injured[2] by such contact. If that is the only alleged injury, standing would be dubious. On the other hand, the TCPA, in part, makes it unlawful "to make any call (other than a call made for emergency purposes or *with the prior express consent* of the called party) using any automatic telephone dialing system." 47 U.S.C. § 227(b)(1)(A) (emphasis added). As such, it is an essential element of a TCPA claim that there not be express consent. Therefore, it seems that the issue of express consent under the TCPA is a perfect example of the jurisdictional (i.e. standing) and

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status was a substantive element of the claim as opposed to a jurisdictional requirement. *Xie v. Univ. of Utah*, 243 F. App'x 367, 371 (10th Cir. 2007). However, the holding that jurisdictional questions that are intertwined with the merits of claims should be resolved on a Rule 12(b)(6) or 56 motion continues to apply. *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (stating that a court's exercise of discretion to consider extrinsic evidence "does not convert a Rule 12(b)(1) motion into a summary judgment motion unless 'resolution of the jurisdictional question is intertwined with the merits'") (citation omitted).

[2] Plaintiff alleges that Defendant's unsolicited text messages caused Plaintiff actual harm. Am. Compl ¶ 47. "Specifically, Plaintiff estimates that she has wasted approximately 20 minutes reviewing all of Defendant's unwanted messages and retaining counsel for this case in order to stop Defendant's unwanted messages." *Id.* It is curious that Plaintiff's first reaction to solving the issue of these unwanted messages was to retain counsel instead of replying "stop" like the messages indicated could be done. Nevertheless, absent consent, it is likely that Plaintiff suffered the requisite harm. *See Walker v. Highmark BCBSD Heath Options, Inc.*, No. 2:20-cv-01975-CCW, 2021 WL 396742, at *2 (W.D. Pa. Feb. 4, 2021) (finding six instances of unsolicited calls or messages sufficient to satisfy the statutory harm).

merits-based questions being intertwined. Consequently, the Court should resolve the question of consent on either a Rule 12(b)(6) motion or a motion for summary judgment, not on a Rule 12(b)(1) motion. *Wheeler*, 825 F.2d at 259. As Defendant has only moved on this issue under Rule 12(b)(1), the Court respectfully recommends that Judge Arguello deny the Motion on the issue of standing as to consent.[3]

The same is true for the existence of an ATDS. As stated above, the TCPA makes it unlawful to make a call "using any *automatic telephone dialing system*." 47 U.S.C. § 227(b)(1)(A) (emphasis added). Hence, the lack of an ATDS suggests that Plaintiff has not been harmed in a way that can be traced back to Defendant. Yet, like with consent, the existence of an ATDS is an essential element of the claim. The Court must resolve this issue under a Rule 12(b)(6) standard. Unlike with consent, Defendant has moved both on Rule 12(b)(1) and (6) grounds for the lack of allegations concerning the existence of an ATDS. As such, the Court respectfully recommends denying the Motion on the issue of standing as to the use of an ATDS. The Court will proceed to examine the merits of the claim.

II. Fed. R. Civ. P. 12(b)(6)

As the Court already described, the TCPA states "[i]t shall be unlawful for any person . . . to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . ." 47 U.S.C. § 227(b)(1)(A). The statute defines an ATDS as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or

[3] Even if the Court considered the argument under Rule 12(b)(6), Plaintiff has alleged that she never provided "express written consent, or any other form of permission" to Defendant. Am. Compl. ¶ 28. The Court would have to accept this allegation as true. Accordingly, any argument that Plaintiff failed to state a TCPA claim because of her alleged consent would likely fail.

sequential number generator; and . . . to dial such numbers." § 227(a)(1). Hence, to state a TCPA claim, a plaintiff must allege the following three elements:

> (1) "[a defendant made] any call . . ."; (2) "using any automatic telephone dialing system or an artificial or prerecorded voice"; and (3) "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."

Forrest v. Genpact Servs., LLC, 962 F. Supp. 2d 734, 736 (M.D. Pa. 2013) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)).

Defendant argues that Plaintiff's allegations concerning the use of an ATDS are largely conclusory and rely heavily on the statutory language. Mot. at 11. Additionally, Defendant urges the Court to adopt the definition of an ATDS used by the Seventh and Eleventh Circuits. *Id.*at 14–15. In support, Defendant's affidavit avers that Defendant's systems do not use a random or sequential number generator. ECF 33-1 ¶ 24. Plaintiff responds that she plausibly alleges the existence of an ATDS. Resp. at 11–14. Plaintiff asserts this is true even if the Court uses the Seventh and Eleventh Circuits' definition but contends that the Ninth Circuit's broader definition of an ATDS should be used. *Id.*

The Seventh and Eleventh Circuits have held that devices that dial numbers only from a stored customer database are not autodialers under the TCPA. *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020). Conversely, the Ninth Circuit has held that any equipment that has the capacity to (1) either store numbers to be called or produce numbers using a random or sequential number generator and (2) dial such numbers automatically is an ATDS. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018). The Ninth Circuit reaffirmed this definition in *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1152 (9th Cir. 2019), *cert. granted in part*, 2020 WL

3865252, at *1 (2020), and *rev'd and remanded*, No. 19-511, 2021 WL 1215717 (U.S. Apr. 1, 2021). The Tenth Circuit has not weighed in on this issue; however, a district court in this Circuit has predicted that the Tenth Circuit "would take the same approach as the Seventh and Eleventh Circuits in *Gadelhak* and *Glasser*." *Hampton v. Barclays Bank Delaware*, 478 F. Supp. 3d 1113, 1149 (D. Kan. 2020).

The Supreme Court just provided clarity on this issue. In *Facebook, Inc. v. Duguid*, the Supreme Court unanimously rejected the Ninth Circuit's interpretation of the TCPA. 2021 WL 1215717, at *2. Instead, the Court held that an ATDS "must have the capacity either to store a telephone number *using a random or sequential generator* or to produce a telephone number *using a random or sequential number generator*." *Id.* (emphasis added). As such, it is critical that a random or sequential number generator be utilized to constitute an ATDS. While the Supreme Court's decision elucidates the definition of an ATDS, that holding will prove far more relevant on a future motion for summary judgment than it does now. At this stage, the Court must take all well-pleaded facts as true and cannot consider outside evidence without converting the Motion into a motion for summary judgment. For the following reasons, the Court finds that Plaintiff has plausibly alleged the use of an ATDS.

Beginning around June 26, 2020, Plaintiff received at least seven text messages regarding sales and product information about Defendant. Am. Compl. ¶ 23. The messages were not specifically addressed to Plaintiff. *Id.* ¶ 26. The messages were sent from telephone numbers 833-711-0254 and 833-344-0168, numbers operated by Defendant. *Id.* ¶ 31. These numbers are known as "long code."[4] *Id.* ¶ 32. To send the message, Defendant utilized a messaging platform

[4] The Court notes that "[w]hile use of a long code does not foreclose the possibility that [Defendant] used an ATDS, it does not support a plausible inference that an ATDS *was* used." *Mantha v. QuoteWizard.com, LLC*, No. CV 19-12235-LTS, 2020 WL 1274178, at *1 (D. Mass.

("Platform") that allowed the transmission of thousands of text messages without human involvement. *Id.* ¶ 35. Defendant relied on the Platform's ability to store telephone numbers, generate sequential numbers, dial numbers in a sequential order, and dial numbers without human intervention. *Id.* ¶¶36–40. In other words, the Platform automatically retrieved each telephone number from a list of numbers in a sequential order, generated each number in the sequential order listed, combined each number with the specific content of Defendant's message to create individual "packets," and transmitted each packet in a sequential order. *Id.* ¶ 42.

These allegations are reminiscent of those in a recent case in this District. In *Geraci v. Red Robin Int'l, Inc.*, the court summarized the plaintiff's allegations as follows:

> In his Complaint, Plaintiff alleges that "[t]he content of the text messages was automatically generated, with no human involvement in the drafting or directing of the message." *Compl.* [#1] ¶ 25. Plaintiff further alleges that, "[t]o send the messages, Defendant stored Plaintiff's cellular telephone number in its text messaging system with thousands of other consumers' telephone numbers and then automatically sent identical messages *en masse* to Plaintiff and thousands of other consumers at the same time." *Id.* ¶ 26. In addition, Plaintiff states that "[t]he messages Defendant sent to Plaintiff were composed of pre-written templates of text, and were identical to text messages Red Robin sent to other consumers," and that, "several of the text messages received by Plaintiff followed the same template, beginning with 'Red Robin Royalty:' and then after listing the details of a given promotion, concluding with 'Reply STOP to cancel.'" *Id.* ¶ 23.

2020 WL 2309559, at *3 (D. Colo. Feb. 28, 2020). The court found these facts, accepted as true for purposes of a motion to dismiss, as sufficient to state that the defendant used an ATDS. *Id.* at *4. Like in that case, Plaintiff here has alleged no human involvement in Defendant's use of a system capable of sending thousands of generic and commercial text messages. Plaintiff's allegations here go even further. In *Geraci*, the plaintiff only alleged that the defendant "stored" telephone numbers; in this case, and as is necessary after *Facebook*, Plaintiff alleged that

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Mar. 16, 2020). Thus, despite Plaintiff's arguments to the contrary, such an allegation does not persuade the Court of the use of an ATDS.

Defendant's Platform generated the numbers in sequential order. Defendant has not tried to distinguish *Geraci*. Without a basis to believe otherwise, the Court finds *Geraci* highly persuasive.

In a similar vein, the Court finds Defendant's citations distinguishable from this case. *Mantha v. QuoteWizard.com, LLC*, 2020 WL 1274178, at *2–3 (dismissing TCPA claim in which the allegations of only two messages sent did not give rise to a plausible inference of the use of an ATDS); *Hildre v. Heavy Hammer, Inc.*, No.3:20-cv-00236-L-LL, 2021 WL 734431, at *2 (S.D. Cal. Feb. 25, 2021) (dismissing TCPA claim when the defendant was only alleged to have made two phone calls); *Perez v. Quicken Loans, Inc.*, No. 19-cv-2072, 2020 WL 1491145, at *2–3 (N.D. Ill. Mar. 27, 2020) (dismissing TCPA claim in which allegations focused solely on "unwanted calls and a short period of dead air when the call is answered"); *Armstrong v. Investor's Bus. Daily, Inc.*, No. CV 18-2134-MWF, 2018 WL 6787049, at *5–6 (C.D. Cal. 2018) (dismissing TCPA claim in which the plaintiff's allegations are "extremely close" to the statutory definition of an ATDS such that the allegations are mere recitations of the legal definition).

In finding *Geraci* persuasive and Defendant's citations unpersuasive, and accepting Plaintiff's well-pleaded allegations as true, the Court finds Plaintiff's Amended Complaint sufficiently alleges the use of an ATDS by Defendant. Therefore, the Court finds Plaintiff has adequately stated a TCPA claim, and the Court respectfully recommends that Judge Arguello deny the Motion on this ground. The Court makes this recommendation specifically acknowledging that this case is at the motion to dismiss stage. Defendant's affidavit, which the Court could not consider here, raises significant questions concerning whether Defendant utilized an ATDS (and whether Plaintiff in fact consented to receive the messages). The Court fully expects that the issues raised in the Motion will be raised again by Defendant on a future motion for summary judgment when the Court can consider extrinsic evidence.

CONCLUSION

Accordingly, the Court respectfully RECOMMENDS that Judge Arguello **DENY** the Motion [filed February 16, 2021; ECF 33].[5]

Respectfully submitted this 7th day of April, 2021, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

[5] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).