

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KAREN SAUNDERS,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION
)	1:17-CV-00335-GJQ-RSK
DYCK O’NEAL, INC.,)	
)	
Defendant.)	
)	
)	
)	

**Defendant Dyck O’Neal, Inc.’s
Second Motion for Summary Judgment**

Introduction

Saunders claims Dyck-O’Neal (“DONI”) violated the TCPA by dialing her cellular phone number and leaving a prerecorded message.¹ In its October 4, 2019 Order Granting Plaintiff Partial Summary Judgment, the Court stated:

DONI’s argument[] that Saunders...failed to show the existence of a call being placed by the VoApps technology to her cell phone, as required to establish her claim [is] irrelevant [to Plaintiff’s Motion for Entry of Summary Judgment] as she has not moved for summary judgment on her claim. Moreover, DONI has not moved for summary judgment on the issue[], although it is free to do so.²

DONI now moves for summary judgment “on the issue” as the undisputed evidence fails to “show the existence of a call being placed by the VoApps technology to [Saunders’] cell phone, as required to establish her claim.” The prerecorded message was deposited directly into

¹ See 47 U.S.C. § 227(b)(1)(A) (2018); *Harris v. World Fin. Network Nat’l Bank*, 867 F. Supp. 2d 888, 892 (E.D. Mich. 2012) (setting forth elements of *prima facie* TCPA case).

² See ECF No. 115 at PageID.1149.

the voicemail platform maintained by Saunders's chosen voicemail service provider. This delivery process took place entirely over the land-based telephone network.³ No call was made to a telephone number assigned to cellular telephone service and Dyck O'Neal is, therefore, entitled to summary judgment as a matter of law.

Statement of Undisputed Facts

A piece of real property owned jointly by Saunders and her ex-husband went into foreclosure. A sheriff's sale ultimately was held and rendered less than the amount owed creating by operation of law a deficiency balance.⁴ The deficiency balance was assigned to Dyck O'Neal to attempt to collect from Saunders.⁵

As part of its collection practice, Dyck-O'Neal contracted with a third-party vendor, VoApps, LLC ("VoApps") to deliver collection-related voice messages to voicemail service providers' platforms using VoApps's unique delivery technology.⁶ According to the inventor of the VoApps technology, David King, the "call" or "communication" (however characterized) placed on behalf of Dyck O'Neal traveled exclusively from VoApps's server directly to the servers comprising the voicemail platform of Saunders's chosen voicemail service provider.⁷ Indeed, Saunders's own expert Randall Snyder has acknowledged the accuracy of King's description of the process, stating: "The direct drop voicemail system utilized by the Defendant consists of automated voice message technology that enables its centralized computer equipment

³ As detailed below, Saunders' own expert confirms the accuracy of this statement.

⁴ Ex. A (Mary Resch Decl.), attached hereto.

⁵ *Ibid.*

⁶ *See* Sept. 26, 2017 Deposition of Paul Gies ("Gies Dep."), ECF No. 36-4 at 8:1-8 (filed under seal).

⁷ *Ibid.* at 32:25-34:8; *see also id.* at 11:1-16; 13:25-14:18; 17:19-24; 21:19-22:1.

system to communicate with cellular carriers' voicemail servers.”⁸ So the delivery of the message is completed without any call to the consumer's cellular telephone number or otherwise contacting the consumer's cellular device in any way.⁹

Legal Standard

Federal Rule of Civil 56(a) provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁰ Rule 56(c)(1)(B) provides that “[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”¹¹ “A mere scintilla of evidence is insufficient.”¹² Rather, a party with the burden of proof opposing a motion for summary judgment has the burden to come forth with requisite proof to support her legal claim, particularly where she had an opportunity to conduct discovery.¹³

Argument

1. The Court must read the statute as written—prohibiting only calls to numbers assigned to cellular service.

The relevant TCPA provision only prohibits calls to numbers assigned to cellular telephone service.

⁸ See Dec. 22, 2017 Report of Randall A. Snyder (“Snyder Report”), ECF No. 36-2 at 25, ¶ 59 (filed under seal).

⁹ Gies Dep., ECF No. 36-4 at 32:11–34:8; Ex. B, November 20, 2019 Declaration of David King (“King Decl.”) at ¶ 26 (“Once both connections are made and information is transferred, the system has established an end-to-end call, complete with an audio path between the Media Cluster and the Voicemail Platform.”).

¹⁰ Fed. R. Civ. P. 56.

¹¹ *Id.*

¹² *Humenny v. Genex Corp.*, 390 F.3d 901, 904 (6th Cir. 2004).

¹³ See *Cardamone v. Cohen*, 241 F.3d 520, 524 (6th Cir. 2001).

The Court is well-aware that statutory interpretation begins with the text itself,¹⁴ and as such, its review of § 227(b)(1)(A) of the TCPA is constrained by the words and phrases of the text itself. The TCPA, in relevant part, prohibits placing calls without consent using an automatic telephone dialing system or which deliver prerecorded messages “*to any telephone number assigned to* a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.”¹⁵ That Congress chose to include subsection (A)(iii), means not just “*any call*” will do. Instead, as Judge Bell rightly observed in *Strand*, another TCPA case:

The *plain language* of the statute refers to calls placed to a “telephone number assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). A plain reading of the statute then, shows that to prove her case *a plaintiff must prove that a defendant called a specific telephone number and that the telephone number was assigned to a cellular telephone service.*¹⁶

Had Congress intended to include residential landline service in § 227(b)(1)(A)(iii), it could have easily done so. That it chose not to was not a mistake or oversight as there is another part of the same statute, *i.e.* 47 U.S.C. § 227(b)(1)(B), specifically addressing and prohibiting calls to “residential telephone line[s]” “without . . . prior express consent” *except for* debt collection purposes. These two statutory sections are right next to each other yet are separated by a “statutory construction” fence that prevents them from being conflated.

¹⁴ *Strand v. Corinthian Colleges, Inc.*, 1:13-CV-1235, 2014 WL 1515494, at * (W.D. Mich. Apr. 517, 2014); *Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005) (“To determine legislative intent, a court must first look to the language of the statute itself.” (citing *Bd. of Ed. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 237 (1990); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985))).

¹⁵ 47 U.S.C. § 227(b)(1)(A)(iii) (2018); *see also Strand*, 2014 WL 1515494, at *5.

¹⁶ *Strand*, 2014 WL 1515494 at *3 (emphasis added).

Dyck O’Neal anticipates Saunders will—implicitly or explicitly—urge the Court to engage in some sort of legal gymnastics that ignores the plain reading of the TCPA. But the Court should not do so. Indeed, Plaintiff’s own Complaint concedes that Plaintiff knows she must prove the challenged message was sent to the number assigned to her *cellular* telephone service:

- “Defendant has initiated multiple telephone calls to Plaintiff’s cellular telephone in an attempt to collect a debt.”¹⁷
- “Defendant, or some person authorized by Defendant, called Plaintiff’s cellular telephone number.”¹⁸
- “Defendant violated the TCPA by placing automated calls to Plaintiff and the class members’ cellular telephones using its predictive dialer and/or prerecorded or artificial voice without the consent of the called party.”¹⁹
- “Defendant has a policy, practice or procedure of placing calls to cell phones regarding the collection of an alleged debt without the prior consent of the called parties.”²⁰
- Plaintiff seeks to represent a class of people Dyck O’Neal “called on their cellular phone [sic].”²¹

Unfortunately for Saunders, there is no evidence supporting her claim that Dyck O’Neal (or VoApps) called the *number assigned to Plaintiff’s cellular service*. Instead the evidence proves the message delivered on behalf of Dyck O’Neal was delivered directly to Saunders voicemail account by landline—not cellular—service, so Saunders’s TCPA claim fails.

¹⁷ See ECF No. 1 at PageID.3, ¶ 11.

¹⁸ *Ibid.* at PageID.3, ¶ 12.

¹⁹ *Ibid.* at PageID.5, ¶ 24.

²⁰ *Ibid.* at PageID.5, ¶ 25.

²¹ *Ibid.* at PageID.5, ¶ 27.

2. Dyck-O’Neal is entitled to summary judgment as it did not initiate a call to a number assigned to a cellular telephone service.

The prerecorded message was transmitted server-to-server by landline.

To deliver voice messages, VoApps utilizes proprietary, patented technology called Adaptive Signaling (“Adapti-Sig”) to establish a direct connection between the VoApps Adapti-Sig media cluster and the target voicemail service provider’s voicemail platform and delivers messages directly into the voicemail service provider’s voicemail platform.²² The “call” or “communication” (however characterized) placed by the Adapti-Sig technology creates a connection from the Adapti-Sig server directly to the servers comprising the voicemail service provider’s voicemail platform.²³

King, the inventor of the Adapti-Sig technology, explains his invention as follows:

The Adapti-Sig technology that delivers DDVM bypasses the traditional way of leaving voicemail messages for consumers. Instead of a call being made from Adapti-Sig to a cellular handset, the technology only makes a call between the Adapti-Sig servers and the servers comprising the voicemail service provider’s voicemail platform, each of which are owned by business operators.²⁴

Stated differently, the call/communication made by Adapt-Sig server is to a business class, landline telephone number assigned to the voicemail service provider’s voicemail platform.²⁵

²² See Gies Dep., ECF No. 36-4 at 11:1–16; 13:25–14:18; 17:19–24; 21:19–22:1; 32:11–34:8; *see also* Ex. B at ¶¶ 14–39 (King Decl.).

²³ Gies Dep., ECF No. 36-4 at 32:4–34:8.

²⁴ Ex. B at ¶ 28 (King Decl.).

²⁵ *Ibid.* at ¶¶ 29–30; ¶¶ 31–40; *accord* Gies Dep., ECF No. 36-4 at 47:8–48:5. And since the call is a landline-to-landline connection or a business-to-business connection, VoApps pays business class rates. Ex. B at ¶ 28 (King Decl.).

Saunders's own expert agrees with King. Snyder was hired by Saunders's counsel to offer "expert" opinions in this case and executed a Declaration outlining various opinions and musings.²⁶ While the overwhelming majority of Snyder's "opinions" are not admissible,²⁷ he has acknowledged the accuracy of King's description of the process, stating in his own Declaration: "The direct drop voicemail system utilized by the Defendant consists of automated voice message technology that enables its centralized computer equipment system to communicate with cellular carriers' voicemail servers."²⁸ This server-to-server communication approach described by both King and Snyder (and confirmed by VoApps's then-president, Paul Gies)²⁹ distinguishes the VoApps process used to transmit voice messages from traditional "roll-over" voicemail delivery.

Unlike voicemail messages that result from an unanswered call placed to a cellphone using the cellphone's number,³⁰ the Adapti-Sig technology never calls the cellular telephone number, so there is no "roll over" to voicemail. Instead the Adapt-Sig technology "initiates a landline connection to a business class telephone number" that sends the voice message directly to the voicemail platform, bypassing the consumer's cellular handset entirely.³¹ Indeed "**the**

²⁶ See generally Snyder Report, ECF No. 36-2.

²⁷ Dyck O'Neal will be filing a separate Motion to Strike Snyder's Declaration, unless Plaintiff agrees to withdraw it.

²⁸ See Snyder Report, ECF No. 36-2 at 25, ¶ 59.

²⁹ See Gies Dep., ECF No. 36-4 at 32:11-34:8; *id.* at 17:19-24.

³⁰ Calls to cellphones can rollover to voicemail for a variety of reasons including there being a busy signal, the consumer has turned off the cellular handset, or some other action taken by the consumer such as the consumer using the app on their cellular handset to send/swipe a call directly to voicemail. See Ex. B at ¶¶ 46-50 (King Decl.) (describing how traditional voicemails traverse the RAN network and directly contact the consumer's handset prior to rolling to voicemail, unlike VoApps's technology); see also Gies Dep., ECF No. 36-4 at 57:15-58:15; 59:5-22.

³¹ Ex. B at ¶¶ 14-39 (King Decl.).

Adapti-Sig technology does not interact with any components of the RAN³² network—in other words, the part of the network that houses the radio equipment necessary to receive cellular calls and communications—including the cellphone itself.”³³

VoApps is not the same as text messaging (“SMS”).

In his Declaration, Snyder implies the VoApps delivery process is the same as certain “mass” SMS/text messaging programs, opining:

Using a similar technology model as the VoApps’s direct drop voicemail system technology, these mobile messaging companies’ equipment and software creates a landline-to landline session connection to the cellular carrier’s SMS servers. There is never direct contact between the message provider’s automated text messaging system and the subscriber’s mobile phone. In both scenarios it is essentially computer-to-computer communication.³⁴

At first blush, it may appear as though Snyder’s statements support Saunders’ argument the VoApps system works just like mass text messages. But a closer examination reveals the following truths: 1) Snyder failed to explain the entire processes for both mass SMS messaging and VoApps messaging; and 2) if Snyder had explained the entire processes for both systems, the explanation would have revealed only SMS actually “sends” a message to the handset.

Nonetheless some of Snyder’s factual statements on the likenesses between mass-text messaging and VoApps are accurate.³⁵ For example, he accurately states:

³² *Id.* at ¶¶ 20–30. As detailed in King’s Declaration, “RAN” is an abbreviation for Radio Access Network, which is nothing more than what is typically called the “cellular network.” *Id.* at ¶ 15a.

³³ *Id.* at ¶ 20; *compare id.* at ¶¶ 41–44 (describing how texts traverse the RAN network, as well as deliver message content directly to the consumer’s handset using a completely different set of telephony protocols); *id.* at ¶¶ 46–50 (describing how traditional voicemails traverse the RAN network and also directly contact the consumer’s handset prior to rolling to voicemail, unlike VoApps’s technology). *Accord* Gies Dep., ECF No. 36-4 at 57:15–58:15; 59:5–22.

³⁴ *See* Snyder Report, ECF No. 36-2 at 26, ¶ 60.

³⁵ It is important to note, however, that Snyder *never* visited VoApps’s operations center to observe the way it connects to a voicemail platform, did not inspect the patents for the Adapt-Sig technology, and did not even request to interview David King, the inventor of the Adapt-Sig technology used by VoApps.

- “Using a similar technology model as the VoApps’s direct drop voicemail system technology, these mobile messaging companies’ equipment and software creates a landline-to-landline session connection to the cellular carrier’s SMS servers.”³⁶
- “There is never direct contact between the message provider’s automated text messaging system and the subscriber’s mobile phone.”³⁷
- “In both scenarios it is essentially computer-to-computer communication.”³⁸
- “The [VoApps’s] voicemail system passes the cellular subscriber’s phone number to the carrier’s voicemail box server.”³⁹
- “VoApps’s direct drop voicemail system deposits a voice message in the carrier’s voicemail box server.”

Snyder’s statements conclusively demonstrate VoApps does not initiate a call to a number assigned to cellular service and does not implicate the TCPA. Yet not wanting to disappoint his benefactor (counsel paying his bill), Snyder then tries to muddy the waters by essentially stopping this side-by-side comparison without acknowledging the fact only one of the technologies actually sends its message to the cellphone—and it is not VoApps.

The same accuracy cannot be attributed to Snyder’s claim that after a VoApps message is left on the voicemail platform and a SMS message is left on the SMS server, “[t]he carrier’s voicemail server system and the SMSC server system both then alert the cellular subscriber that a communication is waiting for his/her attention.”⁴⁰ Not only is this statement factually inaccurate, as it is the *user*—in this case Saunders—who controls whether an “alert” is sent to

³⁶ Snyder Report, ECF No. 36-2 at 26, ¶ 60.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* at 28, ¶ 66.

⁴⁰ *Ibid.* at 28, ¶ 68.

the cellphone, it also fails to mention the server housing the SMS completes the text messaging process by sending the SMS to the cellphone, whereas the VoApps message never leaves the voicemail server where it was placed. Instead the user must access the voicemail platform to hear the message, where it stays until deleted.

Simply stated, the text message eventually finds residence on the cellphone; the voicemail message resides solely on the voicemail platform. The VoApps technology “does not interact with any components of the RAN network,” commonly referred to as the cellular network.⁴¹ It does not interact with any cellular towers, radio transmission equipment, or actual cellular devices or telephones in any way.⁴²

This stands in stark contrast to how SMS messages work.⁴³ SMS text messages inherently rely on the RAN (Radio Access Network) to deposit the message’s content directly onto the cellular device using the number assigned to the recipient’s cellular service.⁴⁴ To do so, SMS text messages utilize each of the components of the RAN, including cellular towers, radio transmission equipment, and the actual cellular device.⁴⁵

SMS text messages operate like traditional “roll-over” voicemail in that both inherently rely on accessing the RAN and the number assigned to the recipient’s cellular service.⁴⁶ This is so because to leave a roll-over voicemail, one first calls the number assigned to the recipient’s

⁴¹ Ex. B at ¶ 20 (King Decl.); *see also id.* at ¶ 15(a).

⁴² *Ibid.* at ¶¶ 20–39.

⁴³ *Ibid.* at ¶¶ 40–45.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at ¶ 44.

⁴⁶ *Ibid.* at ¶¶ 40–45, 46–50; *accord* Gies Dep., ECF No. 36-4 at 57:15–58:15; 59:5–22.

cellular service, and when the subscriber does not answer, the call is “rolled over” to voicemail.⁴⁷ This initial call also may involve each of the RAN’s components.⁴⁸ This is simply not so with respect to VoApps’s Adapti-Sig technology.⁴⁹

At bottom, with respect to voicemail delivered using the Adapti-Sig technology, the only call is placed to a voicemail service provider’s business class, *landline* number.⁵⁰ Therefore, Plaintiff cannot show an indispensable element of her claim—that a call was made *to a number assigned to cellular service*.

**The VoApps message did not cause any communication to
Saunders’s phone to notify her that a message arrived.**

Dyck O’Neal expects Saunders to make an argument that regardless of how the message got on her voicemail platform, it caused her cellphone to notify her of a new voicemail message. Not only would this type of argument be irrelevant to the Court’s interpretation of the statute, it would also be factually inaccurate, as VoApps’s technology does not determine whether consumers receive a notification of a new voicemail.⁵¹ Instead cellphone notification are user-controlled.

Consumers retain sole and exclusive control over what notifications, if any, they want to receive when they get a new voicemail message. King, who invented his own voicemail app, states the following regarding how notifications function on a cellphone:

Modern voicemail apps often allow the user to customize alerts such as new voicemail notifications in the same way the consumer

⁴⁷ *Ibid.*

⁴⁸ Ex. B at ¶¶ 46–50 (King Decl.).

⁴⁹ *Ibid.* at ¶¶ 14–30; *accord* Gies Dep., ECF No. 36-4 at 32:11–34:8.

⁵⁰ Ex. B at ¶¶ 28–30 (King Decl.); *accord* Gies Dep., ECF No. 36-4 at 32:11–34:8.

⁵¹ *Ibid.* at ¶¶ 13, 51–56.

customizes alerts from other apps. Like other communications apps, such as Facebook Messenger, WhatsApp, Twitter, and others, consumers can turn off notifications such as new voicemail notifications. Alternatively, new voicemail message notifications can be set to provide an alerting tone or to be silent, silently flash the camera LED, pop up a notification screen, or place a message in the notification area of the device's screen. They can be set to turn on the icon badge (the little red circle) or badge alerts can be turned off. Today, even flip-phones, which may be incapable of running traditional voicemail apps, have many such settings that consumers can configure according to personal preferences. This is because even older flip-phones now largely run the Android operating system, which offers many of these configurable notification options.⁵²

As with every other app on her cellphone, Saunders controlled the voicemail notification settings on her phone. And she admitted as much, testifying at her deposition that she sets her notifications “more or less on vibrate, unless I’m expecting a certain call.”⁵³ The cellphone user decides if and how to be notified of a new voicemail. If Saunders received an alert, it was because she affirmatively chose to receive alerts from her voicemail platform, not because VoApps sent her an alert.

The argument that Saunders can create a TCPA claim by configuring her cellphone to cause it to get a notification despite no call being initiated to her cellphone number finds no support in case law. And other courts, considering the same type of TCPA claims in different, but technically similar contexts have rejected them for the same reason this Court must reject this argument is Saunders’s makes it.

Similar to Saunders’s decision to configure her phone to push notifications to her cellphone whenever a voicemail was left on the server of the voice platform she used, other

⁵² *Ibid.* at ¶ 54; *accord* Gies Dep., ECF No. 36-4 at 23:3–21; 25:4–20; 19:20–24.

⁵³ *See* Ex. C at 27:5–6 (Saunders Dep.).

cellphone users configure their phones to received calls on their cellphones even though the cellphone number was never called by the party making the call. These persons set up other phones to forward calls to their cellphones. Upon receiving calls forwarded from landlines, some of these users have then filed lawsuits claiming the caller violated the TCPA. Courts have not been receptive to these types of claims as they are inconsistent with the text of the statute banning only calls to numbers assigned to cellular service.

For example, in *Klein v. Commerce Energy*, the court rejected one such claim reasoning a call to a VoIP number that was forwarded to a cellular telephone does not implicate the TCPA as the call was initiated to a VoIP number and not a number “assigned to a cellular telephone service.”⁵⁴ Similarly, the District Court of Massachusetts granted a defendant summary judgment on the plaintiff’s TCPA claim where the plaintiff frequently forwarded calls from her landline to her cellular phone, reasoning the evidence showed a call to the plaintiff’s landline, not cellular, number.⁵⁵ In each of these cases, like the instant case, the plaintiff’s cellphone was implicated only because the plaintiff did something to cause the cellphone to receive a communication that was not initiated to the cellphone’s assigned number. The rulings in these “user-effected” claims are consistent with the FCC’s Opinion that “a call placed to a wireline number that is then forwarded, at the subscriber’s sole discretion and request, to a wireless number or service, does not violate the ban on autodialed and prerecorded message calls to wireless numbers.”⁵⁶

⁵⁴ *Klein v. Commerce Energy*, 256 F. Supp. 3d 563, 581 (W.D. Pa. 2017).

⁵⁵ See, *Harper v. Credit Control Servs., Inc.*, 863 F. Supp. 2d 125, 127 (D. Mass. 2012).

⁵⁶ *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 20 FCC Rcd. 3788, ¶ 48 (2005).

Like the facts in *Klein* and *Harper*, VoApps’s Adapti-Sig technology called a landline—not a cellular telephone number. Any new voicemail notification that a consumer may receive depends entirely on an election *the consumer independently makes and controls* and not an act by Dyck-O’Neal or VoApps.⁵⁷ Plaintiff’s decision to configure her phone to receive voicemail notifications mirrors the consumers’ decisions in *Klein* and *Harper* to configure their phones to cause landline calls to get pushed to their cellphones. Because Saunders only received a new voicemail notification due to her own actions, that notification cannot convert VoApps’s landline call to a call initiated to a number assigned to cellular service, as required by the TCPA.

Adopting Saunders’s position must also fail because it would improperly expand the TCPA’s scope. Essentially, Saunders’s argument would remove the “number assigned to cellular service” element of the TCPA and replace it with the following elements: 1) the consumer received a notification on her cell phone that a message was delivered to a remote server; 2) the consumer accessed the message from that server via her cell phone; and 3) the message requested a call back. Applying Saunders’s approach would result in email messages accessed using a cellphone app being included within the TCPA and directly conflict with FCC guidance confirming email messages do *not* violate the TCPA.⁵⁸ As noted by the FCC, it is the manner the email and efax technologies operated that makes them distinct from phone calls as a legal matter.⁵⁹ In this respect, messages delivered via VoApps’s technology and emails are indistinguishable in any legally significant way as neither involves placing a communication to a

⁵⁷ See Ex. B at ¶¶ 10–13, 51–56 (King Decl.); accord Gies Dep., ECF No. 36-4 at 25:4–20.

⁵⁸ See *In re Westfax, Inc. Petition for Consideration and Clarification*, CG Docket No. 02-278, DA 15-977, 4–5, ¶ 10 (Aug. 28, 2015) (holding that a fax sent as an email over the Internet is not within the scope of the TCPA’s express language, even if the potential harm to the consumer is the same as a traditional fax).

⁵⁹ *Id.*

number assigned to a cellular telephone (even if the communication ultimately may be retrieved using a cellular telephone).⁶⁰

Conclusion

The TCPA prohibits only calls initiated to numbers assigned to cellular service. The evidence demonstrates Dyck O’Neal’s message to Saunders was transmitted over the land-based telephone network and deposited directly into the voicemail server used by Saunders’s chosen voicemail service provider. No call was placed to Saunders’s cellphone, and her decision to receive notifications from her voicemail app cannot provide a basis for the Court to rewrite the statute. Dyck O’Neal is entitled to summary judgment on Saunders’s TCPA claim.

⁶⁰ Compare Ex. B at ¶¶ 14–30 (King Decl.) and Gies Dep., ECF No. 36-4 at 32:11–34:8; 59:5–22 (explaining how the Adapt-Sig technology works and how it does not interact with the RAN portion of the telephony network) with *Aronson v. Bright-Teeth Now, LLC*, 824 A.2d 320, 322 (Pa. Super. 2003). Importantly, the *Aronson* court determined that an email was not subject to the TCPA because it was *delivered* using a technologically distinct process from a fax, just like VoApps messages are delivered in a technology distinct manner from a traditional voicemail or SMS text:

While a FAX machine is described as capable of transcribing text or images from an electronic signal over a telephone line, a computer transmission is much more complex. The Supreme Court of the State of Washington noted the route a commercial email message travels from sender to receiver:

When an e-mail message is transmitted from one e-mail address to another, the message generally passes through at least four computers: from the sender's computer, the message travels to the mail server computer of the sender's Internet Service Provider (ISP); that computer delivers the message to the e-mail server computer of the recipient's ISP, where it remains until the recipient retrieves it onto his or her own computer.

The recipient may then delete the message unopened, open and read the message and elect not to print it, or elect to print it before or after reading the message. *This process is entirely different from the process used by a telephone facsimile machine as defined in the Act.* [. . .] Simply stated, a computer is not a FAX machine and a commercial e-mail message is not regulated by the terms of 47 U.S.C. § 227.

Id. at 322 (emphasis added and internal citation omitted). *Accord McCarrell v. Offers.com LLC*, No. 1:19-CV-00112-LY, 2019 U.S. Dist. LEXIS 118806, *8–9 (W.D. Tex. Jul. 16, 2019) (“[T]he mere fact that emails sent to an email address are read on a smartphone does not bring them within the TCPA.”); *Prukala v. Elle*, 11 F. Supp. 3d 443, 449 (M.D. Pa. 2014) (“The fact that Plaintiff received the alleged e-mails on the same device that she uses as a telephone does not bring such communications under the reach of the TCPA.”).

Dated: November 20, 2019

Respectfully submitted,

/s/ Dale Thomas Golden _____

Dale Thomas Golden
GOLDEN SCAZ GAGAIN PLLC
201 North Armenia Avenue
Tampa, Florida 33609
Telephone: (813) 251-5500
E-mail: dgolden@gsgfirm.com

Eugene Xerxes Martin, IV
MALONE AKERLY MARTIN PLLC
8750 N. Central Expressway, Suite 1850
Dallas, Texas 75231
Telephone: (214) 346-2630
E-mail: xmartin@mamlaw.com

*Attorneys for Defendant
Dyck O'Neal, Inc.*

LOCAL RULE 7.2(b)(ii) CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.2(b)(ii), this brief does not exceed ten thousand eight hundred 10,800 words, including headings, footnotes, citations, and quotations. This brief contains 6,002 words. The word count of this brief was prepared using Microsoft Word, Microsoft Office Professional Plus 2016.

Dated: November 20, 2019

Respectfully submitted,

/s/ Dale Thomas Golden

Dale Thomas Golden
GOLDEN SCAZ GAGAIN PLLC
201 North Armenia Avenue
Tampa, Florida 33609
Telephone: (813) 251-5500
E-mail: dgolden@gsgfirm.com

Eugene Xerxes Martin, IV
MALONE AKERLY MARTIN PLLC
8750 N. Central Expressway, Suite 1850
Dallas, Texas 75231
Telephone: (214) 346-2630
E-mail: xmartin@mamlaw.com

*Attorneys for Defendant
Dyck O'Neal, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, I filed the foregoing document entitled, “DEFENDANT DYCK O’NEAL, INC.’S SECOND MOTION FOR SUMMARY JUDGMENT,” using the CM/ECF system, which will provide notification of electronic filing on all counsel of record:

Alexander H. Burke
BURKE LAW OFFICES LLC
155 N. Michigan Avenue, Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
E-mail: aburke@burkelawllc.com

David Michael Marco
SMITHMARCO, P.C.
55 W. Monroe Street, Suite 1200
Chicago, IL 60603
Telephone: (312) 546-6539
Facsimile: (888) 418-1277
E-mail: dmarco@smithmarco.com

Larry P. Smith
SMITHMARCO, P.C.
55 W. Monroe Street, Suite 1200
Chicago, IL 60603
Telephone: (312) 324-3532
Facsimile: (312) 602-3911
E-mail: lsmith@smithmarco.com

*Attorneys for Plaintiff
Karen Saunders*

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Respectfully submitted,

/s/ Dale Thomas Golden _____

Dale Thomas Golden
GOLDEN SCAZ GAGAIN PLLC
201 North Armenia Avenue
Tampa, Florida 33609
Telephone: (813) 251-5500
E-mail: dgolden@gsgfirm.com

Eugene Xerxes Martin, IV
MALONE AKERLY MARTIN PLLC
8750 N. Central Expressway, Suite 1850
Dallas, Texas 75231
Telephone: (214) 346-2630
E-mail: xmartin@mamlaw.com

*Attorneys for Defendant
Dyck O'Neal, Inc.*