

1 Todd M. Friedman (SBN 216752)
 2 Adrian R. Bacon (SBN 280332)
 3 Meghan E. George (SBN 274525)
 4 Tom E. Wheeler (SBN 308789)
 5 LAW OFFICES OF TODD M. FRIEDMAN, P.C.
 6 21550 Oxnard St., Suite 780
 7 Woodland Hills, CA 91367
 8 Phone: 323-306-4234
 9 Fax: 866-633-0228
 10 tfriedman@toddfllaw.com
 11 abacon@toddfllaw.com
 12 mgeorge@toddfllaw.com
 13 twheeler@toddfllaw.com
 14 *Attorneys for Plaintiff*

11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**

13	JERMAINE STEWART, individually)	Case No. 2:21-cv-00368-MWF-MAA
14	and on behalf of all others similarly)	
15	situated,)	Honorable Judge Michael W. Fitzgerald
16	Plaintiff,)	
17)	PLAINTIFF’S MEMORANDUM OF
18	vs.)	POINTS AND AUTHORITIES IN
19	NETWORK CAPITAL FUNDING)	OPPOSITION TO DEFENDANT’S
20	CORPORATION, and DOES 1 through)	MOTION TO DISMISS
21	10, inclusive, and each of them,)	Date: September 27, 2021
22	Defendants.)	Time: 10:00 a.m.
23)	Courtroom: 5A

24 Plaintiff, JERMAINE STEWART (“Plaintiff”), individually and on behalf
 25 of all others similarly situated, hereby submits the following Opposition to
 26 Defendant NETWORK CAPITAL FUNDING CORPORATION’s (“Defendant”) Motion to Dismiss Plaintiff’s Second Amended Complaint:
 27

28 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
 MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION - 1 -

II. FACTUAL BACKGROUND..... - 3 -

a. What Is A Predictive Dialer? - 3 -

b. What Is A Random Or Sequential Number Generator? - 6 -

c. Procedural History..... - 9 -

III. LEGAL STANDARD - 11 -

IV. ARGUMENT - 12 -

d. Dismissing Plaintiff’s SAC Would Be Improper At The Pleadings Stage..... - 13 -

e. Facebook Did Not Disturb The TCPA’s Prohibition On Predictive Dialers..... - 14 -

f. Plaintiff’s SAC Alleges Sufficient Facts To Survive A Rule 12 Motion..... - 19 -

V. CONCLUSION - 20 -

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)..... - 11 -

Atkinson v. Pro Custom Solar LCC, No. SA-21-CV-178-OLG, 2021 WL 2669558
(W.D. Tex. June 16, 2021) - 14 -

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)..... - 11 -

Bell v. Portfolio Recovery Assocs., LLC, No. 5:18-CV-00243-OLG, 2021 WL
1435264 (W.D. Tex. Apr. 13, 2021) - 13 -

Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047 (9th
Cir. 2011)..... - 11 -

Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336 (9th Cir. 1996)..... - 11 -

Callier v. GreenSky, Inc., No. EP-20-CV-00304-KC, 2021 WL 2688622 (W.D.
Tex. May 10, 2021) - 19 -

Carl v. First Nat’l Bank of Omaha, No. 2:19-CV-00504-GZS, 2021 WL 2444162
(D. Me. June 15, 2021)..... - 19 -

Erikson v. Pardus, 551 U.S. 89 (2007)..... - 11 -

Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021)..... - 1 -, - 16 -, - 18 -

Flores v. Adir International, LLC, 685 Fed.Appx. 533, (9th Cir. March 24, 2017) -
2 -

Grome v. USAA Savings Bank, No. 4:19-CV-3080, 2021 WL 3883713 (D. Neb.
Aug. 31, 2021)..... - 16 -

Gross v. GG Homes, Inc., No. 3:21-CV-00271-DMS-BGS, 2021 WL 2863623
(S.D. Cal. July 8, 2021) - 14 -

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986)..... - 12 -

Jance v. Home Run Offer LLC, No. CV-20-00482-TUC-JGZ, 2021 WL 3270318
(D. Ariz. July 30, 2021)..... - 14 -

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025 (9th Cir. 2008) - 12 -
 2 *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991)..... - 12 -
 3 *Miles v. Medcredit, Inc.*, No. 4:20-CV-01186 JAR, 2021 WL 2949565 (E.D. Mo.
 4 July 14, 2021) - 13 -
 5 *Montanez v. Future Vision Brain Bank, LLC*, No. 20-CV-02959-CMA-MEH,
 6 2021 WL 1697928 (D. Colo. Apr. 29, 2021) - 13 -
 7 *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2011) - 11 -
 8 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984) - 12 -
 9 *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011) - 11 -
 10 *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794 (9th Cir. 1991)..... - 12 -
 11 *Yang v. DTS Financial Group*, 570 F. Supp. 2d 1257 (S.D. Cal. 2008) - 12 -
 12 **Statutes**
 13 47 U.S.C. § 227(b) - 1 -
 14 **Other Authorities**
 15 7 F.C.C. Rcd. 8752 (F.C.C. September 17, 1992))..... - 17 -
 16 Hearing Before the Subcommittee on Communications of the Committee on
 17 Commerce, Science and Transportation, United States Senate One Hundred
 18 Second Congress First Session July 24, 1991, Testimony of Robert Bulmash- 18
 19 -
 20 *In re Rules and Regulations Implementing the Telephone Consumer Protection*
 21 *Act of 1991*, Report and Order, 18 FCC Rcd. 14014 (2003)..... - 4 -
 22 *In re Rules and Regulations Implementing the Telephone Consumer Protection*
 23 *Act of 1991*, Report and Order, 18 FCC Rcd. 14014 (2003)..... - 17 -
 24 In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act
 25 of 1991, 23 F.C.C. Rcd. 559 (Jan. 4, 2008)..... - 19 -
 26 U.S. Patent No. 3,407,269 (issued Oct. 22, 1968)..... - 18 -
 27
 28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
 MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 U.S. Patent No. 3,899,645 (issued Aug. 12, 1975)..... - 18 -
2 U.S. Patent No. 3,943,289 (issued Mar. 9, 1976)..... - 18 -
3 U.S. Patent No. 3,989,899 (issued Nov. 2, 1976)..... - 18 -
4 U.S. Patent No. 4,829,563 (issued May 9, 1989) - 18 -
5 U.S. Patent No. 4,881,261 (issued Nov. 14, 1989)..... - 18 -

6 **Rules**

7 Fed. R. Civ. P. 12(b)(6)..... - 11 -

8 **Regulations**

9 47 C.F.R. §§ 64.1200 - 18 -
10 7 FCC Rcd. 8752 (F.C.C. September 17, 1992)..... - 18 -
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 **I. INTRODUCTION**

2 Defendant’s autodialer platform used to call Plaintiff and other members of
3 the putative class without prior express written consent to solicit its home mortgage
4 services, is alleged to be a traditional predictive dialer used in automated dialer
5 mode. Such systems utilize random and/or sequential number generation to both
6 store and produce telephone numbers through dialing campaigns, to the dialing
7 program, to be auto-dialed without human intervention. Such a system fits squarely
8 within the Supreme Court’s recent *Facebook* ruling, which analyzed a factually
9 distinct dialing platform that unquestionably did not operate in the same fashion.
10 This is where a Rule 12(b)(6) motion analysis should begin and end. Plaintiff’s
11 allegations must be taken as true until discovery yields a different result. Defendant
12 wants the Court to fast track the procedure and apply Rule 56 without providing
13 Plaintiff an opportunity for discovery, or an expert analysis of the programming
14 code of its dialing platform. Such would preclude Plaintiff from having an
15 opportunity to test and dispute with evidence whether the alleged facts are accurate.
16 Plaintiff should be granted an opportunity to demonstrate to the Court with
17 programming code and expert reports that Plaintiff is right, and the system does
18 store and produce telephone numbers to be autodialed using a random or sequential
19 number generator. Defendant invites reversible error, both as to the procedure of
20 Rule 12, and to the substance of the Telephone Consumer Protection Act.

21
22 In support of its Motion to Dismiss Plaintiff’s Second Amended Complaint,
23 Defendant argues that Plaintiff’s claims under 47 U.S.C. § 227(b) should be
24 dismissed for failure to state a claim. Defendant argues that in light of the Supreme
25 Court’s recent decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021)
26 (“*Facebook*”), Plaintiff’s claims under 47 U.S.C. § 227(b) must fail because
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 Plaintiff has not alleged facts sufficient to plausibly conclude that Defendant called
2 him using an automatic telephone dialing system (“ATDS”). Plaintiff obviously
3 could not possess extensive knowledge of Defendant’s proprietary code for its
4 dialing platform. Only somebody with direct access to Defendant’s confidential
5 business records could have such knowledge. Without the benefit of discovery,
6 Plaintiff can only plead facts based upon personal knowledge of the calls he
7 received. In order to truly evaluate his claims, an analysis of Defendant’s dialing
8 system is crucial. Accordingly, conclusions regarding Plaintiff’s TCPA claims are
9 more appropriately drawn at the summary judgment stage, after Plaintiff has been
10 given the opportunity to discover the specifications of Defendant’s dialer. Indeed,
11 the Ninth Circuit reversed Judge Birotte several years ago in a nearly identical
12 TCPA class action when he dismissed a case litigated by undersigned counsel on a
13 complaint that was *less factually detailed* than the complaint before this Court. *See*
14 *Flores v. Adir International, LLC*, 685 Fed.Appx. 533, (9th Cir. March 24, 2017).
15 The same result would occur here if Defendant has its way.
16

17 *Facebook* does not hold that every TCPA case should be thrown out on the
18 pleadings. All it says is that a dialing system must have the capacity to store or
19 produce telephone numbers using a random or sequential number generators to be
20 an ATDS, i.e. exactly what the plain language of the statute already says. It further
21 contemplates that such number generators can be used to dial stored lists of
22 telephone numbers, because platforms like the one in this case literally “produce”¹
23
24
25

26 ¹ Miriam Webster’s Dictionary’s first definition of “Produce” is “to offer to view
27 or notice.” See <https://www.merriam-webster.com/dictionary/produce>.

1 the telephone number from that list, to the dialer.² Plaintiff’s Second Amended
2 Complaint (“SAC”) alleged facts which, when viewed in the light most favorable
3 to Plaintiff, plausibly suggest that Defendant contacted him on his cellular
4 telephone through the use of an ATDS, even under the interpretation given by the
5 Supreme Court’s *Facebook* decision. Accordingly, Plaintiff requests that this Court
6 deny Defendant’s Motion to Dismiss with prejudice and to allow Plaintiff to seek
7 written discovery regarding the exact specifications of Defendant’s dialing system.

8 **II. FACTUAL BACKGROUND**

9 **a. What Is A Predictive Dialer?**

10 Plaintiff wishes to be crystal clear about how predictive dialers typically
11 work, and therefore how on the facts alleged by Plaintiff, which must be taken as
12 true at the motion to dismiss phase, Defendant’s system operates. The following is
13 the FCC’s description of a predictive dialer:
14

15 A predictive dialer is an automated dialing system that uses a complex
16 set of algorithms to automatically dial consumers’ telephone numbers
17 in a manner that “predicts” the time when a consumer will answer the
18 phone and a telemarketer will be available to take the call. Such
19 software programs are set up in order to minimize the amount of
20 downtime for a telemarketer. In some instances, a consumer answers
21 the phone only to hear “dead air” because no telemarketer is free to
22 take the call

23 ...

24 ² Plaintiff explains using illustrations in actual dialer code below how number
25 generators work and what they are in plain English, to decipher the mystery of
26 ATDS technology. Plaintiff and undersigned counsel have a clear plan of what
27 they are looking for in discovery. Undersigned counsel also participated in the
28 *Facebook* briefing, and drafted an Amicus Brief all about the history and
technology behind predictive dialers. The Supreme Court had the opportunity to
subsequently address predictive dialers in *Facebook* but chose to not do so.

1 a predictive dialer is equipment that dials numbers and, when certain
2 computer software is attached, also assists telemarketers in predicting
3 when a sales agent will be available to take calls. The hardware, when
4 paired with certain software, has the capacity to store or produce
5 numbers and dial those numbers at random, in sequential order, or
6 from a database of numbers

7 ...
8 Predictive dialers initiate phone calls while telemarketers are talking
9 to other consumers and frequently disconnect those calls when a
10 telemarketer is unavailable to take the next call...Predictive dialers
11 reduce the amount of down time for sales agents, as consumers are
12 more likely to be on the line when the telemarketer completes a call.

13 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*
14 *of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 ¶¶ 8 fn 31, 131, and 146
15 (2003) (“2003 FCC Order”).

16 In plain English, the following is description of a predictive dialer typically
17 operates: A dialer operator accesses a database of consumer contact information,
18 which is typically contained in a text delimited file, either in a CSV file, text file,
19 Microsoft Excel, or Microsoft Access file. In essence, this is a spreadsheet,
20 containing rows and columns of data, which includes telephone numbers. The
21 operator will load this data set into the dialing platform. The dialing system will
22 cut the data set into individual lines, unique to each telephone number with an
23 assigned row using a parser. It will then store the data. A random or sequential
24 number generator, is simultaneously programmed to generate a list of numbers.
25 That list is used to select, automatically, without any organic triggering event by a
26 human being, which order and sequence the stored list of telephone numbers are to
27 be accessed from storage. Once the number generator corresponds to a matching
28 number in the stored list, that telephone number will be “produced” from storage

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 to the dialer, which then automatically dials that telephone number.

2 To illustrate this using a real-world example that was provided to
3 undersigned counsel by a software engineer who was fluent in Java and has
4 reviewed dialer code, imagine a list of numbers as a lengthy sheet of lined notebook
5 paper. A parser cuts this into strips, and stores it in a paper tray, which is attached
6 to a scanner. Each strip of paper has a row number, and a telephone number. The
7 scanner uses a program to generate numbers, either sequentially or randomly. That
8 generator is hooked to the paper feed, which instructs the scanner to match the
9 generated number, to the corresponding strip of paper in the tray, and then scan that
10 telephone number from the stored list, through the scanner, and out the other side,
11 at which time the scanner is dialing the telephone number on that strip of paper.
12 Now imagine a scanner that accomplishes this with a tray containing thousands of
13 pages of paper in the blink of an eye. Once the tray is empty, the dialing campaign
14 is complete.

15 The program for the dialing campaigns is pre-set like a sprinkler timer to dial
16 the phone numbers at pre-set intervals and pre-set time periods, based on how many
17 available agents there are expected to receive calls. This is done by way of yet
18 another algorithm that is programmed to “predict” how long an average call with a
19 consumer takes, and dial only a certain volume of phone numbers per time interval,
20 so as to attempt to reach the highest possible volume of consumers, without
21 reaching so many consumers that the “abandonment rate” exceeds regulatory limits
22 set forth by the FCC. In crude terms, imagine a call center with 100 agents, a 10%
23 chance that a call will be answered, and an average call length of one minute. The
24 predictive dialer will “predict” that it should place 1,000 calls per minute, because
25 100 of those calls will be answered, and so 100 agents will be available to speak
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 with the consumer. Once those agents get off the line, calls will already be
 2 automatically happening in the background from the autodialer's random and
 3 sequential number generator described above, and agents will be connected with
 4 callers who pick up the line. This process is sometimes referred to as algorithmic
 5 dialing.

6 Due to natural statistical variation, sometimes calls will last longer than a
 7 minute, and there will be no available agent right away. This results in dead air at
 8 the beginning of such calls, or abandoned calls. The percentage of such calls that
 9 are picked up and result in dead air, is referred to as the "abandonment rate" and is
 10 regulated by the FCC, because it is incredibly annoying to pick up the line and be
 11 greeted with silence.³ This was heavily discussed during the congressional
 12 hearings as highly problematic in 1991 during the TCPA hearings, the history of
 13 which can be read in Exhibit A to the contemporaneous Request for Judicial
 14 Notice.⁴ In other words, this is not new technology. It is the same technology
 15 Congress was trying to regulate when it enacted the TCPA. It is the same
 16 technology that has been subject to FCC regulations for decades.

17
 18 **b. What Is A Random Or Sequential Number Generator?**

19 Undersigned counsel have studied the code used to program predictive
 20

21 ³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
 22 *1991*, CG Docket No. 02-278, Report and Order, FCC 03-153 (rel. July 3, 2003) ¶¶
 151-152 (setting a maximum three percent abandonment rate).

23 ⁴ Plaintiff strongly encourages the Court to review the RJN and Amicus brief filed
 24 by undersigned Counsel in Duguid. It sets forth the technological and legislative
 25 history of predictive dialers in great detail. Notably, the Supreme Court in
 26 *Facebook* never mentions the term "predictive dialer" once in its order. That is
 27 **wildly** overstated by Defendant.

1 dialers and other similarly-functioning autodialers in the past, with the assistance
 2 of software engineers fluent in Java, and have found that such autodialers, when
 3 used in automated mode, execute code that relies upon random or sequential
 4 number generation to both store and produce numbers to be dialed by the dialer.
 5 For instance, a common “parser” used in predictive dialing coding integrates code
 6 substantially similar to the following open source Apache code into an autodialing
 7 dialing platform:

```

8     730     if (!this.recordList.isEmpty()) {
9         731         this.recordNumber++;
10        732         final String comment = sb == null ? null : sb.toString();
11        733             result = new CSVRecord(this,
12        this.recordList.toArray(Constants.EMPTY_STRING_ARRAY),
13        comment,
14        734             this.recordNumber, startCharPosition);
15        735     }
16        736     return result;
17        737 }5

```

16 These lines of code, and specifically the “++” in line 731, represent an operator
 17 token that generates sequential numbers as part of a loop. This loop is used to
 18 select which number from the CSV file, will be dialed, and produce that number to
 19 the dialer using a CSV parser. Such programs can dial thousands of consumers in
 20 mere seconds, without any human intervention whatsoever, based on whatever
 21 abandonment rate is targeted by the operator of the dialing platform. The sequential
 22 number generator in the code above is executed in the process of mass predictive
 23 dialing. The program cannot function, and therefore cannot dial any phone numbers
 24

25
 26 ⁵ Available here: [https://commons.apache.org/proper/commons-csv/apidocs/src-](https://commons.apache.org/proper/commons-csv/apidocs/src-html/org/apache/commons/csv/CSVParser.html)
 27 [html/org/apache/commons/csv/CSVParser.html](https://commons.apache.org/proper/commons-csv/apidocs/src-html/org/apache/commons/csv/CSVParser.html)

1 at all, without executing such a sequential number generator.

2 Plaintiff alleges that Defendant used a predictive dialing system with the
 3 identical capacity to autodial numbers as shown above. Functionally, that is simply
 4 how all predictive dialers work. They rely on random or sequential number
 5 generators to instruct the data set to produce telephone numbers to the dialer.
 6 Without this key component, a dialing campaign would require an agent to
 7 manually place the call, via organic decision making, or as was the case in
 8 *Facebook*, through some other organic one-to-one triggering event that instructs
 9 the dialer to place the call.⁶ Plaintiff's allegations must be taken as true at this
 10 stage of the case. Plaintiff will not be able to demonstrate whether the code for
 11 Defendant's dialing system contains such random or sequential number generators
 12 without doing discovery and obtaining the code for the dialing platform.

13 Defendant's Motion is a procedurally premature method of adjudicating
 14 these issues. The problem with these known realities is that because Plaintiff does
 15 not and could not ever have access to Defendant's proprietary code, which is in its
 16

17
 18 ⁶ In *Facebook*, that organic event was a human being trying to gain access to a
 19 user's Facebook account without authorization, and Facebook's system being
 20 programmed to notify the owner of the account when this happened. *Duguid*
 21 should never have been subject to an appeal, because the system unquestionably
 22 did not use random or sequential number generation. Just because a robot sent the
 23 message does not mean random or sequential number generation is involved.
 24 Robots can be programmed to complete isolated tasks by their operators upon the
 25 occurrence of an isolated organic triggering event. If there are a lot of organic
 26 triggering events, then this could optically appear to the untrained eye to be mass
 27 dialing, but it is not. The key distinction here is that the code in predictive dialers
 28 use number generation and dialing campaigns to decide who to dial, while the code
 in the *Facebook* platform does not and could never do so, and so it could never fit
 within the plain language definition of an ATDS under the statutory text.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S
 MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

1 sole possession, Plaintiff cannot allege with any more specificity that the system’s
2 code contains such language. However, based on detailed discussions with experts
3 and years of litigation and expertise surrounding such technology, Plaintiff, and his
4 counsel, have a legitimate and sufficient good faith basis to make these allegations,
5 and assert that if the system is a traditional predictive dialer as alleged, *then it will*
6 *have some variation on the coding that is described herein*, which will very likely
7 include either random or sequential number generators that are being executed in
8 conjunction with storing and dialing the telephone numbers, including the dialing
9 of Plaintiff’s phone number.⁷ And so, it follows that this is an issue best reserved
10 for summary judgment, because Plaintiff’s allegations fall squarely within what the
11 Supreme Court said was an ATDS.

12
13 **c. Procedural History**

14 Plaintiff filed his Complaint on January 14, 2021, alleging that Defendant
15 contacted him in violation of the Telephone Consumer Protection Act (“TCPA”),
16 47 U.S.C. § 227 *et seq.* ECF No. 1. Plaintiff filed a First Amended Complaint
17 (“FAC”) on May 12, 2021. ECF No. 14. Defendant moved to dismiss Plaintiff’s
18 FAC on May 26, 2021. ECF No. 16. This Court issued an Order granting
19 Defendant’s motion on July 16, 2021. ECF No. 29. Plaintiff filed his Second
20

21 _____
22 ⁷ Undersigned counsel asked Defendant numerous times to produce the dialer code
23 and have stated in writing that Plaintiff will dismiss this case with prejudice upon
24 a showing of the code by Defendant to Plaintiff, and confirmation that there is no
25 random or sequential number generator contained therein. Defendant refused to
26 provide the code. It does not take a rocket scientist to see what is going on here.
27 Defendant wants the Court to dismiss the case on a finding that there is no random
28 or sequential number generator in the code without anyone ever actually looking at
the code to see if this is true.

1 Amended Complaint (“SAC”) on August 9, 2021. ECF No. 30. Plaintiff’s SAC
2 added context and specificity to his claims under 47 U.S.C. § 227(b), including
3 legislative history and FCC guidance suggesting plausibly that Defendant’s system
4 still qualifies as an ATDS after the Supreme Court’s decision in *Facebook*.
5 Defendant filed its Motion to Dismiss Plaintiff’s SAC on August 23, 2021. ECF
6 No. 31.

7 Plaintiff’s SAC directly addresses *Facebook* and the interpretation of ATDS
8 handed down by the Supreme Court. SAC ¶¶ 5-7. Plaintiff’s SAC alleges that
9 Defendant contacted him on his cellular telephone number ending in -0395 using
10 an ATDS, partly due to the fact that Plaintiff heard a brief pause on the line before
11 a live representative began speaking. SAC ¶¶ 20-22. Plaintiff further alleges that
12 Defendant never obtained his prior express consent to call his cellular telephone
13 using an ATDS. SAC ¶ 26. Plaintiff’s SAC goes on to allege that Defendant made
14 the same call to thousands of cellular telephone subscribers, featuring the same
15 scripted pitch. SAC ¶¶ 28, 30. Thus, Plaintiff seeks to represent a class of such
16 cellular telephone subscribers who received such calls from Defendant. SAC ¶ 38.

17 Defendant notes in its Motion that Plaintiff does not allege that Defendant’s
18 system employs a “random or sequential number generator,” and argues that
19 Plaintiff “knows it does not and thus cannot so allege in good faith. ECF No. 31.
20 To be clear, Plaintiff’s SAC alleges upon information and belief that Defendant’s
21 system *does* qualify as an ATDS under the Supreme Court’s interpretation. SAC ¶
22 22. Plaintiff cannot determine the exact specifications of Defendant’s system
23 without the benefit of discovery and should not be expected to. Plaintiffs seeking
24 relief under the TCPA after *Facebook* have no greater ability to plead specific facts
25 about a defendant’s dialer than they had before *Facebook*. Thus, if TCPA plaintiffs
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 are not afforded the opportunity to discover the exact model used by a defendant,
 2 they will rarely if ever be able to determine whether it uses a random or sequential
 3 number generator. Accordingly, dismissing such cases at the pleadings stage would
 4 be inappropriate and prejudicial to plaintiffs.

5 **III. LEGAL STANDARD**

6 A Fed. R. Civ. P. 12(b)(6) motion to dismiss is properly granted where the
 7 complaint fails to assert “enough facts to state a claim to relief that is plausible on
 8 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). However, “specific
 9 facts are not necessary.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 968 (9th Cir.
 10 2011) (quoting *Erikson v. Pardus*, 551 U.S. 89, 93 (2007)). *See also Cafasso, U.S.*
 11 *ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
 12 (plausibility standard does not require “the who, what, when, where and how of the
 13 misconduct alleged.”). Nor is “[t]he standard at this stage...that plaintiff’s
 14 explanation must be true or even probable.” *Starr v. Baca*, 652 F.3d 1202, 1216-17
 15 (9th Cir. 2011). Claims have “facial plausibility when the plaintiff pleads factual
 16 content that allows the court to draw the reasonable inference that the defendant is
 17 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 18 (citing *Twombly*, 550 U.S. at 556).

19 In order to survive a 12(b)(6) motion, a complaint need not state detailed
 20 factual allegations. *Id.* at 555. In deciding a 12(b)(6) motion and when considering
 21 the legal sufficiency of a claim, courts accept factual allegations as true, drawing
 22 all reasonable inferences therefrom in the favor of the nonmoving party. *Cahill v.*
 23 *Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Ninth Circuit
 24 has held that a complaint should not be dismissed under a Rule 12(b)(6) motion
 25
 26
 27
 28

1 “unless it appears beyond a reasonable doubt that the plaintiff can prove no set of
 2 facts in support of his claim which would entitle him to relief.” *Manzarek v. St.*
 3 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citing *Robertson*
 4 *v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)).⁸ Moreover,
 5 in the Ninth Circuit, the Rule 12(b)(6) motion “is viewed with disfavor and is
 6 rarely granted.” *McDougal v. County of Imperial*, 942 F.2d 668, 676 n.7 (9th Cir.
 7 1991) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986)).
 8 The Ninth Circuit has reversed dismissals under Rule 12(b)(6) where a Plaintiff has
 9 pled facts that give rise to an inference that a dialing system was used that has the
 10 capacity to store or produce telephone numbers to be called using a random or
 11 sequential number generator. *Flores v. Adir International, LLC*, 685 Fed.Appx.
 12 533, (9th Cir. March 24, 2017). Finally, binding authority from the Ninth Circuit
 13 Court of Appeals mandates that if the Court grants Defendant’s Motion, but the
 14 complaint can be amended, the Court should grant Plaintiff leave to amend. *Texaco,*
 15 *Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991).

17 **IV. ARGUMENT**

18 Defendant argues that Plaintiff has still failed to plausibly plead that
 19 Defendant used an ATDS to place its calls to him. Plaintiff maintains that his SAC
 20 plausibly alleges Defendant’s use of an ATDS, even under the Supreme Court’s
 21 recent interpretation in *Facebook*. For the reasons stated below, Plaintiff requests
 22 that this Court deny Defendant’s Motion to Dismiss.
 23

24
 25
 26 ⁸ See e.g., *Yang v. DTS Financial Group*, 570 F. Supp. 2d 1257 (S.D. Cal. 2008)
 27 (denying motion to dismiss and motion for summary judgment prior to discovery).

1 **d. Dismissing Plaintiff’s SAC Would Be Improper At The**
2 **Pleadings Stage**

3 First, Plaintiff has not had the opportunity to engage in discovery at this time.
4 Without the benefit of discovery, it is difficult to discern what Plaintiff could
5 possibly allege in support of his ATDS claims, aside from facts based on his own
6 experiences of receiving Defendant’s calls. Those experiences informed Plaintiff’s
7 understanding of how Defendant contacts consumers for purposes of solicitation.
8 If given the opportunity to propound written discovery, Plaintiff anticipates
9 gathering further information about Defendant’s dialer, which would serve this
10 Court’s interests in efficiency and justice by narrowing the issues in dispute.

11 A survey of post- *Facebook* decisions shows that district courts consistently
12 favor allowing plaintiffs to proceed with discovery over dismissing their claims at
13 the pleadings stage. *See Miles v. Medicredit, Inc.*, No. 4:20-CV-01186 JAR, 2021
14 WL 2949565, at *4 (E.D. Mo. July 14, 2021) (“Additional factual details about
15 Medicredit’s dialer...might be helpful but are not required at the pleading stage
16 [...] the Court finds Plaintiff has pled enough facts to proceed with discovery, at
17 which time he will have the opportunity to discover the precise technology that was
18 used at the time of the alleged TCPA violations”); *Bell v. Portfolio Recovery*
19 *Assocs., LLC*, No. 5:18-CV-00243-OLG, 2021 WL 1435264, at *1, fns. 4-5 (W.D.
20 Tex. Apr. 13, 2021) (“the Court believes that any resolution of dispositive motions
21 in this case will almost certainly involve some analysis regarding the capabilities
22 of the device in question...”); *Montanez v. Future Vision Brain Bank, LLC*, No. 20-
23 CV-02959-CMA-MEH, 2021 WL 1697928, at *7 (D. Colo. Apr. 29, 2021) (“While
24 the Supreme Court’s decision elucidates the definition of an ATDS, that holding
25 will prove far more relevant on a future motion for summary judgment than it does
26
27
28

1 now.”); *Gross v. GG Homes, Inc.*, No. 3:21-CV-00271-DMS-BGS, 2021 WL
 2 2863623, at *7 (S.D. Cal. July 8, 2021) (“Plaintiff need not include additional
 3 details concerning the process by which Defendant’s device stores and produces
 4 phone numbers. Plaintiff need not describe the technical details of Defendant’s
 5 alleged ATDS at this stage. The issue is appropriately addressed following
 6 discovery and on a motion for summary judgment.”); *Atkinson v. Pro Custom Solar*
 7 *LCC*, No. SA-21-CV-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16,
 8 2021) (“As a practical matter, no plaintiff will have personal knowledge of the
 9 defendant’s telephone system at the pleadings stage. Only the defendant has that
 10 knowledge. However, Plaintiff had pled enough facts to proceed with
 11 discovery...”); *Jance v. Home Run Offer LLC*, No. CV-20-00482-TUC-JGZ, 2021
 12 WL 3270318, at *3 (D. Ariz. July 30, 2021) (“whether a defendant has an ATDS
 13 is often a fact exclusively within the defendant’s possession...courts have
 14 acknowledged the difficulty a plaintiff faces in pleading the existence of such a
 15 system with specificity because it is a factual question that is not properly resolved
 16 without formal discovery or at this stage of the proceedings.”) (internal quotations
 17 and citations omitted).

18
 19 These courts are following the correct procedure of the Federal Rules.
 20 Defendant invites the Court to commit procedural error.

21 **e. Facebook Did Not Disturb The TCPA’s Prohibition On**
 22 **Predictive Dialers**

23 Second, Defendant overstates the extent to which *Facebook* rolled back the
 24 definition of ATDS. The reality is that the ATDS definition in Facebook is
 25 identical to the Ninth Circuit’s common law definition from the 2009 *Satterfield*
 26 decision. The law has remained relatively consistent and yet there is a great deal
 27
 28

1 of misunderstanding surrounding this issue because very few of the attorneys who
2 are arguing about this actually understand what a random or sequential number
3 generator actually is and are simply not articulating the issue correctly. This is why
4 Plaintiff sets forth the illustrations above. Number generators do not generate
5 phone numbers, they generate numbers as an incredibly common programming tool
6 used by software engineers when creating computer programs, to automate
7 functionality that otherwise would have to be performed organically. This saves
8 time and money because computer processors are faster than people.

9 Number generation is **not** the same as automation however. It is a very
10 specific type of automation from a programming perspective, which effectively
11 comes down to this question – can the system itself decide to dial a particular phone
12 number in a particular order, or does a human need to decide this issue? Where
13 number generators come in with respect to autodialers is that they are used by the
14 software engineers who write code for dialing platforms to automate the dialing
15 system, i.e. in conjunction with storing the lists of telephone numbers to be dialed,
16 and producing those numbers from the list to the dialing system. This simply
17 means that the system has the capacity to dictate which telephone number to dial,
18 without a person being involved in that process. Modern cell phones do not have
19 this capability, Facebook’s dialing system did not have this capability, regular
20 desktop telephones do not have this capability. And so the *Facebook* concerns are
21 not present with this common sense interpretation. Indeed, the only reason anyone
22 ever argues otherwise is because they do not understand what a random or
23 sequential number generator is, and have never analyzed dialer code or spoken to
24 a programmer about any of this. Defendant’s system, as alleged by Plaintiff, **does**
25 have this capacity, because this is how predictive dialers work.
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 In *Facebook*, the Supreme Court held that “[t]o qualify as an ‘automatic
 2 telephone dialing system,’ a device must have the capacity either to store a
 3 telephone number using a random or sequential generator *or* to produce a telephone
 4 number using a random or sequential number generator.” 141 S.Ct. at 1163
 5 (emphasis added). The Court further observed that “advances in automated
 6 technology made it feasible for companies to execute large-scale telemarketing
 7 campaigns at a fraction of the prior cost, dramatically increasing customer contacts.
 8 Infamously, the development of “robocall” technology allowed companies to make
 9 calls using artificial or prerecorded voices, obviating the need for live human
 10 callers altogether.” *Id.* at 1167. The Court determined that the texting platform used
 11 by Facebook, which sent one-to-one text messages to individuals upon a triggering
 12 event, was not the type of technology targeted by Congress and presented real
 13 world problems of overbreadth because such systems “could affect ordinary cell
 14 phone owners in the course of commonplace usage, such as speed dialing or
 15 sending automated text message responses.” *Id.* at 1171. However, the Court also
 16 referenced the possibility that “an autodialer might use a random number generator
 17 to determine the order in which to pick phone numbers from a pre-produced list. It
 18 would then store those numbers to be dialed at a later time.” *Id.* at 1172 n.7.⁹ This
 19
 20

21
 22 ⁹ Although there is not much post- *Facebook* caselaw interpreting footnote 7, one
 23 district court recently held that a system which automatically re-sequenced
 24 numbers on a campaign list would have qualified as an autodialer, if not for the fact
 25 that there was no evidentiary showing in the record by plaintiff that it did so by
 26 using a random or sequential number generator. *See Grome v. USAA Savings Bank*,
 27 No. 4:19-CV-3080, 2021 WL 3883713, at *5 (D. Neb. Aug. 31, 2021). The natural
 28 extension of this order is that if the plaintiff had shown evidence of programming
 code for the dialing system that utilized a random or sequential number generator

1 is an inarticulate way of describing how number generation works, but the point is
2 clear – predictive dialers are in.

3 The legislative history and early FCC rulings on the TCPA support the
4 conclusion that *Facebook* did not disturb the TCPA’s application to predictive
5 dialers. Similar to other autodialers, “predictive” dialers also call from a stored list
6 of phone numbers, but utilize algorithms to “predict” when an agent will receive a
7 live answer. Simply put, predictive dialers are autodialers. Even the FCC’s first
8 ruling on the TCPA in 1992 recognized the importance of restrictions on equipment
9 such as predictive dialers. Referring in part to “predictive dialers” to place live
10 solicitation calls (7 F.C.C. Rcd. 8752, 8756 (F.C.C. September 17, 1992)), the FCC
11 then opined that “both live [referring again to live solicitation calls, such as with a
12 predictive dialer] and artificial or prerecorded voice telephone solicitations should
13 be subject to significant restrictions” (*Id.*). Since 2003, the FCC has long held,
14 definitively, that predictive dialers qualify as an ATDS under the TCPA. *See* 2003
15 FCC Order at ¶¶ 131-134.
16

17 The term “predictive dialer” never appears in the Supreme Court’s ruling in
18 *Facebook*, nor does the order ever suggest that predictive dialers are not an
19 ATDS.¹⁰ Indeed, the ruling suggests that reading the Supreme Court’s order as
20

21 _____
22 in the method Plaintiff argues herein, that the court’s order would have gone the
23 other direction. This is insightful and Plaintiff believes, is correct.

24 ¹⁰ The Supreme Court had every opportunity to discuss predictive dialers in
25 *Facebook*, because undersigned counsel put the issue before the Court in the
26 briefing for the *Facebook* decision. Plaintiff’s Request for Judicial Notice, Ex. A.
27 Why would nine Justices ignore this issue entirely? Because predictive dialers
28 were not before the Court, and there was no legitimate question that Facebook’s
system did not operate by way of number generation.

1 precluding an ATDS finding as to such technology would “greatly overstate[] the
 2 effects of accepting Facebook’s interpretation.” *Id.* at 1173. This is consistent with
 3 the history of autodialers, and predictive dialers which have been dialing stored
 4 lists of numbers since the 1970’s.¹¹ Predictive dialers, which dial stored lists of
 5 numbers using algorithms, have been prohibited since the passage of the TCPA,
 6 and have historically been prohibited by the FCC ever since.¹²

7 Further, reading *Facebook* to preclude dialing systems that dialed stored lists
 8 of numbers using algorithmic data pulls would render the consent requirements set
 9 forth under 47 U.S.C. § 227(b)(1)(A) irrelevant surplusage. Courts and the FCC
 10

11 _____
 12 ¹¹ See U.S. Patent No. 3,899,645 (issued Aug. 12, 1975) (“processor for controlling
 13 the operation of a telephone”); U.S. Patent No. 3,407,269 (issued Oct. 22, 1968)
 14 (“system for automatically sequentially signaling plural different alarm messages
 15 to different telephone subscribers”); U.S. Patent No. 3,943,289 (issued Mar. 9,
 16 1976) (“automatic telephone caller”); See U.S. Patent No. 3,989,899 (issued Nov.
 17 2, 1976) (“telephone scheduling system”); U.S. Patent No. 4,817,130 (issued Mar.
 18 28, 1989) (“call management system with protocol converter and port controller”);
 19 U.S. Patent No. 4,881,261 at p. 4 (issued Nov. 14, 1989); U.S. Patent No. 3,989,899
 20 at p. 9-10 (issued Nov. 2, 1976); U.S. Patent No. 4,829,563 (issued May 9, 1989)
 (“method for predictive dialing”); U.S. Patent No. 4,881,261 (issued Nov. 14,
 1989) (“method for predictive pacing of calls in a calling system”); U.S. Patent No.
 3,899,645 (issued Aug. 12, 1975); U.S. Patent No. 3,407,269 (issued Oct. 22,
 1968); U.S. Patent No. 3,943,289 (issued Mar. 9, 1976).

21 ¹² See Hearing Before the Subcommittee on Communications of the Committee on
 22 Commerce, Science and Transportation, United States Senate One Hundred Second
 23 Congress First Session July 24, 1991, Testimony of Robert Bulmash and Steve
 24 Hamm at pgs 11, 16, 19, 24-25, and 27; 7 FCC Rcd. 8752, 8756 (F.C.C. September
 25 17, 1992) at ¶¶ 8-9; *In re Rules and Regulations Implementing the Telephone*
 26 *Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115
 27 ¶¶ 131-134 (2003) at ¶¶ 8 fn 31, 131, and 146; see also 47 C.F.R. §§ 64.1200(a)(5-
 28 7) (prohibiting predictive dialing with certain abandonment rates, i.e. technology
 which automatically dials stored lists).

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S
 MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

1 have generally held that consent is an affirmative defense to any otherwise-
 2 violative conduct under the TCPA. *Van Patten v. Vertical Fitness Group, LLC*, 847
 3 F.3d 1037 (9th Cir. 2017); In the Matter of Rules & Regulations Implementing the
 4 Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 565 (Jan. 4, 2008). An
 5 autodialer that is required to self-generate its own lists of numbers to dial, as
 6 opposed to dialing from a stored list, could **never** be used in compliance with the
 7 TCPA because there is by definition a lack of consent from an individual whose
 8 number is randomly generated. These two concepts are mutually exclusive.

9
 10 **f. Plaintiff's SAC Alleges Sufficient Facts To Survive A Rule 12
 Motion**

11 Given the context detailed above, when viewing the record in the light most
 12 favorable to Plaintiff, it is clear that Plaintiff has pled facts that make it plausible
 13 Defendant's system has the capacity to store a telephone number using a random
 14 or sequential number generator. Such an inference is plausibly drawn where a
 15 plaintiff alleges ATDS violations upon information and belief. *See Carl v. First*
 16 *Nat'l Bank of Omaha*, No. 2:19-CV-00504-GZS, 2021 WL 2444162, at *12, fn. 10
 17 (D. Me. June 15, 2021) (“[T]here is a trialworthy question as to whether the Voice
 18 Portal system had the capacity to store a telephone number using a random or
 19 sequential number generator. [...] *Facebook* suggested that an ATDS could
 20 potentially fall under TCPA if it use[s] a random number generator to determine
 21 the order in which to pick phone numbers from a preproduced list [and] then
 22 store[s] those numbers to be dialed at a later time.”) (internal quotations omitted);
 23 *Callier v. GreenSky, Inc.*, No. EP-20-CV-00304-KC, 2021 WL 2688622, at *5
 24 (W.D. Tex. May 10, 2021) (“[I]t is not unreasonable to infer from the pleadings
 25 that Defendant relied on a sequential number generator to place its calls. Indeed,
 26
 27
 28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S
 MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

1 such an inference is appropriately drawn at the pleadings stage, where the Court is
2 required to credit Plaintiff’s account, [and] view the facts in the light most favorable
3 to Plaintiff...”).

4 Plaintiff’s SAC plausibly alleges that Defendant utilized an ATDS or, stated
5 differently, “equipment which has the capacity to store or produce telephone
6 numbers to be called, using a random or sequential number generator; and to dial
7 such numbers.” Without the benefit of discovery, Plaintiff lacks the ability to
8 specifically identify Defendant’s system, however, under the pleading standards of
9 the TCPA, Plaintiff has alleged sufficient facts to plausibly suggest that
10 Defendant’s system qualifies as an ATDS under the new interpretation set forth in
11 *Facebook*. For these reasons, Plaintiff’s SAC should not be dismissed, and Plaintiff
12 should be given the opportunity to discover the exact specifications of Defendant’s
13 dialing system.

14 **V. CONCLUSION**

15 Rule 12 is not the proper vehicle to adjudicate these issues. If Defendant
16 wants to argue that its system is not an ATDS post Facebook, then it should at least
17 have to disclose the capacity of that system, and its programming code. Such
18 documents, which are inherently private and in the sole possession of the company
19 placing the calls, will provide the evidence needed to decide this issue. Why would
20 the TCPA be any different than any other tort law when it comes to the Federal
21 Rules of Civil Procedure?
22
23
24
25
26
27
28

1 For the reasons set forth above, Plaintiff requests that this Court deny
2 Defendant's Motion to Dismiss with prejudice.

3
4 Respectfully Submitted this 3rd Day of September, 2021.

5 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

6
7 By: /s/ Adrian R. Bacon
8 Todd M. Friedman
9 Adrian R. Bacon
10 Law Offices of Todd M. Friedman, P.C.
11 Attorney for Plaintiff
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

1 Filed electronically on this 3rd Day of September, 2021, with:
2
3 United States District Court CM/ECF system
4 Notification sent electronically via the Court's ECF system to:
5
6 Honorable District Judge Michael W. Fitzgerald
7 United States District Court
8 Central District of California
9 and all Counsel of Record as Recorded on the Electronic Service List.

10 This 3rd Day of September, 2021

11 /s/Todd M. Friedman, Esq.
12 Todd M. Friedman
13 Attorney for Plaintiff
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT