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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KERRY O'SHEA,

Plaintiff,

v.

AMERICAN SOLAR SOLUTION, INC.,

Defendant.

Case No.: 3:14-cv-00894-L-RBB

**ORDER DENYING DEFENDANT'S
EX PARTE MOTION FOR LEAVE
TO FILE A SECOND MOTION FOR
SUMMARY JUDGMENT**

Pending before the Court is Defendant American Solar Solution, Inc.'s ("Defendant") *ex parte* motion for leave to file a second motion for summary judgment. (Mot. [Doc. 140].) Pursuant to Civil Local Rule 7.1(d)(1), the Court decides the matter on the papers submitted and without oral argument. For the reasons stated below, the Court **DENIES** Defendant's motion.

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1 **I. BACKGROUND**

2 This case is a class action alleging Defendant American Solar Solution, Inc.
3 (“Defendant”) violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §
4 227 *et seq.*, by using an automatic telephone dialing system (“ATDS”) to place
5 telemarketing calls to cell phones. Defendant is in the business of selling solar energy
6 equipment to residential and commercial customers. To market its products and services,
7 Defendant used a ViciDial predictive dialer to contact phone numbers uploaded into the
8 dialer. Defendant purchased these telephone numbers from several different companies
9 that sell lists of phone numbers that connect to members of a population meeting certain
10 demographic criteria. Per Plaintiff’s expert’s report, Defendant made 897,534 calls to
11 220,007 different cell phone numbers. Defendant has no evidence indicating any of the
12 alleged call recipients provided prior express consent to receive these calls.

13 Defendant placed fifteen calls to named Plaintiff Kerry O’Shea’s (“Plaintiff”) cell
14 phone. Accordingly, Plaintiff filed a class action complaint alleging Defendant’s conduct
15 violated the TCPA. Since filing, Plaintiff has survived a motion for summary judgment,
16 two motions to dismiss, and achieved class certification. The discovery and motion filing
17 cutoff dates have both passed. During discovery, Defendant repeatedly stipulated to the
18 fact that the ViciDial predictive dialer it used to place the calls at issue was an ATDS for
19 purposes of the TCPA. (See Marron Decl. [Doc. 143-1].) In the jointly proposed pretrial
20 order submitted to the Court on October 9, 2017, Defendant stipulated that “it used
21 ViciDialer predictive dialers which are known [ATDSs] to place the calls to Plaintiff and
22 members of the Class between November 22, 2012 and August 22, 2015.” Defendant
23 now seeks leave to file a second motion for summary judgment arguing that the
24 ViciDialer predictive dialer is not an ATDS. Plaintiff opposes.

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1 **II. DISCUSSION**

2 Use of an ATDS is an essential element of a TCPA claim. 47 U.S.C. § 227
3 (b)(1)(A)(iii). Defendant contends that *ACA Int'l v. Federal Communications*
4 *Commission*, 885 F.3d 687 (D.C. Cir. 2018) changed the definition of an ATDS such that
5 Defendant's ViciDial predictive dialer no longer triggers it.

6 The TCPA broadly defines an ATDS as "equipment which has the capacity (A) to
7 store or produce telephone numbers to be called, using a random or sequential number
8 generator; and (B) to dial such numbers." 47 U.S.C. § 227 (1). Congress charged the
9 Federal Communications Commission ("FCC") with implementation of the TCPA and, to
10 this end, gave it rulemaking authority. 47 U.S.C. § 227(b)(2). Pursuant to this authority,
11 the FCC has issued a number of orders clarifying what type of equipment qualifies as an
12 ATDS.

13 Germane to the present motion are two positions taken by the FCC. The first
14 position is that a predictive dialer is an ATDS. *In re Rules & Regulations Implementing*
15 *the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14093 (2003)
16 ("2003 FCC Order"); *In the Matter of Rules and Regulations Implementing the Telephone*
17 *Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 (2008) ("2008 FCC Order"). A
18 predictive dialer is "an automated dialing system that uses a complex set of algorithms to
19 automatically dial consumers' telephone numbers in a manner that 'predicts' the time
20 when a consumer will answer the phone and a telemarketer will be available to take the
21 call." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act*
22 *of 1991*, 18 FCC Rcd. at 14143 n. 31. In its 2003 Order, the FCC made clear that "while
23 some predictive dialers cannot be programmed to generate random or sequential phone
24 numbers, they still satisfy the statutory definition of an ATDS. *ACA*, 885 F.3d at 702
25 (citing the 2003 FCC Order).

26 In 2015, the FCC took a position on the meaning of the word "capacity" as used in
27 the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone*
28 *Consumer Act of 1991*, 30 FCC Rcd. 7961 (2015) ("2015 Order"). Specifically, the FCC

1 held that equipment need not have the present capacity to function as an autodialer to
2 trigger the TCPA. *Id.* at 7974. Rather, it was sufficient if equipment had the potential
3 capacity to be configured with autodialing functions. *Id.* The DC Circuit Court of
4 Appeals invalidated this specific provision of the FCC's 2015 Order, reasoning it was
5 impermissibly expansive inasmuch as it would sweep even smart phones under the
6 definition of an ATDS. *ACA*, 885 F.3d at 700.

7 The *ACA* decision is unhelpful to Defendant because Plaintiff is not arguing that
8 the ViciDial predictive dialer is an ATDS because it *could be* configured with autodialing
9 functions. Rather, Plaintiff has submitted undisputed evidence establishing that the
10 ViciDial predictive dialer *was* in fact presently configured as a predictive dialer. (Hansen
11 Decl. [Doc. 116-7] ¶ 24.) The *ACA* decision left intact the holding of both the FCC's
12 2003 and 2008 Order that an autodialer is an ATDS. *Swaney v. Regions Bank*, 2018 WL
13 2316452 *1 (N.D. Ala. 2018); *Reyes v. BCA Fin. Servs.*, 2018 WL 2220417 (S.D. Fla.
14 2018). It follows that the ViciDial predictive dialer is an ATDS.

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16 **III. CONCLUSION & ORDER**

17 For the foregoing reasons, the Court **DENIES** Defendant's ex parte motion for
18 leave to file a second motion for summary judgment. A scheduling order setting trial and
19 related dates will issue shortly. In the meantime, the parties are ordered to contact the
20 chambers of the Honorable Ruben B. Brooks no later than July 6, 2018 to arrange for an
21 in person settlement conference.

22 **IT IS SO ORDERED.**

23 Dated: July 2, 2018

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25 Hon. M. James Lorenz
26 United States District Judge
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