UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WILFREDO GONZALEZ,

Plaintiff,

v. Case No: 5:18-cv-340-Oc-30PRL

OCWEN LOAN SERVICING, LLC,

Defendant.

ORDER

Wilfredo Gonzalez received approximately 500 calls to his cell phone from Ocwen Loan Servicing, LLC regarding an alleged debt. Gonzalez alleges that those phone calls were made using an "automatic telephone dialing system" ("ATDS" or "autodialer") or artificial or prerecorded voice, and that the calls continued even after Gonzalez revoked any prior consent for Ocwen to call his cell phone. Gonzalez sued Ocwen alleging the telephone calls violated both the Telephone Consumer Protection Act of 1991 (the "TCPA") and the Florida Consumer Collection Practices Act (the "FCCPA").

In its Motion to Dismiss, Ocwen argues that *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018), in which the D.C. Circuit determined the Federal Communications Commission definition of ATDS in its 2015 Declaratory Ruling was invalid, requires this Court to dismiss the Complaint. The Court agrees with some of Ocwen's arguments—including its argument as to what constitutes an ATDS after *ACA Int'l*—but concludes its Motion can only be granted in part for the reasons explained below.

BACKGROUND

In his Complaint, Gonzalez alleges Ocwen called his cellular telephone roughly 500 times to collect an alleged debt. (Doc. 1, ¶¶ 16–17). According to Gonzalez,

> [S]ome or all of the calls [Ocwen] made to [Gonzalez's] cellular telephone number were made using an "automatic telephone dialing system" which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator (including but not limited to a predictive dialer) or an artificial or prerecorded voice; and to dial such numbers as specified by 47 U.S.C. § 227 (a)(1) (hereinafter "auto-dialer calls"). [Gonzalez] will testify that he knew it was an auto-dialer because of the vast number of calls he received and because he heard a pause when he answered his telephone before a voice came on the line and he received prerecorded messages from [Ocwen]."

(Doc. 1, ¶ 18). Gonzalez also alleges that Ocwen "has a corporate policy to use an [ATDS] or a pre-recorded or artificial voice…." (Doc. 1, ¶ 29–30).

Gonzalez also alleges that he has instructed Ocwen to stop calling his cell phone several times over the last four years. (Doc. 1, ¶ 22). Specifically, Gonzalez alleges he told Ocwen representatives to stop calling him in December 2017 and May 2018. (Doc. 1, ¶¶ 23, 25). Despite these requests, Gonzalez alleges Ocwen continued to call his cell phone. (Doc. 1, ¶¶ 24, 26–27). And Gonzalez alleges that "on numerous occasions" he received more than one phone call per day and received calls on back-to-back days. (Doc. 1, ¶ 28).

Gonzalez also includes allegations about how he was affected by Ocwen's phone calls. Gonzalez alleges he suffered (1) invasion of privacy and intrusion on his right to seclusion, (Doc. 1, ¶ 39); (2) occupation of his cell phone and phone line, (Doc. 1, ¶ 40); (3) unnecessary expenditure of his time by answering the phone or dealing with notifications for missed calls, impairing the usefulness of his cell phone, (Doc. 1, ¶ 41); (4)

nuisance and annoyance, (Doc. 1, ¶ 42); (5) expenditure of his cell phone battery, (Doc. 1, ¶ 43); (6) occupation of space in his cell phone for voicemails, (Doc. 1, ¶ 44); and (7) trespass to his chattel, specifically his cell phone and phone line, (Doc. 1, ¶ 45).

In the Complaint, Gonzalez is suing Ocwen for violation of the TCPA in count I, and for violation of the FCCPA in count II. Specifically, Gonzalez alleges Ocwen violated 47 U.S.C. § 227(b)(1)(A)(iii) in count I by placing non-emergency calls to his cell phone using an ATDS or prerecorded or artificial voice without prior express consent. (Doc. 1, ¶ 49). And Gonzalez alleges Ocwen violated § 559.72(7), Florida Statutes, in count II by willfully communicating with him with such frequency and by engaging in other conduct as can be reasonably expected to harass him. (Doc. 1, ¶¶ 52–53).

MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a complaint to be dismissed for failure to state a claim on which relief can be granted. When reviewing a motion to dismiss, courts must limit their consideration to the well-pleaded allegations, documents central to or referred to in the complaint, and matters judicially noticed. *See La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Courts must accept all factual allegations as true, and view the facts in a light most favorable to the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007).

Legal conclusions, however, "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). In fact, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila*

v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003). To survive a motion to dismiss, a complaint must instead 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 (internal quotation marks and citations omitted). This plausibility standard is met when the plaintiff pleads enough factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal citations omitted).

DISCUSSION

Ocwen seeks dismissal of Gonzalez's TCPA and FCCPA claims for five reasons, three of which are predicated on its interpretation of *ACA Int'l*. In a nutshell, Ocwen argues that the D.C. Circuit in *ACA Int'l* vacated the FCC's 2015, 2008, and 2003 Orders, which means that the FCC's 1992 Order applies. Based on that interpretation, Ocwen argues for dismissal because: (1) the TCPA does not apply to debt collectors under the FCC's 1992 Order, (2) Gonzalez did not allege sufficient facts demonstrating Ocwen used an ATDS, and (3) because the TCPA claim must be dismissed, the Court should decline to exercise supplemental jurisdiction over the FCCPA claim. Additionally—and not contingent on its interpretation of *ACA Int'l*—Ocwen argues: (4) Gonzalez failed to allege facts demonstrating harassment for his FCCPA claim, and (5) Gonzalez's FCCPA claim is at least partially barred by the 2-year statute of limitations.

Gonzalez disagrees with Ocwen's interpretation of *ACA Int'l* and its other arguments seeking dismissal.[1] Gonzalez argues that *ACA Int'l* only vacated the FCC's

[1] The Court notes that Gonzalez's response exceeds the page count permitted by Local Rule 3.01(b). Failure to seek leave to file a motion or response in excess of the permitted number of

2015 Order, leaving intact the 2003, 2008, and 2012 Orders. And under those Orders, Gonzalez argues, he sufficiently stated a TCPA claim against Ocwen. Gonzalez also argues that he sufficiently pleaded a claim under the FCCPA, over which the Court should exercise supplemental jurisdiction since his TCPA claim withstands dismissal.[2]

Given that most of the arguments raised in Ocwen's Motion are based on its interpretation of *ACA Int'l*, the Court will begin its analysis with a summary of the relevant portions of that case. The Court will then analyze the scope of the holdings in *ACA Int'l* as it relates to Ocwen's arguments. Then the Court will analyze whether Gonzalez has alleged enough—given the Court's interpretation of *ACA Int'l*—to state a claim under the TCPA and, if necessary, the FCCPA.

A. Summary of *ACA Int'l*

The TCPA makes it unlawful to place a non-emergency call to a cell phone using an ATDS without the prior express consent of the called party. 855 F.3d at 692–93 (citing 47 U.S.C. § 227(b)(1)(A)(iii)). The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* at 693 (citing § 227(a)(1)). So, as the D.C. Circuit explained:

> In short, the TCPA generally makes it unlawful to call a cell phone using an ATDS. And an ATDS is equipment with the "capacity" to perform each of two enumerated functions: (i) storing or producing telephone

pages in the future could result in the Court striking the filing.

[2] Gonzalez did not respond to Ocwen's FCCPA statute of limitations argument. So the Court grants the Motion on this ground to the extent that conduct occurring more than two years before Gonzalez filed this action is barred as a basis for relief for his FCCPA claim.

> numbers "using a random or sequential number generator" and (ii) dialing those numbers.

Id. The TCPA also gives the FCC responsibility to promulgate regulations and enter declaratory rulings. *Id.* (citing § 227(b)(2).

ACA Int'l involved a number of entities seeking review of one such FCC order: *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) (the "2015 Order"). 885 F.3d at 691. One of the issues addressed—and the only issue relevant to this instant Motion—was "which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls." *Id.* Specifically, in its 2015 Order, the FCC

> reaffirmed prior orders deciding that "predictive dialers"—equipment that can dial automatically from a given list of telephone numbers using algorithms to predict "when a sales agent will be available"—qualify as autodialers. The Commission further explained that a "basic function[ ]" of an autodialer is to "dial numbers without human intervention." At the same time, the Commission also declined to "clarify[ ] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."

Id. at 694. The D.C. Circuit noted that this raised two issues: (i) when does a device have the "capacity" to perform the functions of an autodialer enumerated in the statute;[3] and (ii) what precisely is the content of those functions?

The D.C. Circuit held that the 2015 Order's definition of an ATDS—which reaffirmed its 2003 and 2008 Orders—was invalid as it pertained to the issue of "capacity" and to the issue of content.

[3] Those functions being (1) storing or producing telephone numbers "using a random or sequential number generator" and (2) dialing those numbers. § 227(a)(1).

1. Interpretation of "capacity" in autodialer definition is impermissible.

The D.C. Circuit concluded that the FCC's interpretation of a device that has the "capacity" to operate as an ATDS was impermissibly expansive. *Id.* at 695–99. The FCC determined in its 2015 Order that the "capacity" of calling equipment "includes its potential functionalities" or "future possibility," not just its "present ability." *Id.* at 695. This definition was too far-reaching, the D.C. Circuit reasoned, because it encompassed smartphones used by the majority of Americans since a smartphone user could download an app that would give it the statutorily enumerated functions of an autodialer. *Id.* at 696. Such an interpretation, the D.C. Circuit held, "is 'utterly unreasonable in the breadth of its regulatory [in]clusion.'" *Id.* at 699 (quoting *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1178 (D.C. Cir. 2003)).

Alternatively, the D.C. Circuit concluded the FCC's interpretation was arbitrary and capricious to the extent that the FCC argued its interpretation did not encompass all smartphones. *Id.* at 699–700. That is because its interpretation would be indiscriminate and offer no meaningful guidance if smartphones were not included in its interpretation as a device with the "capacity" to perform the functions of an autodialer.[4] *Id.* So the D.C. Circuit concluded the FCC's interpretation of when a device has the "capacity" to function as an autodialer was invalid as either too expansive or as arbitrary and capricious.

[4] This reasoning centered on the FCC's argument that the Firefox browser had the "capacity" to play Flash videos because the Flash plug-in could be downloaded. *Id.* at 700. The D.C. Circuit determined there was no material difference between downloading the Flash plug-in in Firefox—which in this example would be representative of a device that had the capacity to function as an autodialer—and downloading an app on a smartphone—which the FCC argued would not mean the smartphone had the "capacity" to function as an autodialer." *Id.* at 696–97, 99–700.

2. FCC's Interpretation of what devices are autodialers is impermissible.

Having determined the FCC's interpretation of "capacity" in the autodialer definition was impermissible, the D.C. Circuit turned to the second issue: what precisely does it mean to function as an autodialer. This issue revolved around the FCC's determination that all "predictive dialers"[5] are ATDSs under the TCPA.

Before getting to the substance of this issue, the D.C. Circuit addressed the threshold question of whether it could even review the FCC's decision that all predictive dialers are autodialers since this interpretation was established in its 2003 Order—which was not appealed—and merely reaffirmed in its 2015 Order. *Id.* at 701. The D.C. Circuit held that it could review the interpretation of what it means to function as an autodialer because the 2015 Order purported to "provide clarification on the definition of 'autodialer'…." *Id.* at 701 (quoting the 2015 Order at 8039 ¶ 165 & n.552). Thus, the D.C. Circuit had jurisdiction to review the FCC's interpretation that was reaffirmed in the 2015 Order.

Returning to the substance of the issue, § 227(a)(1)(A)–(B) defines an ATDS as a device that has the capacity to (1) "store or produce telephone numbers to be called, *using a random or sequential number generator*"; and (2) "dial such numbers." Focusing on the emphasized portion, the D.C. Circuit noted that the FCC appeared to be of two minds on whether the device must itself have the ability to generate random or sequential telephone numbers, or can call from a database of numbers generated elsewhere. *Id.* at 701.

[5] "Predictive dialers" are "equipment that can dial automatically from a given list of telephone numbers using algorithms to predict 'when a sales agent will be available….'" *Id.* at 694.

On one hand, "[t]he order twice states that, to 'meet[ ] the TCPA's definition of "autodialer,"' the equipment in question must have the capacity to 'dial random or sequential numbers.' And it is clear from context that the order treats the ability to 'dial random or sequential numbers' as the ability to *generate* and then dial 'random or sequential numbers.'" *Id.* at 701–02 (quoting the 2015 Order at 7972 ¶ 10, and 7974 ¶ 15) (emphasis in original).

But on the other hand, the 2015 Order also indicated that a device could meet the definition of an "autodialer" even if it lacks the capacity to generate and then dial random or sequential numbers. *Id.* at 702. That is because the FCC includes all predictive dialers in the definition of autodialers and refused to limit the definition to only include predictive dialers that could generate random or sequential phone numbers. *Id.*

So because the FCC's interpretation of an autodialer both required *and* did not require a device to be able to generate random or sequential phone numbers, the D.C. Circuit held that the FCC's interpretation of what constitutes an autodialer is inconsistent with reasoned decisionmaking.[6]

B. Scope of *ACA Int'l*'s Holding

In sum, *ACA Int'l* vacated the FCC's 2015 Order in two ways relevant here: it vacated the FCC's interpretation of what it means for a device to have the capacity to

[6] The D.C. Circuit concluded the FCC's interpretation of an autodialer had other inconsistencies as well. The FCC included as a basic function of an autodialer the ability to dial numbers without human intervention, but refused to clarify that "a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id.* at 703. The D.C. Circuit interpreted this as meaning that a device that requires human intervention to dial a number could still qualify as an autodialer under the FCC's current interpretation. *Id.*

function as an ATDS, and vacated the FCC's interpretation that an autodialer was required and not required to be able to generate random or sequential telephone numbers and dial them. But the parties differ as to what those rulings mean when it comes to the autodialer definition this Court should apply.

As noted above, Ocwen argues *ACA Int'l* not only vacated the FCC's 2015 Order, but also the 2003 and 2008 Orders. That is because the FCC's interpretation of what devices are defined as ATDSs in its 2015 Order, which the D.C. Circuit concluded were impermissible, reaffirmed the FCC's interpretation first espoused in its 2003 Order and latter reaffirmed in its 2008 Order. *See Sessions v. Barclays Bank Delaware*, 317 F.Supp.3d 1208 (N.D. Ga. 2018); *Gary v. TrueBlue, Inc.*, No. 17-cv-10544, 2018 WL 3647046 (E.D. Mich. Aug. 1, 2018); *Pinkus v. Sirius XM Radio, Inc.*, No. 16 C 10858, 2018 WL 3586186 (N.D. Ill. Jul. 26, 2018); *Herrick v. GoDaddy.com LLC*, 312 F.Supp.3d 792 (D. Ariz. 2018); and *Marshall v. CBE Grp., Inc.*, 2018 WL 1567852 (D. Nev. Mar. 30, 2018).

But Gonzalez argues that *ACA Int'l* only affected the FCC's 2015 Order—not the 2003, 2008, or 2012 Orders because the D.C. Circuit did not explicitly vacate any other FCC orders. *See Reyes v. BCA Fin. Servs., Inc.*, 312 F.Supp.3d 1308 (S.D. Fla. May 14, 2018); *Swaney v. Regions Bank*, No. 2:13-cv00544-JHE, 2018 WL 2316452 (N.D. Ala. May 22, 2018); *Maddox v. CBE Grp., Inc.*, No. 1:17-CV-1909-SCJ, 2018 WL 2327037 (N.D. Ga. May 22, 2018); *McMillion v. Rash Curtis & Assocs.*, No. 16-CV-03396-YGR, 2018 WL 3023449 (N.D. Cal. June 18, 2018); *Ammons v. Ally Fin., Inc.*, No. 3:17-CV-00505, 2018 WL 3134619 (M.D. Tenn. June 27, 2018); *O'Shea v. Am. Solar Sol., Inc.*, No. 3:14-CV-00894-L-RBB, 2018 WL 3217735 (S.D. Cal. July 2, 2018); *Pieterson v. Wells*

Fargo Bank, N.A., No. 17-CV-02306-EDL, 2018 WL 3241069 (N.D. Cal. July 2, 2018); *Somogyi v. Freedom Mortg. Corp.*, No. CV 17-6546 (JBS/JS), 2018 WL 3656158 (D.N.J. Aug. 2, 2018); and *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-06314-YGR, 2018 WL 3219398 (N.D. Cal. July 2, 2018).

This Court agrees with Ocwen and the cases on which it relies for two primary reasons.[7] First, this Court is bound by the D.C. Circuit's opinion, as are all district courts. That is because when challenges of an FCC order from multiple jurisdictions are combined in one circuit, that circuit court's opinion is binding in all circuits. *Sessions*, 317 F. Supp. 3d 1208 (citing *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017); *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008)). Such a procedure "promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform[,] nationwide interpretation of the federal statute by the centralized expert agency created by Congress to enforce the TCPA." *Pinkus*, 2018 WL 3586186, at *4 (citing *CE*

[7] While the Court agrees with Ocwen that the 2003 and 2008 Orders were vacated to the extent that the Court cannot apply the definitions of capacity or ATDS contained in those Orders, the Court disagrees with Ocwen's argument that other portions of those orders are also invalid. That is the premise of Ocwen's first argument why Gonzalez's TCPA claim should be dismissed: the TCPA does not apply to it because the 2003 Order which first applied the TCPA to debt collection calls is now invalid. But just because one aspect of an FCC order is vacated does not mean that the entire order has been vacated. As proof, this Court need look no further than *ACA Int'l*, in which the D.C. Circuit vacated two portions of the FCC's 2015 Order but upheld two other portions. 885 F.3d at 691–92. Ocwen has provided no authority for this Court to throw out the entirety of the 2003 Order—including the portion determining that the TCPA applies to debt collectors—as opposed to excising only the offending portion of the 2003 Order that the D.C. Circuit held is invalid. Instead, the Court concludes it is bound under the Hobbs Act to apply the FCC's rule that the TCPA does apply to calls made by debt collectors. *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1306–07 (11th Cir. 2015).

Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 450 (7th Cir. 2010)). So this Court is bound by the D.C. Circuit's ruling that the FCC's interpretation of what devices constitute ATDSs is impermissible.

Second, the D.C. Circuit tackled head on the issue of whether it could review the FCC's interpretation of what devices should be considered ATDSs—regardless of when the FCC first applied the definition. The D.C. Circuit rejected the FCC's argument that the court could not review the interpretation what devices constitute ATDSs since neither its 2003 nor 2008 Orders establishing the definition were appealed. *ACA Int'l*, 885 F.3d at 701. Instead, the D.C. Circuit held it had jurisdiction to review the definition reaffirmed in the FCC's 2015 Order and vacated it. *Id.* In doing so, the D.C. Circuit necessarily vacated the definition in the prior FCC Orders that the 2015 Order merely reaffirmed. To conclude otherwise would mean that courts are required to apply the definition of an ATDS—from the 2003 and 2008 Orders—that the D.C. Circuit vacated when reviewing the 2015 Order.

That said, the question as to what devices are ATDSs is still unresolved because *ACA Int'l* did not rule as to the correct interpretation of the statute; rather, it only vacated the FCC's impermissible interpretation. *Pinkus*, No. 16 C 10858, 2018 WL 3586186, at *7. So this Court must answer that question by returning to the statutory definition of an ATDS found in § 227(a)(1): an ATDS is a device which has the capacity to (1) store or produce telephone numbers to be called, using a random or sequential number generator; and (2) dial such numbers.

Having considered the statute, this Court concludes that the definition of an ATDS *would not include* a predictive dialer that lacks the capacity to generate random or

sequential telephone numbers and dial them; but it *would include* a predictive dialer that has that capacity. And because the D.C. Circuit determined that interpreting capacity to mean a device with a "future possibility" of having those functions is too expansive, this Court considers a device to have the capacity to generate random or sequential telephone numbers only if the device has the "present ability" to do so. *ACA Int'l*, 885 F.3d at 695–97. Having made that determination, the Court now must apply that definition to determine whether Gonzalez pleaded sufficient facts to state a claim under the TCPA.

C. Gonzalez Sufficiently Pleaded a Claim under the TCPA

The Court concludes that Gonzalez has sufficiently pleaded a claim under the TCPA. Gonzalez alleges in the Complaint that Ocwen called him using an autodialer, and that Gonzalez knows this "because of the vast number of calls he received and because he heard a pause when he answered his telephone before a voice came on the line and he received prerecorded messages" from Ocwen. (Doc. 1, ¶ 18). Ocwen argues that this is insufficient to state a claim that Ocwen used an ATDS and instead only implies that Ocwen used a predictive dialer. The Court disagrees.

Ocwen's argument relies on a faulty premise, namely that a predictive dialer cannot be an ATDS. But as recognized by the FCC and the D.C. Circuit, it is possible for a device to be a predictive dialer and have the capacity to generate random or sequential telephone numbers and dial them. *Id.* at 702 (noting the FCC explained in its 2003 Order that only "some predictive dialers cannot be programmed to generate random or sequential phone

numbers"). So a conclusion that the device Ocwen used is a predictive dialer does not exclude the possibility that the device is also an ATDS.[8]

Contrary to Ocwen's argument, the Court concludes any allegation that a caller used a device that could have the present ability to generate random or sequential telephone numbers—including predictive dialers—is sufficient to satisfy a plaintiff's pleading requirements in TCPA cases. After all, there is no way for a plaintiff to know the technological capabilities of the device used to place a call short of a caller admitting the fact presuit or the plaintiff learning that information during discovery. So Gonzalez's allegations—hearing a pause when he answered before hearing a voice plus his allegation that that Ocwen used an ATDS—satisfy his burden at this stage of the proceedings. *Sessions*, 317 F. Supp. 3d 1208 (concluding the plaintiff pleaded a TCPA claim by alleging "she heard a 'dead air' silence of five or more seconds before a human representative appeared on the line, which Plaintiff states is indicative of the use of an ATDS.").[9]

[8] Ocwen's other arguments, which are as follows, suffer from the same faulty reasoning: (1) the content of the calls to Gonzales do not suggest they were randomly or sequentially generated as would allegations that Gonzalez was called by a random stranger for no apparent reason; (2) the fact that Gonzalez received multiple calls from Ocwen "virtually eliminates the possibility" that Ocwen was dialing random or sequential numbers; and (3) a device that can randomly or sequentially generate and dial numbers is useless to Ocwen. (Doc. 9, pp. 11–14). Just because the content or the number of calls may be indicative of the use of a predictive dialer, that does not rule out the possibility that the predictive dialer is an ATDS.

[9] That said, to the extent Gonzalez alleges Ocwen violated the TCPA by using a predictive dialer that lacks the present ability to randomly or sequentially generate telephone numbers, his claim is subject to dismissal. And if that is the case, the Court may consider sanctions against Gonzalez if he knowingly pursues this claim solely on that basis.

But even if the Court concluded otherwise, dismissal would not be warranted in this case. In addition to claiming that Ocwen used an ATDS, Gonzalez also alleges that Ocwen used an artificial or prerecorded voice while calling him. As this Court has previously explained,

> From the plain text of [47 U.S.C. § 227(b)(1)(A)], each of these violations is independently actionable; a plaintiff may recover damages for calls made "using any automatic telephone dialing system *or* an artificial or prerecorded voice." Therefore, Plaintiff's claim regarding the use of an artificial or prerecorded voice is appropriately before the court, regardless of the FCC's decision with respect to the definition of an ATDS.

Ayers v. Verizon Commc'ns, Inc., No. 8:14-CV-626-T-30MAP, 2014 WL 2574543, at *1 (M.D. Fla. June 9, 2014) (internal citation omitted) (emphasis in original). So even if Gonzalez had failed to state a claim regarding Ocwen's use of an ATDS, his TCPA claim would proceed based on his allegation that Ocwen used an artificial or prerecorded voice.

D. Gonzalez Failed to Plead a Claim under the FCCPA

While his TCPA claim survives, the Court agrees with Ocwen that Gonzalez failed to plead a claim under the FCCPA. As a threshold issue, though, the Court first notes that because it has original jurisdiction over Gonzalez's TCPA claim, the Court has and will continue to exercise supplemental jurisdiction over his FCCPA claim. 28 U.S.C. § 1367(b).

Gonzalez purports that Ocwen violated the FCCPA—specifically, § 559.72(7), Florida Statutes—in two ways: first, by communicating with him with such frequency as can reasonably be expected to harass Gonzalez, and, second, by engaging in other conduct which can reasonably be expected to abuse or harass Gonzalez. (Doc. 1, ¶¶ 53–53). To support these claims, Gonzalez alleges he suffered (1) occupation of his cell phone and

phone line, (Doc. 1, ¶ 40); (2) unnecessary expenditure of his time by answering the phone or dealing with notifications for missed calls, impairing the usefulness of his cell phone, (Doc. 1, ¶ 41); (3) nuisance and annoyance, (Doc. 1, ¶ 42); (4) expenditure of his cell phone battery, (Doc. 1, ¶ 43); (5) occupation of space in his cell phone for voicemails, (Doc. 1, ¶ 44); and (6) trespass to his chattel, specifically his cell phone and phone line, (Doc. 1, ¶ 45). (Doc. 10, pp. 22–23). Additionally, Gonzalez alleges he received about 500 phone calls over at least four years, and that on "numerous occasions" he received more than one call in a day or on back-to-back days. (Doc. 1, ¶¶ 16, 22, and 28).

This Court has previously explained that claims under § 559.72(7) are construed in the same manner as claims under 15 U.S.C. § 1692d(5) of the Fair Debt Collection Practices Act. *Bonanno v. New Penn Fin., LLC*, No. 5:17-CV-229-OC-30PRL, 2017 WL 3219517, at *5 (M.D. Fla. July 28, 2017). In doing so, courts view such claims of harassing debt collection practices "from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse." *Id.* (quoting *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1179 (11th Cir. 1985)). There is no bright-line rule for determining whether a communication or other conduct is harassing, so a debt collector's actions "must be evaluated as a whole under the circumstances." *Denova v. Ocwen Loan Servicing, LLC*, No. 8:17-CV-02204-23AAS, 2018 WL 1832901, at *3 (M.D. Fla. Jan. 25, 2018), *report and recommendation adopted,* No. 8:17-CV-2204-T-23AAS, 2018 WL 1832902 (M.D. Fla. Feb. 28, 2018).

The Court concludes that Gonzalez has failed to allege sufficient facts to show that Ocwen violated the FCCPA by either the frequency of its communications or other

conduct. In considering the frequency of the calls, "courts generally have held that one or two phone calls per day are not sufficient to violate the FDCPA or its state analogues, absent evidence of other egregious conduct associated with the calls." *Wolhuter v. Carrington Mortg. Servs., LLC*, No. 8:15-CV-552-MSS-TBM, 2015 WL 12819153, at *3 (M.D. Fla. Oct. 28, 2015) (considering cases from various jurisdictions). Here, Gonzalez alleges about 500 calls over at least four years. That calculates to a call about every two days. And accepting the allegation that Gonzalez received multiple calls on the same day on numerous occasions, that means there were periods during which Gonzalez calls less frequently than every other day. Because Gonzales has not alleged a sufficient frequency of calls that would be harassing, the Court concludes that he failed to state a claim under the FCCPA.

Gonzalez also did not allege facts to support his allegation that Ocwen engaged in other conduct reasonably expected to abuse or harass him. Gonzalez's claim fails because he never alleges any "other conduct" in which Ocwen engaged. Instead, his allegations are limited to Ocwen communicating with him and the incidental effects of those communications (*i.e.* occupying his cell phone and phone line, causing him to receive notifications on his cell phone, expending his cell phone's battery, etc.). This conduct does not amount to "other conduct" under § 559.72(7), which would instead include allegations like a debt collector making threats or using abusive language during phone calls or in letters; falsely reporting claimants to credit bureaus; or attempting to collect illegitimate debts. So the Court concludes Gonzalez failed to allege any facts that Ocwen engaged in "other conduct" sufficient to support a claim under § 559.72(7).

But even if the allegations on which Gonzalez relies could be construed as "other conduct," they are insufficient to establish conduct that can be reasonably expected to abuse or harass him. It is beyond belief that any person—even a consumer more susceptible to harassment, oppression, or abuse—could reasonably feel harassed by receiving missed call notifications or having a portion of his cell phone's battery used when receiving a call. Nor is it reasonable for anyone to feel harassed by an incoming call occupying the cell phone line when the calls were made at the frequency Gonzalez alleges. Because Gonzalez did not allege facts establishing Ocwen engaged in conduct other than communicating with him that would reasonably be expected to abuse or harass him, the Court concludes Gonzalez failed to state a claim under the FCCPA.

While Gonzalez failed to state a claim under the FCCPA, the Court concludes he should be given another chance to state a claim if he is able to do so.

CONCLUSION

The Court largely agrees with Ocwen's positions as to the scope of *ACA Int'l*. Although there is a split among district courts, the correct approach—and the approach which this Court is bound to follow—is to conclude that a device only qualifies as an ATDS under the TCPA if it has the present ability to generate random or sequential telephone numbers and dial them. But even relying on that definition, Gonzalez has sufficiently pleaded a claim under the TCPA to withstand Ocwen's Motion to Dismiss. Gonzalez, though, failed to allege that Ocwen called him with such frequency or engaged in other abusive or harassing conduct to state a claim for violation of the FCCPA.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant Ocwen Loan Servicing, LLC's Motion to Dismiss (Doc. 9) is GRANTED IN PART and DENIED IN PART as follows:
   a. Plaintiff's TCPA claims related to Ocwen's use of an automatic telephone dialing system, or artificial or prerecorded voice are not dismissed; and
   b. Plaintiff's FCCPA claims are DISMISSED WITHOUT PREJUDICE.
   c. Plaintiff may file an amended complaint within fourteen (14) days from the date of this Order. Failure to file an amended complaint will result in this count being dismissed without prejudice without further notice.
2. The parties are further ORDERED to include in their case management report a plan limiting discovery during the first sixty (60) days to the issue of whether the device Ocwen used to call Plaintiff qualifies as an ATDS.

DONE and **ORDERED** in Tampa, Florida, this 5th day of September, 2018.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record