Docket No. 21-55099

In the

United States Court of Appeals

For the

Ninth Circuit

JOHN MCCURLEY and DAN DEFOREST,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

ROYAL SEAS CRUISES, INC.,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Southern District of California, No. 3:17-cv-00986-BAS-AGS · Honorable Cynthia A. Bashant

BRIEF OF APPELLEE

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McCurley v. Royal Seas Cruises, Case No. 21-55099

CORPORATE DISCLOSURE STATEMENT

ROYAL SEAS CRUISES, Inc. is owned 100% by H2 Holdings Group, Inc.

No publicly traded company owns 10% or more of RSC's stock.

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B. AS TO ACTUAL AGENCY AND APPARENT AGENCY, FAILING TO PRESERVE ANY ARGUMENT ON THESE THEORIES IN PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

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STATEMENT OF JURISDICTION

RSC agrees with the substance of the Plaintiff's Jurisdictional Statement, except to note an apparent typographical error in the second paragraph. The district court simply entered judgment for RSC, and did not "dismiss[] Appellees' action with prejudice." Appellants' Brief, p.1.

INTRODUCTION

Royal Seas Cruises, Inc. ("RSC") is a travel and leisure services company in the business of marketing vacation packages. RSC markets its vacation packages and cruises in a number of different ways, one of which is telemarketing.

Telemarketing is not illegal. Contrary to the Plaintiffs apparent assumption, legitimate telemarketing is not synonymous with illegal "robocalling," which is a term that is not even defined by the Telephone Consumer Protection Act ("TCPA"). Legitimate telemarketing involves the use of telephone calls to market products in a manner that is compliant with the TCPA and all of its regulations. One of these legitimate methods is by calling only persons who have consented in advance to receive telephone calls for this purpose.

RSC entered into an arms-length contract (the "Agreement") with Prospects DM, an Ohio corporation ("Prospects"). Prospects is in the business of contacting persons who had previously provided their telephone number and consent to be called regarding a wide variety of goods and services, ranging from solar

equipment to medical supplies to vacation services. Prospects purchases these names and numbers from website owners and operators who acquire this information when visitors to their websites voluntarily provide the information and consent to be called. The Agreement between RSC and Prospects required Prospects to contact only persons who had provided their consent to be called, and otherwise to fully comply with the TCPA and similar state and federal statutes and regulations.

After Prospects obtained names, phone numbers and other information from website providers, Prospects would call the consenting individuals and ask them a series of questions to determine their interest, as well as to obtain certain pre-qualifying information. If a person expressed an interest in RSC's services and was otherwise pre-qualified, that person would be "live transferred" by Prospects to a live RSC sales person.

Notwithstanding the wide ranging hyperbole of the Plaintiffs' brief, the summary judgment was a simple one. The district court concluded that the Agreement between RSC and Prospects did not create any actual or apparent agency relationship, nor did RSC ratify any allegedly wrongful acts of Prospects or its sub-contractors. This case is really not about the scope or meaning of the TCPA or telemarketing in general. There is certainly no need to delve into the Plaintiffs' speculations and dubious experts on the operations of the websites three

levels removed from RSC if RSC cannot even be vicariously liable for Prospects at the first level. Rather, this is a garden variety agency case that can be resolved based on legal principles that pre-date Alexander Graham Bell.

The Plaintiffs did not plead any agency theory in their Consolidated Complaint, nor did they develop any argument as to actual or apparent agency in their Response to RSC's Motion for Summary Judgment. The district court understandably gave those agency concepts short-shrift in her ruling. The district court focused its summary judgment, as did the Plaintiffs, on the unpled theory of ratification. In light of the multiple contractual obligations owed by Prospects to RSC regarding TCPA compliance, the lack of a single complaint to RSC from any person other than the two named Plaintiffs in this case, the lack of any relationship or contact between RSC and the sub-contractors of Prospects, and the otherwise vacant record, the district court correctly concluded RSC did not ratify any alleged illegal act and that summary judgment should be entered in favor of RSC.

STATEMENT OF FACTS

RSC sells vacation packages to consumers. One of the methods that RSC has used to market the vacation packages is to purchase "leads," or customer contacts, from third party vendors such as Prospects, then located in Ohio. 2-ER-90, 5-ER-883, 8-ER-1385. Through the parties' "Exit Read Lead Generation Agreement" (the "Agreement"), Prospects contracted to put RSC in telephone contact with potential customers who had agreed to receive telephone calls for that purpose. 5-ER-883, 8-ER-1385. In seven separate clauses of the Agreement, Prospects agreed, represented and warranted that it would only contact potential customers in full compliance with the TCPA, 147 U.S.C. § 227 *et seq.* *See,* 8-ER-1385-1389, clauses 2(c), 3(d), 3(e), 3(g), 9(a), 9(b), 9(c). For example, in clause 2(c)ii Prospects agrees and certifies that "the outbound telemarketing that resulted in consumer expressing interest in an Offer was performed/conducted in strict compliance with any and all applicable local, state and Federal laws, rules and regulations, including the FTC's Telephone Sales Rule, as amended and may be amended, and the FCC's Telephone Consumer Protection Act, as amended and may be amended, along with all of their similar state analogs and all state and Federal consumer protection and trade practice acts."

Prospects in turn purchased contact information from the owners and operators of websites. 5-ER-835, 5-ER-864. Visitors to the websites would input

their names and contact information and "opt in" to be called. 4-ER-438, 5-ER-865-866. Prospects also contracted with a company who placed calls for Prospects' employees, using a platform that did not have the capacity to randomly or sequentially generate telephone numbers. 5-ER-867. When Prospects' employees reached the consumer, they could converse with the consumer either in their own voice or by selecting from a number of pre-recorded voice prompts that the Prospects' employee would choose to suit the situation. 4-ER-442-444, 4-ER-452-453, 5-ER-866. Use of the voice prompts was optional, and some employees never used them. 4-ER-444, 4-ER-452.

Prospects would converse with the consumer about many potential goods and services provided by various companies that had contracts with Prospects. 4-ER-475-476, 4-ER-538-539. If the customer expressed an interest in RSC's services, and met certain qualifications, Prospects would "live transfer" the consumer to an RSC sales person. 4-ER-567, 5-ER-866-867.

The Plaintiffs allege that they received telephone calls from Prospects. 7-ER-1313-1317. They further allege that they did not opt in to receive telephone calls. *Id.* The record created by the Plaintiffs does not show any consumers other than the two named who complained to RSC that they received a telephone call from Prospects without having opted in or consented to receive such calls.

RSC cross checked the opt in information to calls transferred to it by comparing the information collected by RSC with the information provided by Prospects in real time. 5-ER-884 This resulted in a match rate of over 87%, with the remainder being explained by people with multiple phone numbers, people using spouse's names, or nicknames, or data entry error. 5-ER-885-886. RSC was unaware that any leads provided by Prospects were not TCPA compliant, if they were. 4-ER-556, 4-ER-562-563.

RSC and Prospects are unaffiliated companies. Prospects has had many other clients besides RSC, and has made many phone calls completely unrelated to RSC. 5-ER-865-870. RSC did not control or direct how Prospects should go about its business, impose quotas, dictate who to call, or which of the calls made by Prospects might include an offer from RSC. 4-ER-555-556, 4-ER-568-569. RSC and Prospects share no owners, officers or directors, and neither owns any interest in the other. 4-ER-569-470. RSC never trained Prospects' employees and never provided any funding or facilities for Prospects' use. *Id.*

Initially, the Plaintiffs alleged that every single call made by Prospects for RSC was in violation of the TCPA, totaling hundreds of millions of calls. 5-ER-904. After discovery revealed that the Agreement between RSC and Prospects required TCPA compliance, and demonstrated how Prospects did comply, Plaintiffs retreated to a class of about 82,000 calls relating to consents from two

out of the thousands of websites that had provided leads, alleging a theory that these consents had been manufactured by the website operators. 2-ER-90. The district court reduced the class to this fraction of the original class. 5-ER-652.

RSC filed a Motion for Summary Judgment ("Motion"), SER.3, 8, demonstrating that the Plaintiffs failed to meet their burden of proof on vicarious liability, among other grounds. After full briefing, the district court granted RSC's Motion, 1-ER-2, and the clerk entered judgment in favor of RSC, 1-ER-16. This appeal followed. 7-ER-1359.

SUMMARY OF ARGUMENT

Telemarketing is a commonplace marketing activity. While the TCPA regulates telemarketing, it does not prohibit telemarketing. There are several ways to conduct telemarketing in full compliance with the TCPA, one of which is to place calls only to consumers who have previously opted in or consented to be called. RSC contracted with Prospects to place such calls. The relationship between RSC and Prospects was a completely arm's length, contractual agreement to perform perfectly legal acts.

RSC can only be liable for acts of Prospects or Prospects' subcontractors if the Plaintiffs establish an agency relationship. This involves simple, garden variety principles of agency law. There are no exceptions, assumptions, or lowered burdens merely because the TCPA is involved.

The Plaintiffs waived all agency theories in this case. They waived them first in the operative pleading, which fails to plead any agency theory whatsoever. As to actual and apparent agency, the Plaintiffs waived these theories again when they failed to address them in their response to RSC's Motion. For these reasons, this Court need not consider the Plaintiffs' arguments on agency, or the district court's reasoning on ratification, because this Court may affirm for any reason that is supported by the record.

The precedent from this Court makes it clear that the seven separate clauses in the Agreement between RSC and Prospects in which Prospects contracted, represented and warranted that calls would only be made to consumers who had

given prior consent to be called, disproves any theory of actual agency. Indeed, calling a consumer who did not consent to be called would be a breach of the Agreement, and outside any authority conferred by RSC.

The newly minted theory promoted by the Plaintiffs and Amicus that advertisers like RSC may be held directly liable for TCPA violations by their contractors is contrary to the binding authority of this Court and the Federal Trade Commission that require the application of federal common law principles of agency. This Court has definitively stated that there is no direct liability for TCPA violations under these circumstances. The new theory of direct liability without fault promoted by Plaintiffs and Amicus would render decisions of this Court and the FCC nonsensical.

The Plaintiffs cannot escape the import of the seven clauses in the Agreement by mislabeling them as exculpatory clauses. These clauses merely define the kinds of leads that Prospects agreed to sell, and that RSC agreed to buy. There is nothing in these clauses that is void and against public policy. The actual agency theory flounders because RSC simply did not control Prospects, a company that has existed for years before the Agreement, and for years after the Agreement was terminated, serving scores of clients of its own in telemarketing home improvement supplies and services, medical supplies, and many other products in addition to vacation packages. In the absence of any control by RSC over Prospects, there can be no actual agency.

The apparent agency theory similarly flounders because there was no representation by RSC as principal that would give a customer a reasonable belief that Prospects was RSC's agent. The mere fact that some calls were transferred to RSC implies no such agency, particularly where the same call may well have been forwarded to a supplier of solar panels, windows or diabetes supplies.

The only agency theory that the Plaintiffs mentioned in their Response to RSC's Motion (after already waiving it in their pleadings) is the theory of ratification. However, ratification requires the preexistence of an agency relationship. Thus, the Plaintiffs waiver of actual and apparent relationship dooms their reliance on ratification.

At the least, this Court requires that the putative agent have held itself out as an agent in order for ratification to apply. The facts here again fail the Plaintiffs. There is no evidentiary support for any assertion that Prospects ever represented to the two individual Plaintiffs or to any of the class members that Prospects was acting as RSC's agent. Any such representation would not have been reasonably relied upon in light of the array of companies and industries contracting with Prospects. Thus, ratification cannot apply.

Ratification also requires that the putative principal must have knowingly accepted the benefits of the wrongful acts of the putative agent. The record contains no evidence that RSC was actually aware of any TCPA violations or allegations of violations until this lawsuit. Thus, the Plaintiffs are forced to fall back upon a theory of willful ignorance, which inputs actual knowledge if the

putative principal was confronted with "red flags" or warning signs that TCPA violations may be occurring. Here again, there is no evidence of any red flags. Even the transcript of one of the Plaintiffs' own telephone conversations reveals that the Plaintiff was surprised and thrilled at the prospect of being offered a free cruise. Even if he was also skeptical, he never complained about receiving the telephone call or demanded any kind of investigation or to be placed on a Do Not Call list. Of course, the fact that the Plaintiffs have been unable to gin up any evidence of any other individuals who were called by Prospects in alleged violation of the TCPA is deafening silence on the issue of willful ignorance.

Faced with this hole in the record, the Plaintiffs resort to misstating the record. The Plaintiffs claim that RSC did absolutely nothing to insure TCPA compliance. Wrong. RSC performed cross-checks on the information about the calls sent over by Prospects in real time. These cross-checks showed a remarkable correlation between the calls sent to RSC and the consent information on file. A 100% correlation is impossible due to the fact that people use multiple phones, multiple names, or spouses names, and that a date entry person may simply make occasional typographical errors. RSC was well aware of the TCPA, and took steps to insure TCPA compliance by Prospects.

At the end of the day, the Plaintiffs have failed to preserve any legal theories that would make RSC liable for any alleged TCPA violations by Prospects, and have failed to place evidence in the record to support any such theories. The

district court correctly granted summary judgment to RSC relying solely on principles of agency. This Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW AND BURDEN OF PROOF.

This Court reviews a district court's grant of summary judgment under a *de novo* standard. *Inteliclear, LLC v. ETC Global Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020).

A party moving for summary judgment initially bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the burden of proof on a critical point is on the nonmoving party, then the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Once this is done, the nonmoving party must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotations omitted).

As applied to this case, the Plaintiffs bear the burden of proving that there is an agency relationship to support vicarious liability. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1073 (9th Cir. 2019). They cannot rely merely upon their pleadings or suppositions, but must identify facts in the record that show a genuine issue of material fact for trial.

Throughout their brief, the Plaintiffs note that they previously met their burden to achieve class certification. *See, e.g.,* Appellants' Brief, p.18, 32. From this, they deduce that they have also met their burden of proof in opposing summary judgment. The Plaintiffs are wrong. The district court herself admonished in the order certifying the reduced class that the Plaintiffs were facing a much lower burden of proof at the class certification stage than they now face at the summary judgment stage. 5-ER-664 (noting that the court could consider inadmissible expert testimony at the class certification stage), 5-ER-673, (distinguishing between a class certification burden and a summary judgment burden.) *See generally, Sali v. Corona Reg. Med. Ctr.,* 909 F.3d 996, 1003-1005 (9th Cir. 2018) (discussing the lower burdens associated with class certification and the "tentative, preliminary and limited" nature of a class certification inquiry) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) (internal quotations omitted.)

Of course, the Plaintiffs are also wrong when they act as though nothing has changed since class certification. Discovery has been completed. The law has further developed. And most importantly, the Plaintiffs' burden has been raised. To be sure, the Plaintiffs have shown nothing more in this appeal or in response to the Motion than they did in

connection with class certification. This tactical error, however, does not excuse their failure to meet their summary judgment burden.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO RSC BASED ON A LACK OF VICARIOUS LIABILITY.

This case hinges on vicarious liability. Unless the Plaintiffs can establish vicarious liability of RSC for the alleged wrongful acts of others, final judgment is properly entered for RSC. *Henderson, supra.* Notwithstanding the Plaintiffs' misstatements, *e.g.,* Appellants' Brief, p.3, n.4; p.27; p.32, agency is not an admitted fact in this case. This issue was neither conceded nor determined in the Plaintiffs' favor in the district court. In fact, the district court correctly resolved the agency issue in RSC's favor. While there are other grounds for affirmance that were not reached by the district court that would justify affirmance, *McQuillion v. Schwarznegger,* 369 F.3d 1091, 1096 (9th Cir. 2004); *Jones v. Allison,* __ F. 4th __, 2021 WL 3700345 at *3 (9th Cir. August 20, 2021) ("We may affirm a District Court's decision . . . on any grounds supported by the record"), prevailing on this issue alone is sufficient to warrant affirmance. The Plaintiffs analysis to the contrary is erroneous. Appellants' Brief, p.27.

One such alternative basis for affirmance is waiver. The Plaintiffs did not plead any theory of vicarious liability, and therefore waived any vicarious liability theories. Parties cannot proceed based on unpled theories. *Coleman v. Quaker*

Oats Co., 232 F.3d 1271, 1293-94 (9th Cir. 2000) (employee plaintiff could not pursue disparate impact claims when they plead only disparate treatment claims.); *Schaffer by Schaffer v. A.O. Smith Harvetone Products, Inc.*, 74 F.3d 722, 731 (9th Cir. 1996) (affirming summary judgment for defendant when plaintiff failed to plead vicarious liability). When RSC pointed out this deficiency in its Memorandum in Support of Motion, SER.23, Plaintiffs mounted an insufficient response in a footnote in their opposition memorandum. 2-ER-107. There, the Plaintiffs relied upon certain numbered paragraphs of their Consolidated Class Action Complaint, 7-ER-1308, but these cited paragraphs do not properly plead any theory of agency. Paragraph 58 merely notes that RSC contracted with a third party, while the remaining paragraphs 77, 78, 81 and 82 simply added the gloss "or their agents" to conclusory pleadings without specifying any particular theory or any facts in support thereof. 7-ER-1316-1320. As a backstop, the Plaintiffs buried a request for leave to amend deep in this same footnote. 2-ER-107. The district court did not address this request and the Plaintiffs have not asserted in this appeal that the district court erred by not granting leave to amend. Accordingly, on the pleadings, there is no theory of vicarious liability properly before the district court or this Court, further justifying affirmance.

The Plaintiffs have also waived all theories of vicarious liability except the theory of ratification by their filings in connection with summary judgment. In

both their opposition memorandum to RSC's Motion, as well as in their own motion for summary judgment, the Plaintiffs addressed only the ratification theory, 2-ER-106-114, 2-ER-169-179. No other theory of vicarious liability is addressed. Accordingly, all other theories of vicarious liability have been waived. *Batzel v. Smith*, 372 F.Supp.2d 546, 554 and n.2 (C.D. Cal. 2005). *See, e.g., United State v. Carlson,* 500 F.2d 1346, 1349 (9th Cir. 1990). *See e.g., Bitton v. United States Citizenship and Immigration Services,* 817 Fed.Appx. 329, 331 (9th Cir. 2020) (failure to raise an argument in response to a motion for summary judgment waives that argument.). *Day v. LSI Corporation,* 705 Fed.Appx. 539, 540 (9th Cir. 2017); *Johnson v. Georgia-Pacific Corp.,* 329 Fed.Appx. 65, 68 (9th Cir. 2009). Plaintiffs certainly never preserved or mentioned any argument asserting a "non-delegable duty" on a party like RSC who contracts to purchase TCPA compliant leads, so that argument is also waived. The district court addressed actual authority and apparent authority briefly in her ruling on the Motion, but only because those theories were mentioned by RSC in its Motion.

A. Actual Authority.

TCPA liability can be imposed using principles of agency. However, there are no relaxed or special rules of agency that are applicable to TCPA claims. Rather, the familiar common law rules of agency apply. *Jones v. Royal Ad Men. Servs. Inc.,* 887 F.3d 443, 449 (9th Cir. 2018). The Plaintiffs bear the burden of proof to establish agency. *Henderson,* 918 F.3d at 1073.

The Plaintiffs attempt to resurrect this waived actual authority theory on appeal after failing to raise it either in their pleadings, 7-ER-1308, their response to RSC's Motion, 2-ER-96, or in their own motion for summary judgment, 2-ER-151. This theory of liability has been waived. *Bitton, supra; Batzel, supra; Day, supra; Johnson, supra.*

The Plaintiffs were correct to waive this argument below. *Schick v. Caliber Home Loans, Inc.,* 2021 WL 4166906 *1 (N.D. Cal. Sept. 14, 2021) (Plaintiff could not argue actual agency when the lead generator was "specifically directed . . . to stay within the bounds of federal law, including the TCPA." The Agreement between RSC and Prospects, in seven separate clauses, represents, warrants and requires that all leads provided by Prospects to RSC will be fully TCPA compliant and based on prior consent to be called. 8-ER-1385. In his deposition testimony, Joshua Grant, the owner, president and founder of Prospects, testified that Prospects' Agreement with RSC provided that Prospects was "only authorized to

make telephone calls where [it] received the consumer's permission to receive a phone call in accordance with federal, state and local laws . . ." 4-ER-558-560, and that RSC never authorized Prospects "to make telephone calls to consumers without consent." 2-ER-175, 5-ER-865.[1]

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[1] The Plaintiffs expend considerable space and effort in their brief attempting to show that the consents to be called were manufactured. RSC has largely ignored these efforts because the issue of manufactured consent is not pertinent to the district court's ruling on summary judgment, which was limited solely to agency and vicarious liability. Even if consents were manufactured, Plaintiffs still must prove vicarious liability. However, the gross liberties that Plaintiffs have taken with the record cannot go completely unmentioned.

An example of the Plaintiffs' over-zealous advocacy is on the Appellants' Brief, p.22, n.20. There, the Plaintiffs discuss the testimony of a witness, Mr. Brody. They claim that Mr. Brody "disavowed" a prior Declaration during his deposition at 3-ER-201-204, 3-ER-208. This is false. Mr. Brody never disavowed anything, nor did he use any words to that effect at any point in his deposition. Even though Plaintiffs claim that Brody accused RSC of pressuring him and harassing him into signing the Declaration under duress, Brody actually attributed this conduct to an entity named Catalyst, 3-ER-201, and its CEO, David Rulis, 3-ER-203. Brody denies knowing who even drafted the Declaration under discussion. 3-ER-208. If anyone recanted anything, it was Plaintiffs' counsel who said "I won't use the word harassment. I didn't mean to place any characterization on that." 3-ER-204.

Mr. Brody attributed Catalysts' urgency to the fact that Brody's employee had not been responsive to them, 3-ER-204, and he admitted that the employee "has a tendency to not be the most responsive person." 3-ER-202.

When Mr. Brody used the words "set-up" and "shady" he was referring to the opinions of another person, Danny Lance. 3-ER-208. It is unclear what Mr. Lance reportedly felt was a "set-up," but his use of the word "shady," was to describe an expert. The point of the Declaration was to rebut Plaintiffs' expert, so presumably he was the "shady" one. *Id.* In short, the Plaintiffs' four lines of discussion in this footnote are awash with factual misstatements. The Plaintiffs' recitations of fact cannot be taken at face value.

The law in this Circuit is clear that such limitations on a contractor's authority preclude any finding of actual agency to violate the contract by violating the law. "Any claim that [Prospects] had actual authority to place the calls is precluded by the express language in [RSC's] contract with [Prospects] expressly prohibiting telemarketing methods that would violate state or federal laws, including laws governing robocalls." *Jones,* 887 F.3d at 446. *See also, Schick, supra; Abante Rooter and Plumbing, Inc. v. Arashi Mahalo, LLC,* 2019 WL 6907077 at *1 (N.D. Cal. September 19, 2019).

Beyond these express contractual restraints, Prospects cannot have been RSC's agent because RSC did not exert any control. "For an agency relationship to exist, an agent must have authority to act on behalf of the principal and the person represented must have a right to control the actions of the agent." *Mavrix Photographs, LLC v. Livejournal, Inc.,* 873 F.3d 1045, 1054 (9th Cir. 2017) (internal quotation and alteration omitted). Control is "[a]n essential element of agency . . . ." *Hollingsworth v. Perry,* 570 U.S. 693, 713 (2013). Simply entering into a contract to purchase leads does not imply the level of control necessary to create an actual agency. *Jones,* 887 F.3d at 451. *See also, e.g., Knapp v. Sage Payment Sols., Inc.,* 2018 WL 659016 at *3-4 (N.D. Cal. February 1, 2018); *Thomas v. Taco Bell Corp.,* 849 F.Supp. 2d 1079, 1086 (C.D. Cal. 2012), *aff'd.* 582 Fed.Appx. 678 (9th Cir. 2014).

RSC's right to approve scripts used by Prospects is not evidence of control. As this Court pointed out in *Jones,* this is not a compelling indicator and does not undermine the district court's ruling. *Jones,* 887 F.3d at 451. Approval of the scripts merely permitted RSC to avoid unintentional misrepresentation of RSC's products. *Id.* This control over how its own products are presented does not constitute the quality or quantity of control over Prospects' operations that is necessary to imbue Prospects with apparent agency.

In *Jones,* this Court laid out a ten factor test for determining whether there is sufficient control that a contractual relationship can be characterized as an actual agency. *Jones,* 887 F.3d at 450. RSC explained in detail how this ten factor test demonstrates the lack of any agency relationship between RSC and Prospects. SER.25-28. Rather than address this Court's precedent on this question, the Plaintiffs engage in a metaphysical sophistry that attempts to contort RSC's and Prospects' belief in their own TCPA compliance into proof of intentional non-compliance. Appellants' Brief, p.15, 33, 37-39. This alchemy is illogical.

The first two premises of the Plaintiffs illogical argument are correct: that RSC and Prospects contracted for TCPA compliant leads, and that both RSC and Prospects believed that the leads supplied were TCPA compliant. Then, Plaintiffs suppose that the leads were not actually TCPA compliant. From this Plaintiffs conclude that RSC and Prospects contracted for TCPA non-compliant leads. The

non sequitur of this line of reasoning is patent. The syllogism's conclusion negates its premise. If the Plaintiffs' supposition is correct, the only logical conclusion is that Prospects breached its contract with RSC, not that Prospects was authorized to violate the law.

The Plaintiffs and Amicus mislabel the multiple representations and warranties in the agreement regarding TCPA compliance as an exculpatory clause. Appellants' Brief, p.40-46; Amicus Brief, *passim.* An exculpatory clause is one that allocates risks among the parties to the contract, agreeing that one party would not be liable to the other for specified risks. *E.g., Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519 (9th Cir. 1987); *Arcwel Marine, Inc. v. Southwest Marine, Inc.*, 816 F.2d 468 (9th Cir. 1987); Black's Law Dictionary, 11th ed. 2019. The contractual provisions that the Plaintiffs mislabel do nothing of the kind. Instead they specify and warrant the kind and quality of leads that RSC agrees to purchase from Prospects. They neither address liability nor characterize the parties' relationship. The Plaintiffs apparently hope to use their rhetorical sleight to undermine the impact of these clauses, or even to impugn RSC for utilizing these clauses. Thus, using a paranoid's logic, the Plaintiffs twist RSC's efforts to ensure TCPA compliance into evidence of TCPA non-compliance. However, this Court in *Jones* forestalled this argument by giving effect to an even

less explicit clause. *Jones.* 887 F.3d at 447, 449. *See also, Schick, supra; Abante, supra.*

The Plaintiffs attempt to distinguish *Jones* with the unsupported assertion that "RSC hired Prospects to robodial." Appellants' Brief, p.39 (emphasis by Plaintiffs). First, the Plaintiffs' misstatement muddies the concepts of the TCPA by using undefined terminology. Even if the Agreement had specifically authorized the use of an ATDS (it didn't)[2] and directed Prospects to use a pre-recorded voice (it didn't)[3], the calls would still be compliant with the TCPA because the calls were required to be made only to consumers who had opted to receive such calls. *Henderson,* 918 F.3d at 1071; 47 U.S.C. § 227(b)(1)(A)(iii). Accordingly, this

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[2] The Agreement says nothing whatsoever about the type of dialer that Prospects is required or permitted to use. Particularly in light of *Facebook, Inc. v. Duguid,* __ U.S. __, 141 S.Ct. 1163 (2021), this is critical. Any argument that Prospects' dialing subcontractor used an ATDS is precluded now by *Duguid.*

[3] The Agreement itself says nothing about use of pre-recorded voices. The insertion order mentions "Publisher's Perfect Pitch pre-recorded audio program," which Grant describes in his deposition as a device that permits a human being on a telephone call to select snippets of pre-recorded conversation to play during the course of a personal interaction with a consumer. 4-ER-442-444, 4-ER-452-453, 5-ER-866. There is an unanswered legal question in this Circuit whether such a hybrid device constitutes a pre-recorded voice for TCPA purposes because a human being is interacting conversationally with the consumer on the telephone call. As a more practical matter in this case, use of this ability was optional for Prospects' employees, and there is no way now to know which of the class members heard any pre-recorded snippets in the course of the telephone call, and which had entirely live interactions. This variation fatally undermines the ability to maintain a class action. Delving into these questions is unnecessary to resolve this appeal, which, again, is predicated solely on vicarious liability.

case is indistinguishable from *Jones,* and the district court was correct in relying on *Jones.*

Elsewhere, the Appellants blithely equate the clauses in the Agreement requiring TCPA compliance with clauses disclaiming agency, in an effort to discard them. Appellants' Brief, p.41. While a true agency relationship cannot be converted into an independent contractor relationship just by the parties' say-so, this principle has nothing to do with the facts of this case. In this case, the clauses in question do not characterize the relationship at all. The district court examined the substance of the relationship between Prospects and RSC to conclude that there was no agency relationship.

The cases that the Plaintiffs cite for the proposition that so-called exculpatory clauses are not enforceable and are against public policy do not relate to this liability without fault proposition at all. Rather, they relate to whether the contracting parties' characterization of their relationship as an independent contractor relationship is binding even if the facts that are adduced tend to show some form of agency. *See cases* cited at Appellants' Brief, pgs.41-43. These cases and this argument are inapplicable here. The Agreement between RSC and Prospects did not characterize the relationship as either an independent contractor relationship or an agency. Instead, the Agreement specified, repeatedly, what quality of leads RSC agreed to purchase from Prospects. Other than specifying

what RSC was willing to buy, the Agreement gives RSC no control whatsoever over Prospects, and does not characterize their relationship. The test that the district court applied in finding no proof of agency in this record was not based on any self-serving characterization of the relationship by RSC or Prospects. Rather, the court looked to "the evidence on the ground." *Krakauer v. Dish Network, L.L.C.,* 925 F.3d 643, 660 (4th Cir. 2019). That evidence established that there was no agency relationship between RSC and Prospects because RSC and Prospects did not act like a principal and an agent, *i.e.,* RSC did not direct or control Prospects in performing its contractual duties, and dictated nothing other than the result of TCPA compliant leads.

Apparently recognizing the futility of attempting to use common law agency principles to hold RSC liable in this case, both the Plaintiffs and the Amicus invite this Court to abandon principles of fault entirely, and create a regime of non-delegable duty and strict liability for ultra-hazardous activity for the TCPA. *See,* Appellants' Brief, p.43-46, Amicus Brief, *passim.* This argument was never preserved below, and need not be entertained here. *Batzel,* 372 F.Supp.2d at 554 and n.2; *Bitton,* 817 Fed.Appx. at 331; *Day,* 705 Fed.Appx. at 540; Johnson, 329 Fed.Appx. at 68.

The Plaintiffs' and Amicus' new argument evinces a renewed effort by TCPA plaintiffs' lawyers to vastly expand TCPA liability that has already been

rejected by both the FCC and the courts. As this Court noted in *Henderson,* there is no *per se* or automatic liability for TCPA violations. *Henderson,* 918 F.3d at 1072. This Court in *Gomez v. Campbell-Ewald Co.,* 768 F.3d 871, 877 (9th Cir. 2014), *aff'd* 577 U.S. 153 (2016) extended TCPA liability to include "ordinary tort-related vicarious liability rules where an agency relationship, as defined by federal common law, is established." (internal quotations and citations omitted). As *Henderson* emphasized, "*Gomez* makes clear that a court may not automatically attribute a third-party caller's TCPA violations to a defendant. In other words, there is no *per se* liability. A plaintiff, according to *Gomez,* must show that there is an agency relationship between a defendant and a third-party caller for there to be vicarious liability for TCPA violations." *Henderson,* 918 F.3d at 1072 (internal citation omitted).

This Court previously rejected *per se* liability by relying on *In re: Joint Petition filed by Dish Network, LLC,* 28 F.C.C. Rcd. 6574, 6574 (2013), the citation most often referenced by TCPA plaintiffs. *Dish Network* expanded TCPA liability, but only as far as the federal common law of agency permits. *Henderson,* 918 F.3d at 1072. Contrary to Plaintiffs' contention, *Dish Network* did not "suggest[]" non-delegable duty. Appellants' Brief, p.5. Oddly, the Plaintiffs here are arguing against *Dish Network* and its affirmation of agency law. Indeed, if the liability without fault and non-delegable duty rule proposed by the Plaintiffs and

Amicus were adopted, then the entire expansion of liability in *Dish Network* was both unnecessary and nonsensical. The FCC limited the expansion of TCPA liability to the confines of the federal common law of agency, and this Court recognized that limitation in both *Gomez* and *Henderson.* This Court should not abandon those principles now, and certainly should not accept Plaintiffs' and Amicus' invitation to reverse itself.

The Plaintiffs' rationale for applying the liability without fault principle to TCPA cases is flawed. The principle of liability without fault is applied to activities that cannot be performed without risk of death, bodily injury or property damage notwithstanding the exercise of utmost care, such as blasting or working with poisonous gas. *See, e.g., Luthringer v. Moore,* 31 Cal. 2d 489 (1948); *Edwards v. Post Transp. Co.,* 228 Cal. App. 3d 980 (1991); *Smith v. Lockheed Propulson Co.,* 247 Cal. App. 2d 774 (1967). With all due respect to the common fulminations of the TCPA bar, there is simply no comparison between the annoyance of an unwanted phone call and the risk of death, bodily injury or serious property damage. Moreover, it is entirely possible to conduct telemarketing activities without violating the TCPA. This case provides a prime example. A telemarketer need only restrict its telemarketing activities to consumers who have opted to receive the communication. Or, a telemarketer could eschew ATDS systems and prerecorded voices. The Plaintiffs attempt to equate the TCPA with

ultra-hazardous activities involving serious risk of severe injury or death simply falls flat.

Likewise, TCPA duties are not non-delegable just because they are statutorily imposed. *Seabright Ins. Co. v. U.S. Airways Inc.*, 52 Cal. 4th 590 (2011) (Employer's statutory employee safety duties were delegable); *Hodges v. Hertz Corp.*, 351 F.Supp. 3d 1227 (N.D. Cal. 2018) (discussing *Seabright,* employer not liable unless it retained control of delegated work). Even without the precedent of *Henderson* and *Gomez,* expansion of TCPA liability into the liability without fault arena is unwarranted.

B. Apparent Authority.

This agency theory was also waived – twice – by Plaintiffs, when they failed to plead it and again when they failed to address it in response to RSC's Motion.

"[A]pparent authority exists when the principal's own actions lead the plaintiff to reasonably believe that the agent has authority to perform certain acts for the principal." *Abante*. 2019 WL 6907077 at *1 (citing *Mavrix,* 873 F.3d at 1055. Here, there is no interaction at all between RSC and the named Plaintiffs unless the consumer consented to be transferred, and therefore no representation by RSC that could lead the Plaintiffs to have a reasonable belief that RSC authorized Prospects to violate the TCPA.

Again, Plaintiffs may reference RSC's right to script approval as evidence of apparent agency. Of course, the Plaintiffs did not and could not know that RSC had that right, and accordingly that fact does not constitute a representation by RSC to the Plaintiffs on which the Plaintiffs could reasonably rely in inferring agency.

The mere fact that the Plaintiffs were transferred to RSC by Prospects only implies that Prospects had the apparent authority to make the transfers. It implies no authority or agency conferred by RSC on Prospects to commit TCPA violations. *Abante* at *1. *See also, Kristensen v. Credit Payments Servs., Inc.,* 2015 WL 4477425 at *5 (D. Nev. July 20, 2015) ("*Kristensen I").* (There is no triable, genuine issue of apparent authority to violate the TCPA implied by hiring companies to generate leads); *Bridgeview Healthcare Center, Ltd. v. Clark,* 816 F.3d 935, 938-39 (7th Cir. 2016) (no vicarious liability for faxes that were sent by a vendor in excess of those approved by the defendant).

The record establishes here that any call by Prospects mentioned a wide array of products and services, including home improvement products like solar panels or windows, medical equipment like diabetes supplies, or leisure services like vacation packages, among many others. 4-ER-475, 4-ER-476, 4-ER-537, 4-ER-539. Plaintiffs' assertion that Prospects worked exclusively for RSC is false. Appellants' Brief at 14. No reasonable customer receiving such a call could

possibly believe that they were conversing with a single provider of all of these goods and services, or such a provider's agent. The only reasonable inference would be the truth, that the consumer was being contacted by an advertising medium, like television or a magazine. There is no reasonable inference that such media are the agents of their advertising clients.

Plaintiffs allege the improper collection of their contact information and consent was actually performed by sub-subcontractors of Prospects who operated the two websites that define the class, 5-ER-715, such as Landfall. Neither RSC nor Prospects ever interacted with Landfall prior to this litigation. 3-ER-226-227, 4-ER-425-426, 5-ER-839. This point further demonstrates the lack of any apparent authority. As in *Keating v. Peterson's Nelnet, LLC,* 615 Fed.Appx. 365 (6th Cir. July 21, 2015), the alleged wrongful actor was far removed from the defendant, neither the advertiser nor its contractor were aware of the existence of the alleged bad actor, and the alleged bad actor was equally unaware of the defendants. Under this factual pattern, the Sixth Circuit concluded that there was no basis for the argument that the bad actor "could have been acting at [defendant's] behest." *Id.* at 372.

C. Ratification.

Ratification is the only agency theory that the Plaintiffs preserved in their Response to RSC's Motion, even assuming it was not previously waived by their failure to plead it in the operative complaint. Under the principle of ratification, a principal who accepts the benefits of an unauthorized act committed by an agent, with full knowledge of the unauthorized act, has ratified the agent's act and cannot claim that it was outside the scope of the agency. *Kristensen v. Credit Payment Services, Inc.,* 879 F.3d 1010, 1014 (9th Cir. 2018) ("*Kristensen II")*.

An act cannot be ratified unless it is "ratifiable." "An act is ratifiable if the actor acted or purported to act as an agent on the persons behalf. Therefore, when an actor is not an agent and does not purport to be one, the doctrine of ratification does not apply." *Kristensen II,* 879 F.3d at 1014 (internal quotations and citations omitted); *Fisher v. LeVian Corp.,* 815 Fed.Appx. 170, 172 (9th Cir. 2020); *Schick* at *2; *Stark v. Stall,* 2020 WL 1978472 at *4 (S.D. Cal. May 18, 2021); *Valdes v. Nationwide Real Estate Executives, Inc.,* 2021 WL 2134159 *5 (C.D. Cal. April 22, 2021). In other words, ratification does not exist in a vacuum. Ratification is not a free-standing agency theory on its own. A pre-existing agency relationship is essential in order for ratification to occur. "Although a principal is liable when it ratifies an originally unauthorized tort, the principal-agent relationship is still a requisite, and ratification can have no meaning without it. *Batzel v. Smith,* 333

F.3d 1018, 1036 (9th Cir. 2003) (superseded by statute on other grounds); *Thomas v. Taco Bell Corp.*, 582 Fed.Appx. 678, 680 (9th Cir. 2014); *Rogers v. Postmates,* 2020 WL 386919 at *7 (N.D. Cal. July 9, 2020); *Abante Rooter & Plumbing v. Farmers, Inc.* 2018 WL 288055 at *6 (N.D. Cal. January 4, 2018); *Linlor v. Five 9, Inc.*, 2017 WL 5885671 at *3 (S.D. Cal. November 29, 2017); *Naiman v. TranzVia, LLC,* 2017 WL 5992123 at *13 (N.D. Cal. December 4, 2017). *Trenz v. Sirius XM Radio, Inc.*, 2015 WL 11658715 at *2 (S.D. Cal. July 13, 2015); *Lushe v. Verengo, Inc.*, 2014 WL 12772259 at *5 (S.D. Cal. March 21, 2014); *Stern v. Weinstein,* 2010 WL 11459791 at *3 fn.2 (C.D. Cal. January 6, 2010); *Noe v. FDIC,* 2010 WL 11549438 at *3 (S.D. Cal. January 15, 2010); *Raggi v. Los Vegas Metropolitan Police Department,* 2009 WL 653000 at *2 (Dist. Nev. 2009).

Against this well-established backdrop providing that agency is a pre-requisite to ratification, and not the result of ratification, the Plaintiffs' waiver of the actual agency and apparent agency theories in their response to RSC's motion for summary judgment becomes even more impactful. By waiving those agency theories, the Plaintiffs necessarily also waived ratification. Accordingly, since the Plaintiffs have failed to attempt to establish an actual agency or apparent agency relationship on a timely basis, there is no predicate for their allegation of ratification, and this argument must also fail.

At a minimum, this Circuit requires a party relying on ratification to at least allege that the actor represented it was acting as an agent of the putative principal. *See, Kristensen II,* 879 F.3d at 1014 ("when an actor is not an agent and does not purport to be one, the doctrine of ratification does not apply") (internal quotation, citation and alterations omitted). There is no such allegation here. The Plaintiffs never alleged that Prospects represented to them that Prospects was acting as an agent for RSC. This is in stark contrast with *Henderson,* when the callers said they were calling on behalf of the defendant to collect a debt, and acted as though they were the defendant, 918 F.3d at 1074. Indeed, since any call made by Prospects could result in a person being forwarded to any of a number of vendors with whom Prospects had a telemarketing contract, it would be very odd for Prospects to identify itself as the agent for any one particular vendor. 4-ER-475-476, 4-ER-537-539. The lack of evidence of even a representation of an agency relationship precludes liability on a ratification theory.

Ratification also requires that the putative principal be aware of the actions taken by the putative agent that were outside the scope of the putative agent's authority at the time that the principal accepts the benefits. Here, there is no evidence that RSC had actual knowledge of any unconsented calls until Plaintiffs raised that allegation well into this lawsuit. Of course, by that point, it was too late for RSC to ratify any alleged actions of Prospects that were alleged in the

complaint. Once again, the Plaintiffs have to fall back on a secondary argument, and argue that RSC should have known about Prospects' alleged violations, and that RSC was willfully ignorant of those alleged violations. And once again, the record does not support the Plaintiffs' arguments, and the district court correctly entered summary judgment.

In order for ratification to occur under a willful ignorance theory, there must be "red flags" putting the defendant on notice that some illegal activity may be being done in its name. *Kristensen I,* 2015 WL 4477425 at *3. *See also, Kristensen II,* 879 F.3d at 1014 ("A principal has assumed the risk of lack of knowledge if the principal is shown to have had knowledge of facts that would have lead a reasonable person to investigate further, but the principal ratified without further investigation.") (internal quotes and citation omitted).

The Plaintiffs rely heavily on *Henderson* to support their ratification theory based on willful ignorance. However, in *Henderson*, the principal was actually aware of TCPA violations, but did nothing. *Henderson,* 918 F.3d at 1071. There was "evidence that USA Funds [the alleged principal] communicated consent to the debt collectors through acquiescence in their calling practices that allegedly violated the TCPA . . . by remaining silent." *Henderson,* 918 F.3d at 1075. Here, there is no evidence that RSC had any reason to suspect any alleged illegal activity until well after being served with this action, when Plaintiffs changed their factual

theory and reduced the class. Indeed, Plaintiffs have adduced no evidence that anyone called by Prospects complained to RSC at all, other than the two named plaintiffs in this case. Therefore, there was no reason at all for RSC to investigate Prospects.

A comparison of the facts of *Henderson, Schick,* and this case illustrates the lack of ratification. In *Henderson,* the defendant was allegedly aware of TCPA violations, but remained silent. This adequately raised an issue of ratification. In *Schick,* the defendant was also aware of TCPA problems, but took corrective actions with its contractor, albeit ineffectively. This communicated a lack of acquiescence, and prevented ratification. Here, the facts are even further away from *Henderson* on the continuum. RSC was not even aware of any alleged TCPA violations until after this case was filed, and thus no duty to take corrective action was ever triggered.

Since the record does not support the Plaintiffs' allegation, the Plaintiffs resort to misstating the record. The Plaintiffs assert that the record at ER-971-972 supports their statement that "RSC *willfully chose not to ever exercise any oversight or auditing* of Prospects." Appellants' Brief, p.54 (emphasis by the Plaintiffs). This is false. On those two pages, RSC marketing director Jennifer Poole testifies that she did not know the model of the telephone used by Prospects, and that RSC's attorneys reviewed and approved the program. This is far from the

damning confession that the Plaintiffs claim it is. Elsewhere in her deposition, Ms. Poole testified to the cross-checking that was done of the Prospects transfers in real time as they were made. These cross-checks revealed no issues for investigation. Ms. Poole testified:

> Q. Does Royal Seas look into whether Lead Generator is complying with the law?
>
> * * *
>
> THE WITNESS: I try to make sure all of my Lead Generators are complying with the law.
>
> * * *
>
> Q. How do you do that?
>
> A. . . . So this one with opt in's, we have, we get the data sent to us so that we can store the opt in information ourselves as well as having it over at Prospects. I also do a match is what it is called to try and match these sales to the source to make sure that there's an opt in.
>
> Q. What do you mean by matching?
>
> A. . . . We indicate, the agents can indicate where their sale is coming from, so it is not a perfect science, the agents put the phone number where the sale is coming from, the in bound number to us and I will ask the processing facility to take those sales and match them into the API data that comes from Prospects. . . . . [T]hey provide me a spreadsheet with the sales that we have indicated came from that source and they will take the API data, for lack of a better word, bounce it against it and add a field at the end telling me if it matched or not, send it to me so I can count and put in percentages and all that.

6-ER-1000-1001.

This matching cross check revealed a very high percentage of matches – over 87%. 5-ER-884-886. Any discrepancy is easily explained by individuals using multiple phone numbers (home, cell, work), a spouse's name or a nick name,

and simple human error in data entry at some step in the process. *Id.* In light of these factors, no 100% match is possible and the match that was achieved in RSC's relationship with Prospects was indicative of compliance, not non-compliance. 5-ER-885. Plaintiffs disbelieve this, but their disbelief has no evidentiary value. The Plaintiffs have the burden of proof on this point, but they provide no evidence that the match rate should have raised red flags. They proffer no expert opinion of what a match rate should have been, or even a comparator that would indicate a red flag here. Contrary to the Plaintiffs bald and unsupported accusation, RSC conducted due diligence in real time, and had no basis for any further investigation.

Even the transcript of the telephone conversation with Plaintiff McCurley does not reflect any call for investigation or any demand from McCurley to that effect. 3-ER-397-400. While McCurley certainly expresses surprise at being offered a free cruise, ranging from delight to skepticism, his reaction is more akin to a person winning the sweepstakes than a person who considers themselves a victim of illegal activity. His verbatim reaction is "Who wouldn't be excited [with a free cruise]?", "Ooooh, free cruise," and "Who wouldn't love a free cruise!" 3-ER-397-398. He makes no demand for an investigation, nor does he allege any illegal activity, nor did he even complain to management or request an escalation.

By the time RSC become aware of Plaintiffs' allegations that Prospects may have purchased bad opt in information from two of its website vendors – a theory

that Plaintiffs asserted late in their case, after discovery and not in their pleadings - RSC had long ceased doing business with Prospects. 2-ER-90. There is nothing in the evidence to suggest any timely red flags to RSC.

The Plaintiffs allege that red flags existed in this case merely because Prospects was engaged in collecting consents from consumers to be called, which Plaintiffs allege is an inherently risky activity. But this Court has already rejected that argument. Mere "knowledge that an agent is engaged in an otherwise commonplace marketing activity is not the sort of red flag that would lead a reasonable person to investigate whether the agent was engaging in unlawful activities." *Kristensen II*, 879 F.3d at 1015. *Rogers v. Postmates, Inc.*, 2020 WL 3869191 at *7; *Abante*, 2019 WL 6907077 at *1. Even Poole's prior experience with employers that had TCPA problems does not constitute a red flag that RSC and Prospects were likewise involved in TCPA violations.[4] If anything, this experience merely explains why RSC was so careful and thorough in its Agreement with Prospects to require Prospects to provide only TCPA compliant leads.

[4] Here, RSC must correct yet another factual misstatement by Plaintiffs. RSC has never been a parent, subsidiary or affiliate of Caribbean Cruise Lines, as erroneously stated by Plaintiffs. Appellants' Brief, p.13. The record citation is to a page from Poole's Declaration where she describes RSC's business, and does not mention Caribbean. Caribbean was Poole's prior employer, and has no connection with this case.

Plaintiffs go on to assert that Prospects placed *"tens if not hundreds of millions of calls on [RSC's] behalf, and transferred over two million phone calls to its call center."* Appellants' Brief, p.55 (emphasis by Plaintiffs). Noticeably absent from this claim is any record citation. Hyperbole is a poor substitute for evidence. On the very next page of the brief, Appellants' Brief, p.56, the Plaintiffs concede that there are only approximately 80,000 class members, 5-ER-886-889, whose opt in information came from the two (out of thousands) websites Prospects used. These two websites define the entire class. 5-ER-715.

Plaintiffs would like to eliminate the requirement for red flags altogether, asserting without supporting authority that telemarketing is itself always a red flag for TCPA non-compliance. Appellants' Brief, p.50. The law in this Circuit is to the contrary. Telemarketing is a "commonplace marketing activity." *Kristensen II,* 879 F.3d at 1015. Engaging in this activity is not a red flag that a contractor may be engaging in illegal activity; *Batzel,* 333 F.3d at 1036; *Abante,* 2019 WL 6907077 at *1; *Rogers,* 2020 WL 3869191 at *7, 8. *See, e.g., Jones.*

The Plaintiffs have litigated this case as though the law of agency does not apply to the TCPA, relying on their interpretation of the policies of the TCPA to lay low all of their evidentiary burdens, along with decades or more

of agency law. The Amicus joins the Plaintiffs in arguing for this wholesale rejection of the settled jurisprudence on this issue. They forget that applying the law of agency in *Dish* was itself already an expansion of TCPA liability, but a measured expansion that is naturally constrained by the same agency principles that it endorses. Plaintiffs must still prove agency to take advantage of this expansion. These Plaintiffs have failed to do so.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(7)(B)(iii). This brief uses a proportional typeface and 14-point Times New Roman font, and contains 9,229 words.

October 1, 2021

Respectfully submitted,

/s/ John H. Pelzer
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STATEMENT OF RELATED CASES

Appellee here certifies that, to Appellee's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 1, 2021

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