IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit Court Case No. 21-55099

JOHN MCCURLEY AND DAN DEFOREST, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLANTS,
V.
ROYAL SEAS CRUISES, INC.,
DEFENDANT-APPELLEES.

REPLY BRIEF FOR PLAINTIFF-APPELLANTS JOHN MCCURLEY AND DAN DEFOREST

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT CASE NO.: 3:17-CV-00986-BAS-AGS
(HONORABLE CYNTHIA A BASHANT)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

INTRODUCTION

Much like the "free cruise" vouchers it marketed to consumers, Appellee Royal Seas Cruises, Inc. ("RSC") wants a free pass on this Appeal. Their position amounts to failsafe agency – Prospects DM, Inc. ("Prospects") is only an agent if Prospects was engaged in "lawful telemarketing," otherwise, if it was found to have been engaged in illegal conduct, it is suddenly not an agent despite arising out of the same conduct. Since Prospects happened to call without consent, even though it was otherwise engaged in conduct for which it was expressly hired, with oversight and authorization to control by RSC, that alone precludes agency. But agency cannot hinge on a legal determination of whether the agent's otherwise-authorized conduct ultimately turns out to be legal. That is the role of indemnification and insurance. RSC's position would create a failsafe whereby any principal could simply insert terms in its contract that required the agent to act lawfully and never be held liable, even when the agent performed exactly what they were otherwise hired to do. RSC has no answer to the bus driver analogy and misdirects by dedicating a substantial portion of its brief to incorrectly and inaccurately addressing waiver. Waiver aside, Appellants correctly describe agency principles, and raise triable issues on all three forms of vicarious liability.[1]

[1] This is a certified Class Action with a robust record, where every argument asserted on Appeal was raised throughout the case. Siding with RSC's waiver position would be unjust to absent Class Members, would only serve to reward a

Even if RSC's exculpatory clause is otherwise upheld as valid delegation (it shouldn't because it is a legal delegation leading to a failsafe), the absolute strict liability obligation to obtain consent is non-delegable under *In re Joint Petition Filed by Dish Network*, LLC, 28 F.C.C. Rcd. 6574 (2013) ("FCC Dish Order"), as set forth under Rest. 2nd Torts §§ 416-429 (1977).[2] The remainder of RSC's arguments on apparent authority and ratification misstate the law and reveal triable issues, which should be determined by a jury, as this Court held in *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068 (9th Cir. 2019) and the Fourth Circuit held in *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019).

The record undermines RSC's position on waiver. Plaintiffs alleged agency in the complaint, including allegations about "Helping Hands" (a DBA for Prospects), as well as a class definition which includes calls placed on behalf of RSC by agents. If RSC believed these allegations insufficient, it could have filed a Motion to Dismiss. Instead, it answered and asserted an affirmative defense on vicarious liability, demonstrating notice of the allegations. After years of discovery and an order certifying the class on vicarious liability, RSC argued under

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historically bad actor, and squander the opportunity to clarify important legal standards.

[2] This Court observes a waiver exception where "the issue presented is purely one of law and the opposing party will suffer no prejudice." *U.S. v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

Rule 56 that Plaintiffs waived the argument. This is the wrong procedure. It also ignores the record of the case. RSC's also rewrites the procedural history of summary judgment, wherein the parties briefed and argued cross motions contemporaneously. These contemporaneous briefs must be viewed in tandem, as presented to the District Court.

RSC asks this Court to endorse a blueprint for unaccountability that has never seen traction and is contravened by FCC guidance. This Court can send a message that companies cannot shovel their obligations onto unaccountable overseas agents who can avoid the U.S. legal system to circumvent federal privacy legislation and harm American consumers for financial gain. The implications of such a ruling extend far beyond this case, or this law.

PROCEDURAL AND FACTUAL HISTORY

RSC misstates or leaves out several factual and procedural issues in its Brief.[3] Deforest filed his initial Complaint on June 7, 2017. Deforest alleged claims jointly and severally against "Defendant, and its subsidiaries and agents." ER-1332. Deforest alleged that Helping Hands, a DBA for Prospects, generated leads and placed calls on behalf of RSC to solicit its services using prerecorded

[3] Whether an ATDS/prerecorded voice were used, and whether there was prior express consent, are irrelevant to vicarious liability. RSC grossly misstates the record on these points, but Appellants abstain from addressing issues irrelevant to this Appeal.

voice messages, and warm transferred those calls to RSC. ER-1333. Appellants consolidated their complaints. ER-1308-1328. Appellants included the same allegations regarding Helping Hands. ER-1316. Appellants defined the Class to include "All persons within the United States who had or have a number assigned to a cellular telephone service, who received at least one telephone call using an ATDS and/or an artificial or prerecorded voice from RSC Cruises, Inc., **or their agents calling on behalf of Royal Seas Cruises, Inc**." ER-1318 (emphasis added). Appellants alleged the phone calls were placed "by Defendant or its agents." ER-1319. Appellants alleged the Class "can be identified through Defendant's records and/or Defendant's agent's records." ER-1320. RSC chose to answer the Complaint and not move to dismiss. ER-1281-1307. RSC asserted a vicarious liability affirmative defense. ER-1303.

Plaintiffs filed a Motion for Class Certification premised on vicarious liability. ER-898-1280. RSC gathered declarations from numerous third-party companies, including Josh Grant and Kevin Brody to oppose class certification. ER-837-80. In response, Plaintiffs voluntarily narrowed the proposed class definition to only leads gathered from websites from which Plaintiffs' lead information was produced. ER-805-830. The District Court issued a 65-page Order extensively discussing the vicarious liability issues asserted by Plaintiffs. ER-652-716.

The Parties stipulated to file cross-summary judgment motions. The Cross Motions for Summary Judgment were filed on March 27, 2020. Plaintiffs advanced evidence and argument in support of all three forms of vicarious liability. ER-89-181. On direct agency, this is what Plaintiff's argued in their opening summary judgment brief:

> Regarding agency, as even Joshua Grant himself testified during cross examination conducted by his own counsel, Prospects was doing exactly what Royal hired it to do when it contacted Class Members with an ATDS using a prerecorded voice to solicit Royal's services. Throughout this case, Royal has taken a consistent position – we hired Prospects to contact people with a robodialer and they did so on our behalf. Royal's only avenue for argument to the contrary stems from its affirmative defense – we told them to only call people if they had consent, and they apparently did not because they unknowingly bought bad leads, so therefore we are not liable. But, the existence of negligence alone does not cause an agent to suddenly act outside of the scope of their agency relationship.

ER155-156. At oral argument, RSC asserted waiver as an argument on vicarious liability. Plaintiffs' Counsel responded to this argument as follows:

> Maybe we could have alleged it in more detail, but they didn't file a 12(b)(6) motion at the pleadings to challenge the sufficiency of that allegation, and this class was certified ultimately on behalf of all consumers who were called by Prospects DM. And the theory was a vicarious liability theory. There's been no attempt by our office to change the facts or change the allegations. That's always been the allegation from day one.

ER-58. Class Counsel also stated no agency theories were being waived:

> [T]here are also other indicia of apparent authority that we cited to in our papers.
> …
> we're not conceding that there's not agency. There is agency. They are unquestionably an agent. Prospects DM is an agent of RSC because they were hired to conduct telemarketing campaigns, and they did that on their behalf, and there's no dispute about that.
> …
> we do think that this is inherently risky conduct that somebody should have engaged in some minimal level of oversight regarding. I don't think you can just have an exculpatory clause in your contract and then conduct no oversight whatsoever when your contract clearly contemplates that you will do so.
> …
> In fact, the only thing that they did to look into this at all in the entire case is this boilerplate exculpatory clause in a contract that they admittedly never did anything to enforce whatsoever, and Prospects DM promised not to violate federal law, but what are we going to do about it? They're a robodialer over in Romania. How are we ever going to enforce this law against them? The only way we can ever enforce this statute on behalf of these consumers is to go after the person who hired the goons to conduct the conduct.

ER-50-51, 55, 60. If this sounds familiar, it is because this is the same argument raised in Appellants' Opening Brief.

As RSC points out, agency is a predicate for ratification. It is thus axiomatic that direct agency was not waived in light of the ratification analysis. Appellants were required to and did establish an agency relationship so they could move for summary judgment on ratification grounds. The Court was explicitly advised that Plaintiffs were not conceding direct agency at oral argument as demonstrated above. The arguments were addressed in the District Curt's Order, which

recognized Plaintiffs' assertion of all three forms of vicarious liability. The District Court did not believe Plaintiffs waived those arguments, at the pleadings or in the briefing, because otherwise it would have held as much or not addressed those forms of vicarious liability.

Only the evidence in the record is relied upon in this appeal.

LEGAL ARGUMENT

RSC's Brief proves there are triable issues of fact. Prospects was an agent because it was engaged in prerecorded voice telemarketing on behalf of RSC, just as the contract authorized, and because Class Members would not have been called but for RSC hiring Prospects to explicitly do so. RSC had ultimate authority to control how Prospects carried out this telemarketing campaign, including the ability to audit in multiple ways, and to terminate, but elected to largely not exercise that authority. Both RSC and Prospects numerously testified and argued that Prospects had done exactly as the contract specified. To the extent RSC argues Prospects was acting outside the contract (which would require ignoring the record where RSC said the opposite), the duty to only robocall with prior express consent is non-delegable and gives rise to strict liability. Having consent (a defense to authorized conduct) is the only aspect of Prospects' behavior RSC points to which could possibly have fallen outside the scope of express agency.

RSC asks this Court to allow it to contract away its statutory duty to a foreign company that cannot be held accountable. The FCC foreclosed this.

There is apparent authority because every Class member went through an exit read transfer with Prospects, was prequalified pursuant to RSC's approved script, and then was warm transferred to an employee of RSC who continued the sales pitch while in possession of their information. Any reasonable consumer would believe there was actual authority under these circumstances, and that belief arises from RSC's conduct.

Finally, there is ratification because RSC knew millions of consumers were being called by its agent and chose to ignore numerous red flags and abandon its oversight duties regarding generation of leads, turning a blind eye to the fact that there was no consent. This is evident from Deforest's circumstances, which show his lead data was provided by a company that did not even list RSC as a marketing partner on its website, and whose call with RSC involved no less than four instances of him telling the employee that he never consented. It is evident from McCurley, whose was not the same person on the information received by RSC from Prospects, and who clearly showed no interest in the services.

As the Fourth Circuit properly held, and this Court held in *Henderson*, a jury should weigh vicarious liability. There is not a single Circuit level decision on vicarious liability under the TCPA with analogous facts where summary judgment

was affirmed. There is no compelling reason for this case to be the first, especially given RSC's history of consumer privacy abuse.

RSC knows this, which is why such a considerable portion of its Brief focusses on waiver. But waiver does not apply, because Appellants asserted vicarious liability throughout the entirety of the three-year history of the case. The record shows robust discovery on these issues. RSC was aware of this theory of liability, and chose to answer the pleadings and assert an affirmative defense. At summary judgment, these theories were briefed and argued at oral argument.

RSC's only potential argument as to waiver is that Plaintiffs did not specifically articulate the non-delegable duty interpretation of the FCC Dish Order. This is imprecise, but also irrelevant, as it is established that pure legal arguments, absent a showing of prejudice, cannot be waived. This Court has discretion to consider all substantive arguments. This case deserves a substantive decision on these important legal, factual, and procedural issues, which will certainly impact other cases and give guidance to companies, consumers and lower courts in how to navigate consumer privacy and vicarious liability. Appellants respectfully request the Court do so, and reverse.

I. PROSPECTS IS AN AGENT OF RSC

RSC argues that a determination of agency hinges on whether the conduct of Prospects was legal. But agency is determined by whether the conduct was within

the scope of a contractual agreement, not whether that conduct ultimately turned out to be lawful. By defining the scope of the contract to include only lawful telemarketing, RSC attempted to circumvent agency which, while clever, is not availing. This is distinct from other TCPA cases where this Court found that expressly forbidding the use of an ATDS or prerecorded voice was an appropriate limitation of the scope of conduct authorized under the contract. RSC's position amounts to failsafe agency, which was expressly rejected by the FCC in the Dish Order, as well as recently by the Fourth Circuit. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 660-61 (4th Cir. 2019).

Why should the legality of otherwise-authorized conduct, which carries strict liability, have any impact on whether the conduct was within the scope of the relationship? Agency principles as cited in Appellants' opening brief refute this position. RSC has no compelling answer to this, the bus driver illustration, or Appellants' interpretation of the FCC Dish Order. RSC entirely ignored the thrust of Appellants' factual argument - Prospects was hired by RSC to telemarket. Prospects was hired to use prerecorded voice technology when doing so. Prospects was paid by the qualified lead. Prospects warm transferred leads to RSC employees in real time. Prospects transferred those consumers' lead data to RSC during those same calls. Prospects used RSC's approved telemarketing scripts in the prerecorded message. Prospects used RSC approved questionnaire when pre-

approving consumers. Prospects provided the identities of lead sellers to RSC for review. RSC was authorized to review lead sellers' websites to ensure the opt in language complied with the TCPA. RSC was permitted to audit Prospects and oversee their work. RSC elected not to do so. RSC was authorized to terminate its contract with Prospects at its discretion, in the event of a breach.

RSC simply points to the exculpatory language in its contract with Prospects, placing sole responsibility to ensure the inherently risky invasive nuisance conduct was consensual on Prospects and suggest that alone precludes agency. Wrong. Even so, Appellants' position on consent being a non-delegable duty goes entirely unaddressed, aside from waiver. Consent is non-delegable because the FCC said so, which is consistent with the Restatement on Torts. Issues of fact remain. These are discussed in turn.

A. RSC's Position Fundamentally Misstates Agency Law

RSC muddles the exceptions to direct agency in addressing Appellants' position. Prospects was acting as an agent of RSC when it placed telemarketing calls to Appellants and other Class Members because the conduct was expressly within the written scope of the contract, and neither Prospects nor RSC, to this day, believes they did anything wrong. As an illustration to why RSC "no liability without fault" position is wrong, it is helpful to look to the doctrine of respondeat superior, which "imposes liability whether or not the employer was itself

negligent." *Bussard v. Minimed, Inc*., 105 Cal.App.4th 798 (2003) , 803. "The doctrine's animating principle is that a business should absorb the costs its undertakings impose on others." *Id*. Under respondeat superior, a principal is liable for the tortious acts committed by its agents "that are committed within the scope of their employment." Black's Law Dictionary, 8 Ed. (2004). An agent is acting within the scope of her employment for purposes of respondeat superior if her tortious act that gave rise to a claim was "reasonably foreseeable" by the hiring party. *Bussard*, *supra* 129 Cal. Rptr. 2d at 675. While it is the case that independent contractors have historically been excluded under respondeat superior principles this general rule "is now primarily important as a preamble to the catalog of exceptions." 41 Am. Jur. 2d Independent Contractors § 27 (2006). Indeed, the introductory note to § 416 of the Restatement explains:

> "(t)he rules stated in the following ss 416—429 unlike those stated in the preceding ss 410—415, do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor . . .. The statement commonly made in such cases is that the employer is under a duty which it is not free to delegate to the contractor. Such a 'non-delegable duty' requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted."

Restatement (Second) of Torts. § 416. As one district court correctly summarized:

> Through the years, courts began to recognize exceptions to the general rule of nonliability where the application of the rule appeared to violate public policy. These exceptions fall into three categories: the inherently dangerous work exception, the non-delegable duty exception, and exception for torts caused by the direct negligence of the employer in selecting, instructing, or supervising the contractor. See Restatement (Second) of Torts § 409, comment b (1965). **Due to these exceptions, an employer may be vicariously liable for the contractor's negligence, even where the employer is not personally negligent**. Eventually, these exceptions became codified in Restatement §§ 410–429 (generally, §§ 410–415 deal with direct liability, while §§ 416–429 deal with vicarious liability).

Rause v. Paperchine, Inc., 743 F.Supp.2d 1114, 1118-19 (D. Az. 2010) (emphasis added) (citations removed).

Agency does not hinge on whether RSC itself was somehow negligent or at fault for TCPA violations of Prospects (though negligent oversight can indicate ratification). The fact that Prospects may have negligently violated the TCPA does not sever agency. Principals are held liable for negligence of their agents routinely. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment"); *New Orleans, M., & C.R. Co. v. Hanning*, 15 Wall. 649, 657 (1873) ("The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of"); Restatement (Second) of Agency § 219(1) (1957); *Meyer v. Holley*, 537 U.S. 280, 285-86 (2003) (applying

vicarious liability under the Fair Housing Act for racial housing discrimination by an agent to the corporation but declining to extend liability to personal individual liability of the shareholders).[4] The appropriate inquiry is simply whether agency principles apply. Liability flows through the acts of the agent, not the principal. Liability is imparted based on the relationship and whether the conduct that gave rise to liability falls within it or should otherwise be covered as a matter of public policy. Ultimate liability of the agent has no bearing on vicarious liability analysis to the principal. RSC's position that there should be no TCPA liability without fault ignores decades of agency jurisprudence. Moreover, contractual attempts to shuffle codified responsibility of only contacting consumers with consent transparently undermines these same principles, the intent of Congress, and their concerns as interpreted and applied by the FCC.

The TCPA carries strict liability. *N. L. by Lemos v. Credit One Bank, N.A.*, 960 F.3d 1164, 1170 (9th Cir. 2020); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, FCC 15-72, Released July 10, 2015*, MCP No. 134 (July 24, 2015); *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011) ("The TCPA is essentially a

[4] RSC' position would require the Court holding that racial discrimination was within the scope of employment, but robodialing without consent in error was not, when robodialing was expressly contractually authorized.

strict liability statute....[and] does not require any intent for liability except when awarding treble damages."). It is therefore *already a statute that imposes liability without fault*. Why then should this Court create a negligence standard for a principal, when there is no negligence standard on the agent? RSC does not cite to a single case that supports such narrowing of agency principles. Instead, RSC references inapplicable cases which address whether to apply strict liability in common law tort.[5] Appellants do not invoke the ultra-hazardous activity exceptions, which pass on underlying negligence standards to a principle. The TCPA involves no such standard, as the underlying standard is absolute, not negligence. RSC's strawman argument distracts from this appeal.

B. Prior Express Consent is an Affirmative Defense Concerning a Codified and Regulated Obligation to the Public, Created to Prevent Widespread Tortious Nuisance and is Therefore a Non-Delegable Duty

The obligation to only dial with consent is non-delegable. The FCC Dish Order treats consent as such a duty. RSC's Brief does not substantively address

[5] *Luthringer v. Moore*, 31 Cal.2d 489 (1948) involved construction defects that were governed by a strict liability theory, as opposed to negligence, due to dangerous conditions. The case was not about vicarious liability or a statute that carried strict liability. It is irrelevant. So is *Edwards v. Post Transportation Co*., 228 Cal.App.3d 980 (1991) (company pumped toxic acid into wrong storage tank causing damage), and *Smith v. Lockheed Propulsion Co*., 247 Cal.App.2d 774 (1967) (seismic missile testing caused property damage).

this position, instead grossly mischaracterizing and overstating Appellants' argument as an expansion of the TCPA (which it is not) which will lead to "*per se* or automatic liability for TCPA violations." This is not Appellants' position. Rather, Appellants' position is quite narrow – if an agent, who is otherwise operating within the scope of its known relationship with a principal, violates the TCPA due to a lack of consent, by neglect, oversight or happenstance, the liability for such neglect, oversight or happenstance should be passed on to the principal under standard agency analysis. After all, the principal can insure, can seek indemnification against the agent, can terminate, and can oversee the agent to ensure that their duty is appropriately exercised. An injured consumer cannot, especially when the agent is outside the jurisdiction of the United States.

This is not a novel argument. Indeed, this is the entire foundation of tort and agency policy – the party with the ability to best avoid harm bears its liability. It is why the Restatement sets forth exceptions under §§ 416-429. It is also the primary focus of the FCC Dish Order. Appellants merely apply these longstanding principles to this case, not to expand the law, but clarify it, so District Courts do not misinterpret *Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010 (9th Cir. 2018) and *Jones v. Royal Administration Services, Inc.*, 887 F.3d 443 (9th Cir. 2018) as creating a unique heightened agency standard for TCPA cases. Restatement (Second) of Torts § 424 is apt in stating "[o]ne who by statute or by

administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions," "the employer cannot delegate his duty to provide such safeguards or precautions to an independent contractor," and "[i]f the duty imposed is an absolute one, the employer is subject to liability for the failure of the contractor to provide the required safeguard or precaution, even though the contractor has exercised all reasonable care in his effort to do so." (emphasis added).

The TCPA, as described above, imposes strict liability on the caller, unless, pursuant a codified affirmative defense, the telemarketer has the consumer's prior express written consent. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). This strict liability requirement is codified and regulated. Thus, the duty to obtain prior express written consent is absolute, as envisioned by § 424. It cannot be delegated. The FCC agreed. See *FCC Dish Order* at 6591-93. The key factual issue, according to the FCC, was whether a seller "has authorized that telemarketer to market its goods or services." Referring to prior FCC Orders, the Commission held that the principle who hires a robodialer "bears the responsibility for any violation of the Commission's rules. Calls placed by a third-party collector on behalf of that creditor are treated as if the creditor

itself placed the call." *Id*. at 6589. Thus, according to the FCC, if the telemarketer (Prospects) was expressly authorized to call consumers with an ATDS or prerecorded voice by the seller (RSC), then the violations of the agent are imparted to the principal, because the duty to obtain consent and follow regulations is absolute and non-delegable.

Restatement (Second) of Torts § 427 supports Appellants' position in stating "[o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger" and "[t]he rule applies equally to work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others."

Prospects bought leads from hundreds of vendors to call millions of consumers on behalf of RSC, while live-transferring those consumers to RSC, along with the data necessary to identify those vendors. This was expressly within the contract. It is not only foreseeable, but virtually guaranteed that some of the individuals contacted will not have consented to the conduct with such a high volume of activity. Moreover, RSC's insertion of exculpatory and indemnification

language in the contract shows RSC was aware of this risk and guarded and insured itself from it with its agent. Accordingly, § 427 would also hold consent to be a non-delegable duty.

It is well established that telemarketing inherently involves nuisance and privacy invasions, as recognized by Congress in passing the TCPA. Thus, Restatement (Second) of Torts §427B applies in stating "[o]ne who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve …the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance" and "[i]t is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result."

Congress enacted the TCPA to deter a flood of unwanted telemarketing calls. *FCC Dish Order* at 6574-75. As recognized in *Carroll v. Federal Exp. Corp*., 113 F.3d 163 (9th Cir. 1997), duties of great public importance cannot be delegated. The duty of telemarketers to only contact individuals who have consented to such communications is clearly such a duty, as it involves invasions of privacy and nuisance, which are both codified and heavily regulated.

Appellants are not advocating an expansion of the law. These agency principles are set forth in the Restatement and have been in place since before the

TCPA was enacted. All Appellants ask is to apply these unremarkable principles to the TCPA, in accordance with Congressional and FCC guidance. Indeed, it would be a substantial contraction of the law to side with RSC and create a heightened requirement of "no liability without fault."[6]

C. Appellant's Arguments Regarding Apparent Authority Stand Unrebutted

If the Court finds no issues of fact on express authority, it could alternatively reverse on the basis of apparent authority. Apparent authority requires only that a principal does something or permits the agent to do something which reasonably leads another to believe that the agent had authority. RSC largely ignores Appellants' factual arguments on apparent authority and misstates the legal standard. The standard is not whether the Appellants had a "reasonable belief that RSC authorized Prospects to violate the TCPA." The standard is whether Appellants had a reasonable belief that Prospects was authorized to call on behalf of RSC. In other words, it is the conduct, not its legality, which must fall within the scope of a consumer's reasonable belief. RSC argues: "The mere fact that the Plaintiffs were transferred to RSC by Prospects only implies that Prospects had the apparent authority to make the transfers." This is imprecise. It also implied that Prospects had authority to engage in the conduct preceding the transfer, i.e. the call

[6] If the Court has any doubt as to the interpretation advanced by Appellants, it should authorize Appellants to petition the FCC for clarification.

itself. Appellants reasonably believed Prospects had authority to robodial them, because on those same robocalls, RSC employees were connected by Prospects, and continued the sales pitch. The analysis need not go further, though it could because subsequent conduct by RSC further reinforced this reasonable belief. One need only review the transcript of the call with Deforest to see such reinforcement.

RSC cites to *Kristensen* for its position that lead generation alone does not give rise to apparent authority. This is true. What RSC leaves out in its substandard analysis is the critical distinction that *Kristensen* did not involve warm transfers from the lead generator to the seller, as is the case here. In fact, there was *zero factual basis in Kristensen* regarding any act of the seller which manifested the consumer's reasonable belief of agency. *Kristensen v. Credit Payment Services Inc*., 2015 WL 4477425 *5 (D. NV. July 20, 2015). The same is true for the only other case cited by RSC. *Bridgeview Health Care Center, Ltd. v. Clark*, 816 F.3d 935, 939 (7th Cir. 2016) ("Clark did nothing to create an appearance that B2B had authority to send faxes on behalf of either Affordable Hearing or Clark himself. In fact, the fax-ad copy was the only way Clark could have communicated with the recipients…"). These cases have zero factual application.

The conduct at issue under both the TCPA and agency analysis, is the placement of prerecorded voice solicitation calls to Appellants by Prospects. Appellants received these calls. They were warm transferred to RSC by Prospects,

which also transferred their lead data in real time. RSC interacted with and attempted to continue the sales pitch initiated by Prospects during these calls irrespective of Appellants advising they had no interest in RSC services, and were called without consent.

This is evidence a jury should weigh, going to whether Appellants' beliefs of agency were reasonable. It just so happened that Prospects called without consent, which is incidental to whether the conduct was authorized, and even more incidental to whether a reasonable consumer would believe it was. RSC fails to address this. Granting summary judgment was in error.

D. Ratification Is A Jury Question

If the Court also finds no issues of fact on apparent authority, it could still reverse on ratification. As this Court held in *Henderson*, and the Fourth Circuit recently held in *Krakauer*, ratification is typically a question of fact for a jury. RSC's Brief proves this point further.

Appellants' aforementioned points regarding agency disprove the crux of RSC's argument on ratification. Prospects was unquestionably an agent. The question, as agency is concerned, is simply whether the calls which happened to be illegal, should be treated legally distinct (regarding direct agency) from those which were "lawful telemarketing" as articulated by RSC. That position makes little sense, but even if it were compelling, the first half of the ratification analysis

is clearly satisfied. The only question remaining is whether there are triable issues of fact as to whether RSC knew or should have known Prospects' known and contracted robodialing campaign could have resulted in consumers being called without prior express consent.

One need look no further than the call with Deforest to see ratification. The RSC employee ratified the conduct of Prospects calling him "out of the blue" on four occasions just on that one call. The same occurred on McCurley's call, wherein he expressed no interest in the services, and was not even the correct person identified in the data lead provided to RSC by Prospects. RSC had lead data for each class member in real time and was able to compare the consumer's data to the person they were speaking with. RSC numerously testified they elected to conduct no investigation into the sources of the leads. Though RSC was authorized to and supposedly did minimal investigation of the lead source websites to check whether opt in language satisfied the 2013 FCC regulations, it chose not to do so with respect to www.yourautohealthlifeinsurance.com. Had RSC done so, as they testified they were supposed to do, they would have found leads from this site lacked consent. www.diabtesehealth.info is facially a shell website. The mediocre response rate should have triggered a red flag. So too should have the high percentage of persons who were contacted and whose personal information did not match the information of the lead. These are hallmarks of an, at best,

unreliable and, at worst, manufactured consent database. A responsible company who cared about compliance would have investigated further. They chose not to investigate because Prospects indemnified violations, and RSC thought the exculpatory clause would preclude liability regardless. These facts are much stronger than *Henderson*.

The truth is RSC simply did not care to know where leads came from, or whether calls were made legally. It wanted Prospects to dial people and, by design, wanted to no part in that process. It wanted to blame Prospects when violations occurred and disavow the agency relationship. Clever lawyers who have been through this with federal agencies and class actions before set this up to circumvent the TCPA. That is facially obvious. A jury should weigh these facts, as this Court held in *Henderson* and the Fourth Circuit held in *Krackauer*. This Court's role is simple – determine whether there is a triable issue of fact on this narrow issue. There should be, due to agency typically being a jury question, and Rule 56 requiring evidence weighing be left to a jury.[7]

Accordingly, summary judgment should also be reversed on ratification.

[7] *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997); *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. APPELLANTS DID NOT WAIVE ANY ARGUMENTS

Appellate courts have discretion to rule on issues that were never raised in the lower court. *Hormel v. Helvering*, 312 U.S. 552, 557–59 (1941). That said, this Court need not invoke such doctrine, as vicarious liability through a third-party call center was asserted at every step of this case – from the complaint, to the consolidated complaint, to the answer, to discovery, to class certification briefing, to the class certification order, through numerous contested motions, during cross-summary judgment, and oral argument. To suggest the arguments raised in this Appeal were waived is debunked by the record, as accurately described above.

RSC conducted discovery on these issues, including by procuring numerous declarations from the third parties who ran the call center, and who bought the consumer leads that make up the Class. These individuals were deposed and questioned by both sides. A robust record was presented to the Court at class certification and during cross-summary judgment of their testimony, written discovery responses, and document production. Experts reviewed this evidence. The evidence served as the basis for the Parties' positions on vicarious liability. Appellants argued direct agency, apparent authority and ratification in the alternative at summary judgment. The evidence was cited at oral argument by both sides. The Court considered this evidence.

The District Court did not find RSC's arguments regarding waiver compelling, as it elected to rule on the merits of all three forms of vicarious liability. This makes sense, as courts generally will not find that vicarious liability arguments can be waived on the pleadings when it is apparent on the face of the complaint that the claims are based on such vicarious liability. *Bynum v. Magno*, 125 F.Supp.2d 1249, 1264-65 (D. Hi. 2000) (declining to find vicarious liability theories waived where the complaint implied "the claims to be asserted against [defendant] would probably derive from a theory of respondeat superior, vicarious or agency liability.").

RSC tacitly concedes that Appellants did not waive these positions by heavily focusing on Appellants' purely legal argument that the FCC Dish Order held consent to be a non-delegable duty. However, its own case citations identify an exception to waiver where "the issue presented is purely one of law and the opposing party will suffer no prejudice." *U.S. v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990); *Golden Gate Bridge & Highway Dist. v. United States*, 125 F.2d 872, 875 (9th Cir. 1942) (whether a contract is ambiguous will be considered by court of appeals although appellee had conceded the ambiguity below); *United States v. Merrill*, 211 F.2d 297, 302-303 & n.4 (9th Cir. 1954) (permitting new arguments where the pertinent record has been fully developed). "The evident principle underlying this exception is that the party against whom the issue is raised must

not be prejudiced by it. Thus, if he might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue, it should not be permitted to be raised for the first time on appeal." *U.S. v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978).

The record of this case is fully developed on all three forms of vicarious liability. RSC had eleven months between when the class was certified, on a vicarious liability theory, and when discovery closed, during which time it was unquestionably on notice of these issues, developed evidence on these issues, and argued them during summary judgment. RSC fails in its burden to establish how this pure legal argument causes prejudice. It doesn't. Moreover, no arguments were waived, and to the extent slight refinements of the legal theories were raised on appeal under the same underlying agency principles, these differences are purely of law and not subject to waiver.[8]

[8] The cases cited by RSC are unavailing. *Bitton v. United States Citizenship and Immigration Services,* 817 Fed.Appx. 329 (9th Cir. 2020) involved waiver of a due process challenge to denial of an immigration visa, where the challenge was never raised in the complaint, not subject to discovery, and never litigated. *Id*. at 331. Distinctly here, vicarious liability was asserted, litigated, argued, and discussed extensively in the District Court's Order. RSC misstates the holding of *Bitton*. *Day v. LSI Corporation,* 705 Fed.Appx. 539, 540 (9th Cir. 2017) involved a plaintiff who argued statute of limitations defenses were waived. This Court observed such defenses cannot be waived, that the defendant asserted it, that plaintiff did not show prejudice, and failed to address the issue with the lower court, thereby himself waiving the issue. *Id*. at 540. If anything, this case supports

CONCLUSION

RSC is culpable for the conduct of its agent Prospects, who it hired to and who did robodial millions of people to disseminate prerecorded messages selling its services, while choosing to abandon its contractual right to exercise oversight and enforcement over Prospects' methods. The law on this topic is clear, and there are triable issues of facts on all three elements of vicarious liability that warrant reversal. As to RSC's argument that Appellants waived their vicarious liability arguments, this is simply not supported by the record.

Appellants respectfully request the Court reverse the District Court's Judgment for RSC. Doing otherwise would condone and enable the commission of mass torts without recourse by simply authorizing overseas goons to do it for you.

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Appellants' position. Non-prejudicial issues subject to discovery and notice are not subject to waiver. RSC waived its right to challenge the sufficiency of the pleadings by answering the complaint and asserting a vicarious liability defense, demonstrating notice. *Johnson v. Georgia-Pacific Corp.,* 329 Fed.Appx. 65 (9th Cir. 2009) involved a lower court finding a defense had been waived. This Court questioned whether waiver applied, but reached the merits of the defense and upheld on separate grounds. *Id*. at 68. This case supports Appellants, not RSC.

Dated: November 18, 2021 Respectfully Submitted,

BY: /s/ Todd M. Friedman
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ATTORNEYS FOR
APPELLANTS

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Reply Brief for the Appellants John McCurley and Dan Deforest complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 6,962 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: November 18, 2021

Respectfully Submitted,

BY: /s/ Todd M. Friedman
TODD M. FRIEDMAN

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Todd M. Friedman, certify that on November 18, 2021, the Appellant's Reply Brief was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system:

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