CASE NO. 22-10695

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KENNETH JOHANSEN, individually and on behalf of those similarly situated,

Plaintiff-Appellant,

v.

BLUEGREEN VACATIONS UNLIMITED, INC.

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida Case No. 9:20-cv-81076-RS

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CORRECTED APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the following is an alphabetical list of trial judges, attorneys, persons, firms, partnerships, and corporations known to have an actual or potential interest in the outcome of the proposed interlocutory appeal:

Abdo, John E. (Vice Chair of Board of Directors of Bluegreen Vacations Corporation)

Bailey & Glasser LLP (Johansen's counsel)

Barrett, John W. (Johansen's counsel)

Bluegreen Vacations Unlimited, Inc. (Appellee)

Bluegreen Vacations Corporation (Appellee's parent company)

Bluegreen Vacations Holding Corporation (NYSE: "BVH") (holding company of Appellee's parent company)

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Smith, Hon. Rodney (District Court Judge)

Stearns Weaver Miller Weissler Alhadeff & Sitterson, PA (Appellee's counsel)

Woodbridge Holdings, Corp. (Appellee's affiliate)

***

Bluegreen Vacations Unlimited, Inc. is a wholly owned subsidiary of Bluegreen Vacations Corporation. Bluegreen Vacations Holding Corporation, a publicly held corporation trading on the New York Stock Exchange under the symbol "BVH," owns over 10% of the stock of Bluegreen Vacations Corporation.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary because the District Court's factual findings, amply supported by the record, compelled finding that the proposed class representative Kenneth Johansen in this case under the Telephone Consumer Protection Act: (1) failed to satisfy Rule 23(a)'s typicality requirement because the audio recordings of phone calls, the transcripts of those calls, and his testimony established that his claims fundamentally differed from the proposed class members on the issue of standing, consent, established business relationships, and damages; (2) failed to satisfy Rule 23(a)'s adequacy requirement because he not only made false statements confirming outdated contact information, but engaged in further deception and embraced deception as appropriate for a class representative.

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly exercised its discretion by concluding that Johansen's claim under the Telephone Consumer Protection Act ("TCPA") was "inherently different" than "those of putative class members" and, under Rule 23(a), atypical because:
    a) On standing, the Court would need to determine "whether the injury allegedly caused by each telephone call is fairly traceable to the unlawful action by the Defendant, Bluegreen Vacations Unlimited, Inc. ("Bluegreen"), or is, instead, a result of Plaintiff's deceptive conduct";
    b) On the issues of consent and established business relationships, Johansen's "deceptive conduct" raised distinct issues of (i) whether he had made admissions about a preexisting established business relationship; or (ii) created one that eliminated liability for some or all of the calls he claims violated the TCPA;
    c) On the issue of damages, Johansen's deceptive conduct raised distinct issues of whether Bluegreen acted "willfully or knowingly" in those and later calls in a way that could support treble damages.
2. Whether the District Court abused its discretion by concluding that Johansen failed to satisfy Rule 23(a)'s adequacy requirement because he falsely

confirmed outdated contact information, admitted to engaging in "deception," and admitted "that he believes engaging in deception is appropriate behavior for a class representative."

3. Whether the District Court's denial of class certification must be affirmed on other grounds for Johansen's failure to satisfy Rule 23(b)(3)'s predominance requirement or Rule 23(a)'s commonality requirement because the undisputed evidence established that proposed class members consented to be called and had established business relationships and those issues would need to be decided individually.[1]

STATEMENT OF THE CASE

A. The TCPA

1. Statutory and Regulatory Framework

In 1991, Congress enacted the TCPA finding, among other things: "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced," *Telephone Consumer Protection Act of 1991,* PL 102-243, 105 Stat 2394 (Dec. 20, 1991). The TCPA required the Federal Communications Commission (FCC) to issue implementing regulations. *Mims v. Arrow Fin. Servs.*, 565 U.S. 368, 372 (2012).

[1] Emphasis is added and citations, internal quotations, and objections are omitted unless otherwise indicated. References to "DE __ at ___" are to the district court docket entries and the pages stamped in the upper right-hand corner.

As further explained below, a private plaintiff in a case for violating the do-not-call regulations has no claim if (1) that plaintiff lacks standing, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019); (2) that plaintiff did not receive more than one call in 12 months, 47 U.S.C § 227(c)(5); (3) that plaintiff consented to be called, 47 U.S.C. § 227(4); 47 C.F.R. §§ 64.1200(c), 64.1200(c)(2)(ii), 64.1200(f)(13)(i); (4) that plaintiff had an established business relationship with the defendant, 47 U.S.C. § 227(a)(4); or (5) that plaintiff was not a "residential subscriber," 47 C.F.R. § 64.1200(c)(2). Standing, consent, and established business relationships are most central here.

2. Standing

"As the party invoking federal jurisdiction, the plaintiff[] bear[s] the burden of demonstrating that they have standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (June 25, 2021). "Every class member must have Article III standing in order to recover individual damages." *Id.* at 2208.

Article III standing has three requirements: (1) the plaintiff must have suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent"; (2) that injury must be "fairly traceable to the challenged action of the defendant"; and (3) it must be "likely . . . that the injury will be redressed by a favorable decision." *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1268 (11th Cir. 2019).

In TCPA cases, "the receipt of more than one unwanted phone call is enough to establish an injury in fact," *Cordoba*, 942 F.3d at 1269, but in every case from this Court finding an injury-in-fact in a TCPA case, the plaintiff has actually received a call, fax, or text, *Cordoba*, 942 F.3d at 1269, and courts have held that when none of those communications are received there is no injury-in-fact.[2]

Under Article III, the plaintiff also has to meet the traceability requirement. "[P]laintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). In the TCPA context, this Court has applied these principles to hold that for individuals that a defendant "could and would have continued to call [] even if it had meticulously followed the TCPA and FCC regulations," there is no injury "fairly traceable to the challenged action of the defendant." *Cordoba*, 942 F.3d at 1272.

3. Consent

In a do-not-call case such as this one, there is no liability for any calls placed with "the subscriber's prior express invitation or permission." 47 U.S.C. § 227(a)(4); 47 C.F.R. §§ 64.1200(c), 64.1200(c)(2)(ii), 64.1200(f)(13)(i). Such invitation or permission "must be evidenced by a signed, written agreement

[2] *See, e.g., Community Vocation Schools of Pittsburg v. Mildon Bus Lines, Inc.*, 307 F.Supp.3d 402, 416-19 (W.D. Pa. 2018); *Eldridge v. Pet Supermarket Inc.*, 446 F.Supp.3d 1063, 1072 (S.D. Fla. 2020); *Etter v. Allstate Ins. Co*., 323 F.R.D. 308, 311 (N.D. Cal. 2017).

between the consumer and seller which states that the consumer agrees to be contacted by the seller and includes the telephone number to which the calls may be placed." 47 C.F.R. § 64.1200(c)(2)(ii). If the "called party" has given such consent, that eliminates liability under the TCPA. *E.g., Mais v. Gulf Coast Collection*, 768 F.3d 1110, 1118, 1126 (11th Cir. 2014).

This Court "use[s] common law principles to interpret whether a party gave—or revoked—their prior express consent to receive calls under the TCPA." *Lucoff v. Navient Solutions*, 981 F.3d 1299, 1304 (11th Cir. 2020). In evaluating consent, this Court has looked not only to written and electronic communications, *e.g.*, *Lucoff*, 981 F.3d at 1305, but also relevant oral communications, *e.g.*, *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1278 (11th Cir. 2017).

4. Established Business Relationships

The TCPA defines a "telephone solicitation" as a call "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. . . ." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(14). But the definition excludes any calls "to any person with whom the caller has an established business relationship." 47 U.S.C. § 227(a)(4)(B); 47 C.F.R. § 64.1200(f)(14)(ii).

The implementing regulations define an "established business relationship" to include certain "voluntary two-way communication[s]" about "products or

services" based on a "transaction" "within the eighteen (18) months immediately preceding the date of the telephone call." 47 C.F.R. § 64.1200(f)(5).

In 2005, the FCC issued an Order explaining that, for a wide range of "financial contracts or agreements" the transaction is "ongoing" and lasts throughout the contract period. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 20 F.C.C. Rcd. 3788, 3797 (2005). The FCC provided examples, including "insurance companies with whom [customers] hold an insurance policy," "lenders with whom [customers] secured a mortgage," or "a publication that a consumer agrees to subscribe to for a specified period of time," explaining that the customer "has an EBR with the consumer for the duration of the subscription." *Id.* In those cases, the established business relationship exists while the "contract remains in force," and until "the consumer makes a company-specific do-not-call request," the company may call the consumer. *Id.*

B. Statement of Facts

1. Bluegreen

Defendant Bluegreen is a vacation ownership, or timeshare, company that markets and sells vacation ownership interests in leisure and urban destinations. DE 37 ¶ 1.

2. Plaintiff Kenneth Johansen

a. Johansen's Credit with Bluegreen

In 2010, according to Bluegreen's business records in its internal

recordkeeping system known as "Concierge," DE 72-12 ¶ 5, Johansen purchased a three-day, two-night discounted Bluegreen mini-vacation, DE 72 ¶ 75; DE 72-12 ¶ 7 & Ex. A.

For 2020, consistent with the call recordings and transcripts, Johansen's Concierge records indicate that his credit was active, DE 72 at ¶ 88; DE 37 at 28; DE 72-12 Ex. A, and that he changed his reservation several times, DE 37 at 29; DE 72-12 Ex. A.

b. The Calls to Johansen

On May 26, 2020, Johansen received a call that disconnected after 30 seconds. DE 74 ¶ 33. Though Johansen alleges that he received a total of nine calls, DE 74 ¶ 32, the only calls in which the Schumer agent and Johansen conversed were the first call on May 27 at 3:15 p.m. and the 9:10 p.m. June 2 call.

On May 27 at 3:15 p.m., according to an audio recording of the call, an agent called Johansen and introduced herself by saying: "I'm calling on behalf of Bluegreen Resort, in regards to a vacation package you purchased from us." DE 10-1 at 2; DE 9 Ex. A at 00:07. After she said, "since you weren't able to use the vacation package, you still have a credit on file with us," Johansen responded, "Wow." DE 10-1 at 2; DE 9, Ex. A at 00:42.

On that first call on May 27 at 3:15 p.m., Johansen then engaged with the agent for nearly thirty minutes. Johansen said "I expect" "to go on vacation," DE

10-1 at 3:6; DE 9, Ex. A at 01:06, said "[l]et's leave it at Charleston" for the location of that vacation, DE 10-1 at 4:16; DE 9, Ex. A at 02:53, and asked the agent to "go ahead" and describe cruising options, DE 10-1 at 6:25; DE 9, Ex. A at 05:47. He confirmed his email and physical address, DE 9, Ex. A at 06:52; DE 10-1 at 7:20, 7:24, though he later testified that those statements were false, DE 40-1 at 151. He also asked for additional information, DE 10-1 at 9:13-15; DE 9, Ex. A at 08:53, provided an alternate email address, DE 10-1 at 9:23-24; DE 9, Ex. A at 09:17, and then confirmed that he had received the e-mail he twice requested, DE 10-1 at 14:14; DE 9, Ex. A at 22:11.

After that first call on May 27, later that day, there were "at least four more" calls. DE 74 ¶ 37.

On June 2, 2020, also according to an audio recording of the call, a different agent called back and Johansen engaged this second agent in another almost thirty-minute conversation. DE 9, Ex. B. Again, the agent introduced herself by saying she was "reaching out" about "the Charleston, South Carolina vacation package that you bought from Bluegreen resort." DE 9, Ex. B at 00:20; Ex. 10-2 at 2:4-9. The agent said she would close out the vacation package and told Johansen to have a nice evening. DE 9, Ex. B at 00:49; DE 10-2 at 2:19-21. Johansen then asked the agent to tell him more about the vacation package, saying "Tell me about it." DE 9, Ex. B at 00:54; DE 10-2 at 2:22.

On that June 2 call, Johansen then chose "Boyne Mountain, Michigan" as the vacation location, DE 9, Ex. B at 04:43; DE 10-2 at 5:23, added his wife to the account, DE 9, Ex. B at 11:33; DE 10-2 at 11:23, and confirmed his phone number, DE 9, Ex. B at 12:10; DE 10-2 at 12:17. After almost thirty minutes of conversation, Johansen announced that he was on the Do Not Call Registry, and a supervisor then promised to take Johansen off the calling list, DE 9, Ex. B at 22:50; DE 10-2 at 19:5-16.

At deposition, Johansen testified that—despite Bluegreen Resorts being identified at the beginning of each call, DE 40-1—he prolonged the calls, *id.* 93:13-15. He admitted that, by doing so, he caused them to take longer, *id.* 93:16-18, to consume more time, *id.* 93:19-21, made them a greater invasion of his privacy, *id.* 93:23-25, and tied up his phone line for a longer period of time (*id.* 93:23-25). He admitted: "I chose how long they were going to tie up my telephone." *Id.* 95:24-25. He testified that after he said he did not want to be called again at the end of the June 2 call, he received no more calls. *Id.* 109:12-16.

c. Johansen's Past "Misrepresent[ations]"

The District Court is not the only court to enter orders adverse to Johansen—indeed, two others have entered summary judgment against him. In *Johansen v. National Gas & Electric LLC*, No. 2:17-cv-587 JLG, 2017 WL 6505959, at *3 (S.D. Ohio Dec. 20, 2017), the United States District Court for the Southern

District of Ohio found that Johansen "posed as an interested customer," that "[i]t is his typical practice to pose as a customer whenever he receives a telemarketing call," that he "misrepresented his address and account number," and that those admissions "cast serious doubts on his fitness to serve as an adequate class representative." *Id.* As explained below, p. 38, that court and another court entered summary judgment against Johansen and in favor of the defendants in those separate cases, after a thorough review of the evidence of the contents of the calls.

d. Johansen Admits to Being "Deceptive" Here and That He Believes It's "Appropriate for a Class Representative to Engage in Deception"

At deposition here, Johansen admitted that he repeatedly lied on the first, 3:15 p.m. May 27 call.

Johansen admitted that when he confirmed his physical address on both the 3:15 p.m. May 27 call and the June 2 call, DE 9, Ex. A at 06:52; DE 10-1 at 7; DE 9, Ex. B at 11:17; DE 10-2 at 11:12-17, he made false statements:

> Q. Your statement that you were still at 8822 Turin Hill, Dublin, Ohio was false, correct?
>
> A. Correct, that was a false statement.

DE 40-1 at 101-102.

Johansen admitted that when asked to confirm his email address on the first, 3:15 p.m. May 27 call, he "confirmed the false information she had":

> Q. Did you know, on May 27, 2020, that your e-mail address was not still Kjohan—kjohansen@columbus.RR.com?

A. I did. I confirmed the information so that she would continue the call.

Q. Right. So you provided a knowingly false answer to continue the call, correct?

A. *I confirmed the false information that she had*.

Q. *And your answer, "Yes," was false, correct?*

A. *Correct.*

DE 40-1 at 150-151.

He also testified "I had no intention of purchasing the package she was offering," *id*. at 98, and "I was not going to buy a Bluegreen vacation," *id*. He admitted that, on both the 3:15 p.m. May 27 call and the June 2 call, he "pretend[ed] to be interested in buying vacation packages [he] had no interest in." *Id*. at 113. He testified: "whatever she asked me, I was going to respond affirmatively." *Id*. at 100.

He also admitted that he believes that "deception is appropriate for a class representative":

Q. Do you believe that deception is appropriate behavior for a class representative?

MR. PARONICH: Objection. You can answer.

A. Yes.

DE 40-1 at 172.

3. The Proposed Class

a. Class Definition

Johansen seeks to assert TCPA claims on behalf of the following proposed,

nationwide class:

> All persons within the United States who, (a) from October 1, 2018 through July 8, 2020; (b) received more than one outbound call from Schumer for Bluegreen within a 12 month period prior to making any inbound calls; (c) to their residential telephone numbers registered with the National Do Not Call Registry; and (d) whose phone numbers were obtained by Bluegreen either (1) prior to 2013, at the time of a purported vacation, vacation purchase, or contemplated vacation purchase, or (2) as a referral from someone else.

DE 74 ¶ 56.

b. Schumer

The phone calls to the proposed class were placed by Schumer Management & Consulting, LLC ("Schumer"). Bluegreen supplied telephone numbers—or leads—to be called by Schumer. DE 40-2 at 26.

c. Evidence of Consents

Members of the proposed class gave written consent to receive calls in various ways, over time, from different locations.

David Doucette, Bluegreen's Vice President of Database Marketing, testified: "As part of its marketing program to attract new customers, Bluegreen obtains various forms of express written consent ("consents") from potential and existing customers." DE 37 ¶ 3. The sources included "Bluegreen past guests," "Choice Hotels past guests," "Sweeps Entries," and "mini-vacation/tour purchases." DE 40-4 at 3-5. For sweeps contests alone, consent took various forms, including "[p]ermission-based leads captured via a kiosk at various locations

and/or events," "[p]ermission based leads captured via text-to-enter promotion," "[p]ermission-based leads captured via a website form," and "[p]ermission-based leads captured via physical paper." *Id*.

Doucette further testified: "Bluegreen produced a representative sample of the types of consents that were obtained for the calls that were made by Schumer Management & Consulting, LLC." DE 37 ¶ 4. His declaration attached four examples of consents obtained by Bluegreen before 2013, which include phone numbers and signatures of individuals who would fall within the proposed class definition. DE 37 Ex A. Above their signatures appeared the following text, in bold, capital letters: [3]

> *…I consent to be contacted by Bluegreen Corporation, its subsidiaries and affiliates ("collectively, Bluegreen") and each of their respective contractors and agents regarding their promotions, products and services via telephone* (including the use of an automated telephone dialer, in which case a pre-recorded message may be left on my voicemail or answering machine), facsimile, mail & email *at the number(s)* and address(es) p*rovided above. I understand that this constitutes a waiver of my rights under the*

[3] Comparing the class definition to these consents establishes that they would fall within that definition. Plaintiff's proposed class definition includes phone numbers that "were obtained by Bluegreen" "prior to 2013, at the time of a purported vacation, vacation purchase, or contemplated vacation purchase." DE 74 ¶ 56. Doucette's declaration attached four examples of pre-2013 consents for customers who listed their phone numbers and "contemplated [a] vacation purchase" by signing a "discount vacation offer contact form" granting Bluegreen consent to contact them regarding Bluegreen's "promotions, products, and services." DE 37 at 6; *see also* DE 37 at 5, 7-8. The consents thus fall squarely within the class definition.

> *Telephone Consumer Protection Act*, the Telemarketing Sales Rule, *and Federal and State "Do Not Call" laws.*

DE 37 Ex. A (original emphasis omitted; italics added).

Jarred Schumer, Schumer's sole owner, also testified that "most of our leads, if not all of them, were permission-based and/or existing business relationships."

> A. [M]ost of our leads, if not all of them, were permission-based and/or existing business relationships, as I understood it.
>
> Q. So in the period from October 2018 to July 2020, did you understand most of your calls were either permission-based or based on an established business relationship?
>
> A. As I recall, yes.

DE 40-2 at 78; *see also id.* at 28, 31-34; DE 37 ¶¶ 1-7.[4]

Johansen submitted a declaration from his proposed expert Aaron Woolfson to support his motion for class certification, but, at deposition, Woolfson testified that—until the day before his deposition—he did not know what Bluegreen did. DE 40-3 at 66. As for the some 82 million call records he loaded into his database,

[4] Though in 2012 the FCC added additional disclosure requirements for other contexts, it made plain: "Nothing in this Order changes the Do-Not-Call consent requirements," and "sellers may contact consumers registered on the national Do-Not-Call Registry if they have obtained prior express invitation or permission from those customers" "evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by the seller and includes the telephone number to which the calls may be placed." *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1831 n.7 (Feb. 15, 2012). The examples of consents provided here, DE 37, Ex. A, satisfy those governing requirements.

Woolfson testified: "I don't know how they were obtained. I was not asked to look at them." DE 40-3 at 68; 67.

As for consent, Woolfson testified: "I don't know whether or not the lead source—was related to non-nonconsensual calling or otherwise." DE 40-3 at 37-38; *see also* DE 40-3 at 40. When asked whether he knew if any consents were provided before 2013, he testified: "I don't—couldn't tell you one way or the other." DE 40-3 at 41.

Indeed, Johansen has failed to identify a single proposed class member who received a call despite being listed in the Do-Not-Call Registry who did not consent. DE 72 at ¶¶ 44-45.

d. Evidence of Established Business Relationships

Members of the proposed class also had established business relationships with Bluegreen, based on different communications and different transaction histories spanning many years.

Doucette testified that the sources of established business relationships likewise included "Bluegreen past guests," "Choice Hotels past guests," "Sweeps Entries," and "mini-vacation/tour purchases." DE 40-4. He further testified: Bluegreen has data reflecting those relationships that Bluegreen keeps and maintains in the regular course of business in its Concierge system, "such as the date of purchase of a Bluegreen vacation package, the date of stay at a Bluegreen

resort, and changes to reservations for any tours or vacation packages." DE 37 ¶ 11.

Schumer also testified that the process of screening leads for consents, established business relationships, and whether they were listed on do not call lists worked in practice. In his experience working with Bluegreen since 2014, when asked how often an agent called someone to be told the call recipient was on "the do-not-call list," he testified: "I don't recall that happening in any volume at all." DE 40-2 at 77.

When Johansen's proposed expert Woolfson was asked whether he took "any steps to screen the inputs in your data for established business relationships," he testified, aside from looking at a single consent and comparing it to his results: "I don't remember anything like that. And I wasn't asked to do that." DE 40-3 at 38-39. When asked whether he knew "if any of the leads contacted by Mr. Schumer's company had any credits for vacations," he testified: "I wouldn't have known that one way or another. I wasn't—I wasn't asked to look at that." DE 40-3 at 51-52.

Johansen has failed to identify a single proposed class member who received a call despite being listed in the Do-Not-Call Registry without an established business relationship. DE 72 at ¶ 49.

e. Evidence of Scrubbing

For 16 months of the proposed 21-month class period, Bluegreen screened—or scrubbed—all numbers provided to Schumer against the national Do-Not-Call Registry. DE 47-1 at 5-6; DE 43, Wardak, Dep. 58. If the number appeared on the list, Bluegreen only sent the number to Schumer if the customer had consented to be called or had an established business relationship. DE 43-1 at 46; DE 40-2 at 28, 31-34, 78; DE 37 at ¶¶ 1-7.

In April 2020, to save costs after COVID-19 severely disrupted the travel industry, Bluegreen suspended scrubbing against the national Do-Not-Call Registry through the Experian DNC system and, to comply with the TCPA, restricted all the numbers sent to Schumer to those that were permission-based. DE 43, Wardak, Dep. 58.

Ahmad Wardak, Bluegreen's Executive Vice President and Chief of Marketing, testified at deposition that "only permission-based leads were called after the Experian DNC processing was suspended in April 2020" and "that [was] the policy that Bluegreen continued to have with respect to calls until any DNC processing resumed." DE 43, Wardak, Dep. 58. At deposition, Doucette likewise testified that, in April, "knowing that we had suspended the DNC scrubbing, we limited [Schumer's] leads primarily to the sweepstakes and the packages that would not have required a scrub." DE 43, Doucette, Dep. 46.

Consistent with that testimony, on April 4, 2020, Mark Fleig of Bluegreen wrote to others at Bluegreen and Schumer, including Jarred Schumer that Bluegreen would stop supplying "any non-permission based leads":

> Good morning Jarred. *We've suspended our Experian DNC processing for the time being* to save on licensing fees *which means that we won't be able to provide any Referrals, NOR/POR, or really any non-permission based leads.*
>
> Paper, TNBs, and Expireds are still good, so in addition to what I sent over yesterday, I'll get you 500 Expireds today like last week. But our Gen1 Expireds are not being replenished, so we'll have to mix Gen2+ in there as well and the Gen1s will eventually dry up.

DE 43 at 474.

When pressed by Plaintiff's counsel at his deposition why Johansen was called if—hypothetically—he had not consented and lacked an established business relationship, Doucette testified that "potentially" "it might have been a business process failure that resulted in [] Johansen's number being provided to Schumer." DE 43 (Doucette Dep. at 55).

Again, Johansen has not identified a single proposed class member who was called despite being listed on the National Do-Not-Call Registry and had not consented or lacked an established business relationship. DE 72 at 7-9; *see also* DE 47-1 at 5.

f. Call Records and Recordings

In response to Plaintiff's sweeping document requests and subpoenas asking for call data, Bluegreen, Schumer, and Schumer's data vendor produced data from 2014 to 2020 that included over 146 million duplicative and conflicting call records. DE 38 ¶¶ 28-29. Johansen's expert Woolfson loaded over 82 million of those records into his database and identified 280,440 calls as included within the operative proposed class. DE 35-9 at 9-10.

Schumer testified that audio recordings of each and every call exist. DE 40-2 at 43. Though Schumer operators used call scripts, Schumer did not know how many scripts were used, DE 40-2 at 24, did not know how often the scripts changed, *id*. at 24-25, and the scripts included different questions that different call recipients answered differently, *id*. at 30.

g. Residential Subscribers

Johansen has offered no way to determine, on a class-wide basis, whether any subscriber was residential or business.

As Jan Kostyun—a telecommunications expert with over 35 years of experience—testified: "many telephone numbers under residential accounts may" "still be used as business numbers," DE 38 at ¶ 96, and many numbers may be "used a portion of the time for residential purposes, and the remaining portion for business use," DE 38 at ¶ 98.

Johansen's expert Woolfson admitted that he has not analyzed whether any

number is residential. DE 40-3 at 121; *see also id*. 12, 123. And—despite receiving subpoenas—the telephone carriers of the proposed class members have not provided evidence about actual use and cannot. DE 64-1 at 6-7, 11-12.

Johansen has also not identified a class-wide method for identifying subscribers to phone numbers. Kostyun testified about the many barriers to using call records here to identify subscribers, including the over 146 million call records produced, the over 82 million call records loaded into Woolfson's database, and Woolfson's failure to take any steps to resolve conflicts among those call records. DE 64-1 at 8-9, 12.

The only source Johansen has ever pointed to for identifying subscribers is Bluegreen's "lead data," DE 43 at 7-9. But, at deposition, Johansen's expert Woolfson admitted that he had "done no analysis of Bluegreen's lead files in terms of their contact information." DE 40-3 at 77-79. Indeed, Woolfson testified, "I wouldn't be comfortable in doing that." *Id.* at 77-79. Woolfson admitted that he knew nothing about the origin of the over 82 million call records loaded in his database, DE 46 at 6. Woolfson speculated that telephone carriers could identify individual subscribers, but the only evidence and testimony from the carriers shows that they have not and, at least for resold and prepaid lines, cannot. DE 64-1 at 9-10, 14. Indeed, Woolfson had repeatedly testified—from at least 2014 to 2018—that identifying the historical subscriber at the time a call was placed cannot

be done "reasonabl[y]" or "reliabl[y]." DE 64-1 at 8-9.

C. Course of Proceedings

1. Second Amended Complaint

On August 7, 2020, Johansen sued in the District Court. DE 1. In Johansen's First Amended Complaint, he alleged he did not "intend to pursue claims based on the last four May 27, 2020 calls or the June 2, 2020 call." DE 15 ¶ 36. But he removed that reservation from his operative, Second Amended Complaint, which the District Court correctly noted "indicat[es] that he now intends to seek damages for each of the nine alleged calls, not just the first two." DE 95 at 8.

The operative Second Amended Complaint alleges that, in May and June of 2020, "Schumer placed at least nine telemarketing calls to [] Johansen." DE 74 ¶ 32. Among those nine, his operative complaint identifies one call on May 26, 2020, DE 74 ¶ 33, one call on May 27, 2020 where he "listened to the sales pitch," *id*. at ¶ 35, four later calls on May 27, 2020, *id*. at ¶ 37, and one call on June 2, 2020, *id*. at ¶ 38. The Second Amended Complaint principally seeks damages, including treble damages for up to $1,500 for each call. DE 74 at ¶¶ 70-71.

2. Briefing on Motion for Class Certification

On February 18, 2021, Johansen filed his Motion for Class Certification, which sought to certify a class of individuals seeking damages of over $120 million. DE 35.

On March 10, 2021, Bluegreen filed its Opposition to Class Certification.

DE 36. On March 29, 2021, Johansen filed his reply in support of class certification, which relied heavily on six depositions taken since the filing of his motion and attached declarations from two witnesses at telephone carriers never previously identified. DE 43. On April 12, 2021, Bluegreen filed a motion to strike the newly-raised parts of Plaintiff's reply memorandum and a motion for leave to file an attached sur-reply in further opposition to Plaintiff's motion for class certification. DE 47. On April 28, 2021, Johansen also served a declaration from a witness at another telephone carrier. DE 64-2.

With leave of the District Court, Bluegreen deposed the three newly disclosed witnesses after the discovery cutoff and then also moved to file a supplemental memorandum addressing that testimony. DE 59; DE 61. Given the voluminous testimony taken and submitted since Bluegreen had filed its opposition, Bluegreen filed a motion to file a supplemental memorandum addressing that testimony. DE 64.

Though the District Court did not decide those motions to file supplemental memoranda, before the District Court entered its Order Denying Class Certification, DE 95, Bluegreen also timely filed a Motion for Summary Judgment, DE 73, and the District Court considered the scope of issues raised in that Motion in denying class certification, DE 95 at 9.

3. The District Court's Denial of Class Certification

On September 30, 2021, the District Court denied Johansen's motion for class certification. DE 95.

Johansen identified no class-wide proof of TCPA violations. Without addressing this evidence and testimony or the implications of consent and established business relationships for their TCPA, Johansen's Initial Brief nonetheless asserts Bluegreen "made nearly 50,000 [] illegal calls to the putative class members" Initial Br. at 3, "Plaintiff's expert revealed the staggering scope of Defendant's illegal telemarketing campaign, identifying 280,444 calls," *id* at 20, and accuses Bluegreen of "wholesale violations of federal law," *id.* at 39. But neither in the District Court nor on this appeal has Johansen or his expert identified any admissible evidence that a single proposed class member he sought to represent was registered on the national do-not-call registry, DE 36 at 8, had failed to consent to receiving calls, DE 46 at 12; *see also* DE 40-3 at 37-41, and lacked an established business relationship, DE 46 at 12; *see also* DE 40-3 at 38-39, 51-52, 197. Rather than identifying record evidence of 50,000 or 280,444 calls illegal calls, to this day, Johansen has identified none. At best for Johansen then, if it were possible to prove liability (it is not), that proof would need to proceed individually, class member by class member, defeating both commonality and predominance. DE 36 at 16-21, 24.

Against this backdrop, the District Court considered the evidence bearing on

Johansen's individual claims.

a. Factual Findings

As background, the District Court found that Johansen testified that he has filed about 60 TCPA lawsuits and Johansen estimated that, since 2014, he has made on average about $60,000 per year serving as a TCPA plaintiff. DE 95 at 1-2; *see also* DE 40-1 at 140, 157.

Johansen alleges that, on May 26, 2020, he received a phone call and that the call disconnected after about 30 seconds. DE 95 at 2.

On May 27, 2020, Johansen received a second call. The District Court noted that Johansen claims he "listened to and engaged with the telemarketing representative, intending to conclusively identify the entity responsible for illegally contacting him." DE 95 at 2. Relying on the call transcript, however, the District Court found that "the representative began the conversation by telling Johansen that she was calling on behalf of Bluegreen about a vacation package that Johansen had previously purchased in 2010." DE 95 at 2. The District Court then found that "Johansen actively engage[d] with the telemarketing representative for approximately thirty minutes—verifying his personal information, [and] requesting additional information on available products and services." DE 95 at 2. On the May 27 call, the District Court found that Johansen "knowingly verif[ied] false contact information" and "confirmed false contact information that the

representative had on file." DE 95 at 2.

Again, the District Court found: "During the June 2, 2020 call, the representative began the conversation by telling Johansen that she was calling on behalf of Defendant." DE 95 at 3. "The representative attempted to end the conversation shortly after it began; however, Johansen requested more information about the vacation package, intending to continue the conversation." DE 95 at 3. Specifically, "[d]uring the June 2, 2020 telephone call, Johansen actively engaged with the representative for approximately twenty-five minutes—verifying personal information, requesting additional information about vacation destinations, adding his spouse to the account, and knowingly verifying false contact information." DE 95 at 3.

The District Court also found: "Johansen readily admits his conduct during the…telephone conversations was deceptive" and that he "believes deception is appropriate for a class representative." DE 95 at 3. The District Court again relied on Johansen's deposition testimony comparing his conduct here to his conduct in a prior class action case against National Gas where his TCPA claim was dismissed:

> Q. Do you agree that your conduct with National—National Gas was deceptive?
>
> A. Yes.
>
> Q. And *do you agree that your conduct with the operator on the May 27 and June 2 calls here about Bluegreen was deceptive?*

A. *Yes.*

DE 40-1 at 171:8:-14.

The District Court also found that "Johansen also admits that he believes deception is appropriate behavior for a class representative." DE 95 at 3. Johansen had testified—without qualification—at deposition as follows:

> Q. Do you believe that deception is appropriate behavior for a class representative?
>
> A. Yes.

DE 40-1 at 172.

b. Legal Rulings

The District Court found that the Johansen "failed to adequately satisfy the Rule 23(a) typicality and adequacy prerequisites" and therefore did not address issues pertaining to predominance or commonality. DE 95 at 7.

i. Typicality

As for typicality, the District Court ruled that Johansen's claim is "inherently different" than "those of the putative class members" and requires "additional inquires with respect to standing, consent, and damages":

> Johansen's claim differs from those of putative class members' claims. The record clearly demonstrates the deceptive and dishonest tactics employed by Johansen to establish his claim. Thus, *Johansen's claim is inherently different than those of putative class members* who presumably did not use similarly deceitful methods. *Johansen's conduct necessitates additional inquiries with respect to [] standing, consent, and damages.*

DE 95 at 8.

The Court went into detail on the issue of standing, first explaining that the operative complaint indicates that Johansen "now intends to seek damages for each of the nine alleged calls, not just the first two." DE 95 at 8. The Court then ruled Johansen's "deceptive conduct" created unique issues on traceability:

> *The Court has not yet issued a ruling on whether Johansen has standing to proceed with his claim as to the other seven calls.* Moreover, the injury suffered by Johansen must be "fairly traceable to the challenged action of the defendant." [*Cordoba v. DirectTV*, 942 F.3d 1259, 1268 (11th Cir. 2019)]. *The Court must still decide whether the injury allegedly caused by each telephone call is fairly traceable to unlawful action by the Defendant or, instead, is a result of Johansen's deceptive conduct*—inducing the telemarketing representative to believe that Johansen was a customer of Defendant, genuinely interested in the available products and services, and expressly requesting that the representative provide him with additional information. Defendant has already raised this argument in its pending Motion for Summary Judgment [DE 73]. Thus, Johansen has failed to satisfy the typicality prerequisite.

DE 95 at 9.

ii. Adequacy

The Court also agreed that "Johansen is an inadequate representative because of his deceptive conduct" and "he believes engaging in deception is appropriate for a class representative":

> Johansen readily admits that his conduct during the May 27, 2020 and June 2, 2020 telephone conversations was deceptive. (Pl. Dep. [DE 40-1] 171:11-14.) Johansen has what appears to be an extensive and profitable history with lawsuits involving TCPA claims. Johansen acknowledges that he has developed a "typical practice" of deceitful conduct used to succeed in prosecuting TCPA claims. Johansen poses as a customer of the entity

> responsible for the entity initiating the telemarketing call and induces the representative into believing that he is, in fact, an established customer and genuinely interested in the product or service offer, thereby prolonging the purported injury that Johansen claims to have suffered and increasing the potential damages that he could, in theory, recover….
>
> *Most concerning, during his deposition in the present lawsuit, Johansen admits that he believes that engaging in deception is appropriate behavior for a class representative*. (Pl. Dep. [DE 40-1] 172:1-5.) Based on the foregoing, *the Court has serious concerns about Johansen's credibility, honesty, trustworthiness, and motives in bringing forth this putative class action. Thus, the Court finds that Johansen is an inadequate class representative.*

DE 95 at 10-11.

D. Standard of Review

This Court "review[s] the class certification order for abuse of discretion." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id*. (quotation omitted). The Court reviews "issues of law de novo" and "issues of fact for clear error." *Id*.

SUMMARY OF THE ARGUMENT

Johansen sued Defendant Bluegreen under the TCPA and sought to represent a proposed class alleging a violation of the FCC's do-not-call regulations. Among other things, no claim exists under those regulations if the plaintiff lacks Article III standing, has consented to receive the calls, or has an established business relationship with the defendant.

At the crux of the District Court's denial of class certification were Johansen's recordings of two calls about a Bluegreen vacation "credit," DE 9, Ex. A at 00:42; DE 23-1 at 2:22, and his admissions at deposition that he confirmed "false" information about his address and email address, DE 40-1 at 151, and engaged in "conduct" that "was deceptive," DE 40-1 at 171-172.

That testimony and those call recordings (corroborated by Bluegreen recordings) established that he posed as an interested customer, engaged the operator about how to use the vacation credit for over 50 minutes, and—for three independent reasons—is atypical.

First, under Supreme Court and this Court's precedent interpreting Article III of the United States Constitution, Johansen would need to prove at trial that any injuries he alleged were fairly traceable to Bluegreen and not self-inflicted based on the recordings of his individual calls. *Second*, his conduct made his claims "inherently different" from the proposed class members because he repeatedly tried to fulfill his "credit," yet seeks now to disclaim it. Even if the District Court were not to enter summary judgment against Johansen on that issue (like two other District Courts in TCPA cases filed by this same Plaintiff), any trial of his "inherently different" claim would differ substantially from those of proposed class members. *Third*, Johansen seeks treble damages, which requires showing that Bluegreen acted "knowingly or willfully," but his elaborate deception would defeat

his ability to make any such showing, presumably unlike other members of the class.

Johansen repeatedly argues that the TCPA violation occurred "the minute the agent placed a second call to Johansen," and "nothing that happened after that moment has any bearing," Initial Br. at 2-3, but the District Court correctly rejected that argument. Both the transcripts and Bluegreen's business records established that Johansen had a "credit" with Bluegreen before any calls were placed, and his statements during the calls were evidentiary admissions. The District Court also correctly rejected this argument as contrary to his operative pleading. In his operative pleading, Johansen alleges a *first* call occurred on May 26, then the first call that could create liability under the TCPA was the *second* call on the afternoon of May 27, but then seeks to assert liability for at least *five* later calls. At the very least, for each of those five later calls—made after the 30-minute call on the afternoon of May 27 where Johansen falsely engaged the operator and even made false statements about his contact information—he presents atypical issues of standing, his established business relationship, and any treble damages.

As the District Court ruled, Johansen was also inadequate. Johansen admitted—without any qualifications—that he "think[s] it's appropriate for a class representative to engage in deception," DE 40-1 at 172. Even if his "deception" were justified—as he and Amici argue—Bluegreen would cross-examine him

further about it at any trial. Whether profiteer or crusader, what Johansen considers "appropriate" "deception" could well include lying to a jury.

Plaintiff also accuses Bluegreen—heedless of the inconsistency—of "50,000 [] illegal calls to the putative class members" and an "illegal telemarketing campaign" with a "staggering scope" including "280,444 calls," Initial Br. at 16, 34, but the record belies those assertions. As explained below and contrary to Johansen's assertion, even if a person is on the Do Not Call Registry, that person can be lawfully contacted if they consented to be called or have an established business relationship with the caller.

And Plaintiff says nothing about the undisputed evidence and testimony detailed above, pp. 12-16, establishing that proposed class members had consented to receive calls in various ways, over a long period, in various locations and that proposed class members also had established business relationships with Bluegreen. At deposition, Plaintiff's expert admitted that he had not identified in any way—let alone excluded from his tally of calls to the proposed class—individuals with consent or established business relationships. If this Court does not affirm for the reasons offered by the District Court (it should), it should affirm on alternate grounds because individual—not common—issues predominate. This Court should join the overwhelming weight of authority holding that, in TCPA cases, such individualized issues of consent preclude class certification.

Appointing Johansen as a class representative would disserve the proposed class members. Despite his hyperbole, Johansen has never identified any evidence of illegal calls to other proposed class members, but, if they existed, it is difficult to imagine a less qualified class representative. For these reasons and many, many more, the District Court's order denying class certification must be affirmed.

ARGUMENT

"The party seeking class certification has a burden of proof, not pleading," "must affirmatively demonstrate his compliance with Rule 23 by proving that the requirements are in fact satisfied," and "the entire point of a burden of proof is that, if doubts remain about whether the standard is satisfied, the party with the burden of proof loses." *Brown v. Electrolux Home Products, Inc.*, 817 F.3d 1225, 1233-34 (11th Cir. 2016).

I. The District Court Correctly Ruled that Johansen Is Atypical and Inadequate

A. Typicality

The District Court correctly ruled Johansen failed to satisfy Rule 23(a)(3)'s typicality requirement.

"A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Cooper v. S. Co.*, 390 F.3d 695, 713 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457–58, (2006). Typicality "measures whether a

sufficient nexus exists between the claims of the named representative and those of the class at large." *Hines v. Windall*, 334 F.3d 1253, 1256 (11th Cir. 2003). It "require[s] that the named representatives' claims share the same essential characteristics as the claims of the class at large." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000).

The District Court ruled that Johansen's "claim is inherently different [than] those of the putative class members," and "Johansen's conduct necessitates additional inquiries with respect to [] standing, consent, and damages." DE 95 at 8. Though the District Court rightly and principally focused on standing, Johansen's claims under the TCPA itself are also atypical.

1. Article III Standing

As the District Court explained, "a plaintiff is conferred Article III standing when three requirements are met: (1) the plaintiff must have suffered an injury-in-fact that is 'concrete and particularized' and 'actual or imminent'; (2) that injury must be 'fairly traceable to the challenged action of the defendant'; and (3) it must be 'likely . . . that the injury will be redressed by a favorable decision.'" DE 95 at 8 (citing *Cordoba*, 942 F.3d 942 F.3d 1259, 1268 (11th Cir. 2019)).

The District Court then ruled that Johansen's operative complaint revealed that "he now intends to seek damages for each of the [] alleged calls, not just the first two," "[t]he Court must still decide whether the injury allegedly caused by

each telephone call is fairly traceable to unlawful action by the Defendant, or, instead, is a result of the Johansen's deceptive conduct," and that made his claims atypical. DE 95 at 9; *see also* pp. 26-28, above. The District Court was correct.

The District Court correctly focused on the specific claims asserted—including at least five after the first 3:15 p.m. May 27 call—because Johansen must establish Article III standing to assert each and every claim in light of the remedy sought. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). And "the specific facts set forth by plaintiffs to support standing must be supported adequately by the evidence adduced at trial." *Id.* at 2208.

Johansen faces unique hurdles to establishing his standing under both this Court's precedent interpreting Article III in the TCPA context and under the general requirement that any harm not be self-inflicted.

First, as explained above, pp. 6-9, for at least five of the calls at issue, Johansen flunks the most basic test of traceability. This Court has held that if a defendant "could and would have continued to call [] even if it had meticulously followed the TCPA and FCC regulations," there is no injury "fairly traceable to the challenged action of the defendant." *Cordoba*, 942 F.3d at 1272. If—as in *National*

Gas—Johansen's deception created an established business relationship on the May 27 call, *see* pp. 7-9, then he lacks standing to assert claims for damages for all of the following calls because any harm is not traceable to Bluegreen. At the very least, any trial of his individual claims would need focus on this issue.

Second, at any trial, Johansen will need prove that his Article III injuries on the calls after the first May 27 call were caused by Bluegreen, rather than self-inflicted. An injury is not fairly traceable to the defendant and "not justiciable when a plaintiff independently caused his own injury." *Cordoba*, 942 F.3d at 1271 (quoting *Swann v. Sec'y, Ga.*, 668 F.3d 1285, 1288 (11th Cir. 2012)). By falsely confirming facts and engaging in other deception to prolong the 3:15 p.m. May 27 and June 2 calls, *see* pp. 7-9, above, Johansen admitted he caused the calls to take longer, consume more time, made them a greater invasion of privacy, and tied up his phone line for a longer period of time. DE 40-1 at 95-96. Any harm from Johansen's deceptive conduct was not inflicted by Bluegreen but instead Johansen himself. At trial of his individual claim, Johansen would need to address these facts bearing on traceability, rendering his claims atypical.[5]

[5] This Court has repeatedly held that self-inflicted harm is not traceable to the acts of the defendant. *See, e.g.*, *Muransky v. Godiva Chocalatier, Inc.*, 979 F.3d 917, 931 (2020) (en banc); *Swann v. Sec'y, Ga.*, 668 F.3d 1285, 1288 (11th Cir. 2012) (prisoner plaintiff had no Article III standing to assert claim for failure to receive ballot where his "failure to provide the address of the jail on his application independently caused his alleged injury"); *Pevsner v. Eastern AirLines, Inc.*, 493 F.2d 916, 918 (5th Cir. 1974) (plaintiff had no Article III standing to assert claim

Of course, for purposes of that standing analysis, it matters not when the statutory violation occurred but rather when Johansen suffered an injury-in-fact fairly traceable to Bluegreen's conduct that can be redressed. Johansen claims that the first violation of the TCPA occurred "the instant Schumer initiated the second illegal telemarketing call" on May 27. Initial Br. at 35. Even putting aside that neither the statute nor its regulations themselves can confer standing,[6] Johansen still must establish standing for each claim and remedy sought, *see* pp. 3-4, above. If he established a business relationship on the first May 27 call or if all of the harms after that call were self-inflicted, he would need to prove those issues at trial, which are inherently individualized.

2. Consents and Established Business Relationships

Though the District Court correctly focused on standing first, it also cited the

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under Federal Aviation Act because defendant did not charge more than what was billed and plaintiff's attempt to make it do so would have made his injury "self-inflicted"); *see also Schalamar Creek Mobile Homeowner's Assoc. v. Adler,* 855 Fed. Appx. 546, 550 (11th Cir. 2021) (affirming summary judgment where the "residents haven't produced any summary judgment evidence to show that the higher rent is traceable to any misrepresentation or omission—i.e., to the defendant's scheme—rather than to the residents' decisions to buy their homes").

[6]*Cordoba*, 942 F.3d at 1272 ("If the injury asserted by unnamed putative class members is just that DIRECTV violated regulations under the TCPA," "that claim runs smack into the *Spokeo* problem of asserting a 'bare procedural harm' untethered to a concrete and particularized injury in fact."); *see also, e.g.*, *Muransky v. Godiva Chocaliter, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc); *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1002 (11th Cir. 2020).

statute itself as eliminating liability for "a call or message [] to any person with that person's prior express invitation or permission [or] to any person with whom the caller has an established business relationship." DE 95 at 5 (citing 47 U.S.C. § 227(a)(4)). And the District Court correctly ruled that Johansen's claims present issues of consent and the existence of an established business relationship "inherently different" from those of proposed class members. DE 95 at 8.

Johansen's individual claim and how it would be tried well illustrate how proving any of these claims would require individualized proof and that his claim is atypical. To determine whether Johansen himself had an established business relationship, any jury would have to consider Bluegreen's business records establishing his "credit" before receiving the first call. *See* pp. 6-7, above. And that jury would also need consider whether Johansen on the first 3:15 p.m. May 27 and June 2 calls, by confirming outdated contact information falsely, engaging the operator for about fifty minutes about how to use his "credit," and pretending to be a Bluegreen customer, *see* pp. 7-9, above, made evidentiary admissions of the prior established business relationships reflected in Bluegreen's business records.[7]

Separately, Johansen's individual claims for each and every call after the

[7] Johansen's admissions in the call recordings are admissions of a party opponent and admissible under Federal Rule of Evidence 801(d)(2). *See United States v. Williams*, 837 F.2d 1009, 1013 (11th Cir. 1988); *United States v. Pinalto*, 771 F.2d 457, 459 (10th Cir. 1985); Fed. R. Evid. 801(d)(2)(D) Advisory Committee's Note.

first 3:15 p.m. May 27 call—at the very least—hinge on whether his deceptive conduct on the first 3:15 p.m. May 27 call created an established business relationship. Indeed, the United States District Court for the Southern District of Ohio entered summary judgment against Johansen based on similar conduct. That Court ruled that Johansen had created an established business relationship because "his deceptive conduct gave [defendant] an objectively reasonable basis for believing [Johansen] had an established business relationship with [defendant]." *Johansen v. National Gas*, 2018 WL 3933472, at *1, 2-3, 5 (S.D. Oh. Aug. 16, 2018). Since, yet another District Court has entered summary judgment against Johansen based on similar conduct.[8]

As explained above, pp. 12-16, Johansen could not identify any record evidence that a single proposed class member other than Johansen did not consent to receive calls or have an established business relationship with Bluegreen. But each does have an individual history, spanning years, *see* pp. 12-16, above, and Johansen's history is—to put it charitably—very unique. At best for Johansen, it would lead to an individualized, atypical trial of his claims.

[8] In *Johansen v. Efinancial LLC*, No. 2:20-CV-01351-DGE, 2022 WL 168170, at *3–5 (W.D. Wash. Jan. 18, 2022), the United States District Court for the Western District of Wisconsin entered summary judgment against Johansen based on the defendant's business records establishing consent, in combination with Johansen's continued interest in an insurance quote on the call itself because "it is reasonable to conclude that by sharing such detailed information there was an interest in an insurance quote."

3. Damages

Finally, the District Court correctly ruled that "Johansen's claim differs from those of putative class members" on the issue of "damages."

Johansen's operative complaint seeks treble damages, DE 74 ¶ 70, for Bluegreen "willfully or knowingly" violating the TCPA and its implementing regulations, 47 U.S.C. § 227(c)(5). This Court has ruled that, to recover treble damages under the TCPA, "[t]he requirement of 'willful[] or knowing[]' conduct requires the violator to know that he was performing the conduct that violates the statute." *Lary v. Trinity Physician Financial*, 780 F.3d 1101, 1107 (11th Cir. 2015).

Even if Johansen's deceptive conduct were not relevant to liability—it is—that conduct would be presented at trial on his claim for treble damages, particularly for the calls after the first 3:15 p.m. May 27 call. When Johansen affirmatively deceived Bluegreen by falsely confirming outdated contact information and posing as a customer on that May 27 call, pp. 7-9, above, he eliminated the possibility that Bluegreen was acting "willfully or knowingly" on both that call and future calls. For that reason too, the trial of his individual claim would be highly atypical.

* * *

Johansen's central argument to the contrary is that a TCPA violation

occurred the moment the first 3:15 p.m. May 27 call connected, but that argument is contrary to his operative pleading, the record, and the law. As explained above and the District Court ruled, p. 30, Johansen's operative pleading asserts claims for at least five calls following that first May 27 call. At any trial, his conduct on that call would be critical to his Article III standing, and the FCC's regulations creating liability cannot confer standing. Even under those regulations, Johansen's statements on both calls serve as evidentiary admissions consistent with Bluegreen's business records showing a prior established business relationship before any calls were placed. Johansen's statements on the 3:15 p.m. May 27 call also created an established business relationship that eliminated liability *at least* for the later calls, and his statements on both the 3:15 p.m. May 27 call and the June 2 call would be relevant to whether Bluegreen acted "willfully or knowingly" on those calls and later calls. Even if the District Court does not enter summary judgment on any of these issues against Johansen (like two other District Courts), Johansen's claim would need to present evidence and testimony to overcome all of these hurdles at any trial.

This idiosyncratic Plaintiff is atypical.

B. Adequacy

The District Court also correctly ruled that Johansen failed to satisfy Rule 23(a)'s adequacy requirement. The District Court found that Johansen "readily

admit[ted] his conduct . . . was deceptive," has a history of engaging in such deception, and was most disturbed by the fact that Johansen admitted—without qualification—that he "believe[s] that deception is appropriate behavior for a class representative," DE 40-1 at 172. *See* DE 95 at 9-10. The District Court further found that, "[b]ased on the foregoing, the Court has serious concerns about the Plaintiff's credibility, honesty, trustworthiness, and motives." DE 95 at 11. Based on this record and these findings, the District Court correctly ruled Johansen was inadequate.

"A named plaintiff who has serious credibility problems . . . may not be an adequate class representative." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011); *see also Dubin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990) (collecting cases). As Judge Posner has reasoned, where "there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility to the detriment of the absent class members' claims," the class should not be certified. *CE Design Ltd.* 637 F.3d at 728. Johansen's deposition testimony satisfies that standard readily—it goes to the crux of his case and is so distracting that it is hard to imagine focusing on much else.[9] Far from an abuse of discretion, the District

[9] *See also, e.g., Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998) (affirming denial of class certification where plaintiff "offered differing accounts about the letters that form the very basis for his lawsuit," "would create serious

Court's findings required denying class certification.

This incredible Plaintiff is inadequate.

II. Additional Grounds for Denying Class Certification.

Although the District Court correctly ruled that Johansen was inadequate and atypical and did not reach any other issues, the record further establishes that proof of liability for each and every proposed class member would be individualized and those issues would predominate and drive the resolution of their claims. And this Court "may affirm on any ground that finds support in the record." *Long v. Comm'r of IRS*, 772 F.3d 670, 675 (11th Cir. 2014).[10]

A. Individual Issues Predominate

"To certify a Rule 23(b)(3) class" seeking damages, "the [p]laintiffs must demonstrate [] that questions of law or fact common to class members predominate over any questions affecting only individual members." *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009). "[A] district court must first identify the parties' claims and defenses and their elements" and "should then classify these issues as common questions or individual questions by predicting how the parties

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concerns as to his credibility at any trial," and "[t]he district court was in the best position to assess the potential impact"); *Hively v. Northlake Foods, Inc.*, 191 F.R.D. 661, 669 (M.D. Fla. 2000); *Armour v. City of Anniston*, 89 F.R.D. 331, 332 (N.D. Ala. 1980), *aff'd on other grounds*, 654 F.2d 382 (5th Cir. Unit B 1981).

[10] *See also Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 862 (11th Cir. 2012) (affirming denial of class certification motion and also affirming based on alternative ground of lack of subject matter jurisdiction).

will prove them at trial." *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016). "[I]ndividual questions are ones where the evidence will var[y] from member to member." *Id.* "If the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues (made relevant only through the inclusion of these new class members) are important." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009).

Individual—not common—issues predominated here on five separate issues central to liability:

1. Standing

"Every class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. And this Court has held that Article III's traceability requirement in the TCPA context requires that proposed class members show that the defendant could not "have continued to call them even if it had meticulously followed the TCPA and FCC regulations," and the implications of that issue must be decided at class certification. *Cordoba*, 942 F.3d at 1264-65, 1272. In other words, at any trial, Johansen must establish that the proposed class members had not consented and had no established business relationships to meet the traceability requirement and, in moving for class certification, how they can do so consistent with the predominance requirement.

Johansen here—despite undisputed evidence of proposed class members' consents and established business relationships—has offered no way to identify those who did not consent or lacked established business relationships. As explained above, pp. 12-16, 37-38, the only way to do so would be to delve into each proposed class members' history of consent, form of consent, and history of transactions with Bluegreen, which might include the recordings of the calls themselves on which any consent might have been modified orally. That inquiry is potentially dispositive and inherently individualized.

2. Consent

The TCPA places the burden of proving consent on the Johansen, but, as this Court has held, regardless of who bears the burden of proof on the issue, if the "called party" has given consent to receive "calls," that eliminates liability. *E.g.*, *Mais*, 768 F.3d at 1118; *see also* pp. 4-5, above.[11]

[11] Though this Court has explained that the defendant bears the burden of proving consent, *Mais*, 768 F.3d at 1118, the TCPA itself requires Plaintiff to prove the absence of consent for three reasons: (1) Generally "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); (2) the TCPA excludes from the definition of "telephone solicitation" and eliminates liability in cases where the caller has the "person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). And where "the plain meaning" of an "element[] giving rise to liability" requires the plaintiff to prove a related statutory definition, the plaintiff bears the burden of proof. *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1111-12 (11th Cir. 2008); and (3) the TCPA itself does not make showing "prior express consent" an affirmative defense, but elsewhere does make the existence of adequate policies and procedures an affirmative defense. 47 U.S.C. §

The overwhelming weight of authority holds that when the defendant identifies evidence of consent given in various ways, at various times, from various sources, individual issues predominate and no class can be certified. In *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839 (7th Cir. 2022), for example, the Seventh Circuit affirmed the denial of class certification in a TCPA case involving faxes because the plaintiff showed no way to prove the absence of consent on a class-wide basis. This Seventh Circuit there ruled that "prior express permission was the key issue for the proposed class to recover," the telephone numbers faxed were collected "in multiple ways" from "franchise agreements that were not uniform," and "there is no generalized proof that can be used to resolve the issue of prior permission on a class-wide basis." *Id.* at 845.[12]

227(c)(5). "It is well-settled that where Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *Ela v. Destefano*, 869 F.3d 1198, 1202 (11th Cir. 2017). And "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Id.* The burden of proving the absence of consent therefore should lie with the Plaintiff.

[12] *See also Sandusky Wellness Ctr. v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468–69 (6th Cir. 2017), *as corrected on denial of reh'g en banc* (Sept. 1, 2017) (no predominance: "many forms would demonstrate that these customers . . . had given the requisite consent" but "identifying these individuals would require manually cross-checking 450,000 potential consent forms against the 53,502 potential class members"); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327–28 (5th Cir. 2008) (individualized issue of whether "fax advertisements were transmitted without the prior express invitation or permission of each recipient" prevented plaintiff from "advanc[ing] any viable theory employing generalized proof concerning the lack of consent with respect to the class ... [which] leads to

The reasoning of *Gorss* these other cases applies with even greater force to require denying class certification here. As explained above, pp. 12-16, consent from the proposed class members here was obtained in various ways, in various locations, both virtual and real, spanning many different states, and spanning many different marketing vendors. *See*, *e.g.*, DE 40-2 at 32-34. Bluegreen had policies and procedures to restrict calls to permission-based leads, *see* pp. 17-18, above; those policies and procedures worked in practice, *see id*.; and Bluegreen provided examples of consents that fell within the proposed class, *see* pp. 12-15, above. Indeed, Plaintiff could not identify a single proposed class member who had not consented to be called, let alone some way to prove the absence of consent on a class-wide basis.

In Johansen's motion for class certification and in the Second Amended Complaint, he tried to sidestep this issue by limiting the class to individuals whose phone numbers Bluegreen obtained prior to 2013 or through referrals. But even from prior to 2013, Bluegreen obtained and has produced written consents. DE 37

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the conclusion that myriad mini-trials cannot be avoided"); *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 89-92 (1st Cir. 2021); *Brodsky v. HumanaDental Ins. Co*., 910 F.3d 285, 291 (7th Cir. 2018); *New Concept Dental v. Dental Res. Sys., Inc.*, No. 17-CV-61411, 2020 WL 3303064, at *9 (S.D. Fla. Mar. 3, 2020); *Sliwa v. Bright House Networks, LLC*, 333 F.R.D. 255, 272 (M.D. Fla. 2019); *Licari Family Chiropractic Inc. v. eClinical Works, LLC*, No. 16-CV-3461-MSS-JSS, 2019 WL 7423551, at *1 (M.D. Fla. Sept. 16, 2019); *Morgan v. Orlando Health, Inc.*, No. 17-CV-1972 GJK, 2019 WL 7469797, at *10 (M.D. Fla. Oct. 23, 2019).

¶ 4. And this Court in *Lucoff v. Navient Solutions*, 981 F.3d 1299, 1305 (11th Cir. 2020) squarely held that if a customer later "reconsented" before receiving a call, it would eliminate any claim. Johansen's proposed class definition, which tries to link numbers provided before 2013 to calls made from 2018 to 2020 and effectively spans a longer time period, involving more potential contacts and transactions with Bluegreen, and did not reduce the number of individualized issues raised about consent—instead, it multiplied them.[13]

3. Established Business Relationships

As discussed on pp. 5-6, there is no liability under the TCPA for calls made to "any person with whom the caller has an established business relationship." 47 U.S.C. § 227(a)(4)(B); 47 C.F.R. § 64.1200(f)(14)(ii).[14] The FCC's 2005 Order interpreting the "established business relationship" or "EBR" definition language

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[13] The single Circuit Court case cited by Johansen in his motion for class certification finding certification appropriate in a TCPA case is inapposite because there—unlike here—"all of the major issues in the case could be shown through aggregate records." *Krakauer v. Dish Network*, 925 F.3d 643, 658 (4th Cir. 2019).

[14] The TCPA also requires the Plaintiff to prove the absence of an established business relationship under governing principles of statutory interpretation: (1) as the party seeking relief, the Plaintiff should bear the burden of persuasion, *e.g.*, *Schaffer*, 546 U.S. at 57-58; (2) the statute excludes from the definition of "telephone solicitation" and eliminates liability in cases where there is an established business relationship," 47 U.S.C. § 227(a)(4), making it "element[] giving rise to liability" and requiring plaintiff to bear the burden of proof, *e.g.*, *Thomas*, 525 F.3d at 1111-12; and (3) the TCPA itself does not make showing an "established business relationship" an affirmative defense, but elsewhere does make the existence of adequate policies and procedures an affirmative defense, 47 U.S.C. § 227(c)(5), presumably intentionally, *e.g.*, *Ela*, 869 F.3d at 1202.

explained that, "during the time a financial contract remains in force between a company and a consumer, there exists an established business relationship, which will permit that company to call the consumer during the period of the 'contract.'" *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 20 F.C.C. Rcd. 3788, 3797 (2005).

Though Bluegreen's business records and the call transcripts established that Johansen had a vacation "credit" and an ongoing, established business relationship with Bluegreen, pp. 6-7, he denied it in two separate declarations and at his deposition, DE 28-1; DE 35-6; 40-1 at 35-37. But that just illustrates that each proposed class member would have their own history transacting with Bluegreen and that the established business relationship for them too must be decided individually.

4. Residential Subscribers

Because Johansen has invoked the TCPA's regulations involving the Do Not Call Registry, Johansen will also be required to prove the calls were made to "residential telephone subscribers." 47 C.F.R. § 64.1200(c)(2).

As explained above, pp. 19-21, the issues of identifying "residential" "subscribers" too will break down in to individualized issues. Johansen's expert testified that he had done nothing to identify residential lines, DE 40-3 at 120-121; the telephone carriers did nothing, DE 40-3 at 123-125, 130, 162-167; and, the

evidence from both Woolfson and the carriers established that they cannot, DE 40-3 at 49-50, 150-152, 156; DE 46 at 14-16; DE 64-1 at 9-10, 14. Woolfson also admitted that he did nothing to identify subscribers, DE 40-3 at 77-79, 150, and testified "I wouldn't be comfortably doing that," *id*., consistent with his prior testimony that it cannot be done reasonably or reliably, *id*. at 77-79. These issues too—also necessary for plaintiffs to establish liability—must be decided individually.

B. Common Issues Will Not Drive the Resolution of this Case

As the Supreme Court has held: "What matters to class certification" is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011). For all of the reasons that Johansen did not and cannot establish predominance on the issues necessary to establish liability, *see* pp. 42-49, any trial would not generate common answers that could "drive the resolution of the litigation." There is no commonality here.

III. Johansen's Policy Arguments Are Contrary to "Federal Law" and the Undisputed Record

Amici and Johansen argue that affirming the denial of class certification would "afford a free pass to defendants who commit wholesale violations of federal law," Initial Br. at 53, but that argument is contrary to "federal law," the undisputed record, and the District Court's factual findings:

(1) *The "Federal Law" of Rule 23 and Article III*: "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). And "courts must be mindful that the Rule [23] as now composed sets the requirements they are bound to enforce," *Amchem Products v. Windsor*, 521 U.S. 591, 620 (1997), which were "tuned to the instruction that rules of procedure 'shall not abridge…any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). Indeed, the courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted"—such as general notions of fairness to victims of asbestos. *Id*. at 622. That is why the Supreme Court and this Court have ruled over and over that, under Rule 23, district courts must conduct a "rigorous analysis." *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *Brown v. Electrolux Home Products, Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016).

(2) *The Supreme Court and the Eleventh Circuit Have Rejected Johansen's Crude Characterization of the TCPA's Purpose:* As explained above, pp. 2-3, Congress enacted the TCPA to address "[u]nrestricted telemarketing" to protect "privacy rights" but also recognized the need to balance "commercial freedoms of speech and trade." In the context of addressing the TCPA's definition of autodialers, the Supreme Court rejected arguments based on "broad privacy-

protection goals." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1172 (2021), which could not override the "narrow statutory design." *Id.* So too here.

(3) *There Were No "Wholesale Violations of Federal Law" Here*: As explained above, pp. 12-16, Bluegreen produced undisputed evidence and testimony establishing members of the proposed class had consented to be called and also had established business relationships. Indeed, Johansen has failed to identify a single proposed class member who received a call despite being listed in the Do-Not-Call Registry who did not consent or have an established business relationship. And encouraging more meritless TCPA lawsuits serves no constructive purpose.[15]

(4) *Johansen Embraced Deception as Appropriate, Making Him Different from Almost All Other Proposed Class Representatives*: Johansen is rare among even professional TCPA plaintiffs. He falsely confirmed outdated contact information, *see* pp, 13-15, above, which, if anything, would have frustrated his

[15] Though "[f]ar too many Americans are receiving far too many fraudulent telemarketing calls," the current statutory and regulatory framework has not remedied that problem. *In re the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135 (FCC Commissioner Pai dissenting). Instead, "trial lawyers have found legitimate, domestic businesses a much more profitable target." *Id.* "So it's no surprise the TCPA has become the poster child for lawsuit abuse." *Id. See also* Brief for Amicus Curiae Chamber of Commerce of the United States of America, pp. 15-17, *Charter Communications, Inc. v. Gallion*, 2019 WL 6524905 (U.S. 2019).

stated goal of identifying the caller. DE 40-1 at 151. Judge Posner has recognized in a proposed TCPA class action that "[a] class is disserved if its representative's claim is not typical" or "adequate." *CE Design Ltd. v. King Architectural*, 637 F.3d 721, 724-25 (7th Cir. 2011). As the District Court explained, "Johansen admits that he believes that engaging in deception is appropriate behavior for a class representative." DE 95 at 11. He made that admission without any qualifications at deposition and it remains unqualified—at any trial, Johansen would need defend that he did not believe telemarketing such a scourge that it justifies all deception, including, for example, taking the witness stand and lying. The District Court correctly cabined its decision to the facts here, meaning it would disqualify few professional plaintiffs and even fewer (if any) non-professional plaintiffs.

* * *

Most importantly, in *Facebook*, the Supreme Court also made the obvious point that a statute's purpose cannot override its plain meaning. It explained that the plaintiffs there had a "quarrel [with] Congress" and that is "no justification for eschewing the best reading of the statute." *Facebook*, 141 S. Ct. at 1173. Johansen's characterization of the TCPA's purpose here similarly cannot override the plain meaning of Federal Rule of Civil Procedure 23, let alone the United States Constitution.

CONCLUSION

Bluegreen respectfully requests that this Court affirm the District Court's Order Denying Class Certification.

Dated: May 16, 2022

Respectfully submitted,

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