RECORD NO. 22-10695

In The

United States Court Of Appeals

For The Eleventh Circuit

KENNETH JOHANSEN,
individually and on behalf of a class of all persons and entities similarly situated,

Plaintiff - Appellant,

v.

BLUEGREEN VACATIONS UNLIMITED, INC.,
a Florida corporation,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
HON. RODNEY SMITH - 9:20-CV-81076-CIV-SMITH

PLAINTIFF-APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for Plaintiff-Appellant hereby certifies that to the best of counsels' knowledge, the following is a complete list of trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Honorable Rodney Smith (United States District Judge for the Southern District of Florida and Judge below);
2. Abdo, John E. (Vice Chair of Board of Directors of Bluegreen Vacations Corporation);
3. Bailey & Glasser LLP (Plaintiff's counsels' firm);
4. Barrett, John W. (Plaintiff's counsel);
5. Bluegreen Vacations Unlimited, Inc. (Defendant and wholly owned subsidiary of Bluegreen Vacations Corporation);
6. Bluegreen Vacations Corporation (Appellee's parent company);

7. Bluegreen Vacations Holding Corporation (NYSE: "BVH") (Corporate Parent of Bluegreen Vacations Corporation and Bluegreen Vacations Unlimited, Inc.);

8. Brueckner, Leslie A. (Plaintiff's counsel);

9. de Zayas, Veronica Louise (Defendant's counsel);

10. Hogan, Benjamin J. (Plaintiff's counsel);

11. Johansen, Kenneth (Plaintiff);

12. Kaufman, Avi R. (Plaintiff's counsel);

13. Kaufman PA (Plaintiff's counsel's firm);

14. Levan, Alan (CEO and Chair of Board of Directors of Bluegreen Vacations Corporation);

15. Mead, Grace Lee (Defendant's counsel);

16. Nathan, Andrea Naomi (Defendant's counsel);

17. Onorati, James Joseph (Defendant's counsel);

18. Paronich, Anthony (Plaintiff's counsel);

19. Paronich Law P.C. (Plaintiff's counsel's firm);

20. Schumer Management & Consulting, LLC;

21. Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. (Defendant's counsels' firm);

22. Woodbridge Holdings, LLC (Appellee's affiliate)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

INTRODUCTION[1]

A finding that a class representative's claim is typical of those of other class members depends not on ancillary facts unrelated to the legal claim asserted for putative class members, but on *the claim itself*. And adequacy depends on the proposed representative's ability to represent the class and the absence of any conflicts between the representative and class members.

Plaintiff made those arguments in his opening brief, but Defendant/Appellee Bluegreen failed to address them. It failed even to address Plaintiff's argument that (1) a TCPA claim for Do-Not-Call (DNC) violations is established when a second telemarketing call is initiated to a phone number listed on the DNC Registry; and (2) the *only* calls at issue here are the first two placed by Defendant's telemarketer to Plaintiff Johansen. It is those two calls that form the exclusive basis for Plaintiff's TCPA claim, and it is those two calls that establish Plaintiff's claims as typical of those of the class, regardless of the lengths he took in subsequent calls to identify who was behind them. The subsequent calls are legally

[1] Plaintiff's Opening Brief is cited as "OB" and Bluegreen's Answering Brief is cited as "AB."

irrelevant (OB 18, 26–27, 34–35)—and yet Defendant's arguments focus on why *those* calls make Plaintiff an atypical and inadequate representative.[2]

The district court made the same error. Like Defendant, the court incorrectly assumed that Plaintiff's claim is premised on *all* the telemarketing calls placed by Bluegreen's agent—not just the first two clearly illegal calls. Based on that incorrect assumption, the court held that (1) Plaintiff's claims are atypical because, in the court's view, those subsequent calls create unique issues as to standing, consent, and damages; and (2) Plaintiff is an inadequate representative because he "deceived" Bluegreen into thinking he was an interested customer. Plaintiff's opening brief explained that his claim is based on and he is seeking damages for the *first* two calls. As to those two calls, there is no basis for finding Plaintiff atypical or inadequate, because his claim arose before he even spoke a word to Defendant's telemarketer. *See* OB 26, 31.

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[2] For example, Bluegreen argues that the *subsequent* five calls created an "established business relationship," which is an affirmative defense to liability under the TCPA. AB 36–38. Based on those calls, Defendant also argued that Plaintiff lacks standing to sue because his damages were supposedly self-inflicted. AB 33–35. Those arguments have no bearing on the first two calls. Indeed, the district court recognized that Plaintiff *does* have standing as to the first two calls, and Defendant admits as much in its brief. AB 35; *infra* Part II.A.

Bluegreen nonetheless focuses entirely on the five calls *after* the establishment of the TCPA violation, arguing that they show Plaintiff is atypical (because he invited further dealing with Defendant's agent to identify the caller) and that he is an inadequate representative (because he pretended to be interested in Defendant's product). But none of that is relevant to the actual issues presented in this appeal.

This appeal is far simpler than Defendant makes it out to be. Plaintiff's claim is based only on the first two calls from Bluegreen's telemarketer. As the district court already held under this Court's precedent, TCPA liability as to those two calls attached the minute Johansen received the second call and before he ever spoke a word to the telemarketer. ECF No. 70 at 5. Johansen's conduct during the subsequent calls has no bearing on his claim, typicality, or adequacy as a class representative because as to those calls, Johansen is indistinguishable from every other member of this putative class. For that reason alone, Defendant's arguments fail.

ARGUMENT

Bluegreen devotes a substantial portion of its brief to facts and arguments that were never addressed by the district court and have

nothing to do with the issues in this appeal. Thus, Bluegreen argues (AB 42-52) that this class could never be certified because there are too many common issues as to standing, consent, and predominance. And Bluegreen spends the bulk of the fact section of its brief (AB 16-22) setting forth facts to support those arguments. But none of that matters. The *only* issue on appeal is whether the district court erred in finding that this class cannot be certified because Plaintiff is atypical and inadequate to serve as class representative. The court never reached issues of commonality and predominance, as Bluegreen well knows. Yet Bluegreen is asking this Court to decide those issues now, even though the lower court never reached them.

Bluegreen's errant focus speaks volumes as to its confidence in the *actual* ruling on appeal. The district court's ruling was wrong, so Bluegreen must sidetrack the Court with irrelevant facts and argument. As to the *actual* issues on appeal—typicality and adequacy—Bluegreen's attempted defense of the district court does not withstand scrutiny, as we now explain.

I. THIS CASE IS, AND HAS ALWAYS BEEN, ABOUT THE *FIRST TWO* CALLS TO PLAINTIFF BEFORE HE EVEN SPOKE TO BLUEGREEN'S TELEMARKETER.

As previously explained (OB 7–9), a telemarketer violates the TCPA's do-not-call provisions by initiating at least two calls in twelve months to a residential telephone number listed on the DNC Registry. *See* 47 C.F.R. § 64.1200(c)(2); 47 U.S.C. § 227(c)(5). There is no dispute that Plaintiff Johansen's telephone number is on the DNC Registry. And there is no dispute that he received two calls to his DNC-Registered phone from Bluegreen's telemarketer before speaking with anyone. That's the violation and the basis for his claim. Plaintiff is to represent the class based on his claim that arose from those two calls.

Two calls matter for purposes of this appeal:

- May 26, 2020 – Bluegreen's agent initiated a call to Plaintiff, Plaintiff answered, and the call disconnected after 30 seconds. AB 7; ECF No. 74 ¶ 33; ECF No. 95 at 2.

- May 27, 2020 – Bluegreen's agent initiated a call to Plaintiff, Plaintiff answered and then engaged with the telemarketer. ECF No. 74 ¶¶ 34–36; ECF No. 95 at 2.[3]

[3] Bluegreen cannot even admit this much without obfuscation. In the section of its brief entitled "The Calls to Johansen," it admits that, on "May 26, 2020, Johansen received a call that disconnected after 30 seconds," but then confuses: "Though Johansen alleges that he received a total of nine

Plaintiff's TCPA claim accrued when Bluegreen's agent initiated the second call to him on May 27, 2020. *Nothing else is relevant to Plaintiff's claims or class certification.*

There were more calls, but they were alleged to provide the full picture of Bluegreen's dealings with Plaintiff (and to prevent Bluegreen from claiming that Plaintiff had only told part of the story). The Second Amended Complaint mentions that Plaintiff was contacted by the telemarketer four more times on May 27, 2020, and once on June 2, 2020, but it does not seek damages for those calls. ECF No. 74 ¶ 37. After setting forth the single cause of action, Plaintiff qualifies the relief he seeks as for only those calls that violate the TCPA as allowed by law: "As a result of Defendant's . . . *violations* of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the Class *presumptively* are entitled to an award of up to $1,500 in damages for each and every call made." *Id.* ¶ 70 (emphasis added). Plaintiff then seeks "[a]n award to Plaintiff and the Class of damages, *as allowed by law*." *Id.* at 11 ¶ F (emphasis added). This is always the case with

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calls, 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." AB 7.

any complaint. Liability for the *allegations* in a complaint are always limited to actual violations of the law, and a Plaintiff is not required to affirmatively limit his claims in a complaint.[4]

The reference to "at least four more" calls on May 27 and being "called again" on June 2 is part of the relevant factual story. Plaintiff did not intend to seek damages for those calls, as stated in the First Amended Complaint. *See* ECF No. 15 ¶ 36 (stating that Plaintiff is not seeking damages for the "last four May 27, 2020 calls or the June 2, 2020 call."). The district court was confused because that express disavowal was removed from the Second Amended Complaint, but that should not be a "gotcha" as Bluegreen argues. As explained above, that does not change the claim, and the relief sought is limited to only those calls that violate the law. ECF No. 74 ¶ 70; *id* at 11 ¶ F. To the extent that there is any ambiguity, Plaintiff is willing to amend his complaint and/or stipulate

[4] Our adversarial system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (citing *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)); *see also DeRoy v. Carnvial Corp.*, 963 F.3d 1302, 1308 n.7 (11th Cir. 2020) ("[P]leading in the alternative is permissible in federal courts.").

that he does *not* seek damages for the calls subsequent to the first May 27, 2020 call.[5]

Moreover, it is well established that complaint allegations must be viewed in the light most favorable to the Plaintiff. *Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1139 (11th Cir. 2020). To the extent the Second Amended Complaint is ambiguous with respect to whether it seeks damages for the calls subsequent to the first two, any ambiguity should be construed in favor of the Plaintiff—i.e., that he is not seeking damages for the subsequent calls. This is also consistent with the record.

II. BLUEGREEN'S TYPICALITY ARGUMENTS LACK MERIT.

Bluegreen acknowledges this Circuit's simple test for determining Rule 23(a)(3) typicality: "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical." AB 32 (citing *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir.

[5] Bluegreen argued below that Plaintiff's interactions with Bluegreen's representative on the *second* call created an established business relationship, and therefore the second call was not illegal. But Bluegreen concedes, and cannot argue otherwise, that the second call—the "first call on May 27"—was made and received before the possible creation of an EBR. AB 37–38 ("[e]very call after the first 3:15 p.m. May 27 call—at the very least—hinge on whether his deceptive conduct . . . created an established business relationship.").

2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457–58, (2006)). In other words, there must be a "sufficient nexus" between the claims of the class representative and those of the class at large, *Hines v. Windall*, 334 F.3d 1253, 1256 (11th Cir. 2003), and those claims should "share the same essential characteristics." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000).

Here, Plaintiff possesses the same interest (prohibiting telemarketing calls to numbers on the DNC Registry) and suffered the same injury (two calls to his DNC Registered phone in twelve months) as class members. Because his claim accrued when the second call rang to his phone, his claim shares the precise elements and characteristics of any class member. *Krakauer v. Dish Network*, 925 F.3d 643, 655, 663 (4th Cir. 2019) (explaining this "simple and administrable" claim requires only "two things: a number on the Do-Not-Call registry, and two calls made to that number in a year.").

In arguing to the contrary, Bluegreen argues the facts and attempts to embellish the district court's suggestion that Plaintiff lacks typicality because there are individualized questions as to "standing, consent, and damages." *See* AB 26–27 (citing ECF No. 95 at 8). None of these arguments has any basis in law or fact. Bluegreen's "suggestion otherwise is nothing

more than an attempt to dismember the TCPA, converting a simple remedial scheme into a fact-intensive quarrel over how long a party was on the line or how irritated it felt when the phone rang. Obviously, Congress could have created such a cumbersome scheme if it wanted to. It instead opted for a more straightforward and manageable way of protecting personal privacy, and the Constitution in no way bars it from doing so. *Krakauer*, 925 F.3d at 654.

A. Standing has no bearing on the calls at issue in this case.

The crux of Bluegreen's argument on standing is that, because Plaintiff engaged with Bluegreen during the last *five* calls, his injuries were self-inflicted and aren't traceable to the defendant—and thus he lacks standing. AB 34. This argument fails because, as explained above, Plaintiff's claim is based on and he is *only* seeking recovery for the *first two* calls, and as to those calls, *the district court agreed that Plaintiff has standing*. ECF No. 70 at 4–5.

Thus, in denying Bluegreen's motion to dismiss, the court held that Plaintiff has alleged specific facts sufficient to establish standing. *Id.* The district court zeroed in on those first two calls, stating that "Plaintiff alleges that Plaintiff received more than one unwanted telemarking phone call—on May 26, 2020 and again on May 27, 2020—from Defendant, despite the

fact that Plaintiff's residential telephone number was listed on the National Do Not Call Registry." *Id.*

Critically, the court then held that, "[a]ccording to the Eleventh Circuit's ruling in *Cordoba* [*v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019)], whether or not Plaintiff affirmatively engaged with the telemarketer after receiving the telephone call is irrelevant — *the injury in fact occurred when Plaintiff received the second unwanted call*." *Id*. at 5 (emphasis added). Thus, the court held, Plaintiff unquestionably has standing as to those two calls. *Id*.

Bluegreen never mentions this holding. Instead, it cites the court's *subsequent* erroneous ruling that Plaintiff's claim is atypical because he may lack standing as to the *last* five calls. Based on that alone, Bluegreen argues Plaintiff is atypical. *See* AB 34 (arguing that "for at least five of the calls at issue, Johansen flunks the most basic test of traceability."). But Bluegreen's premise is incorrect because Plaintiff is solely suing about the first two calls. As to those calls, there can be no argument that Plaintiff lacks standing or that his injuries were "self-inflicted." Plaintiff's claim accrued after the first two calls rang to his phone and before he said a single word to the telemarketer. For those calls, there is no question that he has

standing to sue, just like all of members of this putative class—and the district court *agrees* with Plaintiff on that key point. ECF No. 70 at 4–5.

B. Bluegreen's contention that it had an "Established Business Relationship" with Plaintiff lacks merit.

Bluegreen also argues that "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." AB 37 (citing ECF No. 95 at 8). This argument also fails on several fronts.

1. Defendant has the burden of showing an Established Business Relationship, not Plaintiff.

As a threshold matter, Bluegreen errs when it argues that Plaintiff bears the burden of proving the *absence* of a viable affirmative defense such as an Established Business Relationship ("EBR"). *See, e.g.*, AB 47 n.14 ("The TCPA also requires the Plaintiff to *prove the absence* of an established business relationship."). That's plainly wrong as a matter of law.

The TCPA's protections to those with numbers listed on the DNC Registry are set forth at 47 C.F.R. § 64.1200(c), and prohibit all telephone solicitations to numbers on the Registry with two exceptions: (1) where the consumer provides the seller with his prior express consent in writing

to receive telemarketing calls; or (2) where the caller has an EBR with the consumer. *See* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(f)(5). Telemarketers, like Bluegreen, who claim an EBR exemption for telemarketing calls made to numbers listed on the Do Not Call Registry face a heavy burden.[6] A telemarketer who claims an EBR exemption "must be prepared to provide clear and convincing evidence of the existence of such a relationship." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673, at ¶ 109-115 (F.C.C. June 26, 2003) (recognizing the EBR exemption arises due to the relationship of the defendant with the consumer prior to the calls at issue). This is because the limited purpose for creating the EBR exemption to the TCPA was to allow companies to communicate with their existing customers. *Id.* ("We conclude that, based on the record, an established business relationship exemption is necessary to allow companies to communicate with their existing customers").

[6] Like every provision of the TCPA, and contrary to Bluegreen's representations, the EBR exemption must be construed liberally in favor of consumers and against telemarketers. *See Mey v. Honeywell Intern., Inc.*, No. 2:12-cv-1721, 2013 WL 1337295, at * 1 (S.D.W. Va. Mar. 29, 2013) ("The TCPA is a remedial statute and thus entitled to a broad construction.").

The existence of an EBR is an affirmative defense. *See United States v. Dish Network, LLC*, 256 F. Supp. 3d 810 (C. D. Ill. Jun. 5, 2017) ("The [EBR] exception is an affirmative defense"); *Krakauer v. Dish Network, LLC*, 311 F.R.D. 384, 397 (M.D.N.C. 2015) ("the absence of an [EBR] is not an element of a TCPA claim that [plaintiff] has to prove"); *Charvat v. Home Depot U.S.A., Inc.*, No. 1:17-CV-01446-ELR, 2017 U.S. Dist. LEXIS 227309, at *5-6 (N.D. Ga. Nov. 6, 2017) (same). Federal district courts in Florida have agreed. *See FTC v. First Choice Horizon LLC*, No. 6:19-cv-1028-Orl-40LRH, 2020 U.S. Dist. LEXIS 54238, at *7 (M.D. Fla. Feb. 12, 2020) (refusing to strike and acknowledging that an established business relationship is an affirmative defense); *Denova v. Ocwen Loan Servicing, LLC*, No. 8:17-cv-02204-23AAS, 2018 U.S. Dist. LEXIS 66956, at *11-12 (M.D. Fla. Jan. 25, 2018) ("Ocwen submits that it included its Third Affirmative Defense so it could argue that some of its calls were to a residential line, for which the 'established business exception' is a valid defense"). And it is fundamental that the party asserting an affirmative defense bears the burden of proof. *See Thorsteinsson v. M/V Drangur,* 891 F.2d 1547, 1551 (11th Cir. 1990) (citing *Superior Oil Co. v. Devon Corp.,* 458 F. Supp. 1063, 1071 (D.Neb.1978) (holding the asserting party bears the burden of proving an affirmative defense)).

Ignoring all this authority, Bluegreen insists that Plaintiff must affirmatively *disprove* the existence of an EBR, and that it must do so at the class certification stage as part of the typicality determination. That is not, and should not be, the law.

2. Bluegreen has failed to proffer *any* facts to show an EBR here.

Against that backdrop, Bluegreen has offered no facts—none—to suggest that it had an EBR with Johansen at the time it violated the TCPA. On this point, Bluegreen first argues that Plaintiff had an EBR with Bluegreen *even as to the first two calls* because it purportedly issued a credit to him in 2010, without his knowledge, interest, or consent. *See* AB 37. That alone is insufficient to infer an EBR. As Plaintiff testified in a sworn declaration in this case, "I have never purchased a vacation package from Bluegreen," and "entities telemarketing vacation claims attempt to lure consumers into a purchase asserting they will 'lose' a credit if they do not purchase the partially 'discounted' vacation package." ECF No. 28-1.

Bluegreen's argument is that it can manufacture an EBR out of thin air by unilaterally declaring that a potential customer has a credit they never requested. And Bluegreen doubles down. It also argues that this

unilateral credit lasts in perpetuity—here more than ten years—as a justification for a telemarketing call. The district court properly rejected that argument as a matter of law, recognizing an EBR lasts only "eighteen months" and explaining it was not "convinced that a purported vacation package purchased through a travel agency constitutes an ongoing financial agreement." ECF No. 70 at 6–7. Like so much of Bluegreen's position, this too turns on resolving disputed facts. *Id.*

Bluegreen also argues that Plaintiff's allegedly deceptive conduct "on the first 3:15 p.m. May 27 call" created an EBR with Bluegreen. AB 38. That argument fails, first, as a matter of law, because an EBR cannot arise from a solicitation call that itself was illegal. There must be a voluntary two-way communication between the company calling and the consumer. *See* 47 C.F.R. § 64.1200(f)(5); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673 at ¶ 109-115 (F.C.C. June 26, 2003) (FCC emphasizes that in order for an EBR to arise, the communication from which it arises must be voluntary).

In addition, for an EBR to arise based only on such a voluntary communication, the communication must be initiated by the consumer, not the company. *See* 47 C.F.R. § 64.1200(f)(5) (EBR arises when a *subscriber*

inquires); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673 at ¶ 1114 (F.C.C. June 26, 2003) (explaining that the type of "inquiry" that gives rise to an EBR is one where the consumer has made an inquiry as to a defendant's goods or services). Here, all the calls were made by Schumer, not Plaintiff.

Perhaps most importantly, even *if* an EBR could be created during a call that violated the TCPA in the first instance, that call itself *still* violates the TCPA even if the subsequent calls do not. As the cases Bluegreen cites in its brief make clear (*see* AB 36–39), it is only calls *after* the call during which an established business relationship is created that have the potential to be excused based on the existence of the EBR.

Thus, even if Plaintiff created an EBR with Bluegreen during the second illegal call, that merely cuts off TCPA liability as to *subsequent calls*. He still has a cause of action as to the first two calls—and that is all that Plaintiff is seeking damages for in this case.

Notably, in support of its claim that an EBR may arise from a telemarketing call made to a Registry-listed number in violation of the TCPA, Bluegreen ignores the text of the EBR exemption and its regulatory and statutory history and, instead, cites to *Johansen v. Nat'l Gas & Elec.*, No.

2:17-cv-587, 2018 WL 3933472 (S.D. Ohio Aug. 16, 2018) to suggest Johansen created an EBR in this case during the second call. AB 38. But as an earlier opinion in that case makes clear, the initial telemarketing call made by National Gas & Electric to Johansen's Registry-listed Number was disconnected before Johansen was able to identify the calling party. *Johansen v. Nat'l Gas & Elec. LLC*, No. 2:17-CV-587, 2017 WL 6505959, at *3 (S.D. Ohio Dec. 20, 2017). To identify who had called him, Johansen *himself* contacted National Gas & Electric. *Id.* at *8-9. During that call, Johansen expressed an interest in the goods and services offered by National Gas to identify the calling party. *Id.* But because Johansen initiated the call back to National Gas, the court found that he created an EBR—even if his intent was to identify the party calling him in violation of the TCPA. *Id.*

Here, in contrast, Johansen did not call Bluegreen, ever. In fact, by listing his Number on the DNC Registry, he lawfully forbade Bluegreen from calling him. Johansen did not "voluntarily" engage with Bluegreen. Bluegreen called Johansen in contradiction to his legally binding instruction not to call. Unlike in *National Gas & Electric*, here Johansen did not "initiate" any call about Bluegreen's goods or services. Bluegreen called

him and tried to solicit his business. Bluegreen's "solicitation" is not Johansen's "inquiry," and the law does not allow it to be construed as such.

Notwithstanding, even if this Court were to hold that an illegal telemarketing call initiated by a telemarketer can create an EBR, Johansen has *still stated a claim*, because he received the two telemarketing calls from which his claim arises *before* a word was spoken and *before* an EBR could possibly have existed.

C. Bluegreen's consent argument lacks merit.

Bluegreen also suggests that Plaintiff isn't typical of the class because he "consented" to receive telemarketing calls from Schumer. *See* AB 36-37. This argument is linked to Bluegreen's EBR argument; thus, Bluegreen seems to argue that Plaintiff's EBR with Bluegreen constituted or is evidence of consent. And it suggests that Plaintiff's consent to an EBR with Bluegreen renders him atypical for purposes of class representation.

This argument fails for the same reason Bluegreen's EBR argument fails. First, Bluegreen wrongly argues that the "TCPA places the burden of proving consent on the [sic] Johansen." AB 44. But that's not the law, and Bluegreen knows it. AB 44 n.11 ("[T]his Court has explained that the defendant bears the burden of proving consent."). Like the EBR defense,

the burden of establishing consent in TCPA cases rests squarely on defendants. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1118 (11th Cir. 2014); *True Health Chiropractic v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018) (consent is an affirmative defense and the defendant bears the burden of proof); *Breda v. Cellco Partnership* 934 F.3d 1, fn. 4 (1st Cir. 2019) (same).

Moreover, Bluegreen has offered no evidence that Plaintiff consented to his first two calls with Schumer. And, notably, Bluegreen has not identified any record of (1) written consent for any class member (valid or otherwise), (2) a transaction with any class member within the 18 months preceding calls to them, or (3) an inbound inquiry regarding Bluegreen's products from a class member within the three months preceding calls to them. Based on this record, there is simply no reason to conclude that Plaintiff ever "consented" to being called by Bluegreen's agent.

D. Bluegreen's damages argument lacks merit.

Bluegreen's final argument on typicality is that Plaintiff's "deceptive conduct" renders him ineligible for treble damages under TCPA, "particularly for the calls after the first 3:15 p.m. May 27 call." AB 39. The quoted phrase tips Bluegreen's hand, however, because it reveals that

Bluegreen has no argument that Johansen's damages would be atypical with respect to the first two calls. That's because any "deception" engaged in by Plaintiff occurred after the claim was *already* established by the first two calls. Bluegreen has no argument as to why Plaintiff is atypical with regard to those calls—and in this respect, he is typical of every other member of this putative class.

* * *

In short, Bluegreen has failed to show any reason why the district court's decision on typicality should not be reversed. That decision, like Bluegreen's arguments, is rooted in a misunderstanding of the nature of Plaintiff's claims. But when his claim is properly understood as being limited to the first two calls, there is no question as to his typicality, and the district court's abuse of discretion in finding otherwise.

III. BLUEGREEN'S ADEQUACY ARGUMENTS LACK MERIT.

The court also erred when it denied class certification because, in its view, Plaintiff Johansen's efforts to identify Bluegreen as the culprit make him an inadequate class representative. ECF No. 95 at 11. This was abuse of discretion. It was Plaintiff's persistence in confirming Bluegreen's identify that made this suit possible. Without his efforts, the putative class members

likely would get no relief at all, and Bluegreen would get off scot-free for its violations of the law. And whereas Bluegreen's conduct violates federal law, Plaintiff's conduct in investigating wrongdoers to hold them accountable is *endorsed* by law enforcement. *See* OB 9–17. Johansen's advocacy and commitment to the class makes him an ideal representative, not an inadequate one. *See CE Design Ltd v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (noting that "it's not unlawful to be a professional class action plaintiff. … Indeed, an experienced plaintiff in such an action may be able to ensure that class counsel act as faithful agents of the class.") (citations omitted).

Unsurprisingly, Bluegreen devotes fewer than three pages of its 53-page brief (*see* OB 40-42) to the district court's indefensible finding. One of Bluegreen's own cases says that "[f]or an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that 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." *Dublin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990) (cited in AB 41). This is a high burden indeed, but Bluegreen has nothing to support it.

Instead, its strategy is simply to parrot the district court's refrain that Johansen's "deception" in confirming Bluegreen's identify means that he will have no qualms lying to a jury. *See* AB 2, 27, 31, 52. There is no reason to believe that's true. And—again—Johansen's behavior vis-à-vis Bluegreen was irrelevant, not to mention necessary and appropriate; he did what he needed to do to ensure that the company could be held accountable under the law. If anything, that makes him an ideal representative for this class. *See CE Design Ltd.*, 637 F.3d at 724.

Bluegreen also ignores that Johansen was honest and forthright at his deposition—when he *was* under oath—about his investigation in this case. Pretending to be interested in a telemarketer's product to identify them and vindicate one's rights is very different than lying under oath. Plaintiff's conduct has been perfectly appropriate both during his calls with Schumer *and* during the course of this litigation. ECF No. 40-1.

None of Bluegreen's cases (*see* AB 9, 41-42) are to the contrary. In *Johansen v. National Gas & Electric LLC,* No. 2:17-cv-587, 2017 WL 6505959, at *3 (S.D. Ohio Dec. 20, 2017), the court mused that Johansen might not be an adequate representative because he called the telemarketer back "to

complete the enrollment process." *Id*. Nothing like that happened here; Bluegreen's agent placed all the calls.

Bluegreen's other cases backfire badly. In *Savino v. Computer Credit, Inc.*, for example, the plaintiff "offered differing accounts" about key facts that "formed the very basis of his lawsuit." 164 F.3d 81, 87 (2d Cir. 1998). Nothing like that happened here, either. Likewise, in *Hively v. Northlake Foods, Inc.*, 191 F.R.D. 661, 669 (M.D. Fla. 2000), the proposed class representative in a Title VII lawsuit actually lied about her employment history and her criminal background—both obvious disqualifiers. *See also 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) (cited in AB 41–42 n.9) (finding that proposed representative in race discrimination class action "is not a proper class representative" where she "perjured herself on the witness stand" as to the circumstances of her discharge.").

Here, in contrast, Johansen's only "crime" was to pretend to be interested in a telemarketer *in order to identify a lawbreaker and bring it to justice*. If anything, Johansen is a hero, not a rogue, to those plagued by unwanted telemarketing calls. But even viewed in the most negative light, his actions do not justify the district court's ruling here. *See Dublin*, 132 F.R.D. at 272 ("an

attack on the class representative's motives must show that those motives are so peculiar that they somehow impair the interest of the entire class.")

Bluegreen also fails to acknowledge that determining Rule 23(a)(4) adequacy involves only two inquiries "(1) whether any substantial conflicts of interests exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

Bluegreen does not suggest the test is not satisfied here. It does not deny that Plaintiff's efforts to confirm Bluegreen as the responsible party presents no conflict with the interests of the class or impugn his commitment to prosecuting the action. To the contrary, "[t]he statutory damages available under the TCPA are, in fact, specifically designed to appeal to plaintiffs' self-interest and to direct that self-interest toward the public good: 'like statutory compensation for whistleblowers,' they 'operate as bounties, increasing the incentives for private enforcement of law.'" *Cunningham v. Rapid Response Monitoring Servs.*, 251 F. Supp. 3d 1187, 1195 (M.D. Tenn. 2017). And Bluegreen has no argument that Johansen won't adequately and zealously prosecute the class's interests. That's no surprise, because he clearly will.

IV. BLUEGREEN'S ALTERNATIVE GROUNDS ARGUMENTS SHOULD BE REJECTED.

A. This Court should not address alternative grounds that the district court did not reach.

Bluegreen also urges this Court to affirm the decision below on commonality and predominance grounds, even though those issues were never decided by the district court. *See* ECF No. 95 at 7 (district court concluding it "need not, and will not, address the issues raised concerning predominance."). But this Court is one of review, not first view. Consistent with this maxim, this Court should decline Bluegreen's invitation to decide these issues for the first time on appeal.

Bluegreen's sweeping assertion that the Court can affirm on "any ground that finds support in the record" is contrary to this Court's precedent with respect to reviewing the denial of class certification. In *Sellers v. Rushmore Loan Mgmt. Servs., LLC*, this Court rejected the same argument in a similar context, declining to "to affirm the district court's denial of class certification on the alternative grounds [of] typicality and ascertainability" because the "district court addressed only predominance and did not pass on these other class-certification requirements." 941 F.3d 1031, 1043 n.8 (11th Cir. 2019). The Court explained that "the appropriate

course is to allow the district court an opportunity to address these issues in the first instance." *Id.*; *see also Smith v. Casey*, 741 F.3d 1236, 1243 n.7 (11th Cir. 2014) ("With respect to a decision we would review only for an abuse of discretion, we generally decline to substitute our judgment about the matter when the district court has not yet decided it and leave the decision for the district court to make in the first instance."); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (holding that, because the district court did "not address whether common issues of fact or law predominate . . . it is not a clear enough ruling from the district court to support affirmance [by the appellate court] on an alternate ground").[7]

Bluegreen's arguments regarding predominance and commonality are particularly inappropriate for this Court to decide in the first instance because they are heavily fact specific, and "it is not the role of appellate courts to make findings of fact." *Tippitt v. Reliance Standard Life Ins. Co.*, 457

[7] Bluegreen's cases are not to the contrary. AB 42. In *Walewski V. Zenimax Media, Inc.*, 502 F. App'x 857, 862 (11th Cir. 2012), the Court merely determined it did not have subject matter jurisdiction, an issue the Court was *required* to consider *sua sponte*, even if not considered below. Likewise, *Long v. Comm'r of IRS*, stands for the unremarkable proposition that courts of appeal may affirm on alternative legal grounds or undisputed facts in the record. 772 F.3d 670, 675 (11th Cir. 2014).

F.3d 1227, 1237 (11th Cir. 2006); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings . . . . [I]t should not simply have made factual findings on its own."); *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993) ("We . . . are not factfinders."); *Smith v. Zant*, 887 F.2d 1407, 1419 (11th Cir.1989) ("The role of a reviewing court is not to . . . reassess the facts but to make sure that the conclusions derived from the district court's . . . assessments are judicially sound and supported by the record.") (cleaned up).

Nevertheless, Bluegreen encourages the Court to affirm for fact-bound reasons the district court never considered. The Court should reject this invitation to resolve disputed facts the district court never considered.

B. If the Court does consider alternative grounds, they support class certification because common issues of law and fact predominate.

Bluegreen's arguments as to predominance and commonality also lack merit—and thus should be rejected if the Court does decide to wade into this thicket of unresolved issues.

Bluegreen principally argues that individual issues predominate because (1) some members of the class, including the representative, might have consented to receiving the calls; (2) some members of the class, including the class representative, might have an established a business relationship with Bluegreen; and (3) there is a possibility that not all calls were made to residential subscribers. *See* AB 42–49.

But all of these individualized inquiries relate to affirmative defenses as to which Bluegreen has the burden of proof, not Plaintiff. *See supra* Parts II.B & C; *see also Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 843 (7th Cir. 2022) ("Although plaintiffs seeking to certify a class bear the burden of demonstrating compliance with Rule 23, 'prior express invitation or permission' is an affirmative defense for which defendants bear the burden of proof at trial."). And Bluegreen's consent and established business relationship defenses will be resolved for all class members based on common evidence and legal arguments. *C-Mart, Inc. v. Metro. Life Ins.*, 299 F.R.D. 679, 690 (S.D. Fla. 2014) (finding in a TCPA case that "[t]he issue of consent does not predominate over the questions common to the class").

This Court has confirmed specifically in the context of a TCPA case that class actions are appropriately certified even where individual

questions about the class members' injuries exist "if there is a plausible straightforward method to sort them out at the back end of the case." *Cordoba*, 942 F.3d at 1275; *Northrup v. Innovative Health Ins. Partners, LLC*, 329 F.R.D. 443, 451 (M.D. Fla. Jan. 2, 2019) (certifying TCPA class to be identified "from cell phone carrier documentation, or from inquiries to subscribers"). When factual findings are necessary to resolve the issues on appeal, the case should be remanded to the district court for further factual findings. *Tippitt*, 457 F.3d at 1237. That's what should happen here in the event this Court agrees with Plaintiff and reverses the decision below.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order denying class certification and remand for further proceedings consistent with this Court's guidance.

This 10th day of June, 2022.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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