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 OPENING 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 (BVH) (Corporate Parent of Bluegreen Vacations Corporation and Bluegreen Vacations Unlimited, Inc.);
8. Brueckner, Leslie A. (Plaintiff's counsel);
9. DeZayas, 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;

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Kenneth Johansen respectfully requests oral argument in this matter.

This appeal presents an important question of law: whether, after receiving an illegal telemarketing call, a consumer's lawful efforts to conclusively identify the culprit and serial violator of the Telephone Consumer Protection Act's do-not-call provisions make his claim atypical for purposes of class certification and render him inadequate to serve as a class representative?

The district court held that the answer is yes — despite the fact that Plaintiff's claim meets all the standard class certification requirements for typicality and adequacy — simply because Plaintiff took affirmative steps to identify the telemarketer who called him. That erroneous ruling, if allowed to stand, would seriously undermine the TCPA, which relies in large part on private enforcement by consumers like Johansen. Absent a class-wide remedy in such circumstances, consumers would have no meaningful way to enforce the TCPA.

Plaintiff Johansen therefore respectfully submits that oral argument would assist this Court in adjudicating this issue and facilitate this Court's consideration of the important legal principles at stake.

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JURISDICTIONAL STATEMENT

This class action arises under the federal Telephone Consumer Protection Act, 47 U.S.C. § 227, and the district court had original jurisdiction pursuant to 28 U.S.C. § 1331.

After the district court denied Plaintiff's motion for class certification by order dated September 30, 2021 (ECF No. 95), Plaintiff timely petitioned this Court on October 14, 2021, for review under Fed. R. Civ. P. 23(f). On March 4, 2022, this Court granted Plaintiff's petition to appeal the district court's order denying class certification. This interlocutory appeal is authorized by Federal Rule of Civil Procedure 23(f).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion by holding that a consumer's lawful investigation to identify the perpetrator of illegal telemarketing calls renders his statutory TCPA claim atypical of a class with the same claim, and his representation of that class inadequate, under Federal Rule of Civil Procedure 23(a).

INTRODUCTION

The suit arises under the Telephone Consumer Protection Act ("TCPA"), the federal statute that prohibits telemarketing calls to numbers on the national Do-Not-Call registry. *See* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2). Perhaps the best-known aspect of the TCPA is the National Do-Not-Call Registry, which allows consumers to opt out of receiving telemarketing calls and establishes a clear line to protect them from those unwanted calls. *See* 47 C.F.R. § 64.1200(c)(2). It means what it says: Do Not Call. And 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 Do-Not-Call Registry. *See id.*; 47 U.S.C. § 227(c)(5).

This is what happened here. Plaintiff-Appellant Johansen, like all other putative class members, listed his phone number on the National Do-Not-Call Registry. Defendant-Appellee Bluegreen Vacations Unlimited's ("Bluegreen's") telemarketing agent nevertheless called Johansen multiple times in direct violation of the TCPA. And it made nearly 50,000 more illegal calls to the putative class members whose phone numbers are also on the Do-Not-Call Registry. The TCPA violation occurred the minute the

agent placed a second call to Johansen; nothing that happened after that moment has any bearing on the validity of his claim or class certification.

Yet the district court refused to certify Johansen's class action because it found that his engagement of the telemarketer to verify Bluegreen's identify — after Bluegreen had *already* violated the TCPA — was deceptive. For that reason alone, the court concluded his claim was somehow atypical of the class and he was inadequate as a class representative. That was an abuse of discretion.

In enacting the TCPA, Congress included a private enforcement mechanism that relies on consumers to proactively identify and hold liable telemarketers that violate the Act. The district court here turned that scheme on its head by denying class certification because the proposed class representative (Plaintiff Kenneth Johansen) took affirmative steps to identify the party responsible and then sued on behalf of a putative class. If affirmed, that ruling would effectively gut the TCPA's private enforcement scheme because if consumers cannot do what is lawful and necessary to identify illegal telemarketers, they could never bring these suits. Congress included a private right of action to empower consumers to vindicate their

rights and enlist the public's help to enforce the TCPA. The district court's rule does the opposite and instead ratifies the scofflaw telemarketers' strategy of hiding their identities to avoid detection and avoid the consumer's efforts to find them out. If the district court's rule prevails, then consumers will be powerless to bring actions to enforce the TCPA against telemarketers who attempt to conceal their identities *after* violating federal law. That cannot be the right result.

And the district court's ruling has no basis in Rule 23 itself. Typicality requires only that the class representative have the same interest and same injury as the class members and show a sufficient nexus between his claim and those of the class. Here, Plaintiff's interest, injury, and the elements of his claim are identical to those of the class. Like the claims of putative class members, Plaintiff's claim arose when Bluegreen's telemarketer initiated a second call to his residential phone number listed on the Do-Not-Call Registry. Plaintiff's claim is typical of the class because proving his claim and the claims of class members will be done with the same evidence on a class-wide basis.

As to adequacy-of-representation, that requirement is met where a class representative has no conflict of interest with the class and will adequately prosecute the action. Here, the district court did not find any conflict or suggest that Plaintiff would not vigorously prosecute this case. Rather, the court found that Johansen would not adequately represent the class because he feigned interest in the telemarketer's product to verify the Defendant's identity — actions the court found unseemly and "deceptive." In so ruling, the court both deviated from standard Rule 23(a)(4) adequacy analysis and subverted the important role that consumer advocates, like Johansen, play in enforcing the TCPA. There is no disqualifier under Rule 23 or the TCPA for engaging a telemarketing agent to find out who paid it to violate a consumer's do-not-call protections. Indeed, such a disqualifier runs counter to Rule 23, frustrates Congressional intent, and erodes the private enforcement feature of the TCPA.

The Telephone Consumer Protection Act was enacted to protect consumers from telemarketers, not the other way around. When telemarketers violate the TCPA by initiating calls to phone numbers listed on the Do-Not-Call Registry, the entity responsible for those calls often hides its identity to evade liability. When this happens, a consumer who

wishes to invoke his rights must use investigative tactics to determine who is responsible for the calls. Unfortunately for Bluegreen, when its telemarketing agent "called a phone belonging to [Johansen], they — presumably unwittingly — found themselves in the sights not of an ordinary hapless consumer, but a seasoned plaintiff, likely primed and ready to take them to court if their actions violated the TCPA." *Cunningham v. Rapid Response Monitoring Servs., Inc.*, 251 F. Supp. 3d 1187, 1195 (M.D. Tenn. 2017). Thanks only to his experience, knowledge, and skill, Plaintiff Johansen confirmed that Bluegreen was responsible for the calls, allowing him to vindicate his rights, the rights of the putative class of consumers, and the goals underlying the TCPA.

Yet, the district court faulted Johansen for his advocacy and denied certification, thereby preventing Johansen and thousands of class members from asserting their statutory rights. Perhaps worse, it granted Bluegreen and others a free pass to continue violating the TCPA with impunity. In so doing, the court abused its discretion by wrongly applying the legal standards for both typicality and adequacy-of-representation, misunderstanding when and how a claim arises under the TCPA as a

matter of law, and confusing whom the TCPA is meant to protect. Its decision should be reversed.

STATEMENT OF THE CASE

A. Statutory Background.

1. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. Congress recognized that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy" and that Americans were "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Pub. L. No. 102-243, §§ 2(5)–(6) (1991) (codified at 47 U.S.C. § 227). The Do-Not-Call Registry was thus established to provide a safe haven from unwanted telemarketing calls. By adding a telephone number to the Registry, a consumer indicates her desire for solitude from telephone solicitations. *See* 47 C.F.R. § 64.1200(c)(2); *see also Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264-65 (11th Cir. 2019) (discussing TCPA and Do-Not-Call Registry).

The TCPA's implementing regulations provide that "no person shall *initiate* any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call

registry." 47 C.F.R. § 64.1200(c)(2), (d) (emphasis added); *accord* 16 C.F.R. § 310.4(b)(iii)(B) ("It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to . . . *initiat[e]* any outbound telephone call to a person when . . . [t]hat person's telephone number is on the 'do-not-call' registry, maintained by the Commission.") (emphasis added).

As the italicized language makes clear, a TCPA violation occurs upon the "initiation" of a second call to someone on the Do-Not-Call registry, regardless of anything the consumer may do or say after answering the call or whether they answer the call at all. According to the Federal Communications Commission ("FCC"), the federal agency empowered by Congress to implement and interpret the TCPA, "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call." *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 F.C.C. Rcd. 6574, 6583 ¶26 (2013) ("May 2013 FCC Ruling"); *see also Bennett v. GoDaddy.com LLC*, No. 16-cv-03908, 2019 WL 1552911, at *8 (D. Ariz. Apr. 8, 2019) (explaining "the TCPA can be violated merely upon the initiation of a call for a

prohibited purpose" and the "relevant question is Defendant's *purpose* in initiating the calls, not what *occurred* on each call").

The prohibition against telemarketing to consumers who have listed their residential numbers on the Registry extends both to the entities that physically dial the illegal call and those entities that benefit from such calls. As the FCC has ruled, because allowing an entity "to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy for telemarketing intrusions," a corporation or other entity "may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." May 2013 FCC Ruling ¶1; *see also Krakauer v. Dish Network*, 925 F.3d 643, 659-61 (4th Cir. 2019).

2. The TCPA creates a private right of action for abuses of the Do-Not-Call Registry: "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may" file suit to "enjoin such violation" and recover statutory damages of up to $500 per

violation, which may be trebled in the case of a willful or knowing violation. 47 U.S.C. § 227(c)(5).

As the Fourth Circuit recently observed in affirming class certification in a TCPA case like this one, the "private right of action in § 227(c)(5) offers many advantages for class-wide adjudication." *Krakauer*, 925 F.3d at 655. Because the elements of the claim and any defenses are "likely to be proven by records kept by the defendant company, [t]he problems that so often plague class actions under Rule 23(b)(3) are wholly absent from this scheme." *Id*. Thus, courts routinely certify TCPA class actions based on claims like Plaintiff's here.[1]

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[1] *See, e.g., Krakauer*, 925 F.3d 654–59 (discussing class certification of TCPA cases brought under § 227(c)(5)); *Jay Clogg Realty Grp., Inc. v. Burger King Corp*., 298 F.R.D. 304, 308-09 (D. Md. 2014) (collecting cases); *see also Ira Holtzman, C.P.A. & Assoc. Ltd. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013)("[c]lass certification is normal in litigation under [the TCPA]"); *Bee, Denning, Inc. v. Capital Alliance Group*, 2015 U.S. Dist. LEXIS 129495, 37-38 (S.D. Cal. Sept. 24, 2015) ("In the context of the TCPA, the class action device likely is the optimal means of forcing corporations to internalize the social costs of their actions."); *Arnold Chapman and Paldo Sign & Display Co. v. Wagener Equities, Inc*., No. 09-cv-07299, 2014 WL 540250, at *15, n.11 (N.D. Ill. 2014), *leave to appeal denied,* 747 F.3d 489 (7th Cir. 2014) (discussing "the many cases in which TCPA classes have been certified, as well as the Seventh Circuit's observation in *Turza* that class certification is the norm in TCPA cases").

Of course, private enforcement of the TCPA requires that the individuals on the receiving end of illegal telemarketing be able to identify the parties responsible. But therein lies the rub; telemarketers often hang up the phone as soon as they suspect that a recipient is attempting to learn their identity. And courts often make it difficult for TCPA plaintiffs to bring suit, even where — as here — a telemarketing agent mentions the principal's name at the start of a call or there is other evidence of the principal's identity.[2]

Thus, in order to make a TCPA claim stick, a plaintiff must often obtain confirmatory evidence identifying the party responsible for the

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[2] *Hicks v. Alarm.com Inc.*, No. 1:20-cv-532, 2020 WL 9261758, at * (E.D. Va. 2020) (dismissing complaint because the "connection between these communications and [Alarm.com] is factually flimsy" despite plaintiff's allegation that when he called the number back, "the person who answers identifies the company as Alarm.com"); *Aaronson v. CHW Grp., Inc.*, No. 1:18-cv-1533, 2019 WL 8953349, at *2 (E.D. Va. 2019) (dismissing complaint for failure to sufficiently identify caller where plaintiff alleged that "one of the calls made to plaintiff was from a telephone number that . . . is one of the Defendant's many telephone numbers"); *Scruggs v. CHW Grp., Inc.*, No. 2:20-cv-48, 2020 WL 9348208, at *7-10 (E.D. Va. 2020) (explaining that an allegation a caller said they were "associated with CHW" was insufficient to establish standing for direct or vicarious liability); *Meeks v. Buffalo Wild Wings, Inc.*, No. 17-cv-07129, 2018 WL 1524067, at *1-5 (N.D. Cal. 2018) (dismissing complaint for failure to establish that defendant initiated text messages even though at-issue text messages identified the defendant and included link to defendant's website).

illegal calls. The courts know this well. *See, e.g.*, *Perrong v. Total Ins. Brokers, L.L.C.*, No. 8:20-cv-1905, 2021 WL 3036467, at *4 (M.D. Fla. Apr. 2, 2021) (rejecting defendant's argument that plaintiff lacked standing because he engaged with telemarketers to identify them and concluding "there is nothing wrong with a plaintiff — who receives an unwanted []call — engaging the caller in order to determine the caller's identity").[3]

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[3] *Hirsch v. USHealth Advisors, L.L.C.*, 337 F.R.D. 118 (N.D. Tex. 2020) (plaintiff has standing even though he logged calls, feigned interest in order to ascertain caller's company, and has brought many TCPA suits); *Abante Rooter & Plumbing, Inc. v. Creditors Relief, L.L.C.*, No. 20-cv-3272, 2020 WL 9397554, at *3 (D.N.J. 2020) (same); *Katz v. Liberty Power Corp.*, No. 18-cv-10506, 2019 WL 4645524, at *10 (D. Mass. 2019) (explaining the question is not whether TCPA recoveries make unwanted calls financially beneficial to plaintiff, but whether he maintained the telephone number for any purpose other than to attract calls to support his TCPA claims); *Childress v. Deering*, No. 1:18-cv-00455 LF-KBM, 2019 WL 409825, at *1 (D.N.M. Jan. 29, 2019)(noting that if plaintiff "persisted in questioning the telemarketer about on whose behalf the telemarketer was calling, the telemarketer would either lie and give Childress the name of a fake or non-existent business, or hang up"); *Hossfeld v. Am. Fin. Sec. Life Ins. Co.*, No. 0:19-cv-60597, 2021 WL 2453114, at *1 (S.D. Fla. June 16, 2021) (telemarketing "agent refused to identify his employer and hung up on Plaintiff when Plaintiff continued to ask for identifying information"); Gail Collins, *Robocalls Are Not Even the Worst of It*, The New York Times (Oct. 13, 2021) ("Like 'Chris from U.S. Autocare' who hung up when [the caller] asked how he got [her] name and number."), https://www.nytimes.com/2021/10/13/opinion/spam-callblocking.html?smid=url-share.

Many telemarketers also hide "their identities through a process called spoofing . . . [where] the caller causes false identifying information to appear on the recipient's Caller ID display and phone records." *United States v. Dish Network LLC,* 256 F. Supp. 3d 810, 847 (C.D. Ill. 2017), *aff'd in part, vacated in part, remanded sub nom*. *United States v. Dish Network L.L.C.*, 954 F.3d 970 (7th Cir. 2020). "As a result, the call recipient cannot readily determine the source of the illegal call." *Id.*

Consumers must get around these and other telemarketing tactics to assert their rights under and enforce the TCPA. Thus, consumers often pose as interested customers to successfully identify the parties responsible for illegal telemarketing campaigns and to enforce federal law. *See, e.g., Cunningham*, 251 F. Supp. 3d at 1194–96 (explaining that a Plaintiff does not forfeit his rights where he "openly admits that the reason he eventually accepted one of the calls was 'to ascertain the identity of the party placing' them" and that "to embrace [such] a line of reasoning [] would ultimately undermine the rights of most, if not all, TCPA plaintiffs and plaintiffs in similar statutory schemes."); *see also supra* note 3 and accompanying text.

Consumer advocates do this at some risk because telemarketers could be running a scam or could become hostile and abusive if they find

out that a consumer was "feigning interest in order to identify who was making the call." *See, e.g.*, *Mey v. Monitronics Int'l, Inc.*, No. 5:19-cv-176, 2020 WL 6803845, at *1 (N.D.W. Va. Nov. 19, 2020) (when "the caller became aware that Mey's number was on the Do Not Call Registry, the caller began to make a series of vulgar comments towards her," like it was her fault that he violated the TCPA). Even where a "consumer advocate" has "equipment which is more sophisticated than that of the average consumer" to "record and document TCPA calls when they do occur," it does not mean that the consumer sought to receive such calls "any more than the purchase of a burglar alarm would indicate that the homeowner wanted her house to be broken into." *Mey v. Venture Data, LLC*, 245 F. Supp. 771, 783 (N.D.W. Va. 2017).

Because feigning interest in a telemarketing campaign can be an effective (and in many instances, the only) way to identify violators of the TCPA, federal and state governments have long endorsed and affirmatively facilitated this approach. For example, the FBI and other state and federal enforcement agencies partnered with the American Association for Retired Persons in "Operation Senior Sentinel," where retirees "played

the role of the intended recipient during the tape-recorded conversation" to expose illegal telemarketers, which resulted in hundreds of arrests. *See* Press Release, *Volunteer Retirees Go Undercover to Help Snare Dishonest Telemarketers, More Than 400 Arrests Made in 14 States* (Dec. 7, 1995).[4]

This operation was seen as a "textbook example of how law enforcement agencies at every level can work together, along with concerned citizens, to combat crime." *Id.* As the FBI director explained, "enforcement agencies will continue to use aggressive and innovative investigative strategies to address this crime problem, while seeking the cooperation of American consumers." *Id.* The "partnership between the victimized elderly and law enforcement is the key to combating telemarketing fraud." *Id.*

It is well-established that courts endorse these tactics when enlisting the public in a law's enforcement scheme ranging from antitrust and civil

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[4] *See* www.justice.gov/archive/opa/pr/Pre_96/December95/609.txt.html (last visited April 5, 2022). Similarly, "testers," who pose as interested individuals in order to identify other victims in the housing and employment context "usually are praised rather than vilified." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

rights law to environmental law and false claims.[5] As another example, a court approved employees of the Federal Trade Commission to pose as potential customers to monitor compliance with federal law. *See, e.g.*, Consent Decree, *United States v. Credit Bureau Collection Services*, No. 2:10-cv-169, Doc. No. 3, § X (S.D. Oh. Feb. 24, 2010) (authorizing FTC to use "lawful means," including "posing as consumers and suppliers" to investigate compliance with federal law).

Such investigations are necessary because the TCPA's private enforcement mechanism only works if consumers can learn the identity of the telemarketers who are harassing them. The statutory damages available

[5] *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (discussing "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws"); *Fox v. Vice*, 563 U.S. 826, 833 (2011) ("When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority."); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 350 (6th Cir. 2009) (discussing how plaintiffs "may act as private attorneys general to enforce the Clean Air Act . . . by bringing a citizen suit if the federal and state authorities fail to address their allegations"); *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009) (discussing, in case involving alleged Medicare fraud, how the False Claims Act "encourag[es] 'whistleblowers to act as private attorneys-general' in bringing suits for the common good" (quoting *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005)).

under the TCPA are "specifically designed to appeal to plaintiff's self-interest and to direct that self-interest toward the public good." *Cunningham*, 251 F. Supp. 3d at 1195. These damages were intended to operate as rewards, or "bounties," for catching telemarketers engaged in illegal practices. *Id.* Such "bounty hunting" on the part of private attorneys general like Plaintiff Johansen has been recognized as key to TCPA enforcement.[6]

B. Factual Background.

Plaintiff Kenneth Johansen engaged in this lawful practice when he caught Bluegreen's telemarketing agent, Schumer Management and Consulting ("Schumer"), in the act of illegal telemarking. Bluegreen is a

[6] *See Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 461 (6th Cir. 2010) (noting with approval that Plaintiff "Phillip Charvat has not been shy in taking on the role of a private attorney general under the [TCPA]."); *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 881 (8th Cir. 2005) (private right of action under TCPA demonstrates Congressional intent to incentivize aggrieved parties to act as "private attorneys general"); *Venture Data*, 245 F. Supp. 3d at 783–84 ("While [defendant] is understandably frustrated by Ms. Mey's efficacy, she is doing exactly what Congress intended—enforcing the law."); *FTC v. Lifewatch Inc.*, 176 F. Supp. 3d 757, 771 (N.D. Ill. 2016) (holding that a "telemarketers' admissions are not rendered invalid just because [the plaintiff] (successfully) tricked them into (truthfully) revealing that they sold products for Lifewatch.").

travel services provider that uses third-party telemarketers to promote its services. Second Amended Class Action Complaint ("SAC"), ECF No. 74 ¶¶ 13–14. One of these telemarketers, Schumer, placed the illegal solicitation calls to Mr. Johansen and members of the putative class. *Id.* ¶¶ 2, 29–54; ECF No. 35-9. Bluegreen provided all telemarketing leads to its agent, Schumer, and Bluegreen admitted it did not scrub those leads against the national Do-Not-Call Registry as it is obligated to do. ECF No. 43 at 1 (citing Doucette Dep. 43:14–45:20). Schumer was contractually required to promote Bluegreen's services, and Bluegreen maintained strict control over Schumer's actions. SAC ¶¶ 18–22; ECF No. 35-1. Accordingly, Bluegreen is vicariously liable for Schumer's calls. *See* May 2013 FCC Ruling ¶1 (ruling that even when a defendant does not "initiate" a call, it "may be held vicariously liable under federal common law principles of agency for TCPA violations committed by [a] third-party").

On Bluegreen's behalf, Schumer placed several telemarketing calls to Plaintiff, the first two of which are the basis for this lawsuit. SAC ¶ 18–54. When Plaintiff answered the first call (on May 26, 2020), no one responded, and the line disconnected after 30 seconds. *Id.* ¶ 33. The next day, Plaintiff received another call from Schumer on behalf of Bluegreen. *Id.* ¶ 34. This

time, Mr. Johansen listened to the sales pitch and engaged to identify and confirm whose services were being promoted on the telemarketing call. *Id*. ¶¶ 35, 44, 48; ECF No. 23-1 at 11.

Through his investigation, Plaintiff received an email directly from Bluegreen, confirming that Schumer placed the illegal telemarketing calls on Bluegreen's behalf. SAC ¶¶ 44–48; ECF No. 23–1 at 14. Plaintiff explained that he stayed on the line until he could "document the company that was responsible for the illegal call to [his] Do Not Call listed phone number." ECF No. 40–1 at 75. Plaintiff engaged only to identify the caller — not because he was interested in Bluegreen's vacation packages or timeshares. *Id*. ¶ 49.

C. Proceedings Below.

Plaintiff Johansen filed the operative Second Amended Class Action Complaint on July 16, 2017, alleging a single count violation of the TCPA's do-not-call provisions. ECF No. 74. Specifically, he alleged that Defendant engaged in illegal telemarketing to originate new customers by calling residential phone numbers listed on the National Do-Not-Call Registry, like his own. SAC ¶ 2.

Through discovery, Plaintiff's expert revealed the staggering scope of Defendant's illegal telemarketing campaign, identifying 280,444 calls to 19,772 phone numbers listed on the DNC Registry. ECF No. 95 at 4; ECF No. 35-9 at 11.[7] Indeed, Plaintiff learned that Bluegreen has been subject to nearly *twenty* TCPA lawsuits, a series of Better Business Bureau complaints, and government regulatory investigations related to its telemarketing investigations over the past several years. ECF No. 35 at 7.

With that information, Mr. Johansen moved to certify and represent the following class of similarly situated consumers:

> 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; (d) whose phone numbers were obtained by Bluegreen only once either (i) prior to 2013, at the time of a package purchase or (ii) as a referral; and (e) who did not make any inbound calls to Bluegreen before receiving two calls in a twelve month period to a National Do Not Call Registry registered number.

ECF No. 35; ECF No. 43 at 7 (narrowing the class definition).

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[7] As Plaintiff's expert further determined, the proposed class includes a subset of 46,863 calls to 4,379 potential class members (including Plaintiff) that received calls only after Bluegreen intentionally terminated its Do Not Call list scrubbing procedures as a cost saving measure. *See* ECF No. 43–7 at ¶41.

In his motion for class certification, Plaintiff argued that he satisfied all Rule 23(a) prerequisites (numerosity, commonality, typicality, and adequacy of representation) and the predominance and superiority requirements of Rule 23(b)(3). *Id.*

Regarding typicality, Plaintiff argued that his claim, like those of all class members, arose from Defendant's practice of telemarketing to individuals whose numbers are listed on the Do-Not-Call registry. *Id.* Because the elements of Plaintiff's claim are identical to those of all other class members and because Plaintiff's and class members' claims can be resolved without any individualized inquiry of fact or law, both as to liability and damages, the typicality requirement is satisfied. *See* ECF No. 35 at 12-13.

As to adequacy, Plaintiff argued that he would "fairly and adequately protect the interests of the class," as Rule 23(a)(4) requires, because his interests are perfectly aligned with those of the class members. He also pointed out that "by investigating, filing, and vigorously prosecuting this case, he has demonstrated a desire and ability to defend the interests of members of the class." *Id*. at 13. Plaintiff and his counsel also engaged in fulsome discovery, including taking numerous depositions

and sitting for his own. *See, e.g.*, ECF No. 43 at 1–3 (detailing Plaintiff's discovery efforts and the key facts that support class certification).

D. The District Court's Denial of Class Certification.

The district court denied class certification, finding Plaintiff's efforts to confirm the identity of Bluegreen "deceptive" and "dishonest." For that single reason, the court concluded that Plaintiff's claim was not typical of other class members, and he lacks the requisite "honesty" to serve as a class representative. *See* ECF No. 95 at 8–11.

The court conceded that typicality is satisfied "if the class representative's claim and the potential class members' claims arise from the same event, pattern, or practice and are based on the same theories." ECF No. 95 at 8. The court reasoned, however, that Plaintiff's claim wasn't typical of the class because he had been "deceptive" in order to learn Defendant's identify and "establish his claim." *Id.* The court also reasoned that Plaintiff's claim lacked typicality because it "necessitates additional inquiries with respect to both [sic] standing, consent, and damages." *Id.*

The court did not explain what "additional inquiries" might be needed on the issues of "consent" and "damages." And despite already ruling that Plaintiff had stated a claim and had standing to sue for the first

two calls, ECF No. 70 at 5, the court indicated that, in its view, Plaintiff's damages were somehow due to his own deceptiveness, rather than Defendant's misconduct. ECF No. 95 at 8. Thus, according to the court, Plaintiff might not be able to show the requisite injury for standing purposes. *Id.*

In so ruling, the court did not acknowledge the language of the controlling regulation that, under the TCPA, the legal injury occurs upon the "initiation" of a call — and thus hinges on the Defendant's actions in placing an illegal call, not on what the recipient of the call says or does in response. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2); *see also Krakauer v. Dish Network, LLC,* 311 F.R.D. 391-92 (M.D.N.C. September 9, 2015) (noting that "[t]he [TCPA's] standing provision, Section 227(c)(5), states that '[a]person who has received' a call in violation of the Section 227(c) regulations may sue.") (citing 47 U.S.C. §227(c)(5)).

With regard to adequacy, the district court reasoned that Plaintiff lacked sufficient "integrity" and "honesty" to serve as a class representative because he "posed as a customer" in order to learn Bluegreen's identity and because he has "an extensive and profitable history with lawsuits involving TCPA claims." ECF No. 95 at 10. The court

did not acknowledge that it is Plaintiff's knowledge, experience, and investigation that made this lawsuit possible. In the court's view, Plaintiff's efforts render him inadequate, even though state and federal enforcement agencies utilize those same lawful tactics to enforce the TCPA and other federal laws. The court also assumed that because Plaintiff "had no intention of becoming [a Bluegreen] customer," he could not adequately represent the class. *Id*. at 11.

In sum, the district court concluded that Plaintiff's claim is "inherently different from those of the putative class members who presumably did not use similarly deceitful methods" in the nearly 50,000 calls that rang to their residential phones. *Id*. The court likewise held — again, for those very same reasons — that the Plaintiff is an inadequate class representative because his efforts to identify the telemarketers render him dishonest and unfit for such a role. *Id.* at 9–11.

STANDARD OF REVIEW

This Court reviews class certification decisions for abuse of discretion. *See, e.g.*, *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015). A "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." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1264 (11th Cir. 2009). The Court "'decide[s] pure law issues *de novo*, which is another way of saying that a ruling based on an error of law is an abuse of discretion.'" *Ewing*, 795 F.3d at 1326 (quoting *Young v. New Process Steel, LP*, 419 F.3d 1201, 1203 (11th Cir. 2005) (citations omitted)); *see also, e.g., Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir. 2001) ("We review *de novo* the district court's conclusions of law that informed its decision to deny class certification.").

SUMMARY OF ARGUMENT

The district court abused its discretion by wrongly applying the legal standards under Rule 23(a) for both typicality and adequacy-of-representation and by misunderstanding when a claim arises under the TCPA as a matter of law.

1. Rule 23's typicality requirement ensures that a class representative possesses the same interest and same injury as the class members so that "class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)). In other words, a class representative satisfies Rule 23(a)(3)'s typicality requirement when he has

the same claim as the class and when that claim arises from a common pattern of conduct. *See Falcon*, 457 U.S. at 159 n.15.

Plaintiff readily meets the typicality standard because he and class members alike possess the same claim under the TCPA, which arose from Schumer's telemarketing campaign to sell Bluegreen's vacation packages to members of the DNC Registry. The simple claim requires only "two things: a number on the Do-Not-Call registry, and two calls made to that number in a year." *Krakauer*, 925 F.3d 655. That's precisely the claim Plaintiff and every class member present: Schumer, on behalf of Bluegreen, initiated at least two telemarketing calls in a year to their telephone numbers listed on the DNC Registry.

Importantly, and contrary to the district court's characterization, the claim was established when Schumer initiated the second call to members on the DNC Registry. Whether Plaintiff or class members have a claim does not depend on whether they answered the call, spoke to the telemarketer, or the contents of any conversation. *See* 47 C.F.R. § 64.1200(c)(2). As a result, Johansen and the putative class members complain of precisely the *same* pattern of conduct by Schumer and Bluegreen, allege the *same* cause of action, and seek the *same* relief. The district court's belief that Johansen's

lawful conduct *after* Bluegreen violated the TCPA somehow rendered his claim atypical is incorrect as a matter of law; what occurred after the claim accrued is simply irrelevant.

2. The court also abused its discretion by concluding that Plaintiff Johansen's efforts to conclusively identify Bluegreen as the principal behind the telemarketing calls make him "an inadequate class representative." ECF No. 95 at 11. Rule 23(a)(4) adequacy involves twin 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 v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

The answers to both questions support class certification, as does the fact that Plaintiff did what was necessary to identify the party responsible for the illegal calls and stepped forward to bring this lawsuit. Plaintiff's claim does not conflict with those of any class member (because they are identical) and Plaintiff has a proven track record of vigorously prosecuting TCPA claims against abusive telemarketers. Adequacy of representation should have been an easy call in this case.

The district court's condemnation of Plaintiff's necessary and lawful efforts to identify Bluegreen and expose its illegal telemarketing racket — and the conclusion stemming from that denunciation — gets things backwards. The TCPA is a remedial consumer protection statute. Its robust private enforcement mechanism would be nullified if Plaintiffs like Johansen were disqualified from serving as class representatives. The deceptive conduct the district court found so distasteful was necessary to arm Johansen with the knowledge he needed to enforce the TCPA. That makes him an ideal class representative, not an inadequate one. The district court's conclusion to the contrary should be reversed.

ARGUMENT

A. The District Court Abused Its Discretion In Finding that Plaintiff's Claim Is Not Typical of the Class.

The district court's first error was in finding that Plaintiff's claim is not typical of the class he seeks to represent. The exact opposite is true.

1. Typicality protects the rights of class members by ensuring that the interests of their representatives are aligned with their own. The plain language of Rule 23(a)(3) requires that the class representative "possess the same interest and suffer the same injury as the class members in order to be

typical" and there must be a "sufficient nexus . . . between the claims of the named representatives and those of the class at large." *Vega*, 564 F.3d at 1275.

Typicality is a "guidepost[] for determining . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157-58 n.13). When the interests of the class representative and the class are aligned, the named plaintiff's pursuit of his claim will simultaneously advance the interests of the class members. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009). Typicality is thus satisfied when the class representative has the same "claims or defenses" as the class, and when those claims or defenses arise from a common pattern of conduct, even in circumstances where the effects of that conduct may vary. *See Falcon*, 457 U.S. at 159 n.15.

With this singular purpose, the typicality inquiry is generally straightforward. The class representative must be a member of the class. *See E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 404 (1977) (class representatives, who were not class members, were "hardly in a position to

mount a classwide attack" on the practices challenged by the class). And the representative must raise the same legal claims and theories as the class. *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980) (typicality "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims"). The representative should also seek the same relief as is sought for the class. This symmetry avoids the danger that the representative will "maximize one type of relief that redounds to her benefit while minimizing another" form of relief that would favor the class. 1 William B. Rubenstein, Newberg on Class Actions § 3:44 (5th ed. 2020).

Courts consistently hold that a "plaintiff 's claim is typical if it *arises* from the same event or practice or course of conduct that *gives rise* to the claims of other class members and [is] based on the same legal theory." *See, e.g.*, *Lacy v. Cook Cty.*, 897 F.3d 847, 866 (7th Cir. 2018) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (emphasis added); *accord Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018) (same). "Even relatively pronounced factual differences" do not defeat typicality so long as "there is a strong similarity of legal theories." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016)

(quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998)). This principle extends even to factual differences between injuries to the representative and the class members — which are not present here — because such variations do not hinder the representative's ability to protect the interests of the class. *Prudential*, 148 F.3d at 312.

2. Plaintiff Johansen satisfied the Rule 23(a)(3) typicality requirement. Every class member in the lawsuit presented the *same* claim: they received at least two telemarketing calls in a year from Schumer, on behalf of Bluegreen, to their residential telephone numbers listed on the DNC Registry. Plaintiff Johansen's claim arose when Bluegreen's telemarketer "initiate[d]" the second violative call to Plaintiff. *See* 47 C.F.R. § 64.1200(c)(2). The same is true of all other class members. They were subjected to precisely the same pattern of conduct by Schumer and Bluegreen, allege the same cause of action, and seek the same relief. As such, the narrow and specific purpose of the typicality requirement is satisfied: Johansen's personal interest aligns with that of the putative class

such that the district court could be assured that he would work to benefit the entire class.

The district court's conclusion to the contrary rested on an error of law and a misunderstanding of how and when a TCPA claim accrues. The court erred by finding that Plaintiff's efforts to identify Bluegreen — *after* its agent had already violated the TCPA — somehow renders his "claim [] inherently different tha[n] those of the putative class members who presumably did not use similarly deceitful methods." ECF No. 95 at 8.

This was error as a matter of law because a consumer's conduct after they pick up an illegal telemarketing call neither establishes nor undoes a claim under the TCPA. Rather, as explained above, it is the "initiation" of the second call in twelve months to a telephone number on the National Do-Not-Call registry that triggers liability. 47 C.F.R. § 64.1200(c)(2); *Bennett*, 2019 WL 1552911, *7–8 ("[A] prohibited telemarketing call occurs as soon as an entity initiates the call. In other words, assuming there was no express written consent, a TCPA violation occurs once the steps necessary to physically place [the telemarketing] telephone call are completed. The existence of a TCPA violation does not depend on an analysis of the

contents of the call. In fact, it does not even require the call be answered.”) (cleaned up); *Golan v. Veritas Entertainment, LLC*, 788 F.3d 814, 820 (8th Cir. 2015) (explaining that the purpose behind the call controls the analysis, not what happened during the call).[8] And the liability arising from those illegal calls cannot be undone by any conduct following their placement; such conduct is independent of, and irrelevant to, all claims or defenses.

Again, the claim requires only “two things: a number on the Do-Not-Call registry, and two calls made to that number in a year.” *Krakauer*, 925 F.3d 655. That’s it. And Plaintiff and class members will prove those two elements the same way, with class-wide call records from Schumer and

[8] The existence of a TCPA violation does not depend on the analysis of the contents of the call or even whether the call was answered. The Ninth Circuit has concluded that TCPA violations occur even if a call is not answered. *Romero v. Dep't Stores Nat'l Bank*, 725 F. App’x 537, 539 (9th Cir. 2018). And multiple courts explicitly recognize a plaintiff may assert a TCPA violation for unanswered calls. *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 725 (S.D.N.Y. 2015), *rev’d on other grounds*, 894 F.3d 473 (2d Cir. 2018) (“[Defendant] violated the statute each time it placed a call using its [automatic dialer] without consent, regardless of whether the call was answered by a person, a machine, or not at all.”); *Fillichio v. M.R.S. Assocs., Inc.*, No. 09-cv-61629, 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (“[T]he prohibition in the TCPA applies to phone calls placed to cellular telephone numbers even if the intended recipient does not answer the calls. It is the mere act of placing the call that triggers the statute.”).

Bluegreen. For those reasons, the Fourth Circuit labeled this portion of the TCPA "a model of clarity. It means what it says. If a person wishes to no longer receive telephone solicitations, he can add his number to the list. The TCPA then restricts the telephone solicitations that can be made to that number." *Id.* at 649.

Thus, contrary to the district court's reasoning, the elements of Plaintiff's TCPA claim are precisely the same as those of all class members, and the "liability determinations involve no questions of individual reliance, no complicated contractual obligations, and no theories of probabilistic injury." *Id.* at 655–56 (internal citations omitted). Likewise, "[t]he damages calculations do not turn on individual evidence . . . , nor are they difficult to connect to the underlying harm." *Id*. at 656 (citations omitted). *Id.* "Put simply, a plaintiff suing under § 227(c)(5) is likely to be in the same position as a great many other people and can rely largely on common proof to make out his claim." *Id.* Indeed. Whatever occurs after a TCPA claim is established has no bearing on the typicality inquiry.

The district court nonetheless found that Plaintiff's claim might be atypical because he used "deceptive and dishonest tactics . . . to *establish* his claim." ECF No. 95 at 8 (emphasis added). This language suggests that, in

the court's view, Plaintiff's claim was not "established" until he engaged with the Defendant — and in that sense, his claim might lack typicality. This is incorrect because Plaintiff's claim was "established" the moment Schumer initiated its second call to him. Plaintiff's subsequent conduct merely allowed him to *make* his claim, the conduct of Bluegreen, through its agent, "established" the claim.

The district court also reasoned that "Plaintiff's claim is inherently different tha[n] those of the putative class members" because his "deceitful methods" necessitate "additional inquiries with respect to both [sic] standing, consent, and damages." That, too, was error, because none of those factors requires any individual inquiry at all.

As to standing, Plaintiff's injury is not just "fairly traceable" to Defendant's conduct (*Cordoba*, 942 F.3d at 1268); it was a direct and immediate result of Defendant's conduct. Plaintiff suffered the injury the instant Schumer initiated the second illegal telemarketing call to his phone number registered on the Do-Not-Call list. The court's concern that his injury might "instead" be a "result of Plaintiff's deceptive conduct" is misplaced because his statutorily defined injury occurred upon Defendant's "initiation" of the second call. ECF No. 95 at 9. Indeed, it is the

TCPA violation itself — i.e., the initiation of illegal calls — that causes concrete harm and give rise to liability. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019); *see also supra* note 8 and accompanying text. As many courts recognize, that a consumer has served as a plaintiff in other TCPA actions does not in any way deprive him of standing to sue. *See Cunningham*, 251 F. Supp. 3d at 1196.[9]

As to consent, the district court reasoned that Plaintiff's claim might be atypical because he "induc[ed] the telemarketing representative to believe that [he] was a customer of Defendant [and] expressly request[ed] that the representative provide him with additional information." ECF No. 95 at 9. Again, this ignores the fact that Plaintiff's claim arose when the

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[9] *See also Abramson v. Oasis Power LLC*, No. 2:18-cv-00479, 2018 WL 4101857, at *6 (W.D. Pa. July 31, 2018), *report and recommendation adopted*, No. 18-cv-479, 2018 WL 4095538 (W.D. Pa. Aug. 28, 2018) ("Again, even if true, the fact that Abramson may have posed as an interested consumer does not, in itself, negate standing in private TCPA lawsuits."); *Moser v. Health Ins. Innovations, Inc.*, No. 17-cv-1127, 2018 WL 6735710, at *11 (S.D. Cal. Dec. 21, 2018) (Plaintiff's "faked interest in the calls to learn the identity of the callers" did not "forfeit his right to sue[.]"); *Fitzhenry v. ADT Corp.*, No. 14-80180, 2014 WL 6663379, at *5 (S.D. Fla. Nov. 3, 2014) ("Although Plaintiff may have created a home environment that allows him to document telemarketing calls better than most customers, [this did not place] Plaintiff...outside the zone of interest."); *Venture Data, LLC*, 245 F. Supp. at 783.

second call was "initiated," before Plaintiff "induced" the telemarketing representative to believe anything. The fact that Plaintiff requested "additional information" from Schumer to verify Defendant's identify didn't affect his claim at all; it merely gave him the information that he needed to vindicate it.

As to damages, it is hard to understand the district court's suggestion that Plaintiff's "deceptive" conduct might render his damages atypical. The damages Plaintiff seeks under the TCPA are defined by statute and are unaffected by anything that a consumer might say or do in response to an illegal telemarketing call. *See* 47 U.S.C. § 227(c). "Violations of the law are clear, as is the remedy." *Krakauer*, 925 F.3d at 649. The damages available to Plaintiff and the class are the same — and thus his claim is typical of the class in this sense as well.[10]

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[10] Contrary to the court's suggestion (ECF No. 95 at 10), the statutory damages available to a TCPA plaintiff have nothing to do with the length of the calls. Instead, TCPA plaintiffs may recover the greater of "actual monetary loss" or up to $500 per violation. 47 U.S.C. § 227(c)(5). Here, Plaintiff seeks statutory damages of $500 per violation, which may be trebled if the violations were knowing and willful. *Id*. The same is true of all other members of the putative class. The amount of these statutory damages does not vary based on any class member's unique experience.

The court's typicality decision is also in tension with other courts that have certified classes under similar circumstances. *See supra* note 1 and accompanying text; *infra* note 11 and accompanying text. In another TCPA class action with similar facts, a court certified the class and appointed Plaintiff Johansen as class representative. The court explained that Johansen's claim was typical of the class because the "common element of fact is simply that the putative class members received telemarketing calls from [the agent] on behalf of [the principal] on a phone number listed on the Do Not Call Registry." *Johansen v. One Planet Ops, Inc.*, No. 2:16-cv-00121, 2018 WL 1558263, at *3 (S.D. Ohio Mar. 5, 2018). Thus, the court reasoned, "[i]f the class is successful in proving their allegations, then all putative class members would be entitled to the same relief: statutory damages under the TCPA." *Id*. The district court's failure to reach the same conclusion here was an abuse of discretion that should be reversed.

* * *

In the final analysis, the district court's theory that Plaintiff Johansen's claim lacked typicality because he took the trouble to verify Defendant's identity so he could vindicate his rights under the TCPA is a good example of throwing out the proverbial baby with the bathwater. Not

only is Plaintiff's claim typical of the other class members' claims in every sense, but his conduct was an essential predicate for the vindication of their rights. Without Plaintiff's advocacy and persistence, the members of this putative class would likely have no remedy at all.

"The TCPA was enacted to solve a problem . . . [with] a combination of public and private enforcement." *Krakauer*, 925 F.3d at 663. Plaintiff's service as a consumer advocate should be applauded, not condemned. And it certainly should not be used to defeat class certification and afford a free pass to defendants who commit wholesale violations of federal law.

B. The District Court Abused Its Discretion By Concluding That Plaintiff's Efforts to Verify Bluegreen's Identity Rendered Him Inadequate As A Class Representative.

The court also erred when it denied class certification because, in its view, Plaintiff Johansen's efforts to conclusively identify Bluegreen as the culprit make him "an inadequate class representative." ECF No. 95 at 11. A consumer's efforts to identify the law-breaking parties behind an illegal telemarketing scheme do not render him dishonest and unfit to serve as a class representative. To the contrary, as courts routinely recognize in the context of the TCPA and beyond, consumers who make the extra effort are "doing exactly what Congress intended — enforcing the law." *See Venture*

Data, 245 F. Supp. 3d at 783–84; *Universal Underwriters*, 401 F.3d at 881 (recognizing that the private right of action under TCPA demonstrates Congressional intent to incentivize aggrieved parties to act as "private attorneys general"); *see supra* pp. 10–16 and notes 1–5.

Rule 23(a)(4) adequacy involves twin 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*, 350 F.3d at 1189.

The district court here did not identify any conflict of interest between Plaintiff and the class members or find that he would not adequately prosecute the claims on the class's behalf. Instead, it found that "Plaintiff is an inadequate representative because of his deceptive conduct" and because he supposedly "prolong[ed] the purported injury . . . [to] increase[e] the potential damages that he could, in theory, recover." ECF No. 95 at 10.

Not only is that not the test for adequacy, it misunderstands TCPA liability and damages. The fact that Plaintiff kept Schumer's telemarketers on the phone to verify Bluegreen as the principal behind the calls does not have any bearing on his claim, which arose the minute Schumer placed the

second call on Bluegreen's behalf. As to damages, as explained above, Plaintiff Johansen seeks the same damages as all other class members — no more, no less. Thus his "deceptive conduct" has no bearing on his ability adequately to represent this class.

Beyond that, the court's conclusion that Plaintiff's deceptiveness rendered him inadequate gets it exactly backwards. As explained above, investigations by consumers to identify those violating federal law play a critical role in enforcing the TCPA.[11]

Plaintiff's efforts to confirm Bluegreen as the responsible party does not conflict with the interests of the class or impugn Plaintiff's commitment to prosecuting the action. To the contrary, "[t]he statutory damages available under the TCPA are, in fact, specifically designed to appeal to

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[11] That's true in other areas of the law as well. *See supra* note 5 and accompanying text. For example, "testers," who pose as interested individuals in order to identify other victims in the housing and employment context "usually are praised rather than vilified." *Murray*, 434 F.3d at 954 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982); *Arlington Heights*, 429 U.S. 252). Likewise, the Federal Trade Commission regularly engages investigators to pose as interested customers, and courts endorse that approach. *See, e.g.*, Consent Decree, *United States v. Credit Bureau Collection Services*, No. 2:10-cv-169, Doc. No. 3, § X (S.D. Oh. Feb. 24, 2010) (authorizing FTC to use "lawful means," including "posing as consumers and suppliers" in order to monitor and investigate compliance with federal law).

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*, 251 F. Supp. 3d at 1195. Enlisting the public to enforce a statute is a well-established tool that can be found various statutory schemes with a private right of action. *Id.* Although plaintiffs must satisfy the constitutional requirement of standing, there is no "additional hurdle simply because the plaintiff may have a motive beyond mere compensation for his injury." *Id.* at 1195–96.[12]

To the extent that the district court premised its decision on its perception that "Plaintiff has what appears to be an extensive and profitable history with lawsuits involving the TCPA," that reasoning

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[12] *Mey v. Venture Data, LLC*, No. 14-cv-123, ECF No. 247, *18 (N.D.W. Va. June 6, 2017) (certifying class and determining the plaintiff, Ms. Mey, to be adequate class representative because "by investigating, filing, and vigorously prosecuting this case, she has demonstrated a desire and ability to protect class members' interests"); *see also In re Monitronics International, Inc., TCPA Litigation*, No. 17-cv-00157, ECF No. 116 (N.D.W. Va. June 12, 2018) (certifying class for settlement purposes, appointing Ms. Mey as class representative, and granting final approval); *Mey. v. Frontier Comms. Corp.*, No. 13-cv-01191, ECF No. 164 (D. Conn. June 2, 2017) (same); *Mey v. Got Warranty, Inc. et al.*, No. 15-cv-00101, ECF No. 149 (N.D.W. Va. July 26, 2017) (same); *Mey v. Interstate National Dealer Servs., Inc., et al.*, ECF No. 173, No. 14-cv-01846 (N.D. Ga. June 8, 2016) (same).

ignores that a majority of courts agree that a plaintiff's prior litigation history does not prevent him from seeking redress for future harms, no matter how similar they may be. *See Murray*, 434 F.3d 954 ("What the district judge did not explain, though, is why 'professional' is a dirty word. It implies experience, if not expertise. The district judge did not cite a single decision supporting the proposition that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders."); *see also Patten v. Vertical Fitness Grp., LLC*, No. 12-cv-1614, 2013 WL 12069031, at *9 (S.D. Cal. Nov. 8, 2013) (finding plaintiff's status as a professional plaintiff "has nothing to do with the merits of class certification"); *Gallion v. Callingpost Commc'ns, Inc.*, No. 18-cv-02065, 2018 WL 8647762, at *2 (C.D. Cal. Dec. 27, 2018) (explaining that because plaintiff has filed other TCPA cases does not mean he lacks standing).

That Mr. Johansen has repeatedly been called by telemarketers and sued them for violating the TCPA does not create a "'serious credibility problem'" that would either cause class counsel to "'devote too much attention to rebutting an individual defense'" or "'reduce the likelihood of prevailing on the class claim.'" *One Planet Ops, Inc.*, 2018 WL 1558263, at *4

(quoting *Nghiem v. Dick's Sporting Goods, Inc.*, 318 F.R.D. 375, 383 (C.D. Cal. 2016)).

In support of its adequacy analysis in this case, the district court points to *Johansen v. Nat'l Gas & Elec., LLC*, (ECF No. 95 at 11). No. 2:17-cv-587, 2018 WL 3933472 (S.D. Ohio Aug. 16, 2018). But the court's reliance on that wholly distinguishable case is misplaced for purposes of assessing Plaintiff's adequacy in this case.

First, and most importantly, the case is factually distinguishable because Plaintiff called the defendant back after a single call and expressed interest in its services. *Id.* at *3–4. Thus, "plaintiff's claim under the TCPA fail[ed] as a matter of law." *Id.* at *5; *cf.* 47 U.S.C. § 227(c)(5) (requiring "more than one telephone call within any 12-month period" to establish a legal injury). In this case, Plaintiff Johansen's TCPA claim accrued when he received the second call from Schumer and before he ever spoke a word to the telemarketer. Critically, the proposed class here specifically excludes consumers who made an inbound call to Bluegreen before receiving two telemarketing calls. *See supra* p. 20.

Second, as explained in detail above, the court's concerns about Johansen's investigative efforts in that case and his prior experience

generally are misplaced. *See supra* pp. 10–16, notes 1–5 and accompanying text.

Rather, as the court held in *One Planet*, "Mr. Johansen's experience as a repeat TCPA plaintiff does not . . . prejudice the class" and that Mr. Johansen would be an adequate representative under Rule 23(a). *Id*. at * 4. Likewise, nothing in the record here suggests "that Mr. Johansen lacks a genuine interest in curbing phone calls that invade his privacy, and Defendants have not brought to this Court's attention any defenses specific to Mr. Johansen that threaten to become the focus of any future litigation." *Id.* As a result, he is well positioned adequately to represent this class.

*   *   *

Put simply, the court's "concerns about the Plaintiff's credibility, honesty, and trustworthiness, and motives" are misplaced. ECF No. 95 at 10. Although Plaintiff played along with the telemarketers to confirm Defendant's identity, he did so to vindicate his rights under the TCPA. And he has been completely forthright about his investigative tactics and his history as a TCPA plaintiff during this litigation.[13] His interests are fully

[13] *See* Johansen Dep. 112–13, 140 ECF No. 40-1.

aligned with those of the class because they all share the same goal: stopping illegal telemarketing by holding those who violate the TCPA responsible.

This makes Plaintiff an ideal representative for the class, particularly in light of his demonstrated track record of vigorously prosecuting TCPA violators. The district court therefore abused its discretion in concluding that the Plaintiff would be an inadequate class representative.

The court's ruling would directly undermine the TCPA's private enforcement scheme, which relies on class actions like this one to effectuate Congress's goals. If the court's decision were allowed to stand, it "would contort a simple and administrable statute into one that is both burdensome and toothless. It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer*, 925 F.3d at 663.

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 13th day of April, 2022. Respectfully submitted,

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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 on April 13, 2022.

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