IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit Court Case No. 21-55099

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

OPENING BRIEF FOR PLAINTIFF-APPELLANTS JOHN MCCURLEY AND DAN DEFOREST

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

LAW OFFICES OF TODD M. FRIEDMAN
Todd M. Friedman, Esq. (SBN 21675)
Adrian R. Bacon Esq. (SBN 280332)
Thomas E. Wheeler (SBN 308789)
21550 Oxnard St., Suite 780
Woodland Hills, CA 91367
Phone: 323-306-4234
Fax: 866-633-0228
Email: tfriedman@toddflaw.com

KAZEROUNI LAW GROUP, APC
Abbas Kazerounian, Esq. (249203)
ak@kazlg.com
Matthew M. Loker, Esq. (279939)
ml@kazlg.com
245 Fischer Avenue, Unit D1
Costa Mesa, CA 92626
Telephone: (800) 400-6808
Facsimile: (800) 520-5523

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of California had federal question jurisdiction under 28 U.S.C. §1331, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740-53 (2012) for appellants John McCurley and Dan Deforest ("Appellants") claim under the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"), and supplemental jurisdiction under 28 U.S.C. § 1637 over Appellants' claim under the California Invasion of Privacy Act, Cal. Pen. C. § 632.7.[1] 7-ER-1309-29.[2]

This appeal is from the January 29, 2021 Order of the District Court granting Appellee Royal Seas Cruises, Inc.'s ("RSC") Motion for Summary Judgment pursuant to Rule 56[3] of the Federal Rules of Civil Procedure. The District Court entered judgment for RSC and dismissed Appellees' action with prejudice. 1-ER-16. The January 29, 2021 Order was a final appealable order, giving this Court jurisdiction under 28 U.S.C. § 1291. *See* Fed. R. Civ. P. 54(b). Appellants filed a

[1] Appellants do not appeal the dismissal of the claim under the California Invasion of Privacy Act, Cal. Pen. C. § 632.7, which they did not contest on the Motion for Summary Judgment.

[2] Citations to Appellants' Excerpts of Record are denoted "ER," preceded by the volume number and followed by the page number.

[3] All subsequent references to rules will be to the Federal Rules of Civil Procedure, unless otherwise specified.

timely notice of appeal 7 days later on February 5, 2021. 1-ER-17. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting RSC's motion for summary judgment pursuant to Rule 56 by applying the wrong standards for express agency, apparent agency, and ratification?
2. Does a seller have a non-delegable duty under the TCPA to ensure its agent-telemarketer, who is contracted to place robocalls, is doing so with prior express consent.
3. Are there triable issues of fact with respect to vicarious liability that a reasonable jury, in the light viewed most favorable for Appellants, could decide in favor of Appellants at trial?

STATEMENT OF THE CASE

This appeal is about accountability and responsibility. The District Court's Order granting summary judgment for RSC endorses a blueprint crafted by RSC, its parent company, and its attorneys, whereby a telemarketer can avoid any and all legal accountability under the TCPA by simply hiring overseas vendors to do its dirty work and inserting an exculpatory clause in their contract, while choosing to engage in absolutely zero oversight over the misdeeds of their agents. That is what happened here by express design. Millions of Americans received millions of robocalls from untouchable overseas bad actors, who were engaging in conduct they were hired by RSC to do, which RSC knew was inherently risky and likely unlawful. All RSC had to do to avoid liability, according to the District Court, was insert a clause in the contract specifying that the agent agreed to not break the law while it engaged in highly regulated and inherently risky conduct.

Prospects DM, Inc. ("Prospects")[4] was hired to 1) robodial people at RSC's direction, 2) use a prerecorded voice containing RSC's approved script to sell RSC products, 3) live-transfer those consumers to RSC, and 4) simultaneously transmit

[4] Prospects is a Canadian lead generation company operated by Josh Grant ("Grant"). Lead generators are companies, often outside the United States, hired to generate business on behalf of the principle. There is a contract between RSC (principal) and Prospects (agent) contracting Prospects to place prerecorded voice robocalls telemarketing RSC services. There is no question Prospects is an agent. The question is whether the exculpatory clause absolves RSC of its agent's violations of the TCPA.

real time data to RSC showing who sold the consumers' data to Prospects. Robodialing and, in particular, the use of prerecorded voices are heavily regulated under the TCPA to require any such calls have prior express consent of the called party. Both Prospects and RSC knew this. RSC's contract with Prospects provided for RSC to have the right to audit Prospects' conduct placing prerecorded voice telemarketing calls, which was the explicit purpose of the contract. Yet, neither RSC nor Prospects conducted any audits or investigation into these lead sources. As it turns out, consumers were called with prerecorded voice telemarketing messages they never consented to. Irrespective of this, both RSC and Prospects maintain, to this day, that Prospects was properly engaging in conduct within the scope of its contract.

The District Court's order is a recipe for unaccountability, in an age when consumer privacy threats have reached a boiling point. If this Court endorses the District Court's order, it will enable telemarketers to circumvent the TCPA by hiring overseas vendors to place robocalls and feigning ignorance of their misdeeds. By shifting all risk, liability, and responsibility onto companies outside the jurisdiction of the United States that cannot realistically be sued, RSC planned to do whatever it wanted.

Agency and tort law policy have a lot to say about this. Indeed, the risk to consumer privacy is so serious that the FCC foresaw this exact issue nearly a

decade ago and wrote a binding order to prevent this from happening, suggesting that the obligation of ensuring there is consent to place robocalls is nondelegable. If the FCC's warning[5] is ignored, and RSC is permitted to avoid trial, it will deliver a devastating blow to consumer privacy.

Exculpatory clauses are supposed to only be used as a shield to insulate companies from unexpected conduct that truly lies outside the control of the principal and the scope of its agent's normal course of duties. Instead, a marketing company contracted away its risky marketing efforts to reap the rewards and bear no responsibility. This Court has the power to side with consumer privacy, and to hold companies accountable when they can and should do more.

I. PROCEDURAL HISTORY

Appellant John McCurley ("McCurley") filed his original Complaint on May 12, 2017. 7-ER-1331-45. Appellant Dan Deforest ("Deforest") filed his original Complaint on June 7, 2017. 7-ER-1346-59. Appellants agreed to consolidate their cases and filed a Motion to do so on November 29, 2017. The Motion was granted and, on December 20, 2017, a consolidated complaint was filed. 7-ER-1307-29.

[5] *In re Joint Petition Filed by Dish Network*, LLC, 28 F.C.C. Rcd. 6574 (2013) ("FCC Dish Order").

RSC answered on January 8, 2018. 7-ER-1282-1308. Appellants served written discovery on RSC as well as third party agent Prospects to which both companies responded. Appellants took the deposition of RSC' Rule 30(b)(6) representative Jennifer Poole ("Poole"), and RSC took depositions of both Appellants.

A. The Motion for Class Certification

On July 30, 2018, Appellants filed their Motion for Class Certification, which included two expert reports for Wesley Weeks. 6-ER-1061-1221, 7-ER-1227-1281. On October 22, 2018, RSC filed its Opposition, attaching declarations of numerous, previously unnamed third-party entities. 7-ER-1360-80. RSC additionally "changed" the website it asserted it obtained Deforest's consent from "myhealthauthority.com" to www.yourautohealthlifeinsurance.com. 5-ER-797-802.

Appellants filed an *ex parte* and obtained an extension on their reply until January 14, 2019 for time to depose the newly identified third parties and conduct discovery on the new information. 7-ER-1360-80. On December 21, 2018, Appellants deposed Kevin Brody ("Brody"), who brokered the sale of data from the owner of diabeteshealth.info. 3-ER-183-397.[6] On January 14, 2019, Appellants filed their Reply in support of Class Certification, including the

[6] Brody initially claimed to operate the website but this was revealed to be untrue.

discovery conducted since RSC's Opposition and the expert report of Nathan Bacon, which described how diabeteshealth.info was not programmed in a way that could generate the data produced by Brody. 4-ER717-95. RSC filed a surreply authorized by the Court.

On March 27, 2019, the Court granted-in-part Appellants' Motion for Class Certification. 5-ER-653-717. The Court certified a Class consisting of:

> "All persons within the United States who received a telephone call (1) from Prospects, DM, Inc. on behalf of Royal Seas Cruises, Inc. (2) on said Class Member's cellular telephone (3) made through the use of any automatic telephone dialing system or an artificial or prerecorded voice, (4) between November 2016 and December 2017, (5) where such calls were placed for the purpose of marketing, (6) to non-customers of Royal Seas Cruises, Inc. at the time of the calls, and (7) whose cellular telephone number is associated in Prospects DM's records with either diabeteshealth.info or www.yourautohealthlifeinsurance.com."

The Court additionally certified a Transfer Subclass consisting of:

> "All members of the Class whose call resulted in a Transfer to Royal Seas Cruises, Inc."

The Court found that "the evidence Royal submits at the class certification stage does not show prior express consent from either Plaintiff or any putative class member." Id. at 695-96. Explaining further, "Royal has submitted declarations of [Poole], [Grant]; and [Brody] . . . The fundamental problem with the information provided by these individuals is that none of them has personal knowledge of

whether Plaintiffs or any class member actually visited and completed the form . . .[and] therefore cannot constitute evidence that class members provided consent before they were contacted on Royal's behalf." Id. at 706. The Court further noted that "the 'opt-in' form available on www.yourautohleathlifeinsurance.com . . .[has] no reference to Royal, Prospects, or any of the third-party digital marketing companies that Prospects has identified as companies from which it purchases leads . . . [and thus] the form would not establish consent for DeForest or any class member for which this website generated a lead." *Id*. at 711.

B. Post-Certification Discovery And Motions

After certification, Appellants spent eight months seeking to depose Grant, which included numerous attempts to meet and confer, serving subpoenas and a notice of deposition, seeking issuance of a Letter Rogatory, and moving to compel in Canada. Grant was ordered to sit for a deposition on February 12, 2020. 7-ER-1360-80. Fact discovery closed on February 19, 2020. 6-ER-1360-80.

While Appellants engaged in the above discovery, RSC engaged in secret discovery consisting of calling "approximately 560 class members" from which it attempted to obtain "affidavits," which it then did not disclose for approximately five months until January 17, 2020. 2-ER-70-89. Appellants filed a Motion for Sanctions, to Disqualify Counsel, and to Strike the Affidavits on January 31, 2020 and amended it on March 4, 2020 to update it with information obtained from a

deposition of RSC' 30(b)(6). 7-ER-1360-80. On July 31, 2020, the Court granted-in-part and denied-in-part Appellants' Motion, striking the affidavits, ordering RSC and its counsel to have no further *ex parte* with class members about the case, and authorization monetary sanctions,[7] but declining to disqualify. The Court found "Defendant's contact with the class members and misleading coercive behavior in obtaining the affidavits to be unethical and in bad faith." 2-ER-87. It further found "the communications were misleading, omitted material facts about the existence of the class action, and were coercive in that they used suggestive, leading questions, offered incentives for giving the "right" answers, and suggested the answers were not important except for the marketing purposes." 2-ER-86. Accordingly, RSC conducted and produced no usable discovery after Class Certification up to the fact discovery deadline of February 12, 2020, and thus its Motion for Summary Judgment was based on the same evidence used at Class Certification plus Grant's deposition.[8]

On March 4, 2020, Appellants filed a Motion to Decertify the Class In Part to modify the Class to the definition of the Transfer Subclass. 7-ER-1357-80. On March 17, 2020, RSC filed a Motion to Decertify the Class in full. Id. On August

[7] Appellants' Motion for Monetary Sanctions was granted in the amount of $48,622.22. 2-ER-77.

[8] On February 10, 2020, RSC filed a Motion to Amend the Scheduling Order to extend fact discovery and for leave to conduct discovery of class members. On April 13, 2020, the Court denied both motions. 7-ER-1360-80.

10, 2020, the Court granted Appellants' Motion and denied RSC' Motion to Decertify, narrowing the Class to the Transfer Subclass. 4-ER-625-647.

C. The Motions for Summary Judgment

On March 26, 2020, Appellants and RSC filed Cross Motions for Summary Judgment. RSC additionally filed Motions to Exclude Appellants' experts. On January 27, 2021, the Court held oral argument. On January 29, 2021, the Court granted RSC's Motion for Summary Judgment and denied Appellants'. In granting Summary Judgment, the Court noted three issues: "(1) whether proof exists that the calls were made using an automatic telephone dialing system [] or prerecorded voice; (2) whether Royal Seas Cruises Inc. [] can be held vicariously liable for the calls placed by Prospect DM []; and (3) whether Royal Seas has any evidence to support its defense that the calls were made with the express consent of all class members." 1-ER-3.

With respect to the first issue, the Court found that "there is clear evidence that an artificial or prerecorded was used on some occasions" but ultimately "the Court need not reach this issue because it finds that Royal Seas is not vicariously liable for the acts of Prospects and, indirectly, the claimed malfeasance by third-party web sites." 1-ER-12. With respect to the third issue, the Court ruled it "moot," but "note[d] that the Declaration of McCurley and Deforest explicitly stating that they did not consent to be called, nor had ever visited the websites at

issue, raise an issue of fact for the jury." Accordingly, the Court did not find that Prospects did not violate the TCPA, ruling solely on whether there was vicarious liability.

Turning to the second issue, the Court held "[f]or Royal Seas to be liable for the calls place by Prospect, Plaintiff must show that there is an agency relationship between Prospect and Royal Seas and that Prospect had actual authority, apparent authority, or ratified the calls made in alleged violation of the TCPA." 1-ER-12. On the issue of actual authority, the Court dismissed this argument in one sentence, stating "[a]ny claim of actual authority is belied by the express language in the contract between Royal Seas and Prospect requiring that any leads be from individuals who had consented to be called." *Id*. The Court's order as to this issue is exclusively based on the exculpatory clause in Royal Seas' contract.

On apparent authority, the Court noted "[c]ritical to the analysis of 'apparent authority' is 'proof of something said or done by the alleged principal, on which the Plaintiff reasonably relied.'" *Id.* The Court found "the only arguable manifestation by Royal Seas is Royal Seas' contract with Prospect allowing it to approve the prerecorded scripts used by Prospect." But this does not analyze whether RSC manifested to Appellants that Prospects was acting pursuant to its authority in robodialing without consent—which it did by accepting the hot

transfers and proceeding to try and sell to Appellants immediately after they spoke to Prospects.

Regarding ratification, the Court noted Appellants could prove ratification by either "(1) actual knowledge [or] (3) willful ignorance." 1-ER-13-14. "Under a willful ignorance theory, a principal assumes the risk of lack of knowledge when the plaintiff shows that the principal 'had knowledge of facts that would have led a reasonable person to investigating further but ratified [the principal's] acts anyway without investigation." *Id.* The Court dismissed Appellants' arguments that RSC showed willful ignorance through "[doing] nothing to verify that Prospect was following the TCPA as it [was] contracted to do" and because "cruise lines have been subject to approximately 100 TCPA actions in the past and [] the fact that so few people actually purchased the cruises after transfer should have alerted Royal Seas to the fact that not everyone consented to be called." *Id.* The Court instead required that Appellants show "evidence that Royal Seas received any complaints about the calls" and ruled that "Plaintiffs provide no evidence to support their theory of vicarious liability . . . ." *Id.* The Court's ruling was based on finding that a jury could never find the evidence submitted by Appellants indicated an agency relationship and finding that the exculpatory clause in RSC' contract inoculated it

from vicarious liability.[9] In finding no actual agency, apparent agency, or ratification, the Court found that RSC could not be held vicariously liable for the actions of Prospects.

II. STATEMENT OF FACTS

A. RSC Contracts With Prospects To Place Prerecorded Voice Telemarketing Calls

RSC is a Florida corporation and subsidiary of Caribbean Cruise Line, Inc., which marketed cruise vacation packages in the Bahamas. 5-ER-894. In November 2016, RSC hired Prospects to provide robocalling services concerning RSC' vacation packages. 8-ER-1384-94; 5-ER-865-66; 5-ER-884; 2-ER-90. RSC's contract with Prospects ("the Contract") states Prospects will call consumers using pre-recorded messages written by RSC with the goal of obtaining direct transfers to which it would sell RSC products. 8-ER-1384-94; 6-ER-968-9, 972, 975; 2-ER-90. Once a call is placed by Prospects, a consumer is greeted with a prerecorded voice using a "press one" IVR, which allows them to be transferred to a Prospects agent. The Prospects' agent will ask a series of scripted questions, to "qualify" the lead before transferring to a RSC employee. 6-ER-994-98; 8-ER-1384-94. Prospects is paid per "Qualified Exit Read Transfer" which is someone

[9] "The Court [did] not rely on the opinion of either expert to formulate its opinion" and denied the Motions to exclude Mr. Bacon and Mr. Weeks as moot. 1-ER-7.

qualified by Prospects, transferred to RSC, and who stays on the line with RSC for at least 60 seconds. 6-ER-998-1000; 8-ER-1387.

RSC was in direct constant real time communication with Prospects about the calls being transferred to RSC employees, whose job it was to close sales. When a call is transferred, RSC electronically logs the call in its database, including the phone number called, and consumer contact information such as name and address, as well as data identifying the publisher who sold the consumers' information to Prospects. 6-ER-962, 969, 985-91; 5-ER-868; 5-ER-885; 2-ER-90. RSC produced the call transfer data in Excel format, which includes the websites www.diabeteshealth.info, www.yourautohealthlifeinsurance.com[10] and www.myhealthcareauthority.com. 5-ER-872-73. The Class consists of over 80,000 unique telephone numbers associated with diabetesealth.info that were transferred to RSC by Prospects pursuant to the Contract and over 400 for www.yourautohealthlifeinsurance.com.

The Contract specifies Prospects shall act exclusively as a telemarketer for RSC. 8-ER-1387-8. RSC was aware Prospect used pre-scripted voice prompts initiated using a computer. This expressly complied with the Contract. 6-ER-974-5; 4-ER-521-78. Per the Contract, RSC had the right to demand proof of

[10] myhealthauthority.com was ultimately irrelevant after RSC changed the source of Deforest's information from it to www.yourautohealthlifeinsurance.com in its Opposition to Class Certification.

compliance with all applicable laws at any moment. 8-ER-1389. However, RSC never conducted any audits, never demanded proof of compliance with the TCPA, and never even checked if the sources of its leads—which it was provided—contained complaint TCPA language. 6-ER-972-73, 1000-1003.

Accordingly, the calls at issue in this case were placed pursuant to the express terms of the Contract between RSC and Prospects—prerecorded voice calls placed to obtain telemarketing leads and hot transfers. The only argument otherwise is based an exculpatory clause stating Prospects will only call in compliance with the TCPA:

> "If [Prospects] makes outbound telephone calls, then [Prospects] shall at all times during the term of this Agreement, comply with all laws and regulations applicable to telemarketing, including but not limited to, Federal, state, local law, or regulation, the Telephone Consumer Protection Act, the Telemarketing Sales Rule, state telemarketing laws and regulations, and regulations that may be applicable to its telemarketing activites on behalf of RSC, all as amended and may be amended from time to time hereafter."

8-ER-1388-9. Prospects also agreed to "defend, hold harmless, and fully indemnify RSC related to any and all costs, expenses, liabilities, penalties, fines and other damages associated therewith." *Id.*

This exculpatory clause is a red herring. Both Prospects and RSC believed Prospects was complying with the TCPA, such that the calls were, according to

both Prospects and RSC, squarely within the scope of the Contract, even if they ultimately turn out to violate the TCPA. 6-ER-978, 984-85; 4-ER-553-58, 592, 619-20; 5-ER-866. Grant repeatedly testified that Prospects only intended to make calls that complied with the TCPA and believes to this day his business practices were lawful. 4-ER-553-58, 592, 619-20; 5-ER-865. Prospects did not use scripts to generate data for calls, believed its third-party web publishers[11] only sold TCPA compliant data, and was unaware of any wrongdoing by lead vendors.[12] Id. Prospects believed it placed all calls only in compliance with the TCPA and the Contract.[13] *Id.* Prospects believes that it only calls in response to third-party web publishers who provide TCPA complaint data. Id. Accordingly, Prospects was operating expressly pursuant to its authority under the Contract when placing the calls at issue. *Id*.

B. Appellants' Experiences

McCurley received multiple prerecorded voice robocalls from Prospects pursuant to the Contract with RSC on May 3, 2017 on his cellular telephone, which

[11] Brody, president of Landfall Data which sold leads to Prospects, testified that he was never given any indication the data was illegitimate and if he had even suspected so, he would not have done business with the lead provider. Brody believed his leads were legitimate. 3-ER-300, 355-56.

[12] Grant admitted to simply buying the databases from other sources and having no direct involvement or conducting any audit or investigation. 5-ER-710-12; 5-ER-865-67, 872.

[13] The third-party call centers Prospects employed similarly only made calls for telephone numbers it believed were legitimate. Id.

asked him a series of prequalifying travel telemarketing questions. 6-ER-1050. After responding, he was connected to an employee of RSC, who asked if he was interested in a cruise. *Id*. He informed the employee that he was not interested and terminated the call.[14] *Id*. at 1050-52. McCurley never provided RSC or its agents with his phone number or consent to robodial him to solicit RSC' products. This testimony stands unrebutted. *Id*.

Appellant Dan Deforest ("Deforest") received multiple prerecorded voice robocalls to his cellular telephone from Prospects pursuant to its Contract with RSC. 6-ER-1055-60. In December 2016, Deforest received a prerecorded voice call, which connected him with an agent who asked prequalifying questions about whether he was interested in a cruise. *Id*. at 1056-57. During that call, Deforest asked how RSC obtained his number, and was informed by a RSC employee that he was selected based on travel patterns, having good credit, or his demographics, none of which involved Deforest giving permission to contact him with a robodialer or prerecorded voice. *Id*. Deforest voiced concern that the caller was engaged in a scam and ended the call. *Id*.[15]

[14] A jury will hear McCurley advise RSC he received a prerecorded voice call, which the RSC employee told him was from RSC's "networking department."

[15] This recording was referenced during oral argument. A jury will hear Deforest ask how he got selected to win a free cruise and the RSC employee stated "It's not like you filled out something and then you got chosen for it. No, you actually got

Deforest received another call from Prospects pursuant to the Contract with RSC on May 5, 2017. 6-ER-1056; 4-ER-399-403. He was greeted with a prerecorded voice, which connected him with an agent who asked prequalifying questions about whether he was interested in a cruise. *Id*. Deforest was transferred to an employee of RSC. He asked how RSC had acquired his number. The employee advised he participated in a merchant account or travel survey, both of which were untrue. *Id*. Deforest never provided his number or consent to RSC or its agents to contact him, and yet the record shows he was robocalled 20 times, including twice where he expressed frustration because he did not consent. The transcript of Deforest's June 7, 2017 call with RSC reflects Deforest telling RSC that he never "participate[d] in either a merchant account or [] participated in one of the travel surveys" that would cause him to receive such an "out-of-the-blue-call." *Id*. He repeatedly told the representative that it was suspicious to have somebody call him when he didn't sign up for anything and tell him he had won a free cruise. *Id*.

C. There Is No Evidence Of Any Consent Yet There Is Evidence Prospects' Vendors Manufactured Consent

RSC produced no evidence that even a single consumer consented to be robocalled. 6-ER-984, 992-93. At Class Certification, the Court found that they

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selected…" RSC clearly was aware, listening to this recording at the very beginning of the Class Period, that consumers were being called without consent.

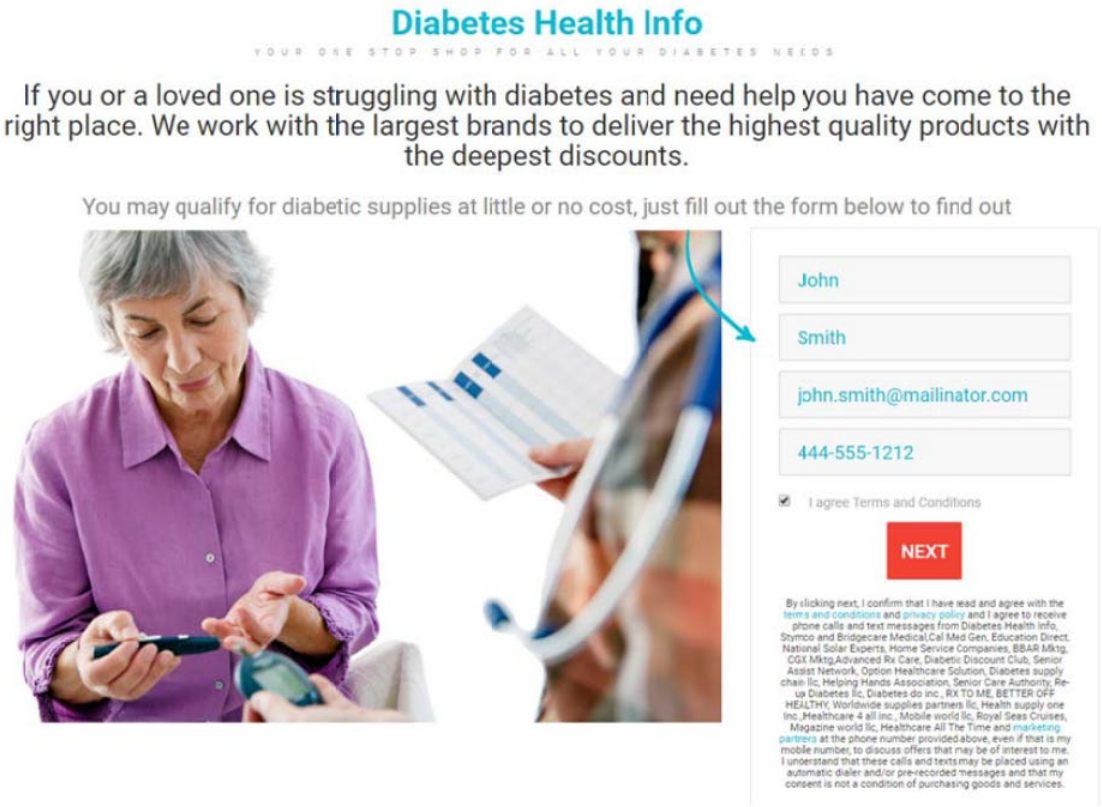
had "no evidence" and the only other evidence they obtained after Class Certification was stricken because of misconduct by RSC and its attorneys. Thus, the issue regarding manufactured consent is irrelevant for the liability of Prospects under the TCPA—because it is RSC's burden to prove the affirmative defense of consent and it has failed to do so. The issues of express authority and apparent authority are entirely based on the factual recitations above and the issue of manufactured consent solely matters for ratification under the theory of willful ignorance.

Prospects produced records of over 630 million robocalls, comprised of over 53 million unique phone numbers and included information pertaining to the consumer name, phone number, address and email address and IP address[16] (in some cases), and a website affiliated with the consumer's number (.5% of the time). 6-ER-1065, 1089[17]; 4-ER-467-70, 499-500. RSC produced a dataset of the real-time transfer data from Prospects to RSC containing over 2 million entries, including the name of the consumer, phone number, address, and, in some instances, a website and IP address. 6-ER-1090-92.

[16] There were thousands of duplicative IP addresses in the data, indicative of the data being provided through the same computer, despite the consumer addresses associated with the leads being geographically dispersed.

[17] Mr Weeks submitted two reports in conjunction with class certification, one of which provided a summary of the large databases produced by RSC and Prospects and one of which analyzed the websites in those databases and web traffic data. While Mr. Weeks' reports were subject to a *Daubert* motion, the Court did not exclude or consider them.

RSC also produced what it claimed to be "opt in consent data" for Appellants.[18] According to this data, McCurley's phone number was sold to Prospects by the operator of the website diabeteshealth.info. Data produced in the case suggests that 2.275 million "leads" similarly came from diabeteshealth.info, with over 80,000 unique telephone numbers associated with that website transferred to RSC by Prospects. 6-ER-1090. The website diabeteshealth.info looks as follows:



[18] Which the Court ruled was inadequate and does not demonstrate consent.

7-ER-1373. This site is a one-page form that effectively says "do you have diabetes? Well then enter your personal information here, and you can get robodialed for a cruise." It is facially plausible that no reasonable person would go to this website and do such a thing. The fact that the lead information that came from it for McCurley was actually for "Jose Fernandez," with an address not affiliated with McCurley, and containing no identifying information for McCurley other than his phone number is even more suspicious. 6-ER-1090-92, 1109-1114. There is an even bigger problem because the data produced "from" diabeteshealth.info contains data that cannot be captured by the www.diabeteshealth.info portal and is missing fields that would have to have been provided by a consumer for the lead to be processed.[19] 5-ER-718-96; Notice of Lodging of Videos Exs. G, H and I. Instead, this evidence demonstrates manufactured consent—meaning that the "consent" is being created through a process by which private data is obtained through other sources and laundered to appear legitimate—rather than the consumer actually organically and voluntarily

[19] Mr. Nathan Bacon's report discusses how the website was not programmed in a way to ever produce the evidence diabeteshealth.info was alleged to produce—namely because it did not contain fields for all the data allegedly collected from it and also because it required a consumer to fill out all fields before accepting submission—and some of those fields are not reflected in the database produced.

agreeing to receive robocalls.[20] Such sources misuse consumer data for economic gain and cover it up by creating the appearance of legitimacy.

With respect to DeForest, the data produced shows an address in Powder Springs Georgia, where Deforest has never resided or visited. 6-ER-1114; 5-ER-803-05; 6-ER-1055-60. Deforest's web browsing history and testimony confirm he never visited that website. *Id*. Additionally, as the Court noted in its Order Granting Class Certification, the website does not contain RSC opt in language and is legally deficient anyways. 5-ER-710. Accordingly, the approximately 400 leads from www.yourautohealthlifeinsurance.com were called without consent.

1. Appellants' Expert Reports on the Sham Nature Of The Websites With Respect To Web Traffic

Besides the "on their face" issues with the websites plausibly generating the volume of leads RSC asserts they generated, Appellants' expert Wesley Weeks opined on the web traffic necessary to generate such volume of leads and how implausible it was that these websites could have done so. In particular, he noted that the websites had no backlinks, no social media presence, and had not been search engine optimized, such that they did not even register in the first 10 pages of Google search results, meaning there was no way for a consumer to access the

[20] When presented with this evidence at deposition, Brody disavowed his declaration, and testified that RSC drafted the declaration and pressured and "harassed" him into signing it under duress after Danny Lance refused to sign it, calling it "shady," and a "setup." 3-ER-202-05, 209.

site unless they knew the obscure URLs and manually typed them into their browsers. Further, for diabeteshealth.info to have generated 80,000 leads as proposed at the optimistic conversion rate of 2.35%, it would have required at least 3.4 million visitors a year. This is 320 times the amount of traffic estimated to have gone to the site via the public sources available on Alexa. 6-ER-1093; 7-ER-1231. These issues only further point to the fact that the leads could not have been legitimate.

D. RSC Was Purposefully Ignorant Of Prospects' Lead Generation

RSC was aware that Prospects was outsourcing lead procurement and doing so was expressly authorized in the contract. 6-ER-963; 8-ER-1386. Moreover, the real time data confirmed which website publishers Prospects was purchasing the data from. This data was maintained by RSC and could have been reviewed at any time as it was in its possession. 6-ER-987. The only compliance oversight RSC ever conducted was to approve consent language that Prospects said it would put on opt in websites that it claimed it would set up in order to gather consent. 6-ER-971-73. Even though the contract envisioned RSC engaging in oversight regarding enforcement and applicability, it did not do so.

Despite fielding calls like the ones for Appellants, where consumers express that they never signed up for anything and have no idea why they are being contacted and find the circumstances suspicious, RSC never once conducted an

audit or investigation into where Prospects got its leads. RSC willfully chose to never exercise any oversight or auditing of Prospects' compliance as authorized by the Contract except by approving boilerplate compliance language that Prospects was supposed to be putting on lead generation websites.[21] 6-ER-972-73, 1000-1003. Poole, who was in charge of reviewing this compliance, was also acutely aware of the importance of this compliance as she has worked for multiple similar entities, including Caribbean Cruise Line; and, Holiday Cruise Line which have been subject to TCPA litigation. 6-ER-955, 960-61. Caribbean Cruise Line in particular was subject to litigation in which it lost a motion for summary judgment with the Court finding that it was vicariously liable for its lead generator who placed calls using a prerecorded voice[22] (*Aranda v. Caribbean Cruise Line, Inc*., 179 F. Supp. 3d 817, 831 (N.D. Ill. 2016)) as well as a consent order requiring it to adopt a hands-on approach regarding its lead generators 2-ER-130-51.

Despite this, Poole merely skimmed examples. 6-ER-965. RSC washed its hands of all compliance by placing sole responsibility of compliance on Prospects. 6-ER-972-73, 1000-1003. Its only form of cross checking whether consumers provided consent to be called is to look at the data of the phone number that was

[21] This is highly relevant as to Deforest, because Deforest's information was sold by a publisher whose website contained no opt in language for RSC. Apparently, what limited role RSC did acknowledge playing with respect to lead generation, they were not even paying attention to, demonstrating how little the company cared about how their business was being generated.

[22] A factual pattern almost identical to the issue here.

dialed by Prospects and match that with the phone number of consumers who end up becoming customers to see if there is a match, which in fact verifies nothing at all and is meaningless. *Id*. and 8-ER-1384-94. RSC *could have* checked if the contact information for these individuals matched the data sent by Prospects and could have reviewed the websites identified in the lead data but chose not to do so. Further, had Poole actually done her job and reviewed the websites, she would have discovered that the website that generated approximately 80,000 transfers and sold McCurley's number was a shell,[23] and that the lead data did not correspond to the website's opt in fields (i.e. that it had to be manufactured), and the website that sold Deforest's data did not contain written consent language for RSC.[24] RSC's argument is that it did not check the data and thus had no reason to know the data was bad—but this is the definition of purposeful ignorance.

SUMMARY OF THE ARGUMENT

If this case were simply about whether Prospects violated the TCPA, there would be a judgment in favor of Appellants because there are no triable issues of

[23] The website is a shell because there is no substance behind it. It is not accessible to the general public, its existence is unknown, nobody actually visited it or provided their information through it, and the only persons who know it exists are the operators, the parties to this suit, and the attorneys. It was not designed to actually process organic consumer traffic or their data leads.

[24] RSC will point to other supposedly "reputable" lead brokers that did business with Prospects, but this is irrelevant to this appeal which only focuses on two specific websites for the certified Class.

fact as to that question. The sole question on appeal is whether RSC can be found vicariously liable by a jury for the acts of its telemarketing agent.

There is little Circuit-level case law regarding vicarious liability under the TCPA, and no analogous decisions except the FCC Dish Order. What is clear is that RSC (principal) hired Prospects (agent) to robodial people. Prospects was not simply hired to generate business and advised not to robodial. It was contracted *to robodial* with a prerecorded voice to sell RSC products by express letter of the Contract. It did so. RSC knew it was doing so because that is what it hired them to do. Both Prospects and RSC believed Prospects was calling in compliance with the Contract and the TCPA.

Millions of consumers were transferred to RSC's employees during these robocalls. RSC never asked where the information was coming from or how Prospects was legally acquiring such astronomical volumes of consumer data. Consent must be in writing. That means Prospects would have to have knowingly convinced 53 million Americans to provide their phone numbers and agree in writing to be robodialed for telemarketing purposes. RSC had real-time information about the websites from whom Prospects was buying data. They never once conducted any investigation into whether this was legitimate or whether someone simply took a phone book, dumped it into a spreadsheet, and slapped the

name of the website on it to make it appear legitimate (which is essentially what happened).

RSC has three defenses: 1) pleading total and complete ignorance, which is not remotely believable (a jury issue); 2) claiming that the consent is in fact legitimate, which is demonstrably false (an issue Appellants should win as a matter of law); and 3) relying on an exculpatory clause in its contract with Prospects, which subverts public policy and makes a mockery of an important federal privacy regulation. RSC cannot win issue 2 (the District Court agreed), and so it must win both issues 1 and 3 in order to avoid a trial. It must also avoid a finding of apparent authority (another issue of fact for a jury). It cannot win any of these three avenues for liability under Rule 56 standards, yet alone all of them.

There is no legitimate dispute factually or legally that Prospects is an agent of RSC. They are. And so, a jury could view the facts of this case in a manner and find that Prospects was acting as an agent and that RSC intended for the calls to be made irrespective of whether there was consent—contractual exculpatory language be damned. Separately, the Restatements of Agency holds limitations of responsibility in an agent-principal relationship are not enforceable, as a matter of policy, where there is negligence, recklessness, or malfeasance as to acts that are otherwise within the scope of duties. Stated otherwise, it is acceptable to prohibit certain conduct as outside the scope of duties (like robodialing) but not acceptable

to delegate liability for the standard of care undertaken regarding such authorized duties (as is the case in the affirmative defense of consent).

Exculpatory clauses like the one in RSC's contract are invalid for public policy reasons. This is because tort law places the responsibility on those who can avoid the harm. RSC can seek indemnification or contribution from its contracted agent Prospects, but the consumers who were harmed and subjected to privacy intrusions should not be blamed or burdened with having to pursue extra-judicial international litigation simply to have their privacy respected. The FCC Dish Order makes it clear that vicarious liability applies to relationships like that of RSC and Prospects. The Restatement would hold RSC accountable under an agency theory, as should this Court.

A jury could also find apparent authority because all indicia of agency would be present for a reasonable consumer, via a traceable manifestation from RSC of being part of the same robocalls, and continuing the sales pitches Prospects initiated. The calls for every class members were placed on behalf of RSC, by its expressly-contracted agent, using a prerecorded voice and a telemarketing script of prequalifying questions that was approved by RSC, and then warm-transferred during the same robocall, to a live employee of RSC, who attempted to close the sale, all while being aware of the publisher who sold the "consent" data for every

single Class Member. Any reasonable consumer would believe that this call was placed by an agent of RSC and approved by RSC. A jury must decide this issue.

A jury could also find ratification via this Court's willful ignorance standard set forth in *Henderson*, and rule that RSC's head-in-the-sand approach, and historic understanding of TCPA consent risks, coupled with its refusal to rebuke Prospect DM's acts after the fact and efforts to cover it up were by design and constituted ratification.

Vicarious liability cannot be analyzed in a vacuum. RSC will attempt to feign ignorance, cite to this Court's decisions in *Kristensen* and *Jones*, which are not analogous, and perhaps even attempt to yet argue that the consent records are legitimate and Appellants are making a big deal out of nothing. This Court should see through that and has the opportunity to hold a bad actor accountable and set a precedent where this type of subversion cannot and will not be tolerated in a civilized court of law. Vicarious liability under the TCPA should typically be reserved as a question of fact for a jury. That is what the Fourth Circuit recently held, and this Court should hold the same. American privacy is at stake. Endorsing the blueprint that RSC's architects have drafted does not serve the greater good.

ARGUMENT

I. Standard of Review

A district court's grant of summary judgment is reviewed de novo on appeal. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1041 (9th Cir., 2017). Summary judgment is appropriate only when it is demonstrated that there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Fortyune v. American Multi-Cinema, Inc*., 364 F.3d 1075, 1080 (9th Cir. 2004). A fact is "material" if it might affect the outcome of the suit under the governing law. *Thrifty Oil Co. v. Bank of America Nat'l Trust & Savings Assn*., 322 F.3d 1039, 1046 (9th Cir. 2002). A dispute is "genuine" as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

The party seeking summary judgment bears the burden of demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a moving party fails to carry its burden of production, then "the nonmoving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion." *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). "Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to

'go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.'" *Celotex*, 447 U.S. at 324 (1986). "Generally, the existence and scope of agency relationships are factual matters and are therefore often appropriately left to the jury." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659-60 (4th Cir. 2019).

II. LEGAL ANALYSIS

A. Prospects' Liability Under TCPA

Vicarious liability exists when an agent commits a tort that is sought to be ascribed to the principal. Thus Appellants' first addresses the undisputed record that Prospects violated Appellants' rights under the TCPA.

The TCPA combats the threat to privacy caused by robocalling, stating it is unlawful: "(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice...(iii) to any telephone number assigned to a … cellular telephone service …" 47 U.S.C. § 227 (b)(1)(A)(iii). Prior express consent is an affirmative defense to which a defendant bears the burden of proof, not an element of the violation. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). With respect to telemarketing, express consent must be "clearly and unmistakable stated" in

writing. *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 955 (9th Cir. 2009); 47 C.F.R. §§ 64.1200(a)(1)(2) and 64.1200(f)(1)(12). Written consent must include a clear and conspicuous disclosure "that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1844 ¶ 33 (2012) (emphasis added).

It is uncontested that Appellants were both contacted by Prospects on their cellular telephones using a prerecorded voice to solicit RSC products, pursuant to Prospects' Contract with RSC. Besides the numerous facts put forth by Appellants demonstrating that RSC did not have consent, RSC was also already found to have presented "no evidence" demonstrating consent for anyone at Class Certification and failed to obtain or present any non-stricken evidence thereafter. Accordingly, Prospects violated the TCPA, and Appellants would have been granted summary judgment but for the question of whether RSC is vicariously liable. For the reasons below, the Court erred in finding it was not.

B. RSC Is Vicariously Liable for Prospects' Violations of the TCPA Pursuant to Their Contract

There is no dispute that Prospects was an agent acting on behalf of RSC—the only question is whether in placing the calls at issue here it was acting within the scope of that agency. The determination of whether an agency relationship

exists is a question of fact, and "summary judgment on vicarious liability is appropriate only in cases where the evidence of the relationship is clear and unequivocal." *Legg v. Voice Media Grp., Inc*., 20 F. Supp. 3d 1370, 1378 (S.D. Fla. 2014); *see also Johnson v. Unique Vacations, Inc.,* 498 F. App'x 892, 894 n.3 (11th Cir. 2012) ("The existence of an agency relationship is one for the jury to decide as the triers of fact."); *Lushe v. Verengo Inc*., No. CV 13-07632 AB (RZ), 2014 U.S. Dist. LEXIS 157124, at *16 (C.D. Cal. Oct. 22, 2014); *Nat'l Football Scouting Inc. v. Cont'l Assur. Co*., 931 F.2d 646, 649 (10th Cir.1991). A finding that there are triable issues of fact for any of the three forms of vicarious liability would be sufficient to overturn summary judgment. The District Court erred in the legal tests it used and its application of the facts to those tests.

Prospects was acting within its express authority in placing prerecorded robocalls which were explicitly called for in the Contract and which Prospects and RSC believed were being made in compliance with the TCPA—even if they ultimately were not. Prospects was also acting with apparent authority from RSC because RSC represented to Appellants and the Class that the lead-in calls had been authorized by RSC when it then attempted to sell these consumers products after the hot transfer. RSC also ratified Prospects' conduct to the extent it was not made with express authority because it accepted the benefits of the lead generation and willfully ignored any problems by refusing to investigate and confirm the calls

were being made in a way that was compliant with the TCPA. If Appellants win on any of these arguments, summary judgment is reversed and this proceeds to trial. Appellants should win all three.

1. The FCC Dish Order

It is important to begin with the FCC Dish Order which is the only binding precedent on vicarious liability under the TCPA as recognized by the Supreme Court. An entity "may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer." *FCC Dish Order* at 6582. These include agency principles of direct agency, apparent authority, and ratification. *Id*.; *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 673 (2016).

The FCC observed that sellers generally are not the ones placing the calls, and typically hire third party agents to do this on their behalf. FCC Dish Order at 6582-84. The FCC interpreted the word "initiate" by its dictionary definition of "to set going; by taking the first step" and went on to find that a telemarketer (like Prospects) who was initiating a call on behalf of a seller (like RSC) as a result of a contractual compensation structure, constructively converts a seller into a telemarketer, because the seller was a but-for cause of the telemarketer's conduct. *Id*. The distinguishing fact pattern discussed was that of a seller who contracted with a telemarketer under a commission structure (liability) and a reseller who was

buying the goods from the seller and reselling them via telemarketing (no liability).

Id. The FCC held:

> The TCPA was enacted primarily to protect consumers from unwanted telemarketing invasions. The private right of action provided in section 227(b)(3) gives consumers the power not only to seek compensation for the harms unlawful telemarketing causes, but also to deter future unlawful invasions of privacy. In *Hydrolevel Corp*., the Supreme Court determined, in a private antitrust action under 15 U.S.C. § 15, that the statute permitted the imposition of liability against a trade association for the actions of its agents. Noting that a purpose of the statute was to deter anticompetitive actions, the Court held that allowing vicarious liability, in that case on the basis of apparent authority, would advance that goal because, if the trade association "is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future." The Court explained that "[o]nly [the trade association] can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [it] to take those steps." By contrast, denying trade association liability would allow the association to "avoid liability by ensuring that it remained ignorant of its agents' conduct," contrary to congressional intent that the "private right of action deter antitrust violations." This analysis applies comfortably to private rights of action for violations of section 227(b)… the seller is in the best position to monitor and police TCPA compliance by third-party telemarketers. We thus agree that, consistent with the statute's consumer protection goals, potential seller liability will give the seller appropriate incentives to ensure that their telemarketers comply with our rules. By contrast, allowing the seller 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. This would particularly be so if the telemarketers were judgment proof, unidentifiable, or located outside the United States, as is often the case … And as the Third Circuit determined in an analogous context, absent the application of agency-related principles, the seller (in this instance) "would benefit

> from undeterred unlawful acts, and the statute's purpose ... would go unrealized."

Id. at 6587-88.

The FCC rejected Dish's argument that vicarious liability and knowledge of wrongdoing by an agent should be analyzed on a granular level, finding such arguments "misplaced" and that imposing a liberal application of vicarious liability principles on the agent and oversight obligations over the telemarketer would reduce unlawful activities, as "sellers will have an incentive to carefully choose their telemarketers to ensure compliance and to force consistent violators out of the marketplace." *Id*. at 6591-92.

> [W]e see no reason that a seller should not be liable under [§ 227b] for calls made by a third-party telemarketer when it has authorized that telemarketer to market its goods or services. In that circumstance, the seller has the ability, through its authorization, to oversee the conduct of its telemarketers, even if that power to supervise is unexercised. In the case of either actions to enforce section 227(b) or actions to enforce do-not-call restrictions under section 227(c), we stress that nothing in this order requires a consumer to provide proof — at the time it files its complaint — that the seller should be held vicariously liable for the offending call.

Id. at 6593.

The FCC sent a strong message that companies cannot hire overseas agents to robodial, delegate compliance responsibilities, exercise zero oversight, and feign ignorance of their misdeeds. Such practices undermine the TCPA's clear goals of protecting consumer privacy. This clear message of accountability, finding triable

issues of fact as to Dish, and liberal interpretation of agency principles, obligate RSC to do more than sit on its hands. This is the only binding authority on topic and it fully supports reversal.

C. Prospects Had Express Authority To Solicit RSC Products Via Prerecorded Voice Robodialing

The District Court disposed of Appellants' express agency argument in one sentence and in doing so applied the wrong legal test under *Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010 (9th Cir. 2018), which is inapplicable here. This Court can and should apply the correct test and determine, based on the record, that there are sufficient facts to demonstrate an express agency relationship between RSC and Prospects where Prospects was calling pursuant to the Contract with RSC, believed it was dialing in compliance with the Contract, and but-for the ultimate legal conclusion that it was actually violating the TCPA, was following the letter of the Contract.

1. Prospects' Prerecorded Calls Were Expressly Authorized By The Contract

To hold a party liable for the conduct of a third-party under the theory of actual authority, the principal must "manifest[] assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *FCC Dish Order* at 6586 (citing Restatement (3d) of Agency

§ 1.01 (2006) ("Restat. Agency")).[25] Actual authority may be express or implied. Express actual authority derives from an act specifically mentioned to be done in a written or oral communication. *NLRB v. Dist. Council of Iron Workers,* 124 F.3d 1094, 1098 (9th Cir. 1997) (citing *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co*., 414 F.2d 750, 755 (9th Cir. 1969)).

Prospects performed under the express actual authority of RSC because the use of prerecorded voice telemarketing calls, the conduct giving rise to liability, was specifically performed per the Contract. The District Court found there could not actual authority simply because of the exculpatory language in the Contract. However, both Prospect and RSC testified in strong language that they believe they did have consent to call Appellants and the Class. Prospects repeatedly testified it believed it only made calls in compliance with the TCPA and its Contract and RSC agreed that it believed all calls made by Prospects were in compliance with its Contract. The only argument the calls were outside the scope of the Contract is because they ultimately turned out to violate the TCPA because the prior express consent was manufactured,[26] but that is simply because Prospects and RSC were negligent in ensuring their leads were valid. In other words, the conduct was within the scope of the Contract, but the consequences were not.

[25] Both the FCC and Ninth Circuit give deference to the Restatement of Agency.
[26] And because RSC never produced evidence of having prior express consent, as is their responsibility.

That cannot be the legal standard. Principals are jointly and severally liable for acts of agents that occur within their express duties, whatever their consequences. [27]

To contrast, in *Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010 (9th Cir. 2018), **there was no contract between the seller and the telemarketers** and therefore no actual authority. The sellers had no idea the telemarketers were robocalling to solicit their goods. Similarly, in *Jones v. Royal Administration Services, Inc*., 887 F.3d 443 (9th Cir. 2018) [28], the contract **expressly prohibited robodialing**. Here, there is no question an agency relationship existed between Prospects and RSC. Their Contract provided for the very prerecorded robodialing campaign that led to the transfer of leads. *Kristensen* and *Jones* have nothing to do with this case because RSC hired Prospects to robodial. RSC approved the prerecorded voice language used on the robocalls. RSC connected its database to Prospects' system so data could be transferred in real time as consumers were transferred to RSC. RSC had authority to audit Prospects, including its lead generation methods. RSC approved the website opt in language (sometimes), to check for compliant language on publishers' sites. RSC had unilateral authority to determine whether Prospects was following RSC's version of the TCPA's

[27] *Birchmeier v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2012 WL 7062748, at * 1 (N.D. Ill. Dec.31, 2012) (only permitting TCPA liability to the party that actually made the call would be "absurd").

[28] Which was the sole citation in support of the District Court's Order in this issue.

requirements. RSC knew in real time where the consumers' data was coming from. RSC had authority to terminate the Contract at any time for any reason. These facts are undisputed. Prospects is an agent acting within its express authority under the Contract, regardless of whether its robocalls were lawful, or negligently or willfully violative of the TCPA. The only argument to the contrary is that because calls ultimately violated the TCPA, they were not expressly authorized. Such clauses have numerously been ruled irrelevant to the analysis of agency.

a. Exculpatory Clauses Cannot Subvert Public Policy By Delegating Non-Delegable Duties

> "A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent."

Restat. Agency § 7.06. The existence of a clause within the contract that Prospect will not violate the law does not prevent the existence of actual authority for the conduct that is explicitly to be performed under the Contract which incidentally violates the law. As this Court has held, non-delegable duties arise where 1) the enterprise (RSC) is the beneficiary of the contractor's (Prospects) work; 2) the enterprise selects the contractor, is free to insist upon one who is financially responsible, and to demand indemnity; 3) the insurance necessary to distribute risk is properly a cost of the employer's business; and 4) performance of the duty of

care is of great public importance. *Carroll v. Federal Exp. Corp*., 113 F.3d 163, 165 (9th Cir. 1997).

RSC argues that because its Contract states Prospects will comply with the TCPA while robocalling, any calls deemed to have been in violation of the TCPA are thus expressly not within the scope of agency. Contractual disclaimers alone are not dispositive of express authority. *Robb v. United States*, 80 F.3d 884, 893 n.11 (4th Cir. 1996); *Jackson v. JTM Capital Mgmt., LLC*, Civil Action No. TDC-19-1009, 2021 U.S. Dist. LEXIS 64919, at *24-26 (D. Md. Apr. 2, 2021) (contractual disclaimers are not dispositive of an agency relationship status, even where a principal testifies they have "no control" over the agent.); *McAdory v. M.N.S. & Associates, LLC*, 952 F.3d 1089, 1090 (9th Cir. 2020) ("an entity that otherwise meets the 'principal purpose' definition of debt collector cannot avoid liability under the FDCPA merely by hiring a third party to perform its debt collection activities."); *U.S. v. Milovanovic*, 678 F.3d 713, 725 (9th Cir. 2012) (finding agency even though agreement labeled them contractors); *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317, 325 (7th Cir. 2016) ("Like the Third Circuit, we think it is fair and consistent with the Act to require a debt collector who is independently obliged to comply with the Act to monitor the actions of those it enlists to collect debts on its behalf."); *Kimber v. Fed. Fin.*

Corp., 668 F.Supp. 1480, 1486 (M.D.Ala.1987); *West v. Costen*, 558 F.Supp. 564, 573 (W.D.Vir. 1983).

Delegation of duty is not dispositive of whether an agency relationship was created. *Highline Capital Corp. v. Ahdoot*, No. 06-cv-2024, 2008 U.S. Dist. LEXIS 12580, at *26 (D. Colo. Feb. 20, 2008) ("courts routinely find such disclaimers only weakly probative of whether such [agency] relationships in fact exist."); *Am. Home Mort. Corp. v. First Am. Title,* No. 07-1257, 2007 U.S. Dist. LEXIS 83337, at *18 (D. N.J. Nov. 9, 2007) ("If courts routinely recognized disclaimers of agency, parties could conduct themselves as principal and agent without legal ramifications that accompany that special relationship."). Courts should ignore disclaimers and exculpatory clauses and instead view contracts as evidence that a finder of fact could use in support of whether an agency relationship arises. *Shamblin v. Obama for America*, 2015 WL 1754628 (M.D. FL April 17, 2015); *Carr v. Stillwaters Dev. Co., L.P*., 83 F. Supp. 2d 1269, 1280 (E.D. Ala. 1999). This approach is consistent with this Court's observation "that Congress intended the actions of an [agent-telemarketer] be imputed to the [seller-principle] client on whose behalf they are taken." *Fox v. Citicorp Credit Services, Inc*., 15 F.3d 1507, 1516 (9th Cir. 1994).

If Prospects negligently placed robocalls in violation of the TCPA and Prospects was an agent of RSC for purposes of telemarketing, then RSC legally

placed the call, and the exculpatory clause is irrelevant as a matter of public policy. The responsibility to make sure the known acts of one's agents are legal is a non-delegable duty. *Worsham v. Nationwide Ins. Co*., 138 Md.App. 487, 772 A.2d 868, 878 (Md.Ct.Spec.App.2001); *Hooters of Au-gusta v. Nicholson*, 245 Ga.App. 363, 537 S.E.2d 468 (Ga.Ct.App.2000); Release No. 95-310 of the FCC, CC Docket No. 92-90, 10 FCC Rcd 12391, ¶¶ 34-35 (1995); *Glen Ellyn Pharmacy v. Promius Pharma, LLC*, No. 09 C 2116, 2009 U.S. Dist. LEXIS 83073, at *10-12 (N.D. Ill. Sep. 11, 2009) (advertiser had "non-delegable" duty to ensure its advertisements were faxed only to legal recipients and noting, "as a matter of policy," that advertiser should not be allowed to "shield itself from liability" by outsourcing transmission of faxes). As the Fourth Circuit held, a seller is not able to avoid legal obligations to telemarket lawfully and overseeing the acts of its agent by simply contracting around them. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 660-61 (4th Cir. 2019) (citing Restat. Agency, § 1.02).

The FCC Dish Order explicitly contemplates this scenario and casts the duty of care in placing robocalls as non-delegable. Sellers and telemarketers are jointly and severally responsible where the robodialers are acting as actual or defacto agents. "[A] company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the

call." *FCC Dish Order* at 6589. This, along with policy concerns identified by the FCC could not be clearer. Compliance with the TCPA is a non-delegable duty.

This is consistent with contract law principles, which generally hold that a term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on policy grounds. Restatement (2d) of Contracts, § 195 (1981).[29] Moreover, the Restatement (2d) of Torts holds both the performance of dangerous work in the absence of specific precautions (§ 416) and the performance of work that has inherent dangers (§ 427) involve nondelegable duties to use reasonable care. Restatement (2d) of Torts, §§ 416 to 429 (1965). "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury." Restatement (3d) of Torts, § 13 (2012). The Restatement clarifies that a party held liable solely because of the tortious conduct of another may be entitled to indemnity from the latter. *Id*. § 22.

Imagine a bus company employs a driver to drive passengers, which pay the bus company for the service. It knows what model bus is being driven, it dictates

[29] *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 833 (9th Cir. 2004) citing *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 880 (9th Cir. 2000) ("It is axiomatic that a contract with an illegal purpose bars enforcement of such contract…")

the schedule, it knows how many passengers are being picked up, and it even greets the passengers as they get off the bus at its bus stops. The contract with the bus driver says that the driver is to drive the route every day but is not to get in any collisions while driving. One day, the bus driver gets distracted and causes a collision, resulting in injury to passengers. Would the bus company be off the hook because of the exculpatory clause? Surely not. If this was permissible, companies would simply delegate away all liability for the acts of their employees, agents, or contractors and the torts system would be thrown into complete chaos. Why should RSC and telemarketing be an exception to this well-trodden rule?

RSC is undoubtedly the beneficiary of Prospects' robodialing campaign, as over 2 million prospective customers were transferred to RSC by Prospects. RSC selected Prospects as its contractor and inserted contractual language in the agreement which required Prospects to indemnify any TCPA violations occurring under the joint robodialing campaign. Prospects is outside the jurisdiction of the United States. Thus, it is proper for the U.S. based company hiring a foreign robodialer to call American consumers, to seek insurance for conduct that violates US law under this contracted call to action. Moreover, as the FCC held in the *Dish Order*, Congress observed in passing the TCPA,[30] this Court observed in *Marks*,[31]

[30] "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out

and the Supreme Court observed in *Barr*,[32] protecting Americans from invasive robocalls is a matter of great policy importance. The *Carroll* factors are met. This was a non-delegable duty.

The District Court erred in ruling that the mere existence of a contractual clause stating Prospects would comply with the TCPA was dispositive of whether Prospects was acting within the express terms of the Contract in placing the prerecorded robocalls on RSC's behalf.

2. Prospects Had Apparent Authority

To the extent Prospects was not acting within its express authority in placing robocalls under the Contract, RSC represented to consumers that Prospect's calls were authorized in accepting the transfers and continuing to sell to those transfers so as to create apparent authority. "A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission." Restat. of Agency 3d § 7.08. "Apparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as

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of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. S16, 205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

[31] *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043-45 (9th Cir. 2018).

[32] *Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335, 2343 (2020).

an agent when the belief is reasonable and is traceable to a manifestation of the principal." *FCC Dish Order* at 6587 (citing Restat. Of Agency 3d. § 2.03). "[D]enying [RSC] liability would allow [it] to 'avoid liability by ensuring that it remained ignorant of its agents' conduct,' contrary to congressional intent that the "private right of action deter [TCPA] violations." *Id.* (citing *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp*., 456 U.S. 556, 565-574 (1982)).

"Apparent authority results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have." *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 940 (9th Cir. 2017) (quoting *Hawaiian Paradise Park*, 414 F.2d at 756). "Apparent authority results from the act of representing responsibility to others, and accordingly, cannot be avoided by private agreements between the principal and agent." *Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1371 (E.D. Cal. 1995). The third party's belief that the agent has authority must be objectively reasonable and traceable to the principal's manifestations. *Hawaiian Paradise Park*, 414 F.2d at 756; *Iron Workers*, 124 F.3d at 1099 ; *see also Chinitz v. Intero Real Estate Servs.*, No. 18-CV-05623-BLF, 2021 U.S. Dist. LEXIS 70436, at *5 (N.D. Cal. Apr. 12, 2021) (noting "apparent authority uses an objective, 'reasonable person' standard") (citation omitted).

The FCC has provided examples of manifestations that would allow a reasonable person to believe there was actual authority, triggering apparent authority, including: (1) allowing access to "information and systems that normally would be within the seller's exclusive control;" (2) providing access to customer information; (3) allowing the third party to "enter consumer information into the seller's sales or customer systems;" (3) approving a telemarketing script; or (4) knowing of TCPA violations and failing to stop such violations. *FCC Dish Order* at 6593-94.

The District Court ignored the vast majority of facts supporting apparent authority. Any reasonable consumer, including Appellants, would reasonably believe Prospects was acting within the scope of agency when robodialing Class Members on RSC's behalf. They were warm transferred to employees of RSC who attempted to sell them cruises. RSC being a part of the same robocall is strong evidence traceable to the principal's manifestation of approving the conduct of Prospects. Appellants were greeted by the employees of RSC after being transferred. Appellants were told that Prospects was RSC's "networking department." Appellants were solicited to buy RSC products. Appellants were exposed to and prequalified using a scripted questionnaire approved by RSC. Appellants' personal information was available to RSC's representatives in real time, who knew their name because it was provided by Prospects to RSC during

the call.[33] Deforest repeatedly told the RSC employee he was called randomly out of the blue without consent and the employee continued the sales pitch and never investigated, condoning Prospects' acts. These are objective facts in the record that the Court ignored. A jury should decide whether it is reasonable to infer, as Appellants did, that Prospects was acting within the scope of RSC's agency. In granting Summary Judgment, the District Court improperly took it out of the hands of the jury where, at worst, there were disputed materials issue of fact.

3. RSC Ratified Prospects' Robodialing

To the extent the Court finds there is not express authority under the Contract or apparent authority through the hot transfer process, Appellants may still satisfy the agency test by showing RSC ratified the conduct and accepted its benefits. Ratification occurs where a principle knowingly accepts the benefits of an actor's conduct. *FCC Dish Order* at 6586-87; *Smith v. State Farm Mut. Auto. Ins. Co.,* 30 F. Supp. 3d 765, 773-74 (N.D. Ill. 2014). Where a business structure has been set up to remain willfully ignorant of the conduct of one's contractor, to avoid liability, this raises issues of fact for a jury as to ratification. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1076 (9th Cir. 2019). As this Court summarized:

[33] RSC's employee repeatedly referred to Deforest by "Daniel" reasonably indicating to Deforest (via a manifestation of RSC) that Prospects gave RSC his personal information after robodialing him on RSC's behalf.

> Restatement § 4.06 requires that a principal knows of the material facts involved in the act it is ratifying. This knowledge requirement is met if the principal either has "actual knowledge" or "choose[s] to affirm without knowing the material facts." § 4.06 cmt. b. Comment d adds that "a factfinder may conclude that a principal has made such a choice when the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation." § 4.06 cmt. d. This can also be described as "willful ignorance."

Id. at 1072-74. "Under the 'willful ignorance' theory, the principal may not know the material facts, but has 'ratified with awareness that such knowledge was lacking.'" *Id*. (citing Restat. Of Agency § 4.01 cmt. b). "The focal point of ratification is an observable indication that a principal has exercised an explicit or implicit choice to consent to the purported agent's acts." *Id*. at 1075 (citing Restat. of Agency § 401 cmt. d). "[I]t is important to consider whether the parties are trying to limit or prevent liability by characterizing their relationship as something other than an agency relationship." *Id*. (citing Restat. of Agency § 1.02 cmt. b).

RSC had a laundry list of red flags that would have sparked any reasonable company to investigate. RSC knew Prospects was telemarketing using a prerecorded voice, calling and transferring millions of people from whom it would have to received *written consent* to be lawful. RSC knew how risky this conduct was because its Contract acknowledges its risky nature and its Director of Marketing who was in charge of ensuring compliance had gone through this

before, including the largest TCPA class action settlement in history, and one of the largest and most punitive FTC Consent Judgments in TCPA history, requiring her employer oversee its lead generators.

Both Appellants' calls with RSC evidence a company turning a blind eye. RSC's call with McCurley demonstrates a consumer who clearly had no interest in the service and had no idea why they were calling. Moreover, RSC would have known in real time that they were speaking with McCurley and not Jose Fernandez. Why not conduct an investigation into why the wrong person was contacted by its agent? RSC asked no questions because it didn't want to know.

The record shows two calls where Deforest spoke to an employee of RSC after being robodialed by Prospects. During the first call he was told by RSC that he was not called with consent, but because he qualified for a promotion. He told the agent he felt it was a scam and hung up, a clear desire not to be called again. Did RSC look into why he was called? No. During the second call, months later he asked why he was called and advised four times that he never gave consent, said "I didn't even do anything…It's crazy" to which RSC just moved on. He told the RSC employee that he "didn't sign up for it, or do anything" and got an "out-of-the-blue-call." The employee responded "That's correct" and then moved on without hesitation. Then he said "if you get a free one without having to do anything, that is rather suspicious, right?" prompting the agent to, instead of

investigating the lead data before her, ignore it and keep selling. He brought up how he never consented to be called a fourth time saying he was "suspicious" and "I didn't sign up for anything and they randomly call me and tell me I won a free cruise…I just want to make sure that…it's legit. You know what I mean right?" The agent proceeded to say "I do, I do, I do…Now Daniel when you do come to Florida to take your complimentary cruise…" Hearing a consumer say they never consented was another day at the office for this sales agent. 6-ER-1056; 4-ER-399-403. RSC knew consumers were being called with questionable consent and did not care. They wanted calls transferred so they could sell. If they cared, they would have investigated. Anyone who cared at all would have, especially if they had a history of being sanctioned for not doing enough.

RSC's willful ignorance and receipt of the benefits of the massive illegal telemarketing campaign it contracted Prospects to conduct could be viewed by a jury as ratification. This Court should look to the factual analysis conducted in *Henderson* in concluding that there was ratification through willful ignorance—as exemplified by its failure to conduct any auditing that it stated it would do but decided not to. The Court should similarly find RSC willfully ignorant in using Prospects to conduct a pre-recorded robodialing campaign with no proof of prior express consent.

In *Henderson*, USA Funds hired Navient Solutions, Inc. ("Navient") to subcontract debt collection companies to place collection robocalls on its behalf. *Henderson*, 918 F.3d at 1070. The contract with Navient provided for USA Funds to review performance reports and operations, including regulatory compliance or lack thereof. *Id.* at 1070-71. USA Funds did conduct auditing, including in 2000, 2009, and 2010, which concluded there were improper collection practices, but did nothing to stop Navient from continuing to use these debt collectors. *Id.* at 1071.

As compared to *Henderson*, in which USA Funds attempted to exercise *some semblance of monitoring if not actual oversight*, RSC chose to intentionally bury its head in the waves and ignore the obviously and alarming signs of an impending storm. There is no dispute that Prospects had actual authority to conduct a pre-recorded voice telemarketing campaign on behalf of RSC.[34] As compared to USA Funds, RSC had authority to exert *more* direct control over the content of the calls as it specifically provided information about its offerings and had authority to issue and approve the scripts in writing to Prospects and Prospects was not contractually permitted to deviate from these scripts. 8-ER-1386. RSC had the right to demand proof of compliance with all applicable laws at any

[34] RSC will contest that Prospects exceeded the scope of authority by violating federal laws contrary to its written contract. *Henderson* rejected this argument. *Henderson*, 918 F.3d at 1079. A similarly exculpatory clause did not preclude this Court from finding a potential for ratification of illegal calling.

moment. 8-ER-1388. RSC *willfully chose not to ever exercise any oversight or auditing* of Prospects. 6-ER-972-73. RSC knew that Prospects was engaging in widespread conduct on its behalf that met each and every affirmative element of a TCPA claim, but simply washed its hands of any duty to conduct oversight of how "consent" leads were generated. This is especially troubling where, as the District Court held at Class Certification, RSC never had even a shred of information or evidence that any of this was being done lawfully. Rather, RSC had a mountain of information with which it could have actually and relatively easily determined that something illegal was happening on its behalf and chose willfully to ignore clear warning signs.

As compared to the lack of direct oversight carried out by USA Funds, RSC maintained the ability "terminate this Agreement at any time and for any reason in RSC's sole and independent discretion." 8-ER-1385-7. RSC also had the information to conduct such direct oversight at any point but chose not to. Prospects provided RSC with the name of the website that sold the data, including www.diabtesehealth.info and www.myhealthcareauthority.com. 5-ER-872-73. This was provided in real time to the RSC sales employee, along with other consumer contact information relating to the consumer. 5-ER-885; 5-ER-1000-1003; 5-ER-868.

Just like how USA Funds "set up the collection structure between itself, Navient, and the debt collectors to remain willfully ignorant and avoid liability," so too did RSC by outsourcing its calling practices to Prospects. RSC washed its hands of all compliance by placing sole responsibility of staying up to date on the law and ensuring compliance on Prospects. 6-ER-972-73, 1000-1003. RSC's directions to Prospects were open-ended with regards to how it could obtain leads to be robodialed. Despite having authority to do so, RSC did not exert compliance controls or checks on Prospects, irrespective of its knowledge that Prospects was placing *tens if not hundreds of millions of calls on its behalf, and transferred over 2 million phone calls to its call center*. RSC had knowledge of the type of campaign (robocalls with a prerecorded voice) and leads being produced by Prospects[35] which would have led a reasonable company acting in good faith to investigate further, but instead ratified its conduct by choosing to conduct zero investigation.[36]

Henderson found the potential for agency between USA Funds and debt collectors because "USA Funds accepted the benefits—loan payments—of the

[35] RSC knew Prospects was outsourcing its lead procurement to third parties. 6-ER-963.

[36] "[A] principal has made such a choice when the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation." Restat. of Agency § 4.06 cmt. d.

collectors' calls" and "continuing to accept the benefits of the collectors' tortious conduct despite knowing what the collectors were doing or, at the very least, knowing of facts that would have led a reasonable person to investigate further." *Henderson*, 918 F.3d at 1075 (citing Restat. of Agency § 4.01 cmt. g ("[a] person may ratify an act ... by receiving or retaining benefits it generates if the person has knowledge of material facts.")). A jury could find agency through ratification because of the significantly higher level of control and auditing RSC could have exerted over Prospects that it willfully abstained from in the interests of profit.[37] RSC clearly profited from its separation, selling its products to five hundred sixty (560) of the approximately eighty thousand (80,000) Class Members it illegally called and harassed. 5-ER-882-83.

Additionally, metrics regarding the calls and sales performance demonstrates a tenuous relationship between "consenting" consumers, and their actual level of interest in the product offerings, further suggesting the consent was illegitimate.

[37] The FCC is strongly in favor of instilling such liability to foster oversight by sellers of their telemarketing agents. As the FCC explained: "[s]ellers can simultaneously employ third-party telemarketers and protect their legitimate commercial interests by exercising reasonable diligence in selecting and monitoring reputable telemarketers *and by including indemnification clauses in their contracts with those entities*." 2013 FCC Order at 6591 (emphasis added). The FCC further explained that "overall unlawful activities should be reduced, as sellers will have an incentive to carefully choose their telemarketers to ensure compliance and to force consistent violators out of the marketplace." *Id*.

Only 87% of those who were called and purchased from RSC had a phone number that matched the "opt-in consent" data, and only 69% matched both the phone number and last name.[38] 5-ER-887-90. Thus, a large percentage of these transfers had incorrect information in the data sent by Prospects, which means the people being called were in large part, not the people who were represented to have supposedly opted in. There were over 2 million calls transferred. And yet only .7% of Class Members ended up signing up for RSC's services after being warm-transferred. One would think such meager conversion rates for consenting pre-qualified leads who were hot transferred for "showing interest" would raise an enormous red flag that something was not right.

Had RSC in fact conducted an audit, it would have found that the database that had been called by Prospects from the Landfall Data transfer was comprised of 2.275 million leads, evidencing a drastically lower true conversion rate for RSC (.0246%). If RSC reviewed www.diabeteshealth.info and questioned how such a large number of people could have actually provided their written consent through such a website, it would have noticed the opt in data did not line up with the data

[38] It is also worth noting that this self-selected sample was for **ALL** of Prospects transfers, where the relevant data set here is ONLY for those originating from the two Class websites, which made up less than 1% of purchasers originating from Prospect (560/58,222). One ponders what the accuracy rate on the proper subset actually is, given the significant validity problems (including with Plaintiff McCurley's information itself).

fields. If RSC looked at www.yourautohealthlifeinsurance.com and seen that its trade name was not even listed on the website. RSC would have known it lacked consent for its telemarketing campaign. It then would have fired Prospects immediately and cross complained against them as soon as this case was filed. Instead, RSC spent this litigation covering for Prospects.

Unfortunately, Poole, whose job was to ensure compliance, did not apply the lessons learned from Poole's predecessors to RSC. Poole blindly accepted leads while learning as little as possible about them. RSC should have (but did not) review the websites from which it was aware consumer data was being purchased. 6-ER-965. A jury could find, under these facts, that RSC ratified Prospects' conduct.

CONCLUSION

There are triable issues of fact as to vicarious liability. Prospects was undoubtedly an agent of RSC, and by its own and RSC's accounts was acting fully within the scope of its contract. The choice to not audit the leads was jointly made by Prospects and RSC, as evidenced by the record. But the TCPA carries strict liability and errors cannot, as a matter of FCC authority, agency jurisprudence, and policy, simply be disclaimed away. The duty of care is joint and non-delegable.

This Court should be wary of RSC's position – that it can contract away the liability of its affirmative defense. Such a position endorsed by this Court would

spell the death knell of enforcement for the TCPA against telemarketers. There will be a blueprint for how to get away with it. Hire whoever you want, shut your eyes to what they are doing, and cover your bases with a contract that only lawyers will read to get you out of trouble. More is required. It has to be.

Sellers cannot have their cake and eat it too under the TCPA. They cannot expressly authorize overseas companies to robodial and shift all responsibility and liability onto them to do so lawfully. Such circumstances naturally give rise to consumers, like Appellants, having a reasonable belief that the agent was acting on behalf of the seller. It also gives rise to a non-delegable duty of care, as well as circumstances highly likely to present triable issues of fact as to ratification. Some form of agency relationship arguably exists. The fine details should be determined by a jury.

Dated: August 2, 2021

Respectfully Submitted,

BY: /s/ Todd M. Friedman
TODD M. FRIEDMAN
ADRIAN R. BACON

ATTORNEYS FOR
APPELLANTS

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases currently pending before this Court.

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

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief for the Appellants John McCurley and Dan Deforest complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 13,844 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: August 2, 2021

Respectfully Submitted,

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

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, Todd M. Friedman, certify that on August 2nd, 2021, the Appellant's Opening Brief and Excerpts of Record were e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system:

Greenspoon Marder PA
Richard Wayne Epstein
E: Richard.epstein@gmlaw.com
John Pelzer
E: John.pelzer@gmlaw.com

MURCHISON & CUMMING
Anton H. Handal
E: ahandal@murchisonlaw.com

LAW OFFICES OF TODD M. FRIEDMAN

BY: /s/ Todd M. Friedman
Todd M. Friedman, Esq. (SBN 21675)
21550 Oxnard St., Ste 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
Fax: (866) 633-0228
Email: tfriedman@toddflaw.com