

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

**MATTHEW DICKSON, on behalf of
himself and others similarly situated,**

Plaintiff,

v.

**DIRECT ENERGY, LP, TOTAL
MARKETING CONCEPTS, LLC, and
SILVERMAN ENTERPRISES, LLC**

Defendants.

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C.A. NO. 5:18-cv-182

**DIRECT ENERGY’S
FIRST AMENDED CROSSCLAIM AGAINST TOTAL MARKETING CONCEPTS**

NATURE OF THE CASE

A. Direct Energy’s Written Agreements with TMC.

1. Direct Energy is a retail supplier of electricity and natural gas. To identify and solicit customers, it (among other things) contracts with third-party telemarketing vendors that hold themselves out as experts in telemarketing and telemarketing legal compliance. TMC is one such former contractor.

2. Direct Energy contracted with TMC, as an independent contractor, to perform various telemarketing operations, like identifying potential Direct Energy customer leads, contacting those leads via outbound dialing, and converting potential leads into DE customers.

3. The scope of TMC’s independent contractor relationship with Direct Energy is outlined in the parties’ Teleservice Agreement and Statements of Work.

4. In the Teleservice Agreement and in each Statement of Work, TMC warranted to “provide all services in accordance with all applicable laws, regulations and rules, including, without limitation, the Telephone Consumer Protection Act of 1991, as amended, and all

accompanying regulations and rules” But Direct Energy’s efforts to ensure TMC’s TCPA compliance were not limited to this general warranty.

5. TMC was only authorized to place outbound calls to an individual’s wireless number after the individual first opted-in to receive marketing messages about Direct Energy services by providing his or her prior express written consent, for example, via various marketing websites. Under the Direct Energy/TMC “Statement of Work (Opt-in Leads)” dated March 29, 2016, TMC agreed that it would “provide opt-in leads for the purpose of selling Direct Energy products and services,” and that its telemarketing for Direct Energy would only be to “potential customers who have opted-in through an online advertisement to receive a call regarding the specific offers determined by Direct Energy for the market in question.”

6. To further ensure that Direct Energy could provide opt-in proof and demonstrate TCPA compliance, the Teleservices Agreement and Statements of Work mandated that TMC preserve all records, documents, data, and recordings for its marketing calls selling Direct Energy services. For example, under the Statement of Work (Opt-in Leads), TMC represented that each opt-in would be accompanied with a TrustedForm certificate that would “provide independent proof of consent of the opt-in by the consumer” TrustedForm certificates are valuable for TCPA compliance because, through an independent third party called Active Prospect, they record all information about how the consumer filled out an opt-in form (including timestamps, data entry, and mouse movement and clicks). Their purpose is to remove any uncertainty or ambiguity about whether the called party, in fact, provided his or her prior express written consent.

7. TMC further warranted: “Records of such ‘opt-in’ consumers will be maintained and retained by TMC Such records will be made available to Direct Energy upon request.”

Additionally, pursuant to the Teleservices Agreement, TMC warranted that it would “retain on record during the Term of the SOW or Agreement (whichever is longer) plus an additional five (5) years all information related to leads, sources, leads identities . . . and any third party consents . . . [TMC] shall make such information available to Direct Energy within one (1) business day of Direct Energy’s request.”

8. Direct Energy brings this crossclaim because TMC failed to honor these obligations and made numerous misrepresentations about them.

B. TMC’s Ringless Voicemail Campaign.

9. Several vendors provide outbound telemarketing services like those provided by TMC. However, TMC attempted to distinguish itself from other third-party telemarketing companies, including other vendors engaged by Direct Energy, by touting its ability to use Ringless Voicemail (“RVM”) technology to contact Direct Energy leads.

10. As TMC explained in its Answer in this case, RVM technology does not actually dial a telephone number or call a telephone line:

Instead, TMC used a direct to voicemail service platform to deliver the voice message. This bypasses the telephone and subscriber altogether, creating direct communication between the underlying provider servers and the voicemail system of the carrier telephone company. In short, the technology interconnects the carrier telephone companies’ voicemail servers directly with the underlying provider’s internal network. This allows the underlying provider’s computers to communicate directly with the carrier telephone companies’ computers without ever placing a call to the subscriber. Importantly, Plaintiff, may have to dial a separate number corresponding to an outside voicemail service provider and enter a password to retrieve voicemail messages.

TMC’s Answer to Pl.’s First Am. Compl. (ECF No. 27 at 4).

11. To test the efficacy of this RVM technology, Direct Energy authorized TMC to conduct a limited campaign, permitting TMC to use its RVM technology to contact leads

procured by TMC—but only leads that had provided their prior express written consent to receive Direct Energy marketing messages.

12. Direct Energy was unequivocal that TMC could only contact leads who first opted-in. In March 2017, before beginning the RVM campaign, Direct Energy’s John Moran wrote TMC that Direct Energy required express permission from the customer for any RVM.

13. In response, on April 4, 2017, TMC sent Direct Energy a two-page opinion letter drafted by TMC’s attorney (and employee) Patrick Crocker on his firm’s letterhead stating that delivery of RVMs without opt-in consent does not violate the TCPA.

14. Nonetheless, out of an abundance of caution and in the interest of fully complying with the TCPA, Direct Energy still insisted that opt-in consent would be required for its RVMs. Mr. Moran wrote TMC’s Larry Corriea in May 2017: “We’ve been given the green light to go forward with the ringless voice message program to opt leads only.” (emphasis added).

15. Further, Direct Energy paid TMC a premium for opt-in consents that, as noted, were required to include TrustedForm certificates. TMC charged Direct Energy \$0.45 per opt-in lead, whereas non-opt-in leads could have been had for a fraction of the cost.

16. And, despite these costs and repeated pressure from TMC, Direct Energy never wavered from its insistence that TMC could not place RVMs without first obtaining opt-in consent.

17. In June and July 2017, because the early sales results of the RVM campaign were very poor, TMC’s Larry Correia emailed Mr. Moran and Direct Energy’s David Schotz multiple times, urging Direct Energy to use “wireless leads” that were not on any Do-Not-Call lists, but for which TMC had not obtained opt-in consent.

18. Further, on July 12, 2017, TMC sent Direct Energy a second opinion letter from Mr. Crocker, again insisting that RVMs are not subject to the TCPA.

19. But Direct Energy still would not allow TMC to place RVMs without opt-in consent. Instead, on August 2, 2017, Mr. Moran told TMC to expand its opt-in consent lead generation: “I’ve greenlighted you to expand Opt in as high [and] as far as you can go.” And, on August 16, 2017, Mr. Moran sent TMC an email restating Direct Energy’s position “that we only use ringless voicemail for potential customers who have provided consent to receive calls.”

20. This email prompted a *third* opinion letter from Mr. Crocker and TMC to Direct Energy (this one in email form) again reiterating that RVMs are not subject to the TCPA. However, Direct Energy still insisted that opt-in consent was required for its RVMs. That insistence never changed. Direct Energy continually and consistently reiterated to TMC through the time that the RVM campaign ended that any RVM required prior express written consent.

21. As noted, Direct Energy paid a premium for these opt-in leads. Over the approximately seven-month period of the RMV campaign in 2017, Direct Energy paid TMC approximately \$530,000 for opt-in consents backed by TrustedForm certificates.

C. Plaintiff’s RVMs.

22. Plaintiff Matthew Dickson filed this lawsuit in 2018, contending that he received RVMs about Direct Energy. He denies ever opting-in to receive marketing messages from Direct Energy.

23. In response to Plaintiff’s allegations, Direct Energy promptly contacted TMC to ask whether TMC had contacted Plaintiff—and, if so, to ask that TMC provide proof of Plaintiff’s opt-in consent.

24. In response, TMC sent Direct Energy an Excel spreadsheet of data and a website screenshot that TMC represented was evidence of Plaintiff's purported opted-in. Recently, in the course of discovery, Direct Energy learned that TMC's documentation was faked and its representations false. TMC employees manufactured the "Dickson opt-in" and fraudulently passed it off to Direct Energy claiming that it was legitimate—it was not.

D. Other TMC Misrepresentations and Breaches

25. As noted, TMC was also responsible under its agreements with Direct Energy to maintain documentation for all opt-ins, including TrustedForm certificates, which could independently verify the legitimacy of the opt-in for each called party. It is now apparent that TMC failed to obtain TrustedForm certificates for some leads; and that for those TrustedForm certificates TMC did obtain, it later defaulted on the requisite payments to Active Prospect (the third party that maintains the TrustedForm certificates), which resulted in the loss of those certificates. TMC did so without notifying Direct Energy. Indeed, TMC actively misled Direct Energy about its TrustedForm certificates, repeatedly stating (before and after this case was filed) that it had obtained and maintained them. These statements were false. Direct Energy not only paid TMC for TrustedForm certificates but relied on TMC's representations that TMC would maintain the certificates—to Direct Energy's detriment. Because of TMC's failures, Direct Energy is left without TrustedForm certificates that would definitively substantiate any opt-ins that TMC procured.

26. Additionally, TMC fraudulently misrepresented that it had ceased using RVM technology to contact Direct Energy leads in late 2017 when, in fact, it did not. Instead, TMC continued to send RVMs to Direct Energy leads in 2018 without Direct Energy's knowledge or authorization. Direct Energy just learned of these facts in the past few weeks.

27. For these reasons, Direct Energy asserts claims against TMC for: (1) fraud, (2) breach of contract, and (3) indemnification.

JURISDICTION & VENUE

28. The Court has supplemental jurisdiction over Direct Energy's crossclaims pursuant to 28 U.S.C. § 1367(a) because Direct Energy's claims against TMC arise out of the same transaction or occurrence that is the subject matter of Plaintiff Dickson's claims against Direct Energy.

29. Venue is proper for Direct Energy's crossclaims against TMC, as venue is proper under 28 U.S.C. § 1391 for Plaintiff Dickson's individual claim against Defendants.

PARTIES

30. Direct Energy, LP and Total Marketing Concepts, Inc. have both appeared in this lawsuit.

FACTUAL BACKGROUND

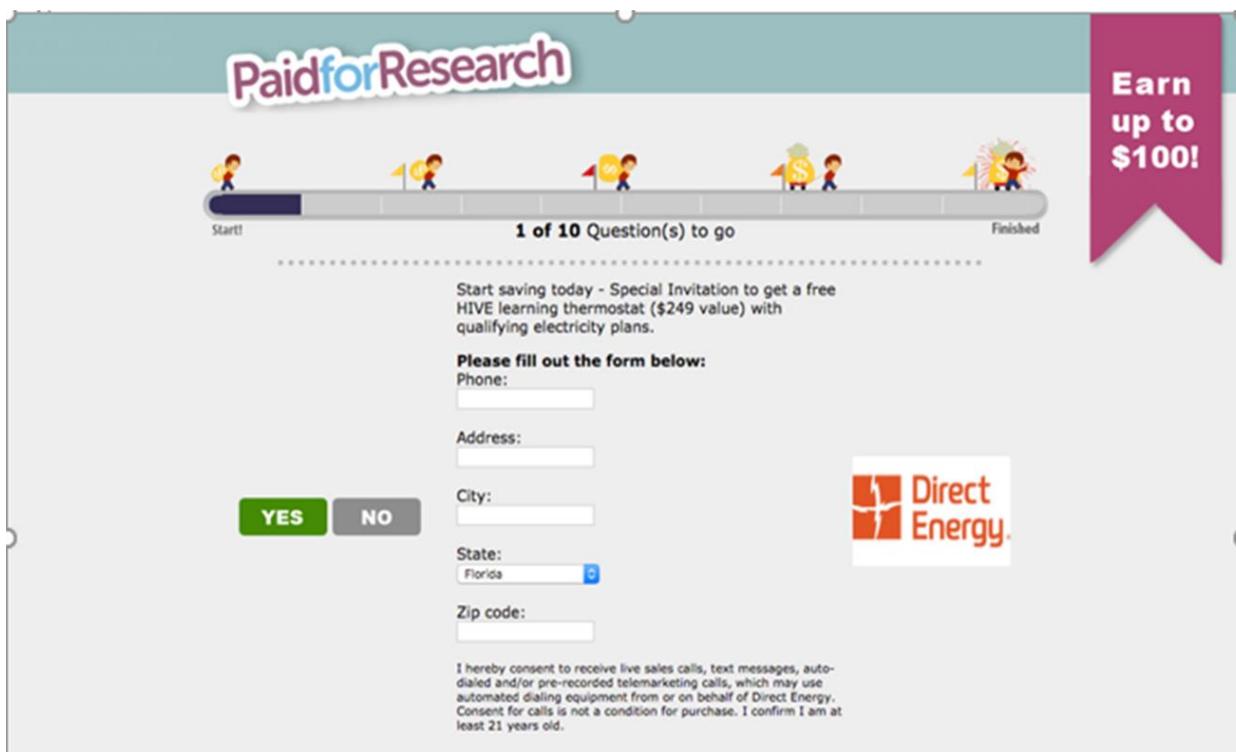
A. TMC Manufactured the Dickson Opt-In.

31. On January 24, 2018, Plaintiff filed this lawsuit. Within days, Direct Energy requested valid opt-in information for Plaintiff from TMC.

32. Pursuant to the Parties' Teleservice Agreement and Statements of Work, TMC was required to produce a TrustedForm certificate demonstrating Plaintiff's consent. Instead, on February 16, 2018, TMC's Larry Correia emailed John Moran and others at Direct Energy an Excel spreadsheet of data and a website screenshot that TMC represented was evidence of Plaintiff's purported opt-in. Mr. Correia stated: "An opt in record is attached for the [Dickson] complaint. Sorry for the delay. Lianna tried to track it down but doesn't have access to that

system.” These records fell far short of TMC’s contractual obligations and Direct Energy has since learned in discovery that Mr. Correia’s statements about them and a “system” were false.

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http://path6.paidforresearch.com/dynamic_live_zeetocat/survey_stack.php?lt	7/19/17 18:35:10	Northfield	OH	44067	US	Matt	Dickson	4404092229	273 Troubadour Dr	Northfield	OH



33. Nevertheless, TMC repeatedly represented to Direct Energy and to this Court that Plaintiff opted-in through this “Paid for Research” website, and that the personal information contained in the Excel spreadsheet was the personal information Plaintiff entered into it.

34. Plaintiff, however, denies that he opted-in through the website and denies that the IP address listed in the spreadsheet belongs to him.

35. When Plaintiff and Direct Energy requested additional information and documentation from TMC about the spreadsheet and the website, TMC did not—because it could not—provide the requested documents.

36. TMC misled Direct Energy about these events until it ran out of excuses. Then it decided to just ignore Direct Energy’s requests and its contractual obligations to Direct Energy altogether. As a result, Direct Energy formally terminated the Teleservices Agreement and any other agreement with TMC in July 2019.

37. TMC also ignored its discovery obligations to all parties and the Court. TMC’s counsel withdrew, and it refused to meaningfully participate in this litigation—even ignoring the Court’s Order to compel TMC to produce responsive documents and information. (ECF No. 95).

38. Instead, TMC focused on covering up its misrepresentations and avoiding its potential liabilities. For example, TMC sought to discharge its obligations to Direct Energy, Plaintiff, and others through a receivership proceeding in Florida state court initiated by a “friendly creditor,” Big Elk. *See Big Elk Funding, LLC v. Total Marketing Concepts, Inc.*, Case No. 2019-CA-2536, pending in the Circuit Court of the 18th Judicial Circuit in and for Seminole County, Florida.

39. In close coordination with TMC, Big Elk initiated the receivership proceeding on August 12, 2019, alleging that TMC defaulted on payment obligations under a secured note. Big Elk moved the Florida court to appoint a receiver, arguing that it was necessary to (among other things) “preserve and protect the interest of non-parties doing business with TMC.” The Florida court granted the motion and appointed a receiver on August 15, 2019.

40. The receivership, however, (like many of TMC's actions) turned out to be a sham.

On April 2, 2020, the receiver filed a Verified Emergency Motion to Terminate Receivership and Discharge Receiver, stating:

The concerns addressed by Big Elk in its Motion for Receiver are unwarranted and disingenuous. There is no legitimate purpose to have a receivership in place other than to avoid liability for those running TMC before [the receiver's] involvement First and foremost, the individuals that were running TMC prior to the receivership are still involved with TMC as of today's date. Specifically, Patrick Crocker, TMC's General Counsel, is actively involved with TMC. Additionally, Andrew Dorko, TMC's Managing Director is still retained as a consultant for TMC Additionally, Mr. Crocker has recently created new derivative companies with Plaintiff Big Elk, and continues to remain in business with Plaintiff Big Elk Mr. Crocker has also set up a bank account at Fifth Third Bank in the name of Elk Solutions, LLC and has diverted funds from TMC to the new entity without the knowledge or consent of the receiver Big Elk, however, is well aware of Mr. Crocker's actions, and is acting in conformity with Mr. Crocker. Big Elk and TMC are entering into obligations with vendors during the Receivership period with the intention that the debts will be absolved through the pending foreclosure process, but that's simply not how this works.

41. Not surprisingly, the Florida court granted the receiver's motion and terminated the receivership.

42. But in late 2019, before these revelations, the Florida court had granted Big Elk's motion for summary judgment to enforce its note and scheduled a foreclosure sale of TMC's assets for January 16, 2020.

43. When Direct Energy learned about the planned foreclosure sale (which could have resulted in the loss of records relevant to this case and others in which TMC is involved) it went to great lengths to secure additional documents from TMC, including those records that were subject to the Court's order to compel against TMC. (ECF No. 95)

44. Among other things, Direct Energy blocked the foreclosure sale by filing a motion for preliminary injunction on December 27, 2019 in *Burk v. Direct Energy*; No. 4:19-CV-663; in the Southern District of Texas—another TCPA case in which Direct Energy and

TMC are parties.¹ Because of Direct Energy's pending motion, the *Burk* court's statements that the motion was meritorious, and the Florida court's related suspension of the foreclosure sale, TMC agreed to allow Direct Energy's counsel to visit TMC's offices in Sanford, Florida to collect relevant records. Direct Energy had been demanding the chance to do so since at least October 2019. Because of Direct Energy's motion for preliminary injunction, TMC finally agreed on January 8, 2020. Direct Energy's counsel traveled to Florida the next day and collected records from TMC on January 10 and 11, 2020.

45. Direct Energy collected those records with the assistance of a third-party vendor. And, due to the size of the files that were transferred from TMC and other logistical challenges, Direct Energy only recently gained access to begin reviewing them.

46. Direct Energy's preliminary review of those records, however, identified internal TMC emails demonstrating that TMC employees manufactured the "Dickson opt-in." The Excel spreadsheet TMC provided listing the Dickson personal information did not originate from any master spreadsheet, central records repository, database, or "system" that "Lianna" did not have access to (as TMC's Larry Correia had represented).

47. Rather, the "Dickson opt-in" originated from TMC employee Joe Yates, who apparently created the Excel spreadsheet and then circulated it to other TMC employees to ensure that the "date lines up with the call date(s) before sending [to Direct Energy]." Meanwhile, Robert Svendsen (another TMC employee) had "concerns" about the document, or about Plaintiff's and Direct Energy's requests:

¹ Direct Energy also notified Plaintiff's counsel here about the motion for preliminary injunction filed in *Burk*.

From: Joe Yates <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/EC393BB7DC4040F98736A7E6FCBD5941-JOE.YATES>
Sent: 2/15/2018 10:05:17 PM +0000
To: Larry Correia <ExchangeLabs/Exchange Administrative Group (FYDIBOHF23SPDLT)/Recipients/TOTALMARKETING.onmicrosoft.com-54191-larry>; Robert Svendsen <ExchangeLabs/Exchange Administrative Group (FYDIBOHF23SPDLT)/Recipients/TOTALMARKETING.onmicrosoft.com-54191-robert.svendsen>
CC: Tyson Chavarie <ExchangeLabs/Exchange Administrative Group (FYDIBOHF23SPDLT)/Recipients/TOTALMARKETING.onmicrosoft.com-54191-tyson>
Subject: Dickson Opt In Record
Attachments: DicksonOpt-InRecord.xlsx

Just need to make sure the opt in date lines up with the call date(s) before sending – Rob has concerns.

48. In addition, despite its efforts, Direct Energy has not located any TMC documents indicating that Plaintiff visited the “Paid for Research” website or opted-in to receive messages about Direct Energy services as TMC previously represented. TMC’s representations that Plaintiff opted-in via the “Paid for Research” website was false. TMC knew they were false and made them with the intent to deceive Direct Energy.

49. Furthermore, TMC operated without authority and is in breach of its agreements with Direct Energy by contacting Plaintiff through RVMs when TMC did not have Plaintiff’s prior express written consent.

50. Direct Energy never authorized, affirmed, or ratified these acts by TMC. Indeed, as discussed, it only learned of them recently through discovery in this lawsuit.

B. TMC Failed to Retain Opt-Ins and Alert Direct Energy.

51. TMC’s fraudulent conduct extends beyond the manufactured “Dickson opt-in,” which appears to be the tip of the iceberg. As stated above, pursuant to Direct Energy’s and TMC’s March 29, 2016 Statement of Work (Opt-In Leads), TMC was obligated to retain documentation of all opt-ins and to retain a TrustedForm certificate that would “provide independent proof of consent of the opt-in by the consumer” TrustedForm certificates help

with TCPA compliance because they remove uncertainty or ambiguity about whether the called party, in fact, provided his or her prior express written consent.

52. TMC repeatedly represented to Direct Energy that it was obtaining lawful opt-ins and regularly invoiced Direct Energy for these leads. And Direct Energy paid TMC in excess of \$527,133.60 for opt-ins that included TrustedForm certificates.

53. TMC knew it was obligated to maintain TrustedForm certificates for each opt-in, but in 2018 defaulted on payments to Active Prospect—the company responsible for maintaining TrustedForm certificates. TMC did not notify Direct Energy of its default or the potential for the TrustedForm certificates to be lost as a result.

54. Because TMC was in default, Active Prospect deleted TMC’s account and, along with it, all TrustedForm Certificates demonstrating a called parties’ consent to receive Direct Energy calls. Active Prospect confirmed these deletions in response to a third-party subpoena served in this case:

Request No. 4: Not applicable. TrustedForm certificates are only stored for customers with a TrustedForm Account. Total Marketing Concepts does not have a TrustedForm Account (they haven't paid us anything since 2018, and which time their account was deleted). See our End User License Agreement and Terms of Service for details. <https://activeprospect.com/trustedform-eula/>, <https://activeprospect.com/terms-of-service/>.

55. If TMC could no longer maintain TrustedForm Certificates, it had a duty to notify Direct Energy. It failed to do so. Had TMC promptly notified Direct Energy, Direct Energy could have paid to maintain the TrustedForm Certificates itself.

56. Instead, TMC continually misrepresented that it was obtaining opt-ins and maintaining TrustedForm certificates. For example, as noted above, when Direct Energy requested proof of consent, TMC represented that it was continuing to maintain a records storage “system” from which opt-in leads could be accessed.

57. TMC's misrepresentations and omissions were intended to induce Direct Energy to continue sending TMC business under the Teleservices Agreement and Statements of Work, which they did. Had Direct Energy known of TMC's actions, it would have instead terminated the agreements much earlier.

58. But now—in addition to the money Direct Energy lost to TMC, and the fees and costs it has incurred in connection with this case and others caused by TMC—because of TMC's fraudulent statements and omissions, Direct Energy can no longer independently verify the veracity of leads through TrustedForm certificates, nor can Direct Energy determine which of those opt-in leads correspond to individuals who received RVMs from TMC.

59. Direct Energy detrimentally relied on TMC's ongoing statements that it was maintaining TrustedForm certificates when TMC knew it was not. TMC's failure to notify Direct Energy that TMC was in default and that Direct Energy's records were going to be destroyed further damaged Direct Energy.

C. TMC Disregarded Direct Energy's Express Instruction to Discontinue RVMs.

60. Not only did TMC deceive Direct Energy through its misrepresentations and omissions concerning its opt-ins and record keeping, but TMC's internal emails (which Direct Energy collected in January 2020 and was just recently able to review) reveal that TMC continued the drop RVMs long after TMC told Direct Energy that it had discontinued RVMs altogether.

61. Specifically, in December 2017, Direct Energy requested confirmation that all RVM-related telemarketing had ceased, which TMC's Larry Correia acknowledged.

From: "Moran, John" <DECORP/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/JMORAN>
Sent: 12/14/2017 5:25:38 PM +0000
To: Larry Correia <larry@thetmcteam.com>
Subject: Have you **stopped RVM** altogether? I remember you telling me you were going to a few weeks back

62. Direct Energy reasonably relied on TMC's representations and did not further authorize TMC to drop any RVMs under any circumstances—even with opt-in consent.

63. Nevertheless, TMC ignored Direct Energy's explicit instructions and, as demonstrated from its internal emails, continued to record and drop RVMs without Direct Energy's consent well into 2018. These emails were not sent to Direct Energy and were not produced by TMC in this case until Direct Energy's attorneys collected them in 2020.

From: Jorge Martin <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/TOTALMARKETING.ONMICROSOFT.COM-54191-JORGE.MARTIN>
Sent: 6/5/2018 4:56:40 PM +0000
To: Robert Svendsen <ExchangeLabs/Exchange Administrative Group (FYDIBOHF23SPDLT)/Recipients/TOTALMARKETING.onmicrosoft.com-54191-robert.svendsen>
Subject: DE RVM Amazon Echo Dot

Hello, this is _____ with Direct Energy. Give me a call back @ _____ so you can learn how to get an Amazon echo dot at no cost, and have a copy of your electric bill handy to review to see if you qualify. Your reference number is _____

Thanks,

Jorge Martin
Director of Quality Assurance
TMC, Inc.
jorge.martin@thetmcteam.com

From: Robert Svendsen <EXCHANGELABS/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/TOTALMARKETING.ONMICROSOFT.COM-54191-ROBERT.SVENDSEN>
Sent: 8/10/2018 2:53:10 PM +0000
To: Tyson Chavarie <ExchangeLabs/Exchange Administrative Group (FYDIBOHF23SPDLT)/Recipients/TOTALMARKETING.c tyson>
Subject: FW: FW: De rvm message use this one
Attachments: Direct Energy RVM.wav

64. TMC never notified Direct Energy that it continued its RVM activities but instead concealed its RVM activities from Direct Energy.

65. Here again, TMC's misrepresentations and omissions were intended to induce Direct Energy to continue sending TMC business under the Teleservices Agreement and Statements of Work. Had Direct Energy known of TMC's actions, it would have terminated the agreements much earlier.

66. Instead, Direct Energy has lost money paid to TMC for services that were improperly provided, or not provided at all. In addition, Direct Energy has incurred substantial fees and costs in connection with this case and others caused by TMC. All of these damages are the result of TMC's fraudulent statements and omissions.

COUNT I: FRAUD

67. Direct Energy incorporates all preceding paragraphs as if fully set forth herein.

68. In the Teleservices Agreement and corresponding Statements of Work, TMC agreed that it would obtain opt-in consent prior to contacting any potential customer, such as Plaintiff, that it would maintain records of such opt-in consents, and that such consents would be available upon request.

69. After entering into these agreements, as discussed above, TMC also repeatedly made independent material misrepresentations (orally and in writing) to Direct Energy about TMC's compliance with these obligations to induce Direct Energy to continue sending it business.

70. Over and over, TMC tried to talk Direct Energy out of using opt-in consents for RVMs. Consistently, Direct Energy refused. And each time Direct Energy refused, TMC represented to Direct Energy that it would continue to only send RVMs to potential customers

who provided opt-in consent. It made these statements knowing that they were false—but knowing that Direct Energy would otherwise not allow the RVM campaign.

71. Indeed, besides TMC’s email and oral representations, in the invoices sent to Direct Energy, TMC represented that it had, in fact, obtained and would maintain all required opt-in consents. TMC knew that such opt-in consents were critical to Direct Energy. And, Larry Correia and others at TMC represented to Direct Energy that TMC would obtain them, maintain, them, and produce them upon request.

72. TMC’s statements were false and TMC knew they were false at the time they were made.

73. Indeed, TMC made additional misrepresentations to cover up the original ones. TMC manufactured the “Dickson opt-in” and made misrepresentations regarding the legitimacy of the “Dickson opt-in” to Direct Energy.

74. TMC also continued to represent that it was maintaining TrustedForm certificates after it stopped paying for them and Active Prospect deleted them. TMC had a duty to notify Direct Energy that its records were at risk of destruction. Instead, it affirmatively misrepresented that it was continuing to maintain a comprehensive records storage “system” from which all opt-in leads could be accessed. There was no such “system.” TMC hid this information and made false representations about it with the knowledge its statements were false and its omissions misleading—to induce Direct Energy to continue sending TMC business. And, Direct Energy reasonably relied on TMC’s misrepresentations and omissions, to Direct Energy’s detriment.

75. Furthermore, TMC falsely represented to Direct Energy in December 2017 that it had stopped sending RVMs altogether. However, TMC’s recently discovered records show that it continued to record and drop RVMs without Direct Energy’s knowledge, much less its

authorization, in 2018. TMC hid this information and made false representations about it with the knowledge its statements were false and its omissions misleading—to induce Direct Energy to continue sending TMC business. And, Direct Energy reasonably relied on TMC’s misrepresentations and omissions, to Direct Energy’s detriment.

76. Direct Energy is entitled to \$527,133.60 in actual damages since Direct Energy received no value through TMC’s leads that can no longer be verified as legitimate.

77. TMC is further liable to Direct Energy for any damages imputed to Direct Energy for TMC’s fraudulent conduct including its fabricated “Dickson opt-in,” failure to maintain records, and RVMs that Direct Energy did not authorize, including to RVMs to Plaintiff or others that did not provide their prior express written consent as well as any RVMs placed after TMC confirmed it that it discontinued all RVMs.

78. TMC is further liable to Direct Energy for all attorneys’ fees and costs it has incurred defending against Plaintiff’s claim, which it would not have incurred but for TMC’s fraud.

COUNT II: BREACH OF CONTRACT

79. Direct Energy reincorporates all preceding paragraphs as if fully set forth herein.

80. TMC and Direct Energy entered into a valid, enforceable Teleservices Agreement and corresponding Statements of Work in relation to a telemarketing campaign.

81. Direct Energy performed and/or tendered performance under the Teleservices Agreement. Specifically, Direct Energy paid TMC in excess of \$527,133.60 for valid opt-ins so that TMC could lawfully contact individuals about Direct Energy. These opt-ins were to be accompanied with a TrustedForm certificate.

82. To the extent that TMC engaged in any telemarketing campaign through the use of RVMs or any other form of technology without prior express consent, it is in breach of the contract and acted far outside its scope of authority and directly contrary to Direct Energy's instructions.

83. TMC further breached the contract by failing to procure and maintain "independent proof of consent of the opt-in by the consumer" through a TrustedForm certificate.

84. TMC's breaches caused Direct Energy injury when it paid in excess of \$527,133.60 for opt-ins that cannot be verified as legitimate because TMC failed to maintain TrustedForm certificates.

85. Direct Energy is entitled to actual damages due to TMC's breach including the over \$527,133.60 in payments for opt-ins, which cannot be independently verified.

86. Direct Energy is further entitled to its reasonable attorneys' fees for breach of contract under TEX. CIV. PRAC. & REM. CODE § 38.001. Direct Energy has notified TMC of its claims and has demanded reimbursement of the over \$527,133.60 in payments for valid opt-ins. TMC has failed to tender payment despite being afforded a reasonable opportunity to do so.

COUNT III: INDEMNIFICATION

87. Direct Energy reincorporates all preceding paragraphs as if fully set forth herein.

88. Pursuant to the Teleservices Agreement and Statements of Work, TMC owes Direct Energy a contractual duty to indemnify Direct Energy against the allegations set forth by Plaintiff in this suit, and from any liability that Direct Energy may incur.

89. TMC also agreed that it would carry out the services Direct Energy contracted for in accordance with all applicable laws, rules, and regulations, including the TCPA.

90. If the Court finds that TMC acted in violation of the TCPA and that damages are owed to Plaintiff or the putative class members, TMC is required to indemnify Direct Energy to the extent Direct Energy becomes liable for all or any part of any judgment.

91. Furthermore, Direct Energy denies that it authorized any telemarketing campaign by TMC, including through the use of RVMs without prior express consent. In fact, TMC was required to obtain and maintain “independent proof of consent of the opt-in by the consumer” through a TrustedForm certificate.

92. To the extent that TMC engaged in any telemarketing campaign through the use of RVMs or any other form of technology without prior express consent, TMC acted far outside its scope of authority and directly contrary to Direct Energy’s instructions.

93. Pursuant to its contractual obligations, TMC must indemnify Direct Energy against the allegations made by Plaintiff in this lawsuit and against any liability Direct Energy is found to incur as to Plaintiff or the putative class members in this action including, but not limited to, Direct Energy’s attorneys’ fees.

PRAYER

WHEREFORE, Direct Energy prays for relief as follows:

- a. that TMC be found liable for fraud and that judgment be rendered against it for Direct Energy’s actual and exemplary damages;
- b. that TMC be found liable for breach of contract and that judgment be rendered against it for Direct Energy’s actual damages and attorneys’ fees;
- c. that TMC indemnify Direct Energy, LP against Plaintiff’s allegations in this lawsuit and against any liability that Direct Energy may incur as to Plaintiff or the putative class members in this action including any attorneys’ fees and costs;

- d. that TMC be ordered to pay prejudgment interest, post-judgment interest, and costs;
- e. all such other and further relief, either at law or in equity, to which Direct Energy may be entitled.

DATE: May 7, 2020

By: /s/ William B. Thomas
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the 7th Day of May via CM/ECF on all counsel of record.

/s/ William B. Thomas
William B. Thomas
Attorney for Direct Energy, LP