No. 20-35962

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nathan Chennette, et al.,
Plaintiffs-Appellants,

v.

Porch.com, Inc., GoSmith, Inc., et al.,
Defendants-Appellees.

On Appeal from a judgment of the U.S. District Court
District of Idaho No. 1:20-cv-00201-SRB
The Honorable Stephen R. Bough

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee GoSmith, Inc. is a wholly owned subsidiary of Appellee Porch.com, Inc.

Appellee Porch.com, Inc. is a wholly owned subsidiary of Porch Group, Inc., a publicly held corporation (NASDAQ: PRCH).

May 5, 2021

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: *s/Benjamin G. Shatz*
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Porch.com, Inc.,
GoSmith, Inc. et al.

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INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs are business owners who advertise their home improvement businesses by posting their phone numbers on the internet, inviting the public at large to contact them for hire. In response to Plaintiffs' solicitations, GoSmith allegedly sent text messages asking Plaintiffs if they were interested in certain local home improvement jobs requested by local homeowners.

Plaintiff business owners then sued, alleging that text messages sent to their businesses violated their personal privacy rights under the Telephone Consumer Protection Act ("TCPA"). The district court dismissed the case, recognizing that Plaintiffs lacked standing to sue because their cell phones were admittedly business lines, and thus Plaintiffs fell outside the zone of interests the TCPA was designed to protect.

This Court should affirm the judgment. Not only was the district court's zone of interests analysis correct, but it was merely one of several sound grounds for dismissing Plaintiffs' case.

Plaintiffs raise four arguments on appeal. All are meritless.

First, Plaintiffs fault the district court for disregarding their conclusory allegation that their phone lines were really "residential." (AOB-9.) But Plaintiffs' own complaint makes clear that they are business owners using business lines. (AOB-17 ["Plaintiffs admitted that they use their phones in their home-based businesses (ER-179)"];

ER-46 [citing 16 paragraphs from the complaint where Plaintiffs refer to themselves as home improvement contractors].)

Second, Plaintiffs argue that they have standing to sue for Do-Not-Call ("DNC") violations even though their phone numbers were used for business purposes. But Plaintiffs' lines are business numbers not entitled to protection under the National DNC Registry provisions; Plaintiffs failed to allege that they received more than one text message in a 12-month period; failed to allege that they personally registered their phone numbers on the Registry; and the messages at issue were not "telephone solicitations."

Third, Plaintiffs argue they have standing to sue for violations of the TCPA's autodialer provisions but disregard their own allegations and the TCPA's zone of interests (residential and consumer privacy). Plaintiffs also failed to allege an automatic telephone dialing system ("ATDS") was used; the messages were not advertisements or telemarketing; Plaintiffs provided the requisite prior express consent by publishing their phone numbers online inviting job opportunities; and the TCPA's autodialer restrictions were unconstitutional at the time the alleged messages were received.

Finally, the district court properly exercised its discretion in denying Plaintiffs' motion to alter the judgment raising the same preceding arguments.

This Court should affirm for the reasons provided by the district court as well as on alternative grounds in the record.

JURISDICTION

Defendants generally agree with Plaintiffs' jurisdictional statement, i.e., federal question jurisdiction exists for alleged TCPA violations; the district court's dismissal was final and appealable; and Plaintiffs timely appealed. (AOB-10.) As explained below, however, subject matter jurisdiction is absent over Plaintiffs' ATDS claims because during the relevant time period, the TCPA's ATDS provision was unconstitutional.

STATEMENT OF FACTS

A. GoSmith texted Plaintiffs in response to online business listings posting Plaintiffs' cell phone numbers and seeking work-for-hire employment.

Until it ceased operations in January 2020 (ER-183, 186-87), Defendant GoSmith, Inc. was a technology company that connected home improvement contractors with homeowners searching for home service professionals. (ER-101, 179, 181.) GoSmith allegedly collected contact information for contractors from their business web pages and other online business directories. GoSmith then allegedly sent text messages to contractors, such as: "[Homeowner name] is wanting [particular home repair service, e.g., plumbing] in [a particular town near the contractor]. You have first priority. Reply 1 if interested, 3 if

not." (ER-180.) In 2017, GoSmith was acquired by Porch.com, Inc. (ER-188.)

Plaintiff Nathan Chennette, for example, runs Idaho Painting & Epoxy LLC, a house painting business, in Kuna, Idaho. (ER-164.) Chennette's business has a Facebook page that advertises his company's contractor services, using his cell number as the business contact number. (ER-157, 160-67, 203.) Chennette claims to have received text messages from GoSmith asking about his availability for painting jobs in Kuna as well as in nearby towns. (ER-157, 180.)

B. Plaintiffs allege TCPA violations for sending job opportunities to their business phones.

In April 2020, Chennette and 50 other individually named plaintiffs (ER-198) filed a mass action (*not* a class action) complaint in the District of Idaho against GoSmith, Porch, and three individual corporate officers (Matthew Ehrlichman, Brenton Marrelli, and Darwin Widjaja) seeking over $15 million in damages. (ER-13, 177-236, 241.) Like Chennette, all Plaintiffs are business owners who advertise their phone numbers on the internet in connection with their respective businesses. (ER-158, 173-76, 179.)

Plaintiffs alleged that GoSmith sent text messages to their publicly posted business numbers about local homeowners seeking to hire them for specific home improvement projects within Plaintiffs' respective areas of expertise and geographical locations. (ER-178-80,

182-83, 186-89.) Plaintiffs alleged these text messages violated their personal privacy under the Telephone Consumer Protection Act. (ER-177-78, 189.) Specifically, Plaintiffs alleged violations of two TCPA provisions:

(1) the TCPA's automated calling restrictions (47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)), which prohibit making calls to cell phones using an "automatic telephone dialing system" ("ATDS" or autodialer) without prior express consent (ER-190, 196); and

(2) the TCPA's National Do-Not-Call ("DNC") Registry Rules (47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2)), which prohibit making more than one "telephone solicitation" in a 12-month period to a residential phone line on the National DNC Registry. (ER-189, 196.)

Plaintiffs' complaint was the tenth such complaint against these Defendants in a series of 13 nearly identical mass tort lawsuits filed by the same plaintiff law firm (LawHQ, LLC of Salt Lake City) in a dozen different jurisdictions for alleged TCPA violations. (ER-135, 146-47.)

The number of text messages alleged and the resulting statutory damages calculations, attached as Exhibit A to the complaint (ER-203-04), were not based on Plaintiffs' text message records. Rather, they were invented by Plaintiffs' counsel, LawHQ, using data it accessed and then harvested by reverse engineering the source code from GoSmith's website. (ER-179, 200-04.) LawHQ assumed the data it misappropriated

was both accurate and complete, and then attributed its own uninformed interpretation to the data. (*Id.*)

For example, comparing the Exhibit A entry for Chennette to the harvested data for Chennette in Exhibit B, LawHQ assumed "CreatedDate" is the date GoSmith began sending text messages to any given contractor. (ER-203, 206.) According to the "Legend" at the bottom of Exhibit A, LawHQ speculated that each plaintiff received two messages per week, beginning on the "CreatedDate" and then calculated statutory damages for each plaintiff on this basis. (ER-204.) Only Chennette provided screenshots of certain text messages he allegedly received.[1] (ER-180.)

C. Defendants move to dismiss the complaint for lack of standing and other reasons.

Defendants moved to dismiss the complaint for five reasons. (ER-124-76.)

First, Plaintiffs lack Constitutional standing for their TCPA claims under Article III because (1) Plaintiffs lack a privacy interest in business numbers they voluntarily publicized on the internet; and (2) the unsubstantiated guesses in Exhibit A do not establish a concrete and particularized injury in fact. (ER-139-41.)

[1] Additional text message screenshots in the complaint (ER-181-82) were sent to plaintiffs in other cases and do not pertain to this case. (ER-152, n.12.)

Second, Plaintiffs lack prudential (or statutory) standing to allege violations of the TCPA's automated calling restrictions and DNC Registry rules because their business numbers are not within the residential consumer privacy "zone of interests" those TCPA sections were designed to protect. (ER-141-42.)

Third, the individual corporate officer defendants could not be sued because (1) personal jurisdiction is lacking (they reside in California and Washington) and there are no allegations that they purposefully directed any activities toward Idaho or availed themselves of Idaho's laws; and (2) Plaintiffs alleged no facts showing that the officer defendants had any direct, personal participation in the text messages sufficient to sue them personally. (ER-142-47.)

Fourth, Plaintiffs failed to state an ATDS claim because the messages are not "advertisements" or "telemarketing," and because Plaintiffs provided the requisite "prior express consent" by publishing their business phone numbers on the internet, expressly inviting communications about work opportunities, like the ones allegedly received. (ER-147-51.) Defendants explained how offers of employment do not constitute "advertisements" or "telemarketing" under the TCPA. (ER-147-48.) Defendants also explained that the text messages at issue were not "advertisements" or "telemarketing" because they were part of an ongoing business transaction. (ER-149.)

Fifth, Plaintiffs failed to state a DNC claim because (1) business numbers are not "residential" and therefore do not qualify for DNC Registry protection; (2) the complaint failed to allege that any plaintiff registered their phone number on the DNC Registry; (3) the complaint did not allege that a single plaintiff received more than one text message, let alone within a 12-month period; and (4) job opportunity text messages are not "telephone solicitations." (ER-151-54.)

In opposition, Plaintiffs first confused the concepts of Article III standing and "prior express consent" under the TCPA, and argued that whether they had Article III standing was "a question of fact that must be resolved in Plaintiffs' favor." (ER-111-12.)

Plaintiffs then conflated the concept of Article III standing with statutory standing, and argued that because their complaint parroted the statutory elements of a TCPA violation, they were in the TCPA's "zone of interests." (ER-114.) Plaintiffs did not explain how they, as business owners, were in the class of plaintiffs the relevant subsections of the TCPA were designed to protect.

Plaintiffs also relied on the unsubstantiated assumptions in Exhibit A to support both their ATDS and DNC claims while arguing that "the full number of violations is known only to Defendants," suggesting that Plaintiffs do not possess the text messages that allegedly disturbed them and violated their privacy. (ER-115, 120-21, 189.)

Plaintiffs further argued that their bare conclusions about the individual corporate officers' involvement was sufficient to sue them in Idaho. (ER-112-13, 121-22.) Similarly, Plaintiffs relied on conclusory allegations that their phone lines were residential and that an autodialer was used to send the text messages. (ER-115.)

In reply, Defendants reiterated how plaintiffs in a mass tort case must individually allege sufficient facts that each one of them suffered an actual injury, and that Plaintiffs had failed to do so, instead relying on mere speculation (e.g., Exhibit A). (ER-82-83.) Defendants also emphasized how Plaintiffs had provided prior express consent by posting their business numbers on the internet, such that their privacy was not invaded by receiving calls and texts they not only expected, but expressly invited. (ER-83-84, 90.) Furthermore, Plaintiffs admitted to using their numbers for their businesses, so the numbers were not "residential" for TCPA purposes. (ER-85, 91.)

Defendants also refuted Plaintiffs' arguments about the nature of the alleged text messages, establishing that they were job opportunities, not advertisements or telemarketing. (ER-88-89.) As for the propriety of suing the individual defendants, Plaintiffs did not dispute the governing law, yet failed to satisfy the requirements necessary to impose individual liability or create personal jurisdiction in Idaho. (ER-86-87.) Defendants concluded by explaining why dismissal with prejudice was

appropriate since Plaintiffs' own admissions doomed their claims. (ER-91.)

D. The district court dismisses the case for lack of statutory standing.

The district court granted Defendants' motion to dismiss with prejudice based on Plaintiffs' lack of statutory standing to assert TCPA claims for text messages sent to their business lines. (ER-15-18.) Among other authority, the court cited two Ninth Circuit authorities that analyzed Congressional intent behind the TCPA. (ER-17, citing *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) and *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).) Both cases explained that the TCPA's purpose is to protect residential and consumer privacy interests, as distinguished from businesses. (ER-17.) The court further cited *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 805 (W.D. Pa. 2016), which explained, "[i]t is unfathomable that Congress considered a consumer who files TCPA actions as a business when it enacted the TCPA …." (ER-17.)

The district court then addressed and rejected Plaintiffs' argument that the TCPA's DNC Registry Rules protected their home-based business lines. (ER-17.) The court explained that a "careful reading" of the FCC authority actually dictates the opposite conclusion. (ER-17-18.)

In sum, the district court concluded that the TCPA provisions at issue apply to consumers, "not business numbers like cell phones used by contractors," and because "Plaintiffs allege they are contractors operating as a business," they do not fall within the TCPA's zone of interests and thus lack standing to sue. (ER-18.)

E. The district court denies Plaintiffs' request for post-judgment relief.

Plaintiffs challenged the court's dismissal by moving to alter the judgment. (ER-53-77.) They argued that the district court erred by (1) conflating the TCPA's ATDS and DNC subsections; (2) failing to accept as true Plaintiffs' assertion that their phone numbers were residential; and (3) misreading and misapplying an FCC Order, which they argued protects home-based business phone lines. (*Id.*)

In support of their ATDS claims, Plaintiffs raised three ancillary arguments: (1) business cell phones are protected under the TCPA's ATDS provision because other sections of the TCPA apply to businesses; (2) the court misread and misapplied the *Stoops* case; and (3) "every other court" to analyze the issue of whether businesses fall within the TCPA's ATDS provision has determined that they do. (ER-60-64.)

In the alternative, Plaintiffs argued that whether their phone numbers are ultimately business or residential is a factual question, precluding dismissal at the pleadings stage. (ER-69-71.) Plaintiffs also conceded—and even emphasized—that the DNC's purpose is to protect

residential consumers (as opposed to businesses). (ER-64-69.) Plaintiffs' motion also improperly introduced new factual allegations, in a last ditch attempt to saving their pleading. (ER-62 n.1, 68-69, 72.)

Defendants responded that the court did not confuse the ATDS and DNC sections of the TCPA because it analyzed two controlling Ninth Circuit authorities and carefully read the FCC's Order before concluding that neither provision of the TCPA applies to "business numbers like cell phones used by contractors." (ER-42-43.)

Defendants also pointed out that other sections of the TCPA applicable to businesses are inapposite. (ER-42-43.) Defendants further distinguished the cases Plaintiffs cited. (ER-43-44.) Two of the three cases involved the facsimile advertisement provisions of the TCPA and the third involved the definition of "called party," neither of which are relevant here. (*Id.*)

Defendants also pointed out that Plaintiffs' attempt to distinguish *Stoops* is misplaced because (1) the full *Stoops* quote (which Plaintiffs truncated) emphasizes that Congress intended to protect consumer privacy in private residences; and (2) *Stoops* is indistinguishable from this case because Plaintiffs wanted to be called, and in fact advertised their phone numbers on the internet, thereby inviting the very messages about which they now complain. (ER-44-45.)

Defendants further explained that in refusing to categorically exempt home-based businesses from DNC protection, Congress did not

categorically protect home-based businesses; rather, it intended those numbers to be evaluated on a case-by-case basis. (ER-46.) Although this can be an issue of fact, Plaintiffs here alleged throughout their complaint that they use and hold out their phone numbers on the internet in connection with their businesses, and thus, effectively pleaded themselves out of court. (ER-46-47.) Moreover, judicially noticeable material further demonstrated the business nature of Plaintiffs' business phone lines. (ER-83, 156-76.)

Similarly, Defendants argued that the district court did not err in refusing to accept as true Plaintiffs' conclusory allegation that their phones were "residential" in the face of factual allegations to the contrary. (ER-46-47.) Finally, Defendants also challenged Plaintiffs' newly asserted facts and evidence as improper. (ER-47-51.)

Plaintiffs' motion failed to change the court's mind. (ER-3-14.) In a detailed order, the court explained that Plaintiffs' allegation that "these are residential phone numbers" was not only conclusory, but was contradicted throughout their complaint—including in the same sentence where Plaintiffs admit they use their phone numbers for their businesses. (ER-6.) Plaintiffs' assertions were also contradicted by allegations that GoSmith obtained Plaintiffs' phone numbers from internet business listings and by repeated admissions in their complaint identifying themselves as home improvement contractors. (ER-6-7.)

The court then distinguished cases cited by Plaintiffs where courts held that the nature of the phone was a factual issue, noting that none of those cases involved plaintiffs who alleged the business nature of their phone lines in the complaint itself. (ER-7-9.) The court also rejected Plaintiffs' attempt to add new facts and evidence. (ER-9.)

The court next explained that the other sections of the TCPA that apply to businesses do not impact its analysis of the ATDS provisions at issue and reiterated that *Satterfield* and *Van Patten* (also analyzing the TCPA's ATDS provision) held that the TCPA was enacted to protect residential and consumer privacy interests (as distinguished from business interests). (ER-10-11.) Delving even deeper, the court analyzed the Senate Report cited by *Satterfield*, which stated the TCPA "does not bar telemarketers from placing automated calls to business users." (ER-11.)

The court went line-by-line through the block quote it had previously cited from the FCC Order, explaining why the passage did not mean that home-based businesses were categorically protected by the TCPA, and reiterated that because Plaintiffs alleged they are contractors operating as businesses, they are not within the zone of interests of the TCPA's DNC provisions. (ER-12-13.)

Plaintiffs timely appealed the dismissal judgment and the post-judgment order denying their motion to alter the judgment. (ER-20.)

ARGUMENT

I. The District Court Properly Dismissed Plaintiffs' Fatally Flawed Case.

This Court may affirm a dismissal on any ground appearing in the record. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). Here, the record contains numerous grounds to affirm.[2]

A. The district court properly dismissed Plaintiffs' case because Plaintiffs are not within the "zone of interests" the TCPA was designed to protect.

This Court recognizes that Congress enacted the TCPA to safeguard *consumer* privacy and to protect against unwanted calls to

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[2] As a threshold matter, Defendants dispute that text messages are properly considered calls under the TCPA. While this Court has previously stated that "a text message is a 'call' within the meaning of the TCPA," *see Satterfield*, 569 F.3d at 952 (referencing *In re Rules & Regs. Implementing the TCPA of 1991*, 18 F.C.C. Rcd. 14014, 14115 (July 3, 2003)), the Supreme Court recently suggested otherwise in *Facebook, Inc. v. Duguid,* 141 S. Ct. 1163, 1168, n.2 (2021). Although the Court did not ultimately decide this issue since the parties did not challenge it, the Court expressly rejected Duguid's argument that TCPA is an "agile tool" that should be adapted to include modern technology. *Id.* at 1173. Because text messaging did not exist at the time the TCPA was enacted in 1991, Congress could not have considered this technology in passing the statute. *Satterfield*, 569 F.3d at 954. Consequently, the statutory provisions at issue do not reference "text messages" or "text messaging." This alone justified dismissing Plaintiffs' case. Courts "must interpret what Congress wrote" and while Plaintiffs may be dissatisfied with this result, their "quarrel is with Congress." *Facebook*, 141 S. Ct. at 1173. *See also* Transcript of Oral Argument at 7-8, *Facebook v. Duguid*, No. 19-511 (S. Ct. Dec. 8, 2020) (Thomas, J.) (questioning why a text message is considered a call under the TCPA).

consumers in the *home*. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020) (President George H.W. Bush signed the TCPA into law in response to "a torrent of vociferous *consumer* complaints about intrusive robocalls" after "Congress found that banning robocalls was the only effective means of protecting telephone *consumers* from this nuisance and privacy invasion." (emphasis added, internal quotations omitted)); *Van Patten*, 847 F.3d at 1043 (analyzing a 47 U.S.C. § 227(b)(1)(A)(iii) cell phone claim and recognizing that in enacting the TCPA, "Congress sought to protect *consumers* from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls" (emphasis added)); *Satterfield*, 569 F.3d at 954 ("The TCPA was enacted to 'protect the privacy interests of *residential* telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the *home*'" (quoting S. Rep. No. 102-178, at 1 (1991), emphasis added)).

"Congress did *not* expect the TCPA to be a barrier to normal, expected, and desired *business* communications." *In re GroupMe*, 29 F.C.C. Rcd. 3442, 3444 (2014) (citing H.R. Rep. 102-317, at 17 (noting the TCPA's Do-Not-Call restrictions do not apply to calls or messages made to a telephone number provided for use "in normal *business* communications") (emphasis added)); *see also* H.R. Rep. 102-317, at 13 (expressing concern about "unfairly expos[ing] *businesses* to unwarranted risk") and S. Rep. No. 102-178, at 8 (noting that the TCPA

provision regulating automated calls to residential customers, emergency lines, and cellular or paging numbers "does not bar telemarketers from placing automated calls to *business* users" (emphases added)).[3]

Indeed, the Do-Not-Call Registry provision of the TCPA, on its face, applies only to "*residential* telephone subscriber[s]." *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2) (emphasis added). In other words, the DNC Registry "does not preclude calls to businesses" and "calls made to such numbers will not be considered violations of our rules." *In the Matter of Rules & Regs. Implementing the TCPA of 1991*, 20 F.C.C. Rcd. 3788, 3793 (April 13, 2005) ("FCC 2005 Order") (emphasis added); *see also GroupMe*, 29 F.C.C. Rcd. at 3444-45; H.R. Rep. 102-317, at 17.[4]

Similarly, the TCPA's automated calling restrictions were not designed to restrict automated calls to businesses. *See* S. Rep. No. 102-

[3] Although other provisions of the TCPA provide some protections to businesses (*see* 47 U.S.C. § 227(b)(1)(D) (prohibiting simultaneously engaging two or more lines of a multi-line business), § 227(b)(1)(C) (prohibiting certain fax advertisements)), those provisions are not at issue here.

[4] To the extent the FCC declined to create a blanket exemption for calls made to home-based businesses, preferring instead to evaluate such calls on a case-by-case basis, the text messages at issue here were clearly intended for Plaintiffs' businesses (ER-174-76, 180-82), and thus were not "made to a residential subscriber." FCC 2005 Order, 20 F.C.C. Rcd. at 3793.

178, at 1, 7-8 (1991); *Van Patten*, 847 F.3d at 1043; *Satterfield*, 569 F.3d at 954.

In this case, Plaintiffs' complaint alleges (1) that Plaintiffs use the phone numbers at issue for their respective businesses (ER-179); (2) they are home improvement "contractors" (ER-179-97); (3) GoSmith obtained Plaintiffs' phone numbers from internet business listings (ER-179); and (4) the messages were clearly intended for Plaintiffs' businesses and inquired about their availability to accept jobs from specific local homeowners (ER-180-82). *See also* ER-174-76 (chart listing each Plaintiff's business and business website(s)).[5]

These are precisely the type of "normal, expected, and desired business communications" Congress did not want to disturb. *GroupMe*, 29 F.C.C. Rcd. at 3444. Indeed, to permit Plaintiffs, on the one hand, to publicly post their business phone numbers and then, on the other hand, to recover at least $500 per call against any person or entity that calls with business inquiries would "unfairly expose businesses to unwarranted risk." H.R. Rep. 102-317, at 13.

"[A] statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'"

[5] Courts properly consider facts subject to judicial notice in deciding Rule 12(b)(6) motions. *See, e.g., Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012). In particular, courts judicially notice information available on a party's website. *See, e.g., Matthews v. NFL*, 688 F.3d 1107, 1113 & n.5 (9th Cir. 2012).

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014); *see also Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166 (9th Cir. 2018); *Gibson v. PNC Bank Nat'l Ass'n*, 673 F. App'x 634, 637 (9th Cir. 2016). The "zone of interests" test "applies to all statutorily created causes of action." *Lexmark*, 572 U.S. at 129.

The district court therefore correctly determined that neither the provision restricting automated calls to cell phones, nor the DNC Registry provision, were intended to apply to *business* inquiries sent to *business* cell phones. Hence, Plaintiffs lack statutory standing.

Moreover, because Plaintiffs could not cure these deficiencies by amendment—without contradicting the allegations they already pleaded—dismissal with prejudice was proper. *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1049-50 (9th Cir. 2006) (leave to amend is futile where the relevant statute does not apply to plaintiffs' claims).

B. Plaintiffs Also Lack Article III Standing.

1. Plaintiffs lack a concrete injury because they solicited telephonic business inquiries.

Article III standing requires that a plaintiff must have suffered an "injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete

and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan*, 504 U.S. at 560). A concrete injury may be tangible or intangible. *Id.* at 1549. "In determining whether an intangible harm constitutes injury in fact," Congress' judgment is both "instructive and important" as it "may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (internal quotations omitted).

For the TCPA, "Congress made specific findings that 'unrestricted telemarketing *can be* an intrusive invasion of privacy'[.]" *Van Patten*, 847 F.3d at 1043 (citing Pub. L. 102-243 § 2, ¶¶ 5, 10, 12, 13, 105 Stat. 2394 (1991)) (emphasis added). But it is *not* the case that any and every telephone call is a *per se* invasion of privacy. Indeed, the TCPA establishes the substantive right to be free from *unsolicited* telemarketing calls and texts. *Van Patten*, 847 F.3d at 1043 (emphasis added). Thus, only "*[u]nsolicited* telemarketing phone calls or text messages" create "a concrete injury in fact sufficient to confer Article III standing." *Id.*

Here, Plaintiffs do not allege any economic or other tangible injury. *See* ER-189 ("Plaintiffs have suffered lost time, an annoyance, a nuisance, and an invasion of privacy because of the text messages."); *see generally* ER-177-236. Rather, Plaintiffs rely solely on the intangible injury Congress created in enacting the TCPA. (ER-189, 194 (citing *Van Patten*)).

But the text messages GoSmith allegedly sent to Plaintiffs were not unsolicited. Chennette, for example, publicly posted his phone number in connection with the "Call Now" button on the Facebook webpage for his painting business. (ER-157-65.) Similarly, each Plaintiff publicly advertised their phone number in connection with their respective businesses, *soliciting the public to contact them with business inquiries at these phone numbers*. (ER-158, 172-76.) Plaintiffs even allege that GoSmith acquired their phone numbers from publicly available business listing directories. (ER-179.) Thus, by publicizing their phone numbers in connection with their respective businesses, Plaintiffs disclaimed any privacy interest with respect to business-inquiry text messages sent to these phone numbers. (ER-180-82.)

In short, because the alleged text messages were solicited, Plaintiffs lack a concrete Article III injury.

2. Plaintiffs' unsupported approximation of TCPA violations in "Exhibit A" to their complaint does not establish a concrete injury.

A complaint's allegations must sufficiently show plaintiff has suffered an injury in fact. *See, e.g. Baldwin v. Sebelius*, 654 F.3d 877, 879 (9th Cir. 2011) (affirming dismissal where the "allegations fail to show injury in fact"). A mere "generalized grievance" does not suffice. *Id.* (citing *Lujan*, 504 U.S. at 573-74). Unlike class actions, where only named class representatives must allege they have been personally

injured (*Spokeo*, 136 S. Ct. at 1547, n.6), in mass actions, like this case, where each Plaintiff is named individually, each Plaintiff must individually allege an injury because each Plaintiff's "right to recover depends on facts particular to his or her case." *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1188 (9th Cir. 2009).

Plaintiffs attempted to satisfy this requirement by referencing the aggregate number of texts alleged in Exhibit A to their complaint. (ER-197, 202-04.) But Plaintiffs admit that the figures in Exhibit A have been pulled out of thin air. The "Legend" to Exhibit A concedes that Plaintiffs' counsel created the number of alleged violations by arbitrarily multiplying the weeks that passed by two, *assuming* each Plaintiff received two messages per week. (ER-204.) Such unsubstantiated assumptions are insufficient to establish a concrete Article III injury. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1268 (9th Cir. 1982) (affirming dismissal for lack of standing based on unsubstantiated assumptions and speculation).

Because the figures in Exhibit A are admittedly based purely on speculation, they need not be accepted as true. *See Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820 (9th Cir. 2002) (affirming dismissal for lack of Article III standing because "unwarranted inferences cannot defeat an otherwise proper motion to dismiss") (internal quotations omitted). Mere assumptions, speculation, and unwarranted inference cannot and do not establish a concrete and

particularized injury-in-fact for any Plaintiff in this case. Thus, the failure to plead a concrete injury under Article III also justifies dismissal.

C. Plaintiffs' claims against the individual defendants were properly dismissed.

Plaintiffs' complaint named individual defendants who had no connection to Idaho. This Court should affirm the dismissal with respect to the individual defendants.

1. Idaho lacks personal jurisdiction over the individual defendants.

"For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile[.]" *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Here, the individual defendants are not domiciled in Idaho: Ehrlichman resides in Washington, and Marrelli and Widjaja are California residents. (ER-178.) Idaho thus has no general jurisdiction over these individual defendants.

For specific jurisdiction, a plaintiff must show: (1) the nonresident performed some act purposefully availing himself of the privilege of conducting his activities in the forum, thereby invoking the benefits and protections of that state's laws; (2) the claim arises out of defendant's forum-related activities; and (3) exercise of jurisdiction is reasonable. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). "The plaintiff bears the burden on the first two prongs… [I]f the

plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed." *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008).

Here, under the first step, Plaintiffs had to establish that the individual defendants purposefully directed their activities to Idaho. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). This required a showing that each defendant (1) committed an intentional act, (2) expressly aimed at Idaho, (3) causing harm known likely to be suffered in Idaho. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007).

But Plaintiffs never alleged any facts demonstrating that the individual defendants personally sent or directed others to send the text messages to Idaho residents. Other than conclusory statements, the only factual allegations about Ehrlichman are that he resides in Washington and is purportedly a GoSmith corporate officer. (ER-178, 185, 189.) Similarly, the only factual allegations about Marrelli and Widjaja are identical foundational statements filed in other cases that each has comprehensive personal knowledge of GoSmith's business model and internet operations generally, and that Widjaja registered GoSmith's website domain. (ER-183-84.) But vague, conclusory and generalized statements, such as these, are insufficient to name GoSmith and Porch officers personally. Plaintiffs pleaded no facts

supporting any intentional act by any individual defendant, much less any such act directed at Idaho. Thus, personal jurisdiction is absent.

2. Plaintiffs failed to allege personal involvement sufficient to hold the individual defendants personally liable.

In general, corporate officers are not personally liable for a corporation's acts merely based on holding a corporate position. *United States v. Reis*, 366 F. App'x 781, 782 (9th Cir. 2010). Rather, personal liability must be "founded upon specific acts by the individual director or officer." *Id.* (citing Restatement (Third) of Agency § 7.01 (2006)).

In the TCPA context, there is doubt about whether corporate officers can be held liable for their companies' TCPA violations under traditional agency theories. *See, e.g.*, *City Select Auto Sales Inc. v. David Randall Assocs., Inc.*, 885 F.3d 154, 160 (3d Cir. 2018); *KHS Corp. v. Singer Fin. Corp.*, 376 F. Supp. 3d 524, 530 (E.D. Pa. 2019) ("a corporate officer is not liable under the TCPA under common law personal liability principles").

Courts within this Circuit generally require that to hold a corporate officer liable for TCPA violations, the officer must have personally directed, sanctioned, actively participated, or cooperated in the wrongdoing. *See, e.g., L.B. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987); *Declements v. Americana Holdings LLC*, 2020 WL 4220075, *1 (D. Ariz. July 23, 2020). But Plaintiffs failed to plead any

facts tying the alleged text messages to the individual defendants or otherwise showing that the officers should be personally liable. For example, there are no facts suggesting that any of them personally sent any of the text messages; that the phone number(s) from which the messages were sent belong to any individual defendant; or that the messages were sent on behalf of the individuals personally (as opposed to GoSmith the entity). Nor did Plaintiffs plead facts demonstrating that any of the individual defendants personally oversaw, knowingly authorized, or directed the texts to be sent, or that their actions otherwise rose to a level warranting the extraordinary imposition of personal liability.

Instead, Plaintiffs merely concluded—without factual support—that *because* they are corporate officers, they must somehow have been "actual participants in these TCPA torts" and were "directly involved in the strategy, approval, set up, and execution of the telemarketing campaigns." (ER-183-85.) But inferring personal involvement based on corporate officer status alone does not suffice. *See Reis*, 366 F. App'x at 782. And conclusory allegations are insufficient in any event. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (courts need not accept as true "mere conclusory statements").

Plaintiffs also alleged that the GoSmith website is registered to Widjaja (ER-183) and pointed to two identical foundational statements in two year-old declarations from unrelated cases in which Marrelli and

Widjaja assert generally that, as co-founders of GoSmith, they were "involved in nearly every facet of GoSmith's operations." (ER-183-84, 210-23.) But a website has nothing to do with text messages, and being company co-founders is similarly insufficient to hold them personally liable. Nor does the mere observation that other lawsuits have been filed against GoSmith establish anything about culpability or establish grounds to hold the individual defendants personally liable. (ER-189.)

D. Plaintiffs failed to state an Automatic Telephone Dialing System ("ATDS") claim.

1. Plaintiffs failed to allege facts showing an ATDS was used to send the texts.

To violate the TCPA's restrictions on autodialing cell phones, a caller must call a phone number assigned to a cellular telephone service using an ATDS (or "autodialer") without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii); *see also* 47 C.F.R. § 64.1200(a)(1)(iii).

An ATDS is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1); *see also* 47 C.F.R. § 64.1200(f)(2). Plaintiffs provided only conclusory allegations that an ATDS was used. *See* ER-178-79 ("using an Automatic Telephone Dialing System"), 182 ("sent automated text messages at scale to stored numbers"), 196 ("The Defendants' use of an

ATDS"). But such "formulaic recitation[s]" do not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *Ashcroft*, 556 U.S. at 678.[6]

Plaintiffs also alleged that GoSmith had a "database" that stores contractor (i.e., provider) accounts and creates account numbers (i.e., ProviderID numbers) "sequentially for each new contractor that GoSmith stored in its database" (ER-179). These allegations are a red herring and intentionally confuse the issues. They do not plead an autodialer claim for multiple reasons.

First, the ATDS provision does not pertain to databases, let alone how records within databases are organized. Rather, "automatic telephone *dialing* system" (as the name suggests) refers to *dialing equipment* used to generate telephone numbers and then make calls to those numbers. *See Facebook*, 141 S. Ct. at 1167 ("[A]n 'automatic telephone dialing system' is a *piece of equipment* with the capacity both to 'store or produce telephone numbers to be called, using a random or sequential number generator,' and to dial those numbers.") (quoting

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[6] *See also Naiman v. Freedom Forever, LLC*, 2019 WL 1790471, *2-3 (N.D. Cal. April 24, 2019) (claims fail "[a]bsent factual allegations giving rise to an inference that the calls were made using an ATDS"); *Priester v. eDegreeAdvisor, LLC*, 2017 WL 4237008, *2 (N.D. Cal. Sept. 25, 2017) (rejecting "any contention that a TCPA plaintiff's pleading obligation is satisfied by generically alleging the use of an ATDS by a defendant, in a manner that simply parrots the statutory language"); *Armstrong v. Inv. Bus. Daily, Inc.*, 2018 WL 6787049, *6 (C.D. Cal. Dec. 21, 2018) (dismissing where "Plaintiff's allegations are mere recitation of the legal definition of an ATDS as defined by TCPA").

47 U.S.C. § 227(a)(1)) (emphasis added); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1044 (9th Cir. 2018), *abrogated by Facebook,* 141 S. Ct. 1163 (2021) (the TCPA "place[s] restrictions on the use of automated telephone equipment"). Thus, Plaintiffs' allegations focused on GoSmith's database completely missed the mark.

Second, Plaintiffs further alleged that GoSmith's database generated unique account numbers (ProviderID numbers) in sequential order. But random and sequential number generation refers to the generation of *telephone numbers*, not the generation of *account* numbers. *Facebook*, 141 S. Ct. at 1173 (holding that "a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce *phone numbers* to be called") (emphasis added); *id.* at 1172, n.7 (providing example of patented dialer technology where dialer could store telephone numbers using a random number generator and then dial those phone numbers at a later time) (citing Brief for Professional Association for Customer Engagement (PACE) et al., as *Amici Curiae* p. 19; 47 U.S.C. § 227(a)(1)(A)). Here, Plaintiffs alleged that the phone numbers at issue were obtained from internet business listings, therefore Plaintiffs cannot allege that the telephone numbers were randomly or sequentially generated. Once again, Plaintiffs' allegations

missed the mark entirely and Plaintiffs effectively plead themselves out of court.[7]

Third, not only are Plaintiffs' allegations misplaced, but they would turn the law on its head. After all, virtually every database stores customer accounts in some sequential order. This would mean that every company that uses a database to store customer accounts (which may include telephone numbers) uses an ATDS, leading to an absurd interpretation of the TCPA. *See ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 698-99 (D.C. Cir. 2018) (declaring the FCC's interpretation of autodialer "utterly unreasonable" and noting that "[i]t cannot be the case that every uninvited communication …. infringes federal law, and that nearly every [company] is a TCPA-violator-in-waiting, if not a violator-in-fact.").

Plaintiffs' allegations are even more absurd considering that smartphones are *dialing* devices (not mere databases) that have the

[7] *See also Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120-21 (3d Cir. 2018) (affirming summary judgment for defendant where no genuine issue of fact regarding whether "Email SMS System actually did or could generate random *telephone numbers* to dial") (emphasis added); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1304-05, 1311 (11th Cir. 2020) (not an ATDS where "neither phone system used randomly or sequentially generated [phone] numbers"); *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 463-69 (7th Cir. 2020) (device sending text messages that neither stores nor produces telephone numbers using a random or sequential number generator but simply dials numbers from a customer database is not an ATDS).

capacity to store telephone contacts sequentially, but smartphones are not autodialers under the TCPA.[8] *See Facebook*, 141 S. Ct. at 1171 (rejecting interpretation of ATDS provision that "would capture virtually all modern cell phones" and "affect ordinary cell phone owners in the course of commonplace usage"); *ACA Int'l*, 885 F.3d at 699 ("Nothing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

Fourth, as a result of Plaintiffs' misplaced allegations, Plaintiffs plead *no* facts about how the alleged messages were sent. They failed to allege *any* facts concerning the purported *dialing* equipment used to send the text messages. Plaintiffs plead no facts concerning the capacity or use of any dialing equipment. Plaintiffs plead no facts showing that any dialing equipment could generate random or sequential telephone numbers. Nor did Plaintiffs plead facts showing that any dialing

[8] A smartphone's camera capabilities are similar. For example, when photos are taken with a smartphone, the phone saves and stores each photo in sequential order (e.g., IMG_0001, IMG_0002, IMG_0003, etc.). But no one would argue that this capability means that a smartphone is an autodialer under the TCPA.

equipment could dial numbers automatically. *See Van Patten*, 847 F.3d at 1045 ("The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of [automatic dialing] to communicate with others by telephone in a manner that would be an invasion of privacy.") (citing *Satterfield*, 569 F.3d at 954); *Marks*, 904 F.3d at 1052 ("By referring to the relevant device as an '*automatic* telephone *dialing* system,' Congress made clear that it was targeting equipment that could engage in automatic *dialing*") (emphasis original); *ACA Int'l*, 885 F.3d at 703 ("'[A]uto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' [] would seem to envision non-manual dialing of telephone numbers."). *See also* 47 U.S.C. § 227(a)(1)(B). In short, Plaintiffs' allegations fell short of pleading an autodialer claim.

Plaintiffs' allegations that the text messages instructed recipients to "Reply 1 if interested, 3 if not" (ER-180-81) do not rectify their failure. The mere fact that GoSmith implemented a streamlined way for home contractors to communicate does not demonstrate that the text messages were sent automatically by a machine. *See, e.g., Freidman v. Massage Envy Franchising, LCC*, 2013 WL 3026641, *2 (S.D. Cal. June 13, 2013) (allegations of generic and impersonal messages insufficient because "[i]t is just as conceivable that the text messages were done by hand, or not using an ATDS"). To the contrary, many of Plaintiffs' allegations belie their conclusion that an ATDS sent the messages.

For example, Plaintiffs allege the texts were sent from many different phone numbers. (ER-181-82.) This shows that Plaintiffs received texts from different individual mobile devices and not from a centralized automated machine.

Relatedly, Plaintiffs allege the messages were all sent from full 10-digit phone numbers which further supports that the texts were sent from individual mobile devices and not an autodialer. ER-180-182; *see Matthews v. Mid City Cannabis Club, Inc.*, 2020 WL 7978499, *4 (C.D. Cal. Nov. 6, 2020) ("allegations that Defendant used a 'long code' number does not suggest an ATDS was used").[9]

Plaintiffs' allegations also show *targeted* messaging, rather than random or impersonal messages, which further undermines their conclusory allegations that an ATDS was used. *See Facebook,* 141 S. Ct. at 1168 (affirming dismissal at the pleadings stage, where plaintiff alleged "targeted, individualized texts to numbers linked to specific accounts"); *Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 5093942, *4 (C.D. Cal. Apr. 13, 2018) (dismissing where allegations suggested texts were targeted to the plaintiff); *Weisberg v. Stripe, Inc.*, 2016 WL 3971296, *3 (N.D. Cal. Jul. 25, 2016) (dismissing where plaintiff's own

[9] Moreover, even if the messages had been sent using short codes, this alone would not be sufficient to plead an autodialer claim. *See Facebook*, 141 S. Ct. at 1168-69 (dismissing suit at pleadings stage where automated text messages were sent from Facebook's notification system using short codes).

allegations suggested direct targeting inconsistent with random or sequential number generation). To wit, Plaintiff Chennette allegedly received texts informing him about painting jobs in close proximity to his painting business that were triggered by specific local homeowners making individual requests to hire a painter. (ER-156-71, 180.) *See Facebook*, 141 S. Ct. at 1168 (system that sent text message alerts triggered by users' suspicious login attempts not an ATDS because no random or sequential number generation); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (system programmed to send text message alerts in response to an individual customer's request for a cab not an ATDS because it did not randomly or sequentially generate numbers to be dialed). Thus, Plaintiffs failed to allege an ATDS claim.

Moreover, amendment would be futile. Plaintiffs do not allege dialing equipment with the capacity to generate random or sequential telephone numbers. Nor could they. The complaint alleges that GoSmith retrieved Plaintiffs' contractor information, including business phone numbers, from business listings on the internet and then sent targeted text messages asking if Plaintiffs were available to service specific home improvement projects for local homeowners. (ER-179-182.) On their face, these allegations show that phone numbers were not randomly or sequentially generated using automated dialing

equipment or capable of being so generated.[10] To the contrary, the allegations show that GoSmith sent targeted text messages to certain phone numbers voluntarily provided by Plaintiffs. In light of these admissions, Plaintiffs' ATDS claim fails as a matter of law and dismissal of these claims with prejudice was appropriate.

2. The messages are neither advertisements nor telemarketing.

The TCPA requires prior express written consent before making autodialed calls that constitute "telemarketing" or introduce an "advertisement." 47 C.F.R. § 64.1200(a)(2). Here, however, GoSmith's text messages were neither telemarketing nor advertisements.

"Telemarketing" means "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(13). "Advertisement" means "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1).

[10] An ATDS was not, in fact, used. *See* Dkt. 25-1 at p. 7 of 16 ("On June 23, 2020, Defendants sent Plaintiffs' counsel a Rule 11 letter providing them with ample documentary and photographic evidence of the fact that the text messages were sent manually via actual physical cell phones."); *see also Dawson v. Porch.com, Inc.*, No. 2:20-cv-604-RSL, Dkt. 42-5 (W.D. Wash.) (copy of June 23 letter, Exhibit E to Reilly Declaration).

Recruitment or job opportunity texts, like those alleged here, do not constitute "telemarketing" or "advertisements" because an employment offer does not pertain to the commercial availability, quality, purchase, rental, or investment in any property, goods, or services. *See, e.g.*, *Reardon v. Uber Tech., Inc.*, 115 F. Supp. 3d 1090, 1096 (N.D. Cal. 2015) ("The texts … were sent to recruit drivers, not to promote the commercial availability of Uber's transportation services, even if Uber's ability to successfully recruit drivers is related to its commercial interest in providing more rides to its customers"); *Dolemba v. Ill. Farmers Ins. Co.*, 2015 WL 4727331, *4 (N.D. Ill. Aug. 10, 2015) (job opportunity text messages are not marketing under the TCPA, even if the business opportunity requires purchasing goods or services or spending money benefitting the defendant).[11] Here, GoSmith's alleged texts concerned job opportunities, not products or services, and therefore are not advertisements or telemarketing under the TCPA. (ER-180-82.)

Further, texts regarding ongoing business transactions are not advertisements or telemarketing. *See In re Rules & Regs. Implementing*

[11] *See also Friedman v. Torchmark Corp.*, 2013 WL 1629084, *5 (S.D. Cal. Apr. 16, 2013); *Gerrard v. Acara Solutions Inc.*, 2020 WL 3525949, *3 (W.D.N.Y. June 30, 2020); *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa. 1994); *Dolemba v. Kelly Servs.*, 2017 WL 429572, *4 (N.D. Ill. Jan. 31, 2017); *Salmon v. CRST Expedited, Inc.*, 2015 WL 1395237, *5 (N.D. Okla. Mar. 25, 2015).

the TCPA of 1991, 21 F.C.C. Rcd. 3787, 3812 ¶ 49 (Apr. 6, 2006) (message not advertising if "purpose is to facilitate, complete or confirm a commercial transaction"); *An Phan v. Agoda Co. Pte. Ltd.*, 351 F. Supp. 3d 1257, 1266 (N.D. Cal. 2018), *aff'd*, 798 F. App'x 157 (9th Cir. 2020) (text messages not advertisements or telemarketing where "the context and the content of the messages demonstrate that the purpose of the messages was not to advertise or telemarket, but instead was directly cabined to facilitating and completing an existing transaction").

Here, Plaintiffs initiated a business transaction when they published their phone numbers on the internet asking to be called about potential contractor jobs. In response, GoSmith sent text messages inquiring about Plaintiffs' availability and interest in certain contractor jobs. GoSmith's responses were targeted based on specific homeowner requests, the type of home services being requested, and the specific geographical location. For example, Plaintiff Chennette posted his phone number on the internet seeking to receive calls concerning contractor jobs for his house painting business in Idaho. The text messages he received from GoSmith in response inquired whether he was available for certain painting jobs for local homeowners. (ER-180 ["Are you available to help Brett with int. painting in Boise. You have 1st priority. Reply 1 if interested, 3 if not"].)

In summary, the text messages were part of ongoing transactions initiated by Plaintiffs themselves and do not constitute advertisements

or telemarketing under the TCPA. *See, e.g. Aderhold v. car2go N.A. LLC*, 668 F. App'x 795, 796 (9th Cir. 2016) (messages "whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements"); *Wick v. Twilio Inc.,* 2017 WL 2964855, *5 (W.D. Wash. July 12, 2017) (text message aimed at completing a commercial transaction that the plaintiff had initiated and for which he had provided his phone number, was not telemarketing); *An Phan*, 351 F. Supp. 3d at 1262-65 (text messages regarding plaintiff's travel reservation sent before completion of his travel were part of an ongoing transaction, and therefore not advertisements or telemarketing).

3. Plaintiffs provided prior express consent by publishing their phone numbers, expressly inviting job opportunities.

This Court has recognized that under the TCPA, "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Van Patten*, 847 F.3d at 1044 (plaintiff's voluntary provision of his phone number constituted prior express consent to be contacted even after plaintiff terminated his business relationship with defendant; quoting *In the Matter of Rules & Regs. Implementing the TCPA of 1991*, 7 F.C.C. Rcd. 8752, 8769 (Oct. 16, 1992); also noting "telemarketers will not violate our rules by

calling a number which was provided as one at which the called party wishes to be reached").

Here, Plaintiffs posted their business phone numbers on the internet, inviting third parties to contact them—at those phone numbers—with job opportunities. (ER-156-76.) Plaintiffs then received exactly what they requested—potential jobs for their businesses. (ER-180-82.) Thus, Plaintiffs provided their prior express consent to receive the messages alleged and have failed to state an ATDS claim under 47 U.S.C. § 227(b)(1)(A)(iii). *See Edelsberg v. Vroom, Inc.*, 2018 WL 1509135, *8 (S.D. Fla. Mar. 27, 2018) (plaintiff provided prior express consent for Vroom to send an automated text inquiring about purchasing plaintiff's car where plaintiff posted his phone number in an internet ad).

4. No federal subject matter jurisdiction existed because the TCPA's autodialer provision was unconstitutional when the alleged texts were received.

In July 2020, the Supreme Court held that an exemption under the TCPA's autodialing provisions for debt collection calls regarding debts owed to or guaranteed by the federal government violated the First Amendment of the Constitution. *See Barr*, 140 S. Ct. at 2346-49 (federally backed debt exemption was an unconstitutional content-based restriction on speech). To remedy the problem, the Supreme

Court invalidated this exemption and severed it from the remainder of the statute. *See id.* at 2349-56.

However, this severance only applies prospectively, rendering the ATDS provision unconstitutional in its entirety and thus unenforceable as to any autodialed calls made between 2015 (when the government-debt exception was added) and July 6, 2020 (when the *Barr* decision issued). *See Creasy v. Charter Comm., Inc.*, 489 F. Supp. 3d 499, 508 (E.D. La. Sept. 28, 2020) (dismissal as to allegedly autodialed calls made before *Barr* decision); *Lindenbaum v. Realgy, LLC*, __ F .Supp. 3d __, 2020 WL 6361915, *3-8 (N.D. Ohio Oct. 29, 2020) (dismissal where allegedly autodialed calls were made before *Barr*); *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc*, __ F. Supp. 3d __, 2020 WL 7346536, *3 (M.D. Fla. Dec. 11, 2020) (dismissal for lack of subject matter jurisdiction because the court lacks authority to enforce the unconstitutional TCPA provision at the time the messages were allegedly received); *Cunningham v. Matrix Fin. Servs.,* 2021 WL 1226618, *11-12 (E.D. Tex. Mar. 31, 2021) (dismissal for lack of subject matter jurisdiction in light of *Barr*).

Thus, there cannot be liability for any of the allegedly autodialed text messages in this case because they were all sent after the government-debt exemption was implemented in 2015 and before the *Barr* decision issued in July 2020. (ER-186-87 (noting GoSmith ceased operations, and thus stopped sending text messages, in late January

2020); ER-197 (complaint was filed in April 2020, meaning any texts sent before April 2016 are outside the statute of limitations).)

E. Plaintiffs failed to state a Do-Not-Call registry claim.

The TCPA prohibits initiating any telephone solicitation to a residential telephone subscriber who has registered their phone number on the National DNC Registry. 47 C.F.R. § 64.1200(c)(2). A "telephone solicitation" is "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(15). To state a DNC claim, a plaintiff must receive more than one unlawful telephone solicitation within a 12-month period after registering their phone number. 47 U.S.C. § 227(c)(5).

Here, Plaintiffs failed to plead a DNC violation for three reasons: (1) Plaintiffs' phone numbers are business numbers that do not qualify for DNC Registry protection; (2) Plaintiffs' complaint fails to allege facts demonstrating that a single Plaintiff received more than one violative text message in a 12-month period after registering their number on the Registry; and (3) the alleged text messages are not "telephone solicitations."

First, the DNC Registry rules do not prohibit calls to business numbers. *In re Rules & Regs. Implementing the TCPA of 1991*, 18 F.C.C. Rcd. 14014, 14040 (July 3, 2003) ("The national do-not-call

rules will also not prohibit calls to businesses"); *In re Rules & Regs. Implementing the TCPA of 1991*, 23 F.C.C. Rcd. 9779, 9785 (June 17, 2008) ("[T]he National [DNC] Registry applies to 'residential subscribers' and does not preclude calls to businesses").

To the extent the FCC has declined to create a blanket exemption for all *home-based* businesses—instead evaluating on a case-by-case basis whether a given call to a home-based business is made "to a residential subscriber"—here, the phone numbers were publicized as business numbers by Plaintiffs themselves and the alleged messages were directed to the business use of that number. Thus, the messages were not sent "to a residential subscriber." (ER-12-14, 17-18, 180-82, 195.) Because Plaintiffs cannot amend the complaint to correct this fundamental flaw in their pleading, dismissal with prejudice of their DNC claims was appropriate.

Further, if a subscriber holds out a phone number to the general public as a business line, that line should not be considered "residential" for purposes of the TCPA with respect to calls or texts clearly directed to the business. *See, e.g., Bank v. Indep. Energy Grp. LLC*, 2014 WL 4954618, *3 (E.D.N.Y. Oct. 2, 2014); *Shelton v. Target Advance LLC*, 2019 WL 1641353, *6 (E.D. Pa. Apr. 16, 2019); *Worsham v. Disc. Power, Inc.*, 2021 WL 50922, *4 (D. Md. Jan. 6, 2021); *Smith v. Truman Rd. Dev., LLC*, 2020 WL 2044730, *11 (W.D. Mo. Apr. 28,

2020); *Katz v. Liberty Power Corp., LLC,* 2019 WL 957129, *3 (D. Mass. Feb. 27, 2019).

Second, the complaint does not allege that any Plaintiff received two or more actionable text messages within a 12-month period after registering their phone number on the DNC Registry. The only text messages actually alleged in the complaint are the screenshots of messages Chennette allegedly received. (ER-180.) But Chennette's number was not registered on the DNC Registry. (ER-203.) Nor have any of the remaining Plaintiffs pled facts demonstrating that they registered their phone numbers on the Registry. *See* 47 C.F.R. § 64.1200(c)(2) (prohibiting telephone solicitations to "[a] residential subscriber who has registered his or her telephone number on the national do-not-call registry"). And as discussed above, Plaintiffs' "Exhibit A" fails to establish any TCPA violations at all, much less demonstrate that any particular Plaintiff received two messages within a 12-month period after registration.

Third, as explained already, offering jobs is not encouraging the purchase or rental of, or investment in, property, goods or services. *See Freyja v. Dun & Bradstreet, Inc.*, 2015 WL 6163590, *2 (C.D. Cal. Oct. 14, 2015) (no solicitation where "call was made for the purpose of acquiring information about the commercial services provided by Plaintiff"); *Hulsey v. Peddle, LLC*, 2017 WL 8180583, *3 (C.D. Cal.

Oct. 23, 2017) (call in response to plaintiff's request for offers to purchase her car not a telephone solicitation).[12]

II. None of Plaintiffs' Arguments on Appeal Provide a Basis for Reversing the Dismissal.

A. The district court was not "clearly erroneous" in finding that Plaintiffs' numbers were business lines, based on Plaintiffs' own allegations.

The district court easily recognized that the phone numbers at issue in this case were business lines. (ER-6-9, 15, 17-18.) After all, Plaintiffs admitted that they use the numbers for their businesses. (AOB-8; ER-179.) Indeed, the crux of Plaintiffs' case was that GoSmith discovered and texted Plaintiffs' numbers because they had been posted on the internet in connection with their businesses. (ER-179.) Moreover, Plaintiffs repeatedly referred to themselves as home improvement contractors, and the text messages alleged are aimed at hiring Plaintiffs' businesses to do jobs for local homeowners. (ER-46.)

Because of the fatal consequences these allegations presented for their case, Plaintiffs now studiously and repeatedly refer to the phone

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[12] *See also Orea v. Nielsen Audio, Inc.*, 2015 WL 1885936, *2-3 (N.D. Cal. Apr. 24, 2015) (calls offering to compensate recipient for participating in a survey are not telephone solicitations); *Murphy v. DCI Biologicals Orlando, LLC*, 2013 WL 6865772, *10 (M.D. Fla. Dec. 31, 2013), *aff'd*, 797 F.3d 1302 (11th Cir. 2015) (text message offering to pay plaintiff to donate blood is not a telephone solicitation); *Trujillo v. Free Energy Sav. Co., LLC*, 2020 WL 7768722, *3 (C.D. Cal. Dec. 21, 2020) (calls offering free weatherization services to low-income residential customers are not telephone solicitations).

lines as their "personal cell phones." (*E.g.*, AOB-13.) They accuse the district court of committing "clear error" by failing to accept their own characterization and argue that the court had to view disputed facts in the light most favorable to them. (AOB-14.) This is wrong.

The district court was not obligated to accept as true Plaintiffs' self-serving and conclusory allegations that they were "residential subscribers" in light of their specific allegations and judicially noticeable facts to the contrary. Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *See Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

Plaintiffs' complaint admitted that they used the phones for their businesses. (ER-179.) And even on appeal, Plaintiffs concede that they used the numbers "in their home-based businesses." (AOB-13, 17.) They struggle to downplay this business use ("to varying degrees" [AOB-13]; "occasionally" [AOB-33]) and also argue that a line may be "both 'residential' and used in a home-based business." (AOB-17.) But Plaintiffs' belated attempt to raise new "facts" that contradict their complaint and prior arguments is improper. *Monroy-Perez v. Ashcroft*, 103 F. App'x 174, 175 (9th Cir. 2004) (improper to raise new facts on a motion to reconsider and on appeal).

Plaintiffs cannot have it both ways: They cannot publicly post their phone numbers online to promote their businesses and then turn

around and claim that their residential privacy rights have been invaded when the public makes relevant business inquiries to that number. The fact that Plaintiffs publicly hold out their phone numbers (including internet posting of such numbers), inviting calls to their businesses, means that they cannot claim their residential privacy rights have been invaded when someone tries to hire the business by calling or texting the business' phone number.

Plaintiffs further argue that they never alleged that *they* advertised their numbers as business numbers, i.e., that they "did not themselves advertise" their numbers online, but that such listings appeared because business listing services (like Yelp) gathered and posted them. (AOB-46-48.) This is of no avail. As the district court aptly pointed out, Plaintiffs never alleged that their numbers were wrongfully or accidentally posted on internet websites. (ER-8.) Instead, they admitted that they use their phone numbers in connection with their businesses, repeatedly referring to themselves throughout the complaint as home improvement "contractors." *See, e.g.,* ER-46.

Furthermore, Plaintiffs do not deny—because they cannot—that these phone numbers *are* for their businesses. Indeed, Plaintiffs' own websites demonstrate that they posted their phone numbers on the internet in connection with their businesses. (ER-173-76.) *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001) (courts need not accept as true allegations

that contradict matters properly subject to judicial notice).

Plaintiffs also argue that there was no discovery about how the lines were used (e.g., what percentage was used for business purposes) or how the lines were paid for (e.g., with business or personal funds) and that the court improperly made dispositive factual findings without such discovery. (AOB-17-18.) While the business or residential nature of a line is sometimes a question of fact, here—as the court pointed out—there was no question of fact because Plaintiffs' own allegations demonstrated that their phone numbers were business lines and Plaintiffs plead no facts whatsoever supporting the assertion that their numbers were residential. (ER-6-9.) Thus, discovery was not necessary to prove what was already apparent from the face of the complaint.

Further, as the court also noted, Plaintiffs did not ask for discovery until their motion to alter the judgment—and such a motion is not the proper vehicle to raise evidence that could have been raised before entry of judgment. (ER-14.) Moreover, all of the cases Plaintiffs cite in this regard are distinguishable because none of them involve plaintiffs who pleaded themselves out of court by alleging facts that the phone numbers in question are business numbers. (ER-7-8.) *See also Weisbuch v. County of L.A.*, 119 F.3d 778, 783, n.1 (9th Cir. 1997) ("A plaintiff may plead herself out of court.").

Because (1) Plaintiffs admit they use the phone numbers for their businesses; (2) Plaintiffs refer to themselves as home improvement

contractors; (3) Plaintiffs admit their phone numbers are publicly posted on the internet in connection with their businesses; (4) judicially noticeable websites prove that Plaintiffs published their phone numbers as the contact number for their businesses, thereby inviting calls; and (5) the alleged messages are aimed at hiring Plaintiffs' businesses for local home improvement jobs, the court correctly rejected Plaintiffs' characterization of their phone lines as "residential."

Contrary to Plaintiffs' argument, this conclusion does not mean that a home-based business line can *never* be a residential line under the TCPA. (AOB-42-43.) Here, however, Plaintiffs alleged facts demonstrating the phones were business lines and thus pleaded themselves out of court. In sum, it was not "clearly erroneous" for the court to conclude that "Plaintiffs' numbers are business numbers." (ER-6.)

B. The district court correctly found Plaintiffs lacked standing to bring Do-Not-Call claims.

Plaintiffs argue that they have standing for Do-Not-Call claims for three reasons: (1) the FCC declined to categorically exempt home-based business lines from the Do-Not-Call Registry Rules; (2) privacy rights are substantial; and (3) the TCPA is entitled to broad construction. (AOB-31.) None of these withstand scrutiny and it is improper to construe a statute so broadly that it creates absurd results Congress never intended.

The FCC's decision not to create a blanket exemption for home-based business lines does not mean that home-based businesses are categorically *protected*. Moreover, as Plaintiffs admit, a factual inquiry into the true nature of the phone line is only necessary when it is ambiguous. (AOB-33.) This is not a case where a plaintiff may have only occasionally used a phone line to complete a business transaction, and thus is generally entitled to privacy rights in that phone number. Rather, Plaintiffs admit to using the phone numbers as the contact numbers for their businesses, and the messages at issue sought to hire Plaintiffs' businesses for local home improvement jobs. To post one's phone number on the internet as the contact number for the business, on the one hand, and then cry that personal privacy has been invaded by business inquiries to that number, on the other, is objectively unreasonable.

Nor is it consistent with the TCPA's purpose or spirit. "Congress did *not* expect the TCPA to be a barrier to normal, expected, and desired *business* communications." *GroupMe*, 29 F.C.C. Rcd. at 3444 (emphasis added); FCC 2005 Order, 20 F.C.C. Rcd. at 3793 (the DNC Registry "does not preclude calls to businesses" and "calls made to such numbers will not be considered violations of our rules"); H.R. Rep. 102-317, at 17 (The TCPA's restriction "does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications."). *See also Facebook*, 141 S. Ct. 1163,

1172 (rejecting broad interpretation of TCPA not intended by Congress).

Plaintiffs' remaining arguments that the court erred in finding they lacked standing to bring Do-Not-Call claims are derivative of their argument that the court erred in characterizing their phone numbers as business lines. (AOB-38-41.) In this regard, Plaintiffs argue that the court (1) erred in finding that their phone numbers were business lines; and (2) should not have dismissed the case before discovery. Both arguments fail, as explained above.

Thus, it was not error for the court to dismiss Plaintiffs' Do-Not-Call claims with prejudice on the basis that the phone numbers are business lines and not subject to the Do-Not-Call Registry's protections.

C. The district court correctly found Plaintiffs lacked standing to bring autodialer claims.

Plaintiffs argue that they can bring autodialer claims for three reasons: (1) the statutory text for such claims speaks in terms of "any call" made "to any … cellular telephone"; (2) Congress intended for businesses to be protected from autodialed calls; and (3) various courts have allowed autodialer claims based on calls to business lines. (AOB-20.) Plaintiffs' arguments miss the forest for the trees and evade the key point about why their case fails.

No precedent (and certainly no binding precedent) mirrors this case. Plaintiffs bemoan that the district court's decision was "unique." (AOB-26.) But every case turns on its own facts and the facts alleged

here point decidedly in favor of dismissal with prejudice. None of the cases Plaintiffs cite involve business-related text messages to publicly posted business phone lines, especially where Plaintiffs admit in their complaint that they use the phone numbers for their businesses.

"[A]s is always true when interpreting statutes, statutory context and purpose matter …." *Rojas v. Fed. Aviation Admin.*, 989 F.3d 666, 672 (9th Cir. 2021) (en banc). As emphasized already, Congress never intended to disturb "normal, expected, and desired business communications." *GroupMe*, 29 F.C.C. Rcd. at 3444; *see also* S. Rep. No. 102-178, at 8 (the TCPA's autodialer restriction "does not bar telemarketers from placing automated calls to business users"). Moreover, the Supreme Court has already rejected arguments that the TCPA's autodialer provisions should be expanded based on "broad privacy-protection goals." *See Facebook*, 141 S. Ct. at 1172 (rejecting arguments to interpret autodialer provision broadly because "Congress was broadly concerned about intrusive telemarketing practices").

Further, in 1991 to 1992, when the TCPA was being debated and ultimately enacted, cell phone use and costs were very different. Back then, it was far more costly to use a cell phone. Consumers had to pay by the minute, making them cost-prohibitive for many. *See Facebook*, 141 S. Ct. at 1167, n.1 ("At the time Congress enacted the TCPA, most cellular providers charged users not only for outgoing calls but also for incoming calls.") (citing *In re Rules & Regs. Implementing the TCPA of*

1991, 18 F.C.C. Rcd. at 14115). Congress was understandably concerned about autodialed calls to such numbers. *See id.* at 1167 (noting autodialed calls to cell phones "impos[ed] unwanted fees"); 47 U.S.C. § 227(b)(1)(A)(iii) (prohibiting autodialed calls to cell phones and any service for "which the called party is charged for the call").

Today, however, most cell phone plans offer unlimited talking and texting, making them much more affordable. As a result, cell phones are now ubiquitous. *See ACA Int'l,* 885 F.3d at 697-98 (by 2013, a "significant majority of American adults" owned a smartphone, and by the end of 2016, "nearly 80% of adults had become smartphone owners"). For this reason, many businesses—especially businesses that require being out of the office on job sites, like home improvement contractors—use cell phones as the contact number for their businesses. Such businesses post these cell phone numbers on business websites, expecting and requesting to be called at these numbers. Thus, when Congress prohibited autodialed calls to cell phones nearly 30 years ago, it never intended to create a giant loophole allowing businesses that use a cell phone to be afforded a private right of action to sue over business inquiries made to that business phone number.

Furthermore, subsection (b)(3)'s use of the word "entity" in creating a private right of action is meant to encompass businesses suing under subsection (b)(1)(D), which prohibits using an autodialer to simultaneously engage multiple business lines, and possibly also

subsection (b)(1)(C), which prohibits certain fax advertisements. *See, e.g.* H.R. Rep. 102-317 at 10 (expressing Congressional concern about fax machines being tied up and "unavailable for legitimate business messages" while processing and printing junk faxes); *but see Van Patten*, 847 F.3d at 1043 ("Congress sought to protect *consumers* from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls *and fax advertisements*." (emphases added; citing Pub. L. 102-243, § 2, ¶12)). Thus, the TCPA's inclusion of the word "entity" pertains to other subsections of the TCPA not applicable here.

The district court also did not misread the *Stoops* case. But even if it had, it would not matter. The full *Stoops* quote is, "it is unfathomable that Congress considered a *consumer* who files TCPA actions as a business when it enacted the TCPA as a result of its 'outrage over the proliferation of prerecorded telemarketing calls to *private residences*, which *consumers* regarded as an intrusive invasion of privacy and a nuisance.'" *Stoops*, 197 F. Supp. 3d at 805 (emphasis added; citing *Leyse v. Bank of Am.*, 804 F.3d 316, 325 (3d Cir. 2015)). The *Stoops* court correctly recognized Congress' intent to protect consumers in "private residences" or residential subscribers, but found that Stoops did not qualify for such protection because she did not suffer an invasion of privacy. Rather, Stoops was using the TCPA as a sword or "as a business." That is no different here, where Plaintiffs seek to use their business numbers to solicit business inquiries, while at the same time

use their business numbers to sue for damages under the TCPA. Like Stoops, Plaintiffs are using the TCPA as a sword and have not suffered an invasion of privacy. Thus, the district court did not err in finding that Plaintiffs, like Stoops, lack statutory standing to seek damages for text messages sent to their business phones.

Even if the court misread or misapplied *Stoops*, that would not change the fact that Congress did not intend to grant businesses the right to sue based on ordinary business inquiries made to business numbers. Nor does a lawyer's blog commentary change this. The district court did not rule that business cell phones are categorically exempt from TCPA protection. Rather, the court ruled that the TCPA did not apply to calls made to business lines under the facts alleged here.

The cases Plaintiffs cite are inapposite. In addition to citing district court opinions from out-of-circuit, two cases pertained to the fax provisions of the TCPA, which are not at issue in this case. (ER-25-26, citing *Robert W. Mauthe, M.D., P.C. v. MCMC LLC*, 387 F. Supp. 3d 551, 565 (E.D. Pa. 2019) and *Eric B. Fromer Chiropractic, Inc. v. Inovalon Holdings, Inc.*, 329 F. Supp. 3d 146, 151, n.4 (D. Md. 2018).) And the issue of whether the TCPA's cell phone provisions protect business lines was not at issue in *Andrews v. Simm Assocs., Inc.,* 2017 WL 3424900 (W.D. Wash. Aug. 9, 2017). That case analyzed whether plaintiff was the "called party" in light of the fact that plaintiff's business paid for the phone line at issue.

Similarly unhelpful to Plaintiffs' cause are their "factual allegations" describing the text messages and providing damages calculations. (AOB-27-29.) First, although Plaintiffs provided several examples of text messages in the complaint, most of them were not sent to any Plaintiff in this case. (*See* ER-105 (admitting that the messages alleged in paragraphs 24-24 of the complaint were not sent to Plaintiffs in this action); ER-152 n.12 (explaining that these messages were copied from other complaints that identified these messages as being sent to individuals who are not parties to this case).) The messages allegedly sent to Plaintiff Chennette demonstrate they inquired about nearby painting jobs for his painting business. (ER-137, 157-67, 180.) Also harmful is that Plaintiffs' "damages calculation" is, by Plaintiffs' own account, entirely made up. (ER-138-39, 204.)

Thus, the district court did not err in holding that Plaintiff-business-owners fall outside the "zone of interests" that the autodialer provision of the TCPA was designed to protect.

D. The district court properly exercised its discretion to deny "reconsideration."

Plaintiffs rest their argument that the district court abused its discretion in denying their post-judgment motion on the shocking assertion that the district court misread *every case* Plaintiffs cited. (AOB-49-53.) This accusation strains credulity on its face and is demonstrably false.

As discussed above, the district court did not err in its reading of *Stoops*. The full quote, which Plaintiffs truncated, explains that Congress was concerned about calls made to consumers in the home.

Nor did the district court err in distinguishing the rest of Plaintiffs' cases—all of which are out-of-circuit—as not involving "a plaintiff who, but for an assertion that the phone number in question is 'residential,' otherwise pled facts that the phone number is a business number." (ER-7.) To begin, three of Plaintiffs' cases—*Clauss v. Legend Secs., Inc.*, 2014 WL 10007080 (S.D. Iowa Sept. 8, 2014); *Smith*, 2020 WL 2044730; and *Savett v. Great Am. Power, LLC*, 2020 WL 4227672 (N.D. Ohio July 23, 2020) (AOB-52)—did not involve *allegations* at all, as those cases were all at the summary judgment stage. (AOB-52.) The plaintiffs in the other three cases—*Baker v. Certified Payment Processing, L.P.*, 2016 WL 3360464 (C.D. Ill. June 1, 2016); *Blevins v. Premium Merch. Funding One, LLC*, 2018 WL 5303973 (S.D. Ohio Oct. 25, 2018); and *Owens v. Starion Energy, Inc.*, 2017 WL 2838075 (D. Conn. 2017) (AOB-51, 53)—did *not* allege in any of their complaints that the phone number at issue was a business number.

In contrast, Plaintiffs here alleged *in the complaint* that they are home improvement contractors who use their phone numbers for their home improvement businesses, that their phone numbers are listed in internet business directories (such as Yelp), and that they received text messages asking about their availability to do local home improvement

jobs. These facts are further bolstered by judicially noticeable websites, demonstrating that Plaintiffs posted their phone numbers on the internet as the contact numbers for their respective businesses. (ER-173-76.) Thus, the court did not abuse its discretion in holding firm on its decision to dismiss this case with prejudice.

CONCLUSION

The district court properly dismissed this case with prejudice. This Court should affirm.

May 5, 2021

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CERTIFICATE OF COMPLIANCE

I certify that Appellees' Brief is proportionately spaced, has a typeface of 14 points or more, and contains **12,741** words.

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court.

May 5, 2021

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