

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 5 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

JOHN MCCURLEY; DAN DEFOREST,
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

v.

ROYAL SEAS CRUISES, INC.,

Defendant-Appellee.

No. 21-55099

D.C. No.

3:17-cv-00986-BAS-AGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted March 8, 2022
Pasadena, California

Before: WARDLAW and HURWITZ, Circuit Judges, and ROSENTHAL,**
District Judge.

Royal Seas Cruises, Inc., hired Prospects DM, Inc., to generate leads and
initiate telephone calls to prospective consumers for cruise packages. The issue for

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Lee H. Rosenthal, Chief United States District Judge
for the Southern District of Texas, sitting by designation.

decision is whether Royal Seas is liable under the Telephone Consumer Protection Act (“TCPA”) for prerecorded voice calls made by Prospects to those, including plaintiffs John McCurley and Dan Deforest, who had not given prior express consent to be called. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1041 (9th Cir. 2017) (citing 47 U.S.C. § 227(a)(5); *id.* § 227(b)(1)(A)(iii)) (explaining TCPA violations). The district court granted summary judgment to Royal Seas. We have jurisdiction over the plaintiffs’ appeal under 28 U.S.C. § 1291. Reviewing *de novo*, *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1068 (9th Cir. 2021), we affirm in part and reverse in part.

1. **Waiver.** Our “general rule” is that “an issue may not be raised for the first time on appeal.” *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Royal Seas argues that the plaintiffs waived their argument that it is vicariously liable for Prospects’s TCPA violations because the plaintiffs did not allege vicarious liability in their pleadings. Alternatively, Royal Seas argues that the plaintiffs waived any arguments about actual and apparent authority because they asserted only ratification as the basis for vicarious liability in their motion for summary judgment and in their response to Royal Seas’s cross-motion.

The plaintiffs did not waive their vicarious liability arguments based on a failure to specifically allege them in the consolidated complaint. To avoid waiver by failing to plead an issue, plaintiffs may “make known during discovery their

intention to pursue recovery on the . . . theory omitted from their complaints.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). Royal Seas had ample notice of, and opportunity to develop facts about, the actual and apparent authority and the ratification theories the plaintiffs asserted. Notice of these theories came from the plaintiffs’ class certification motion filed in July 2018 and the district court’s class certification order issued in March 2019, both long before discovery closed in February 2020. The plaintiffs also presented arguments on apparent authority and ratification in their motion for summary judgment. We hold, however, that the plaintiffs did waive an actual authority theory of vicarious liability by failing to assert it either in their pleadings or at summary judgment. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2. (9th Cir. 2009) (per curiam). None of the narrow exceptions to waiver applies. *See Carlson*, 900 F.2d at 1349.

2. *Nondelegable Duty.* The plaintiffs argue that Royal Seas had a nondelegable duty under the TCPA to ensure that Prospects had prior express consent for each call it made to solicit potential customers for Royal Seas.¹

We disagree. The Federal Communications Commission (“FCC”), the agency responsible for implementing the TCPA, instructs that the relationship between a

¹ The plaintiffs did not present this argument at summary judgment; however, because it is a pure question of law, we may address it. *Carlson*, 900 F.2d at 1349; *see also In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (“[W]aiver is a discretionary, not jurisdictional, determination.”).

seller and a telemarketer should be assessed under federal common law agency principles. *In re Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6574 (May 9, 2013). Our precedent defers to the FCC’s interpretation that the TCPA requires vicarious liability, not strict liability. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1072 (9th Cir. 2019). The plaintiffs present no compelling reason why we should change that position. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016).

3. Vicarious Liability. The plaintiffs also argue that Royal Seas is vicariously liable for Prospects’s placements of prerecorded voice calls to individuals without their prior express consent. The plaintiffs rely on apparent authority and ratification.

“Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” RESTATEMENT (THIRD) OF AGENCY § 2.03. Ratification is “the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.” *Id.* § 4.01(1). “A person ratifies an act by (a) manifesting assent that the act shall affect the person’s legal relations, or (b) conduct that justifies a reasonable assumption that the person

so consents.” *Id.* § 4.01(2).² A principal assumes the risk of lack of knowledge and may be found willfully ignorant if “the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation.” *Id.* § 4.06 cmt. d.

The record does not support a finding that Prospects had apparent authority from Royal Seas to call nonconsenting individuals. When Prospects placed calls, it asked an individual who answered “qualifying questions” about products and services that ranged from home improvement to medical equipment to leisure packages, including cruises. Royal Seas approved the scripts used, but no script is in the record. There is no record evidence of whether, or when, between making the phone call and transferring the individual answering to a live person at Royal Seas, Prospects stated that it was calling on behalf of a third party or mentioned “Royal Seas.” *Cf. Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 940–41 (9th Cir. 2017). There is no basis to find that the person answering a Prospects call would reasonably believe that Prospects was acting on behalf of Royal Seas before the point of the transfer. We affirm the district court’s grant of summary judgment in favor of Royal

² An act is ratifiable “if the actor acted or purported to act as an agent on the person’s behalf.” *Id.* § 4.03. Although the scope of its agency is in dispute, Prospects is at least an agent of Royal Seas for the purpose of generating leads. *See Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010, 1015 (9th Cir. 2018) (because Click Media contracted with AC Referral to generate leads for prospective customers, AC Referral was an agent of Click Media for the purpose of the ratification analysis).

Seas as to apparent authority.

But that does not end the inquiry. Drawing reasonable inferences in the light most favorable to the plaintiffs, *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1159 (9th Cir. 2021), there is a material dispute of fact as to whether Royal Seas ratified Prospects's acts. Royal Seas had knowledge of facts that would have led it to investigate Prospects's lead-generation activities to determine if it was calling only consenting individuals, but instead accepted leads generated by Prospects's calls with scant investigation. Royal Seas knew that Prospects placed calls using prerecorded voices, a prima facie violation of the TCPA. Royal Seas also knew that it received 2.1 million warm-transferred calls from Prospects between January 2017 and June 2018. Royal Seas knew that TCPA compliance required each call to be to an individual who had previously "agreed" to be called by Royal Seas by clicking "next" after submitting personal contact information and seeing a consent box on websites such as www.diabeteshealth.info and www.yourautohealthlifeinsurance.com. Royal Seas knew that the calls Prospects placed to individuals who had allegedly consented by checking forms on the website www.diabeteshealth.info generated 80,081 warm transfers to Royal Seas in 2017. The plaintiffs submitted expert testimony that this number of transfers, which was only a subset of the calls Prospects placed, from this lead-generation website during this period is implausible at best. The expert testimony also addressed several other websites responsible for

generating the 2.1 million transfers, such as www.123FreeTravel.com, and concluded that the volume of traffic to these sites, much less the number of leads from consenting individuals that could be reasonably harvested from them, was very low.

Royal Seas also knew that of the 560 customers whom Prospects warm-transferred and who made purchases from Royal Seas, 13 percent had phone numbers that did not match the customer consent data that Prospects had provided to Royal Seas, and 31 percent did not have a matching phone number and last name. The amount of mismatched data in the record cannot all be explained by data-entry errors or family members with different last names. The number for one of the named plaintiffs, John McCurley, for example, was associated with the name “Jose Fernandez.” There is evidence that Royal Seas’s employees knew of the discrepancies because when they spoke with the transferred customers, because they addressed the customers by the first name that Prospects provided.

These facts, in combination with the evidence of widespread TCPA violations in the cruise industry, would support a finding that Royal Seas knew facts that should have led it to investigate Prospects’s work for TCPA violations. *See Henderson*, 918 F.3d at 1076. We reverse the district court’s summary judgment in favor of Royal Seas as to ratification.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party to bear its own costs.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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