IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA CLARKSBURG

IN RE: MONITRONICS INTERNATIONAL, INC., TELEPHONE CONSUMER PROTECTION ACT LITIGATION

MDL NO. 1:13-MD-2493 (BAILEY)

THIS DOCUMENT RELATES TO ALL CASES

ORDER DENYING SUMMARY JUDGMENT

Pending before this Court is the Motion for Summary Judgment of Monitronics International, Inc. [Doc. 975]. The motion has been fully briefed and is ripe for decision. For the reasons stated below, the Motion will be denied.

Defendant Monitronics International, Inc. ("Monitronics") seeks summary judgment on the issue of liability in this multi-district litigation case, consisting of, at this time, approximately 30 cases.

Monitronics claims entitlement to dismissal because there is:

(a) no evidence Monitronics was the "seller" in any of the alleged illegal telemarketing calls;

(b) no evidence of a formal agency relationship between Monitronics and VMS/Alliance or ISI showing that such entities were directed by Monitronics to act "on behalf of" Monitronics and/or were under Monitronics' control as to the manner and means of the telemarketing activity or otherwise;

(c) no evidence of an apparent agency relationship arising from a direct

communication between Monitronics and the recipient of alleged illegal telemarketing calls that led the recipient to reasonably believe that the telemarketer was the agent of Monitronics; and

(d) no evidence of ratification by Monitronics of the alleged illegal telemarketing calls, because there is --

(i) no evidence of a principal-agent relationship between Monitronics and its dealers or the dealers' third party lead sources;

(ii) no evidence that VMS/Alliance or ISI were acting "on behalf of" Monitronics when making the alleged illegal calls; and

(iii) no evidence that Monitronics accepted the benefits of transactions created through the alleged illegal telemarketing calls with full knowledge of and assent to accept responsibility for the actions generating the transaction accepted.

[Doc. 976-2, p. 13].

All cases are filed seeking damages under the Telephone Consumer Protection Act, 47 U.S.C. §§ 227(b) and (c). These cases contain allegations that Monitronics is vicariously liable for calls made in violation of the Act. There are no allegations that Monitronics actually placed the telemarketing calls.

Legal Standard

Rule 56(e) of the Federal Rules of Civil Procedure provides that "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must– by affidavits or as otherwise provided in this rule– set out specific facts showing a genuine

issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

Rule 56 further provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986). Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Anderson***, 477 U.S. at 250.

Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986). That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(c); ***Celotex Corp.***, 477 U.S. at 323-25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted).

Discussion

"The TCPA was enacted in response to '[v]oluminous consumer complaints about abuses of telephone technology.' ***Mims v. Arrow Financial Services, LLC***, 565 U.S. 368, 370-71 (2012). In ***Mims***, the Supreme Court summarized Congress' findings on the matter:

> In enacting the TCPA, Congress made several findings .... 'Unrestricted telemarketing,' Congress determined, 'can be an intrusive invasion of privacy.' TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings) (internal quotation marks omitted). In particular, Congress reported, '[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their homes.' ***Ibid.*** (internal quotation marks omitted). '[A]utomated or prerecorded telephone calls' made to private residences, Congress found, were rightly regarded by recipients as 'an invasion of privacy.' ***Ibid.*** (internal quotation marks omitted).

Id. at 372.

"The unanimous decision in ***Mims*** also isolated four practices that the TCPA was designed to halt:

> [T]he TCPA principally outlaws four practices. First, the Act makes it unlawful to use an automatic telephone dialing system [('autodialer')] or an artificial or prerecorded voice message, without the prior express consent of the called party, to call any ... cellular telephone, or other service for which

> the receiver is charged for the call. *See* 47 U.S.C. § 227(b)(1)(A). Second, the TCPA forbids using artificial or prerecorded voice messages to call residential telephone lines without prior express consent. § 227(b)(1)(B). Third, the Act proscribes sending unsolicited advertisements to fax machines. § 227(b)(1)(C). Fourth, it bans using automatic telephone dialing systems to engage two or more of a business' telephone lines simultaneously. § 227(b)(1)(D).

Id. at 373." ***Mey v. Honeywell Intern., Inc.***, 2013 WL 1337295, *1 (S.D. W.Va. March 29, 2013) (Copenhaver, J).

"The TCPA is a remedial statute and thus entitled to a broad construction. *See, e.g.*, ***Holmes v. Back Doctors, Ltd.***, 695 F.Supp.2d 843, 854 (S.D. Ill. 2010) ('It is true that ... the TCPA is a remedial statute.'). As such, it 'should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.' ***Scarborough v. Atlantic Coast Line R. Co.***, 178 F.2d 253, 258 (4th Cir. 1950). At the same time, a remedial purpose 'will not justify reading a provision "more broadly than its language and the statutory scheme reasonably permit."' ***Touche Ross & Co. v. Redington***, 442 U.S. 560, 578 (1979) (quoting ***SEC v. Sloan***, 436 U.S. 103, 116 (1978))." ***Id.*** *See also* ***In re Monitronics Intern., Inc., Tel. Consumer Protection Act Litigation***, 2015 WL 1964951, *3 (N.D. W.Va. April 30, 2015) (Keeley, J) (same).

Movants do not dispute that there can be vicarious liability on the part of a seller under the TCPA, nor could they. ***Smith v. State Farm Mut. Auto Ins. Co.***, 30 F.Supp.3d 765 (N.D. Ill. 2014); ***Kristensen v. Credit Payment Svcs.***, 12 F.Supp.3d 1292 (D.Nev.

2014); ***Mey v. Honeywell Intern., Inc.***, 2013 WL 1337295 (S.D. W.Va. March 29, 2013); ***Cunningham v. Kondaur Capital***, 2014 WL 8335868 (M.D. Tenn. Nov. 19, 2014), report and recommendation approved, 2015 WL 1412737 (M.D. Tenn. Mar. 26, 2015).

"In ***Charvat v. EchoStar Satellite, LLC***, 630 F.3d 459, 468 (6th Cir. 2010), the Sixth Circuit was faced with the issue of whether the TCPA and its accompanying regulations permitted a plaintiff to recover damages under Sections 227(b) and (c) from a defendant that did not place any illegal calls but whose independent contractors did so in attempts to sell the products and services of the defendant. The Sixth Circuit invoked the doctrine of primary jurisdiction and referred the matter to the Federal Communications Commission ("FCC") to allow the agency to interpret certain provisions of the TCPA and its accompanying regulations. The FCC issued a declaratory ruling clarifying that, even though a seller may not have initiated or made a call under the TCPA, the seller may nonetheless be vicariously liable under the TCPA based on federal common law principles of agency for violations of Sections 227(b) and (c) that are committed when a third-party telemarketer initiates or places an unlawful call on behalf of the seller. ***In re Dish Network, LLC***, 28 FCC Rcd. 6574, 2013 WL 1934349 (May 9, 2013)." ***Cunningham v. Kondaur Capital***, 2014 WL 8335868, at *5 (M.D. Tenn. Nov. 19, 2014), report and recommendation approved, 2015 WL 1412737 (M.D. Tenn. Mar. 26, 2015).

The FCC opined that "a seller cannot avoid liability simply by delegating placing the call to a third-party. The FCC determined that 'while a seller does not generally "initiate" calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency

for violations of [ ] section 227(b) ... that are committed by third-party telemarketers.' *See* ***id.*** at 6574. This includes 'a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification.' ***Id.*** at 6584." ***Hossfeld v. Gov't Employees Ins. Co.***, 88 F.Supp.3d 504, 510 (D. Md. 2015) (Quarles, J).

The FCC also stated:

> [T]he seller is in the best position to monitor and police TCPA compliance by third-party telemarketers. . . . We thus agree that, consistent with the statute's consumer protection goals, potential seller liability will give the seller appropriate incentives to ensure that their telemarketers comply with our rules. . . . By contrast, allowing the seller to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy for telemarketing intrusions. This would particularly be so if the telemarketers were judgment proof, unidentifiable, or located outside the United States, as is often the case. . . . Even where third-party telemarketers are identifiable, solvent, and amenable to judgment, limiting liability to the telemarketer that physically places the call would make enforcement in many cases substantially more expensive and less efficient, since consumers (or law enforcement agencies) would be required to sue each marketer separately in order to obtain effective relief.

Melito v. Am. Eagle Outfitters, Inc., 2015 WL 7736547, at *5 (S.D.N.Y. Nov. 30, 2015), quoting 28 FCC Rcd., at 6588.

The plaintiffs do not contend that either movant is directly liable, nor could they. "The FCC's ruling in ***In re Dish Network, LLC*** clearly indicates that, in the context of telemarketing telephone calls [and text messages], direct liability under the TCPA applies only to entities that initiate the phone calls:

> Our rules have long drawn a distinction between the telemarketer who initiates a call and the seller on whose behalf a call is made. In accordance with those rules, as we explain below, we clarify that a seller is not directly liable for a violation of the TCPA unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer.

28 F.C.C. Rcd. at 6582, ¶ 24." ***Cunningham v. Kondaur Capital***, 2014 WL 8335868 (M.D. Tenn. November 19, 2014).

"Direct liability under the TCPA, however, applies only to entities that 'initiate' the telemarketing calls. *See* ***In re Joint Petition filed by Dish Network, LLC,*** 28 F.C.C.R. 6574, 6582 ¶ 24 (2013) (hereinafter, the "FCC Ruling" or "***Dish Network***") ("[W]e clarify that a seller is not directly liable for a violation of the TCPA unless it initiates a call ...."); ***Golan v. Veritas Entm't, LLC***, 2014 WL 2095310, at *4 (E.D. Mo. May 20, 2014) ("[A] seller is not directly liable for a TCPA violation unless it initiates [the] call."). A person or entity "initiates" a telephone call when "it takes the steps necessary to physically place a telephone call." *See* ***FCC Ruling,*** 28 F.C.C.R. at 6583 ¶ 26. Accordingly, a seller generally does not "initiate" calls placed by third-party telemarketers. *See* ***id.*** at 6593 ¶ 48." ***Smith v. State Farm Automobile Ins. Co.***, 30 F.Supp.3d 765, 771 (N.D. Ill. 2014).

The FCC concluded in ***DISH Network*** that "a seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA," and may only "be held vicariously liable under federal common law principles of agency for violations ... that are committed by third-party telemarketers," ***Palm Beach Golf Ctr.- Boca, Inc. v. John G. Sarris, D.D.S., P.A.***, 781 F.3d 1245, 1255 (11th Cir. 2015).

While there can be no direct liability on the part of a seller, "a seller may be liable for violations by its representatives under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." ***DISH Network***, 28 F.C.C.R. at 6584.

Monitronics does not contest this framework. Instead, Monitronics argues that it is not a "seller" governed by the TCPA and thus the Court should not even reach the issue of vicarious liability. This argument was rejected by Judge Keeley. ***Mey v. Monitronics International, Inc.***, 959 F.Supp.2d 927, 933 (N.D. W.Va. 2013). The TCPA defines a "seller" as "the person or entity **on whose behalf** a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services..." 47 C.F.R. § 64.1200(f)(9) (emphasis added). A sale does not have to be made during the call for it to constitute a violation; even "[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services" are sufficient. ***In the Matter of Rules & Regs. Implementing the TCPA***, 18 FCC Rcd. 14014, 14097 (2003). Thus, if the purpose of the call is to "encourag[e]" recipients to purchase property, goods, or services, then any company on whose behalf that call is made is a seller.

The primary purpose of the telemarketing calls at issue was to persuade the customer to execute an alarm monitoring contract that requires the customer to pay a monthly monitoring fee. Authorized Dealers could keep the contracts or offer them to Monitronics, which had the right of first refusal to purchase the contracts. Monitronics elected to purchase the vast majority of these contracts. For the contracts that dealers chose to keep, Monitronics provided the monitoring. Although theoretically a dealer could have elected to sell a contract to another dealer if Monitronics rejected the contract, the owners of both VMS and ISI testified that during the time period relevant to this case they did not work with other alarm monitoring companies. Maximum also worked "exclusively" with Monitronics.

Monitronics argues that it cannot be considered a seller under the FCC's ruling because the Authorized Dealers benefitted from the calls. This argument is not persuasive. A business is considered a "seller" under the TCPA if telemarketing calls "were made to increase the flow of consumers" to the defendant's business. ***Aranda v. Caribbean Cruise Line, Inc.***, 179 F.Supp.3d 817, 832 (N.D. Ill. 2016). Where the purpose of telemarketing calls is to increase the flow of consumers to multiple businesses, then all of those businesses are "sellers" under the TCPA. *See* ***id.*** (finding defendant cruise line and defendant timeshare merchant could both be considered "sellers" under the TCPA where one purpose of the telemarketing calls was to convince consumers to take a nominally free cruise through the cruise line during which they would spend money on food, drink, and other products, and another purpose of the calls was to bring customers to the timeshare merchant's facilities for presentations).

The Authorized Dealers' telemarketing calls increased the flow of consumers to Monitronics' business. Monitronics is "totally dependent" on its Authorized Dealers' success and is guaranteed monthly revenue for each contract it purchases from the Authorized Dealers. VMS, ISI, and Maximum agreed to give Monitronics the right of first refusal for all contracts they decided to sell and did not work with any other monitoring companies. As in ***Aranda***, Monitronics is therefore a "seller" and subject to vicarious liability for the calls placed on its behalf under common law principles of agency.

Monitronics asserts that it should not be considered a seller because, in some cases, the Authorized Dealer retains the contract and, in exchange, "keep[s] the monthly customers' monitoring fee." This assertion is misleading. Authorized Dealers elect to keep very few of the alarm monitoring contracts they sell. When Authorized Dealers keep the alarm monitoring contracts, they do so subject to a Master Contract Monitoring Agreement that requires dealers to pay to Monitronics in advance a monthly service charge for each security system that is connected to Monitronics' monitoring equipment. In other words, Monitronics receives compensation for its alarm monitoring services regardless of whether the Authorized Dealer keeps the contract or sells it to Monitronics. In the first instance, the money flows from the customer to the dealer to Monitronics. In the second, the money flows directly from the customer to Monitronics. In both cases, Monitronics profits.

"The classical definition of 'agency' contemplates 'the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control." Potential liability under general agency-related principles extends beyond classical agency, however. A principal may be liable in circumstances where a third party has apparent (if not actual)

authority. Such '[a]pparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal.' Other principles of agency law may support liability in particular cases. For example, a seller may be liable for the acts of another under traditional agency principles if it ratifies those acts by knowingly accepting their benefits. Such ratification may occur 'through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences." ***DISH Network***, 28 F.C.C. Rcd. 6586–87 (2013).

"An entity may be held vicariously liable for violations of the TCPA 'under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification.' ***DISH Network***, 28 F.C.C.R. at 6582 ¶ 28; *see* ***Hodgin v. UTC Fire & Security AmericasCorp., Inc.***, 885 F.3d 243, 252 (4th Cir. 2018). 'Formal agency,' as the FCC calls it, is also known as 'actual authority.' Actual authority may be express or implied. ***Bridgeview Health Care*** [***Ltd. v. Jerry Clark***], 816 F.3d at 938–39 [(7th Cir. 2016)]. An agent has express actual authority when the principal expressly grants the agent the authority to perform a particular act. 'While express actual authority is proven through words, implied actual authority is established through circumstantial evidence.' ***Id.*** at 939. A principal grants implied actual authority to an agent when the principal's reasonably interpreted words or conduct would cause an agent to believe that the principal consents to have an act done on her behalf. ***Opp*** [***v. Wheaton Van Lines***], 231 F.3d at 1064 [(7th Cir. 2000)]. 'To create apparent authority, the principal must speak, write, or otherwise act toward a third party.' ***Bridgeview Health Care***, 816 F.3d at 939.

Finally, ratification occurs when an agent acts for a principal's benefit and the principal does not repudiate the agent's actions. ***Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.***, 376 F.3d 664, 677 (7th Cir. 2004). It 'requires that the principal have full knowledge of the facts and the choice to either accept or reject the benefit of the transaction.' ***NECA–IBEW Rockford Local Union 364 Health & Welfare Fund v. A&A Drug Co.***, 736 F.3d 1054, 1059 (7th Cir. 2013)." ***Aranda v. Caribbean Cruise Line, Inc.***, 179 F.Supp.3d 817, 831 (N.D. Ill. 2016)

While the plaintiffs argue that the issue of agency is not susceptible to resolution by summary judgment, "vicarious liability, like any other issue of fact, may be adjudicated summarily only where the evidence would not permit a reasonable jury to find for the nonmoving party. *See* ***Spitz v. Proven Winners N.A., LLC***, 759 F.3d 724, 731 (7th Cir. 2014) (internal quotation marks omitted) ('Agency is a notoriously fact-bound question, but summary judgment on the existence of an agency relationship is still appropriate when the plaintiff fails to meet her burden in presenting sufficient facts to show that a genuine issue of material fact exists with respect to the agency issue.')." ***Aranda v. Caribbean Cruise Line, Inc.***, 179 F.Supp.3d 817, 829 (N.D. Ill. 2016). *See also* ***Wynn's Extended Care, Inc. v. Bradley***, 619 Fed.Appx. 216, 218 (4th Cir. 2015); ***Hill v. Lockheed Martin Logistics Mgmt, Inc.***, 354 F.3d 277, 287-99 (4th Cir. 2004) (en banc).

Actual Agency

With respect to actual agency, Judge Stamp noted in ***Mey v. Pinnacle Security, LLC***, 2012 WL 4009718 (N.D. W.Va. Sept. 12, 2012), that in order to prove actual agency, the plaintiff must show that the defendant controlled or had the right to control the

purported agent and, more specifically, the manner and means of the solicitation campaign that was conducted. ***Mey v. Pinnacle Security, LLC***, 2012 WL 4009718 (N.D. W.Va. Sept. 12, 2012), citing ***Thomas v. Taco Bell Corp.***, 2012 WL 3047351 (C.D. Cal. June 25, 2012).

This is consistent with the Restatement (Third) of Agency § 1.01, which requires that the agent must be subject to the principal's control.

In their effort to demonstrate actual agency, the plaintiffs cite to a number of facts. These include the fact that the movants may have permitted the persons who purchased from the movants to represent that they are authorized representatives, that telemarketing scripts were provided to the dealers, and that the movants did not move swiftly enough to stop the illegal calling when it came to their attention.

The plaintiffs also describe what they call the "home security sales model." The "model" has three components, each of which plays a critical role in their efforts to sell their products: a manufacturer that provides the home security equipment, a monitoring company that provides monitoring services, and dealers that install the systems. Honeywell and UTC are the manufacturers that provide the home security equipment, defendant Monitronics provides the monitoring service, and defendants such as ISI and VMS are Monitronics authorized dealers that install the systems.

Authorized dealers like ISI and VMS call consumers like plaintiffs and pitch a security system package that consists of a "free" alarm system and a multi-year home security monitoring contract with monthly payments. Monitronics pays the dealer for each monitoring contract and retains a security interest in the dealer's assets to protect against unpaid charges by consumers. The authorized dealer pays Honeywell or UTC a

negotiated amount for each home security "kit." The dealers pocket the difference between the revenue from Monitronics and the amount they pay for the kits.

In evaluating these arguments, it must be kept in mind that, while in-person telemarketing calls may be harassing to the consumer, they do not violate the TCPA. It is only when the calls are "robo-calls" or are made to persons on the do-not-call list that the calls violate the Act. Accordingly, assisting a party in setting up telemarketing centers or providing scripts for in-person calls is not in itself evidence of agency.

"Courts in this district, and elsewhere, have looked to the Restatement as the source of federal agency principles." ***Mey v.Venture Data, LLC***, 245 F.Supp.3d 771, 787 (N.D. W.Va. 2017); *see also* ***Hodgin v. UTC Fire & Security AmericasCorp., Inc.***, 885 F.3d 243, 252 (4th Cir. 2018), and ***Cilecek v. Inova Health Sys. Servs.***, 115 F.3d 256, 260 (4th Cir. 1997). The "essential element of actual agency is the principal's right to control the actor." Restatement § 1.01 cmt. f (emphasis added). "In the TCPA context, courts have characterized the control necessary to establish agency as being control over 'the manner and means' of the agent's calling activities." ***Venture Data***, 245 F.Supp.3d at 787.

When an agency relationship exists, the next step is to determine whether the agent is acting within the scope of its authority. The scope of an agent's authority may be implied by conduct. *See* ***Venture Data***, 245 F.Supp.3d at 787 (citing Restatement § 2.02 cmt. c). The FCC has recognized, for example, that a principal can be held vicariously liable if it knows the telemarketer is violating the TCPA but does not take reasonable measures to stop it. ***Dish***, 28 FCC Fcd. at 6582. Other evidence of implied actual authority includes evidence that the principal provided agents with telemarketing scripts or seeks out vendors

to generate leads for the calls. *See* ***Aranda,*** 179 F.Supp.3d at 832.

Monitronics had the right to control the manner and means by which its Authorized Dealers sold Monitronics' services and exercised that control. Authorized Dealers were required to use contracts that Monitronics drafted and approved to sign up customers. Authorized Dealers had to offer contracts that they wanted to sell to Monitronics first. Monitronics purchased the vast majority of these contracts.

Monitronics required its Authorized Dealers to guarantee at least twelve months of revenue on each contract they sold to Monitronics and pledge all of their accounts as a security interest. Monitronics required Authorized Dealers to maintain credentials to access Monitronics' website and actually access the website on a weekly basis. Monitronics had the unilateral right to terminate the dealer's status as an authorized dealer at any time. Monitronics also retained the right to modify the terms of the authorized dealer program at any time.

Monitronics controlled the manner in which Authorized Dealers ran their businesses. Monitronics dictated the price range Authorized Dealers could charge for the monitoring services and the manner of submitting contracts to Monitronics, and required dealers to comply with Monitronics' installation instructions.

Monitronics' right to control extended to Authorized Dealers' telemarketing. Under the Restatement, the scope of an agent's actual authority can be either express or implied through the principal's conduct. *See* Restatement § 2.02 cmt. c. "While express actual authority is proven through words, implied actual authority is established through circumstantial evidence." ***Aranda***, 179 F.Supp.3d at 831 (quotation and internal marks

omitted). "A principal grants implied actual authority to an agent when the principal's reasonably interpreted words or conduct would cause an agent to believe that the principal consents to have an act done on her behalf." ***Id.*** In the TCPA context, a seller can be vicariously liable for the conduct of third-party telemarketers "if the principal know[s] that a retailer is repeatedly engaging in violative telemarketing when selling the principal's products or services, and the principal fails to take reasonable measures to address the unlawfulcalls." ***2013 FCC Dish Network Ruling*** at 6580.

Through its conduct, Monitronics impliedly granted its Authorized Dealers actual authority to place unlawful telemarketing calls on Monitronics' behalf. In 2010, Monitronics provided dealers with sales training and encouraged dealers to use automated dialers, informing them that a predictive dialer was "preferred."[1] Monitronics repeatedly provided agents with "approved" telemarketing scripts that authorized — and even encouraged —

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[1] This encouragement is highly telling. According to the FCC, Predictive dialers constitute an automatic dialing system and are subject to the TCPA's restrictions on the use of autodialers. ***In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991***, 23 FCC Rcd. 559, 566 (2008).

"Based on the FCC's orders on predictive dialers, several Florida district courts have found that predictive dialers qualify as ATDSs as a matter of law . . .. *See* ***Strauss v. CBE Grp., Inc.***, 173 F.Supp.3d 1302, 1309 (S.D. Fla. 2016) (citing the 2003 FCC order for the proposition that "[a] predictive dialer constitutes an ATDS within the meaning of the TCPA" and then holding that, as to some calls, the debt collector defendant was liable as a matter of law due to its use of the . . . predictive dialer); *see also* ***Patterson v. Ally Fin., Inc.***, 2018 WL 647438, at *2 (M.D. Fla. Jan. 31, 2018) (on summary judgment, rejecting defendant's argument that its predictive-dialing system did not qualify as an ATDS, because the FCC "has consistently held that predictive-dialing technologies are equivalent to ATDSs"); *c.f.* ***Legg v. Voice Media Grp., Inc.***, 20 F.Supp.3d 1370, 1374 (S.D. Fla. 2014) (explaining that 'the FCC determined that a predictive dialer is an ATDS' and also collecting cases that have interpreted more broadly 'the FCC's reasoning that the defining characteristic of an ATDS is the 'capacity to dial numbers without human intervention'")." ***Reyes v. BCA Financial Services, Inc.***, 312 F.Supp.3d 1308, 1316-17 (S.D. Fla. 2018). *See also* ***Ammons v. Ally Financial, Inc.***, 326 F.Supp.3d 578 (M.D. Tenn. 2018).

the agents to use Monitronics' name during telemarketing calls. Monitronics also had relationships with lead generators in order to provide leads to dealers.

Monitronics knew Authorized Dealers were placing calls that violated the TCPA but failed to take reasonable measures to address the violations. Between December 2009 and June 15, 2012, Monitronics received dozens of complaints involving hundreds of consumers. When Ms. Mey complained about telemarketing violations in 2011, Mr. Gotra responded with an expletive dismissing Ms. Mey's complaint and Monitronics did nothing about it except cheer Gotra on. Although Monitronics' CEO sent VMS a letter after Ms. Mey filed her class action lawsuit in 2011, VMS continued to place unlawful calls, including repeated calls to Ms. Mey. Monitronics knew VMS was ignoring its letter and the terms of the AMPA, but failed to take any steps to reign in the conduct. A jury could conclude that Monitronics' dealers believed Monitronics consented to the tactics they were using to sell Monitronics' monitoring services, even when those tactics involved unlawful telemarketing calls.

Monitronics admits that it had the right to investigate the merits of consumers' TCPA complaints and to force Authorized Dealers to comply with the TCPA. Monitronics did not do so. When Monitronics hired outside counsel in 2012, it was too little too late. As of May 31, 2012, Monitronics' Authorized Dealers already had placed approximately 26,532,337 calls that violated the TCPA. A jury could find that by ignoring the repeated notice it had of these violations, Monitronics impliedly authorized the unlawful calls.

Monitronics maintains that summary judgment should be granted because it "does not dictate how its dealers ... choose to come to market." The evidence demonstrates otherwise. Monitronics set the price for its monitoring services, requiring dealers to charge

customers amounts within a specific price range. Monitronics required Authorized Dealers to use approved contracts that Monitronics drafted and circulated. Monitronics provided Authorized Dealers with extensive sales training that encouraged dealers to use predictive dialers when telemarketing. Monitronics provided Authorized Dealers with "approved" scripts to use when telemarketing. Monitronics also provided Authorized Dealers with telemarketing "leads" that it purchased from third parties, including "survey leads." This evidence shows that Monitronics authorized its dealers to seek out vendors to generate leads for its alarm monitoring services and, in some circumstances, Monitronics sought out the lead generators itself, purchased leads, and provided leads to its Authorized Dealers. Thus, "a reasonable jury could find vicarious liability based on grants of actual authority." ***Aranda***, 179 F.Supp.3d at 833 (denying summaryjudgment where defendant authorized co-defendant to enlist subagents to carry out telemarketing and to seek out vendors to generate leads).

Plaintiffs also dispute Monitronics' assertion that it "strictly limits the use of its name and other intellectual property by its dealers." Monitronics disseminated training materials informing the dealer that the purpose of the sales presentation is "to create confidence in your company and also Monitronics." Dealers were told to "[s]hare important information about your company history and qualifications," "[s]hare important information about Monitronics' company history and qualifications; and "[s]hare why you decided to team up with Monitronics." The "approved" telemarketing scripts that Monitronics disseminated to dealers referenced Monitronics by name.

Monitronics incorrectly asserts that no formal agency agreement should be found because the AMPAs explicitly disclaim any agency relationship. It is black letter law that

the parties' characterization of its agency relationship "in an agreement between the parties or in the context of industry or popular usage is not controlling." Restatement § 1.02. When determining whether the parties' characterization bears any relevance to the determination of an agency relationship, "[i]t is appropriate for the court to consider whether the parties' characterization serves a function other than circumventing an otherwise-applicable statute, regulation, or rule of law, or invoking a statute, regulation, or rule of law to limit or prevent liability." ***Id.*** § 1.02, cmt.b. The only function of the disclaimer is to limit Monitronics' potential liability. Indeed, the clause not only contains an agency disclaimer, but also an indemnification agreement.

The trio of cases that Monitronics cites in support of its formal agency arguments are inapposite. ***Leon v. Caterpillar Industrial, Inc.***, 69 F.3d 1326 (7th Cir. 1995), involved allegations that a manufacturer of forklift trucks, Caterpillar, was vicariously liable for injuries allegedly caused by a defective "deadman's switch" that had been manufactured by a competitor of Caterpillar and assembled and installed by one of Caterpillar's resellers. ***Id.*** at 1330-31.

Caterpillar had no knowledge that the reseller was altering the forklift trucks to include the switches. ***Id.*** at 1331. The court found that Caterpillar was not vicariously liable for the act of its reseller under an actual agency theory. The court noted that Caterpillar exercised no control over the prices that the reseller charged to its customers; the reseller did not share in Caterpillar's revenues or profits and losses; and that the reseller purchased products and services not only from Caterpillar but also from other manufacturers. ***Id.*** at 1329-30. The court also found that Caterpillar did not direct the reseller's daily operations.

Id. at 1336. Caterpillar could only cancel its sales agreement with the reseller under very limited circumstances. *Id.* Although Caterpillar permitted the reseller to use its name and trademark in its advertisements, the court held that fact alone "does not render it an agent of Caterpillar, just as every bar which advertises that they sell a particular brand of beer is not the agent of the brewery whose name they advertise." *Id.* Caterpillar is not like this case. Monitronics' Authorized Dealers are not resellers; they sell subscriptions to Monitronics' alarm monitoring services. Monitronics dictates the form of contract the Authorized Dealers can use to sell those services and the price Authorized Dealers can charge customers. Monitronics shares its revenue with Authorized Dealers through its bonus purchase price program. Unlike Caterpillar, Monitronics reserved the right under the AMPA to terminate an authorized dealer "at will" and injected itself in the daily operations of its dealers, providing scripts and leads and recommending certain equipment. Once Monitronics decided to exercise its right to control its dealers' illegal telemarketing, it demanded that dealers provide information about their telemarketing practices and cooperate with CompliancePoint.

Monitronics' Authorized Dealers are not like bars that advertise beer from various breweries. Not one of the Authorized Dealers at issue in this case sells monitoring services for any other monitoring company. Monitronics' Vice President of Sales and VMS and ISI all characterized the relationship of Monitronics to the Authorized Dealers during the relevant timeperiod as "exclusive." Unlike Caterpillar, Monitronics reserves the right under the AMPA to terminate an authorized dealer "at will."

Makaron v. GE Security Manufacturing, Inc., 2015 WL 3526253 (C.D. Cal. May

18, 2015), is likewise distinguishable. In that case, the court found that "the only evidence" that the defendant had "control of the sales tactics of its third-party distributors and/or Authorized Dealers" was the fact that it licensed the use of the GE and Interlogix name to its Authorized Dealers." ***Makaron***, 2015 WL 3526253 at *6. Here, by contrast, Monitronics had the right to control, and actually did control, its dealers.

Johansen v. HomeAdvisor, Inc., 218 F.Supp.3d 577 (S.D. Ohio 2016), did not involve allegations of actual agency, focusing instead on a ratification theory.

Plaintiffs' claims against Monitronics differ from the claims against Honeywell and UTC that the Court previously dismissed on summary judgment. In its order granting summary judgment, the Court cited Restatement (Second) of Agency § 14J, which provides that "[o]ne who receives goods from another for resale to a third person is not thereby the other's agent in the transaction; whether he is an agent for this purpose or is himself a buyer depends on whether the parties agree that his duty is to act primarily for the benefit of one delivering the goods to him or is to act primarily for his own benefit." ***In re Monitronics***, 223 F.Supp.3d 514, 521 (N.D. W.Va. 2016).

Monitronics' dealers do not receive goods from Monitronics for resale, since all payments for Monitronics' monitoring services are made to Monitronics, whether directly from the consumer because Monitronics has purchased the contract from its dealer, or through the dealer in the small percentage of contracts that Monitronics does not purchase. The substantial evidence of Monitronics' control over its dealers' sales tactics—including the provision of scripts, leads, and contracts the dealers had to use to sell Monitronics' services, as well as required pricing structures and extensive sales training—also confirms

that the dealers acted as Monitronics' agents, making it a jury issue whether Monitronics is vicariously liable for their telemarketing violations.

Apparent Authority

This Court is not convinced with Monitronics' arguments concerning apparent authority. Apparent authority turns on whether a third party believes the principal authorized its agent to act and the belief is "traceable" to a manifestation of the principal. Restatement § 2.03, cmt. c. "Apparent authority can arise in multiple ways, and does not require that a principal's manifestation must be directed to a specific third party in a communication made directly to that person." ***Dish***, 28 FCC Rcd. at 6586 & n. 102 (citing Restatement § 2.03, cmt. c). A principal may make a manifestation "by directing an agent to make statements to third parties or directing or designating an agent to perform acts or conduct negotiations, placing an agent in a position within an organization, or placing an agent in charge of a transaction or situation." ***Id.***

In ***Dish***, the FCC stated that apparent authority may be supported by evidence that "the seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control; the ability by the outside sales entity to enter consumer information into the seller's sales or customer systems, and the authority to use the seller's trade name, trademark and service mark." ***Dish***, 28 FCC Rcd. at 5692. "It also might be persuasive that the seller approved, wrote or reviewed the outside entity's telemarketing scripts." ***Id.*** Furthermore, a seller is responsible under the TCPA "for the unauthorized conduct of a third-party telemarketer that is otherwise authorized to market on the seller's behalf if the seller knew (or reasonably should have known) that the

telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct." ***Id.***

A jury could find Monitronics liable on a theory of apparent authority. Monitronics provided dealers with "approved scripts" that referred to Monitronics by name. Monitronics also put Authorized Dealers in charge of selling its alarm monitoring services; Monitronics engaged in no other retail efforts. Monitronics required Authorized Dealers to access its computer system on a regular basis and to enter information about customers into that system. Monitronics knew that Authorized Dealers were engaging in unauthorized conduct, but failed to take any effective steps to stop it until millions of illegal telemarketing calls had already been made. *See* ***Mey v.Venture Data, LLC***, 245 F.Supp.3d 771, 788 (N.D. W.Va. 2017) (denying summary judgment where evidence in the case was consistent with four of the five "Dish Network factors," including provision of scripts, access to information systems, and shared call lists).

Monitronics asserts that to impose vicarious liability on an apparent authority theory the plaintiff must provide proof of "direct communications" between Monitronics and consumers. The Restatement states that manifestations need only be "traceable" to the principal and can take many forms. *See* Restatement § 2.03, cmt. c. The FCC listed the types of evidence that would evidence such manifestations in ***Dish*** and plaintiffs provided the Court with this evidence. ***Dish***, 28 FCC Rcd. at 5692.

Monitronics states that it "consistently advised" people who complained about Authorized Dealers' unlawful telemarketing that it "did not telemarket and that its dealers were independent entities." However, Monitronics made these communications after the

unlawful calls had already taken place. Consumers would not have complained to Monitronics if they did not believe that Monitronics was responsible for those calls. Any communication to consumers mentioning Monitronics was traceable to Monitronics because Monitronics provided its dealers with scripts and trained dealers to promote Monitronics during their sales efforts. For these reasons, summary judgment will be denied.

Ratification

A company ratifies a telemarketer's TCPA violations if it "knowingly accepts the benefits of the transaction." Restatement § 4.01, cmt. d. Ratification typically applies to an entity that accepts benefits knowing the material facts, but an entity is also liable under a ratification theory if it accepts the benefits of a transaction despite knowing that it does not have all the material facts. *See* Restatement § 4.06, cmt. d. In other words, an entity may not evade liability by burying its head in the sand to avoid learning the relevant facts. *See* ***In re Nigeria Charter Flights Contract Litig.***, 520 F.Supp.2d 447, 467 (E.D. N.Y. 2007) (observing that "having once ratified its agents' acts, [a principal] cannot afterwards avoid the effect of such ratification by showing that it was not acquainted with all the facts of the transaction ratified, when it was always in a position and was in possession of means of learning them"); *see also* ***In re Mason***, 300 B.R. 160, 168-69 (Bankr. D. Conn. 2003) ("If the agent procures a contract by fraudulent or corrupt practices, although the principal has not been privy in any way to such conduct of his agent, by claiming the benefit of the contract, the principal must take it tainted as it may be with such practices.").

Ratification in the TCPA context "may occur 'through conduct justifiable only on the

assumption that the person consents to be bound by the act's legal consequences.'" ***Dish***, 28 FCC Rcd. at 6587. As just one example, the FCC explained that a company may be bound by even unauthorized conduct of a telemarketer if the company "is aware of ongoing conduct encompassing numerous acts by [the telemarketer]" and yet "fail[s] to terminate," or, in some circumstances, "promot[es] or celebrat[es]" the telemarketer. ***Dish***, 28 FCC Rcd. at n. 104.

This Court recently acknowledged that ratification "does not require the existence of an agency relationship." ***Venture Data***, 245 F.Supp.3d at 788 (citing Restatement § 4.01, cmt. b). As the Restatement puts it, ratification "may create an agency relationship after the fact." *See* Restatement § 4.01, Introductory Note. The FCC has adopted this view of ratification, explaining that vicarious liability is not limited "to circumstances in which formal agency exists and the principal exerts immediate direction and control." ***Dish***, 28 FCC Rcd. at at 6587 n. 107. All that is required is that the principal was aware of the unlawful acts and accepted their benefits. *See* ***Venture Data***, 245 F.Supp.3d at 788 (citing ***Dish***, 28 FCC Rcd. at 6586-87).

"The Restatement provides that '[r]atification 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.' Restatement (Third) of Agency § 4.01(1) (2006). A party 'may ratify an act by failing to object to it or to repudiate it,' id. at § 4.01 cmt. f., or by 'receiving or retaining [the] benefits it generates,' id. at § 4.01 cmt. g. However, a party 'is not bound by a ratification made without knowledge of material facts involved in the original act when the [party] was unaware of such lack of knowledge.' Id. at § 4.06." ***Hodgin v. UTC Fire & Security***

AmericasCorp., Inc., 885 F.3d 243, 252 (4th Cir. 2018).

Monitronics was aware that its dealers may have been placing calls in violation of the TCPA as early as December 1, 2009. When Ms. Mey alerted Monitronics to multiple potential TCPA violations in 2010, Monitronics could have investigated, learned about its dealers' unlawful telemarketing, and put a stop to it. Instead, Monitronics' executives merely forwarded Ms. Mey's complaint to VMS, joking and laughing when Mr. Gotra responded that Ms. Mey was "fuckin nuts." Monitronics continued to receive complaints about telemarketing throughout 2010, 2011, and early 2012. Nothing prevented Monitronics from investigating the merits of these complaints and reigning in the dealers, but Monitronics chose to do nothing.

Monitronics contends that the letter Mr. Haislip sent to VMS after Ms. Mey filed her class action lawsuit proves that Monitronics did not intend "to avail itself of alleged illegal conduct." There are two problems with this position. First, Mr. Haislip's letter was sent nine months after Ms. Mey informed Monitronics of telemarketing violations. During these nine months, Monitronics' Authorized Dealers placed 524,616 telephone calls that violated the TCPA. Thus, a jury could find that Monitronics already had availed itself of substantial illegal conduct.

Second, Monitronics admitted that it did not follow up with VMS when it learned of unlawful calls that were placed almost immediately after Mr. Haislip sent the letter and that continued through the latter part of 2011 and into 2012. Monitronics could have refused to purchase any contracts until VMS demonstrated that it was complying with the TCPA. Monitronics also could have terminated its relationship with VMS. Monitronics chose not to do any of these things. Monitronics suggests that it did not have "full knowledge" about

whether the complaints were actually valid, but nothing prevented Monitronics from investigating the complaints and requiring VMS to provide proof that it was complying with the TCPA. Again, it chose not to do so, instead, accepting the benefits of VMS's telemarketing without any investigation whatsoever. Monitronics' failure to investigate does not insulate it from liability. *See **Bielicki v. Terminix Int'l Co.***, 225 F.3d 1159, 1164 (10th Cir. 2000) (rejecting employer's argument that it could not be held vicariously liable because it did not know all the details of the unlawful conduct where the employer's ignorance arose from the employer's "own failure to investigate"); see also Restatement § 4.06, cmt. d ("A factfinder may conclude that a principal has made [a choice to accept unlawful conduct] when the principal is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation.").

Monitronics asserts that it cannot be held vicariously liable because in mid-2012 —eighteen months after Monitronics was placed on explicit notice of the illegal telemarketing conduct — it hired outside counsel to "develop a coordinated legal strategy" to handle its dealers' telemarketing violations. By the time Monitronics engaged counsel its Authorized Dealers already had placed approximately 26,532,337 unlawful calls to potential Monitronics customers. Nothing prevented Monitronics from retaining counsel far sooner. Moreover, Monitronics points to no evidence that it told the dealers it would not purchase contracts that had been obtained through unlawful telemarketing. *See **Aranda***, 179 F.Supp.3d at 833 (denying summary judgment where the defendant submitted evidence that it attempted to stop unlawful conduct and no longer received referrals from

unlawful calls but failed to "identify any evidence that it took any steps to ensure that it would no longer receive leads generated through potentially unlawful calls"). In fact, Monitronics continues to purchase tens of thousands of contracts from VMS each year and profits from it.

Monitronics also notes that it required VMS to execute a "telemarketing addendum" to "further clarify its expectations regarding telemarketing." But VMS did not execute the telemarketing addendum until July 30, 2013. By then, VMS had made millions of unlawful calls and Monitronics had been on notice of its illegal telemarketing conduct for three-and-a-half years. Monitronics also cannot rely on the fact that the AMPAs prohibited dealers from violating the telemarketing laws. It is obvious that Monitronics failed to enforce this provision of the AMPA, choosing instead to accept the benefit of its Authorized Dealers' illegal activity. *See* Restatement § 4.01, cmt. e (stating that "knowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction ... even though the person also manifests dissent to becoming bound by the act's legal consequences").

Relying on cases from the employment context, Monitronics contends that it was not obligated to terminate its Authorized Dealers in order to avoid vicarious liability. Again, this is not the law. Failure to terminate may constitute ratification if the employer is "aware of ongoing conduct encompassing numerous acts by the employee." Restatement § 4.01, cmt. d; *see also* ***Dish***, 28 FCC Rcd. at n. 104 (a company may be liable for its telemarketer's unlawful calls if it fails to terminate the telemarketer despite knowing about "ongoing conduct encompassing numerous acts"). Monitronics was well aware of ongoing violations as early as 2010. A reasonable jury could find Monitronics should have

terminated its Authorized Dealers.

The cases Monitronics cites are not the contrary, as they involved employees who committed a single tort during their employment and rest on policy considerations protecting employees from risk of termination when accidents occur that are not applicable to the business relationship between Monitronics and its dealers. *See* ***Javier v. City of Milwaukee***, 670 F.3d 823, 832 (7th Cir. 2012) (finding city was not liable under Wisconsin law for conduct of police officer accused of using excessive force); ***Toledo, St. L. & W.R. Co. v. Gordon***, 143 F. 95, 98-99 (7th Cir. 1906) (holding that railroad company was not liable for punitive damages after conductor ejected trespasser while train was moving). Here, plaintiffs' experts have determined that Monitronics' Authorized Dealers violated the TCPA 26,979,791 times after Monitronics was placed on notice of the illegal conduct.

A genuine issue of material fact exists as to whether Monitronics was aware of its Authorized Dealers' ongoing unlawful conduct. Summary judgment is therefore improper. *See* ***Bielicki***, 225 F.3d at 1164 (finding trial court did not err in upholding jury verdict awarding punitive damages where evidence showed that the employer failed to terminate employee after being made aware of unlawful conduct and instead joked about it).

Monitronics does not dispute that it benefitted from its Authorized Dealers' illegal telemarketing. Nor could it. Plaintiffs have proffered substantial evidence that Monitronics profited from the illegal calls. Monitronics paid VMS alone $38 million for contracts sold between 2008 and 2011. Monitronics was guaranteed to receive approximately a third of this revenue in subscription payments. It likely received much more. Monitronics contends that the Court cannot find Monitronics vicariously liable on a ratification theory because

plaintiffs did not purchase Monitronics' alarm monitoring services. The court in ***Aranda*** rejected an identical argument, finding that an issue of fact existed even though the named plaintiffs did not purchase anything because the evidence showed that the defendants were aware of unlawful telemarketing calls but "continued to accept business flowing" from those calls. *See* ***Aranda***, 179 F.Supp.3d at 833. The bottom line is that Monitronics accepted the benefits of calls which violated the TCPA. The plaintiffs received the illegal calls. No purchase is necessary.

This Court finds that genuine issues of material fact exist, precluding summary judgment. Accordingly, the Motion for Summary Judgment of Monitronics International, Inc. [**Doc. 975**] is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: April 3, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE