

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

Wheeling Division

**DAVID and ROXIE VANCE,
and CARLA SHULTZ, individually
and on behalf of a class of all
persons and entities similarly situated,**

Plaintiffs,

vs.

Case No. 5:17-cv-00179-JPB

DIRECTV, LLC,

Defendant.

FIFTH AMENDED CLASS ACTION COMPLAINT

I. PRELIMINARY STATEMENT

1. For years, Defendant DirecTV has benefited from satellite television subscription sales generated by authorized dealers who use illegal telemarketing to sell subscriptions, while DirecTV turns a blind eye to their activities and attempts to avoid legal accountability based on self-serving independent-contractor clauses in its dealer contracts.

2. Twice DirecTV entered into agreements with the Federal Trade Commission to settle illegal telemarketing claims, and twice DirecTV promised the FTC it would evaluate, monitor, investigate, terminate, and otherwise control its dealers to ensure compliance with federal telemarketing laws.

3. DirecTV has not lived up to these promises. And consequently, a now-defunct southeastern Ohio “Preferred Dealer” called AC1 has violated the Telephone Consumer Protection Act hundreds of thousands of times on DirecTV’s behalf.

4. DirecTV allowed these violations on its behalf to occur even though AC1's founder had for years worked for another DirecTV dealer that used illegal telemarketing. Even worse, DirecTV allowed AC1 to continue selling DirecTV on its behalf *for more than a year* after learning AC1 was using illegal telemarketing to sell DirecTV.

5. Because DirecTV failed to act, AC1 continued to violate the law to sell DirecTV, sending hundreds of thousands of illegal calls, "spoofed" on the recipient's caller ID to appear that the calls were local calls, to marketing targets like the Plaintiffs, who had opted out of receiving telemarketing calls by listing their numbers on the National Do Not Call Registry.

6. This case, which Plaintiffs bring as a class action for violations of the TCPA, demonstrates the importance of private consumer enforcement actions to hold entities like DirecTV responsible for illegal telemarketing under established legal principles of vicarious liability.

7. Vicarious liability is an essential feature of the privacy-protecting provisions of the TCPA. Under applicable law, a seller like DirecTV is not shielded from liability simply because *others* violate the law on its behalf and for its benefit. This is so in part because the dealers and lead-generators that place illegal calls often are judgment proof — just like AC1 — and difficult to identify, and sellers like DirecTV are best positioned to monitor and control their activities. Under these circumstances, and in service of protecting consumers from the nuisance of unwanted telemarketing, liability is imputed to the more reputable and more financially solvent sellers — here, DirecTV.

II. PARTIES

8. Plaintiffs David and Roxie Vance reside in Beverly, West Virginia, in this District.

9. Plaintiff Carla Shultz resides in Blacksburg, West Virginia, in this District.

10. Defendant DirecTV, LLC is a California limited liability company that transacts business throughout the United States, including in this District.

III. JURISDICTION & VENUE

11. This Court has federal question jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 227 *et seq.* because this action alleges violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*

12. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim—namely, the calls to the Plaintiffs—occurred in this District.

IV. STATUTORY BACKGROUND

13. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

14. Perhaps the most well-known aspect of the TCPA was the creation of the National Do Not Call Registry. By adding a telephone number to the Registry, a consumer indicates her desire not to receive telephone solicitations. *See* 47 C.F.R. § 64.1200(c)(2).

15. The TCPA and its implementing regulations prohibit the initiation of telephone solicitations to residential telephone subscribers to the Registry. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

16. Because allowing an entity “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,” the FCC has consistently held that a corporation or other entity “may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.” *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd. 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”). *See also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659-661 (4th Cir. 2019) (affirming class certification and jury finding that Dish Network was vicariously liable for violations of federal do-not-call law committed by its dealer).

17. As the Court of Appeals has recognized, the TCPA’s “simple and administrable” provisions, the “obvious attempt [by Congress] to vindicate the public interest” through the statute’s private enforcement provisions, and the overarching congressional intent “to allow consumers to bring their claims at modest personal expense” all combine to “make TCPA claims amenable to class action resolution.” *Id.* at 663.

V. FACTUAL ALLEGATIONS

A. **DirecTV has a history of illegal telemarketing, and at least twice assured the FTC it would monitor and control its authorized dealers.**

18. DirecTV has long known that its dealers have used illegal telemarketing to generate business and profits for DirecTV.

19. The United States government has twice initiated enforcement actions against DirecTV for illegal telemarketing.

20. On December 12, 2005, the United States filed a complaint seeking civil penalties and injunctive relief against DirecTV. The next day, the United States and DirecTV announced a settlement that required DirecTV to pay over \$5.3 million — and on behalf of itself, and its

agents and telemarketers — agree not to engage in illegal telemarketing of the kind alleged in this action.

21. The 2005 settlement did not stop DirecTV and those acting on its behalf from violating the law.

22. As a result, on April 16, 2009, the United States filed a second complaint against DirecTV. Shortly thereafter, the United States and DirecTV announced a second settlement agreement, this time agreeing to pay more than \$2.3 million, and agree to similar terms as those outlined above.

23. These settlements not only demonstrate that DirecTV *can* undertake a host of obligations to monitor, investigate, terminate, and otherwise control those who sell DirecTV, but also that it promised the FTC it would do so.

B. AC1 becomes a DirecTV authorized dealer, and immediately begins to telemarket.

24. In June 2017, DirecTV contracted via a “Preferred Dealer Agreement” with AC1 Communications. Its principal was Adam Cox.

25. The contract authorized AC1:

- a. to hold itself out to the public to promote, market, advertise, and take orders for the sale of DirecTV subscriptions;
- b. to access DirecTV on-line confidential ordering and payment systems; and
- c. to obtain log-in credentials so that AC1 could access DirecTV’s proprietary training and product information.

26. The contract gave DirecTV the right to revoke AC1’s authority to market on its behalf for violations of the contract, for violations of federal law, and for other transgressions.

27. Before founding AC1, Mr. Cox was a salesman for a DirecTV dealer called North Kentucky Satellites, which used telemarketing to sell DirecTV.

28. Mr. Cox also knew that other dealers were using telemarketing to generate business for DirecTV.

C. AC1 begins placing calls to sell DirecTV and does not remove numbers listed on the National Do Not Call Registry.

29. Almost immediately after contracting with DirecTV, Mr. Cox and AC1 began making sales through telemarketing.

30. AC1 purchased a bulk list of consumer phone numbers from a list company.

31. None of the consumers on this list consented to receive calls from DirecTV or AC1.

32. After uploading its list of consumer phone numbers into its dialing system, AC1 did not remove from its telemarketing lists numbers that were listed on the National Do Not Call Registry for more than 31 days prior to making the calls.

33. ACI also did not remove from its telemarketing lists numbers listed on the DirecTV Internal Do Not Call list.

34. As a result, AC1 frequently called class members' numbers listed on the Registry more than once in a twelve-month period.

D. Diana Mey receives calls and commences this action, giving DirecTV actual notice of AC1's telemarketing.

35. On August 12, 2017, just months after AC1 became an authorized dealer, AC1 made a telemarketing call to the original plaintiff in this litigation, Diana Mey. Specifically, AC1 initiated a telemarketing call to Ms. Mey's cellular telephone line, (304) 242-XXXX, a number

that had been listed on the National Do Not Call Registry for more than 31 days prior to the call at issue.

36. When Ms. Mey answered the call, a sales representative began reading a scripted pitch for DirecTV goods and services.

37. The caller eventually identified himself as a representative of AC1, which is located in Kentucky.

38. The area code of the phone number appearing on Ms. Mey's caller identification screen, however, was from West Virginia, making it look like the call was local.

39. The caller ID was "spoofed" to disguise origin of the call.

40. Ms. Mey never gave AC1 or DirecTV consent to call her cellular phone.

41. Before filing this lawsuit, Ms. Mey wrote to AC1 and its owner, Adam Cox, and reported that she had received an illegal telemarketing call from AC1 in violation of the TCPA. In response, AC1 admitted making the call, but offered no evidence of consent.

42. Ms. Mey commenced this action on December 11, 2017.

43. DirecTV was served with the original complaint on January 9, 2018.

E. Despite actual notice that AC1 was telemarketing, DirecTV allowed AC1 to continue selling DirecTV, which led to more illegal telemarketing to the Plaintiffs and class members.

44. Even though Ms. Mey's lawsuit informed DirecTV of AC1's purportedly unauthorized telemarketing, DirecTV did nothing to stop AC1 from continuing to telemarket to sell DirecTV until it finally terminated AC1 on January 19, 2019, more than one year after DirecTV was served with this lawsuit.

45. By allowing AC1 to continue to telemarket in violation of the TCPA and the DirecTV-AC1 contract, DirecTV ratified and approved of AC1's conduct, and continued to

benefit from the DirecTV subscriptions that AC1 acquired through its unauthorized and illegal telemarketing.

46. Moreover, DirecTV broke its promises to the FTC that it (a) would monitor the marketing practices of authorized dealers such as AC1 to ensure they were not telemarketing in violation of the TCPA and DirecTV's agreement with the FTC, and (b) would stop doing business with any authorized retailer that did not comply.

47. Consequently, DirecTV's actions and inactions allowed AC1 to make hundreds of thousands of illegal telemarketing calls on behalf of DirecTV.

*AC1 places illegal calls to Plaintiffs David and Roxie Vance
in June and November of 2018*

48. On June 1, 2018, AC1 made a telemarketing call to (304) 637-XXXX, the Vance's telephone number that was, and had long been, listed on the National Do Not Call Registry.

49. According to AC1's call detail records, this call was answered, and the call disposition was noted in the records as "not interested."

50. On November 29, 2018, AC1 made a second telemarketing call to the Vances at this same number.

51. AC1's call records state the call was connected.

52. Even after the filing of this lawsuit, the Vances continue to receive telemarketing calls promoting DirecTV's services.

53. Neither AC1 nor DirecTV had express written consent to place these calls.

54. Neither AC1 nor DirecTV had an established business relationship with Mr. Vance.

55. On or about October 4, 2021, the Vances received another call promoting DirecTV's services for 50% off. They have received other calls promoting DirecTV, although they have been unable to identify the entities that placed the calls.

AC1 places illegal calls to Plaintiff Carla Shultz in July 2018

56. On July 17, 2018, AC1 made a telemarketing call to (304) 879-XXXX, Ms. Shultz's telephone number that was, and had long been, listed on the National Do Not Call Registry.

57. According to AC1's call detail records, this call was received by Ms. Shultz's answering machine.

58. On July 19, 2018, AC1 made a second telemarketing call to (304) 879-XXXX.

59. According to AC1's call detail records, this call was received by Ms. Shultz's answering machine.

60. Neither AC1 nor DirecTV had express written consent to place these calls.

61. Neither AC1 nor DirecTV had an established business relationship with Mr. Vance.

F. DirecTV is directly or vicariously liable for illegal telemarketing calls made on its behalf by AC1 to Plaintiffs and class members.

62. Under the terms of its Preferred Dealer Agreement, and by its conduct, DirecTV is directly or vicariously liable for all calls placed by AC1 to Plaintiffs and class members.

63. All calls were placed by AC1 on behalf of DirecTV.

64. AC1 was authorized to market DirecTV's products and services using DirecTV's trademarks and trade name.

65. DirecTV allowed AC1 to hold itself out the public as authorized to sell DirecTV's goods and services.

66. DirecTV trained AC1 and supported its marketing efforts financially and with supervisory support.

67. DirecTV allowed AC1 to access proprietary internal computer systems for the purpose of selling DirecTV's products and services.

68. DirecTV required AC1 to conduct customer service inquiries and satisfaction surveys.

69. At all times, DirecTV had the power to control the marketing conduct and practices of AC1 and simply chose not to.

70. At all times, DirecTV had unfettered authority to require that AC1 act in compliance with its Preferred Dealer Agreement and applicable law.

71. At all times DirecTV knew or should have known that AC1 was telemarketing to consumers in violation of DirecTV's own policies and in violation of the TCPA.

72. By virtue of its 2005 and 2009 agreements with the FTC, DirecTV represented that it was capable of and would evaluate, monitor, investigate, terminate, and otherwise control its dealers' (including AC1's) telemarketing practices to ensure compliance with federal telemarketing laws.

73. DirecTV failed to do so, and as a result, Plaintiffs and all class members received illegal telemarketing calls from AC1 on DirecTV's behalf.

VI. CLASS ACTION ALLEGATIONS

74. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs sue on behalf of all other persons or entities similarly situated throughout the United States.

75. Plaintiffs propose to represent the following class of similarly situated people:

All persons within the United States (a) whose telephone numbers were listed on the Do Not Call Registry, and (b) who received more than one telemarketing call

within any twelve-month period at any time from AC1, (c) to promote the sale of DirecTV.

76. Excluded from the class are the Defendant, any entities in which the Defendant has a controlling interest, the Defendant's agents and employees, any Judge to whom this action is assigned, and any member of the Judge's staff and immediate family.

77. The proposed class members are identifiable through phone records and phone number databases that will be obtained through discovery.

78. The potential class members number in the hundreds of thousands, at least. Individual joinder of these persons is impracticable.

79. Plaintiffs are members of the class.

80. There are questions of law and fact common to Plaintiffs and the proposed class, including but not limited to:

- a. Whether the calls were placed without obtaining the recipients' valid prior express written consent;
- b. Whether the Defendant's agents placed more than one call within a 12-month period to numbers on the Do Not Call Registry;
- c. Whether the Defendant's conduct was negligent, willful, or knowing; and
- d. Whether the Plaintiffs and the class members are entitled to statutory damages because of the Defendant's actions.

81. Plaintiffs' claims are based on the same facts and legal theories, and therefore are typical of, the claims of class members.

82. Plaintiffs are each adequate representatives of the class because their interests do not conflict with the interests of the class, they will fairly and adequately protect the interests of

the class, and they are represented by counsel skilled and experienced in class actions, including TCPA class actions.

83. The actions of the Defendant are applicable to the class and to Plaintiffs.

84. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from call records obtained in discovery and from reliable databases.

85. The likelihood that individual class members will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case and given the small recoveries available through individual actions.

86. Plaintiffs are not aware of any litigation concerning this controversy already commenced by others who meet the criteria for class membership described above.

VII. LEGAL CLAIM

Violation of the TCPA's Do Not Call provisions

87. Plaintiffs incorporate the allegations from all previous paragraphs as if fully set forth herein.

88. The Defendant violated the TCPA, either directly or through the actions of others, by initiating more than one telephone call to the Plaintiffs in a twelve-month period while their respective numbers were on the National Do Not Call Registry. *See* 47 U.S.C. § 227(c).

89. The Defendant's violations were willful and/or knowing.

VIII. RELIEF SOUGHT

Plaintiffs request the following relief:

- A. That the Court certify the proposed class;
- B. That the Court appoint Plaintiffs as class representatives;
- C. That the Court appoint the undersigned counsel as counsel for the class;
- D. That the Court enter a judgment permanently enjoining the Defendant from engaging in or relying upon telemarketing, or, alternatively, from engaging in or relying upon telemarketing that violates the TCPA;
- E. That, should the Court permit Defendant to engage in or rely on telemarketing, it enter a judgment requiring it to adopt measures to ensure TCPA compliance, and that the Court retain jurisdiction for a period of six months to ensure that the Defendant complies with those measures;
- F. That the Court enter a judgment awarding any other injunctive relief necessary to ensure the Defendant's compliance with the TCPA;
- G. That Defendant and its agents, or anyone acting on their behalves, be immediately restrained from altering, deleting, or destroying any documents or records that could be used to identify class members;
- H. That the Court enter a judgment awarding Plaintiffs and all class members statutory damages of \$500 for each negligent violation of the TCPA and \$1,500 for each knowing or willful violation;
- I. That the Court enter an order awarding the Plaintiffs reasonable attorneys' fees and costs; and
- J. That the Plaintiffs and all class members be granted other relief as is just and equitable under the circumstances.

Plaintiffs request a jury trial as to all claims of this Complaint so triable.

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