No. 14-10414

In the United States Court of Appeals for the Eleventh Circuit

JOSEPH B. MURPHY,
an individual on behalf of himself and all others similarly situated
Plaintiff-Appellant,

v.

DCI BIOLOGICALS ORLANDO, LLC; DCI BIOLOGICALS, INC.; and MEDSERV BIOLOGICALS, LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

REPLY BRIEF FOR PLAINTIFF-APPELLANT JOSEPH B. MURPHY

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July 29, 2014

CERTIFICATE OF INTERESTED PERSONS

C-1 of 1, *Murphy v. DCI*, 14-10414

Pursuant to Eleventh Circuit Rule 26.1.1, the undersigned counsel for the Appellant certifies that, to the best of his knowledge, the list of persons provided in Appellant's opening brief, served May 8, 2014, as updated by all subsequent briefs, is complete.

/s/ Deepak Gupta
Deepak Gupta

July 29, 2014

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INTRODUCTION

DCI rests its entire argument on a strained interpretation of a single sentence in a 22-year-old FCC order that predates the widespread use of cell phones and text messaging. On that basis, the company now urges this Court to adopt a view of "prior express consent" that not only conflicts with the ordinary understanding of that term, but also directly contradicts the only FCC order to have directly addressed DCI's theory of the case. In 2003, the FCC specifically "reject[ed] proposals" to "create implied consent" for autodialed calls and text messages to cell phones where a consumer does nothing more than "provide[] his wireless number as a contact number to a business"—the very authorization DCI seeks here. The plain language of the statute and the clarity of the FCC's order addressing this scenario should end the matter in Mr. Murphy's favor.

But even if the FCC had not clearly spoken on the impermissibility of inferring consent based on the bare provision of a cell-phone number, the "scope of the [prior express] consent" is based on "the facts of each situation," as the FCC recently concluded. *GroupMe, Inc./Skype Commc'ns Ruling*, 29 FCC Rcd. 3442 (¶ 11) (2014). In fact, the FCC's 1992 order that forms the backbone of DCI's case, together with all the FCC's subsequent orders interpreting "prior express consent," demonstrates the FCC's sensitivity to the factual and technological scenarios in determining whether a consumer has provided that consent. If Mr. Murphy's

actions left some ambiguity as to his express consent—which they did not—that ambiguity leaves a factual question that must be resolved by a jury. In either scenario—whether this Court concludes that DCI must receive "prior express consent" before it uses a robodialer to blast its former customers with text messages or whether it decides that the question of "prior express consent" presented here must be resolved by a jury—the district court's judgment must be reversed.

ARGUMENT

I. The FCC has rejected DCI's universal theory of implied express consent.

The Telephone Consumer Protection Act (TCPA) requires any business interested in using robodialers to market its services to gain consumers' "prior express consent" to receive such calls. 47 U.S.C. § 227(b)(1)(A). Since 1992, the FCC has interpreted the scope and meaning of "prior express consent" several times. On DCI's retelling, the Commission announced in its very first interpretation of the phrase a blanket rule that changed the word "express" to "implied" and allowed those companies that used robodialers to infer express consent every time any consumer provides a telephone number to anyone else.

The FCC created no such rule. In fact, in 2003 the FCC addressed the very scenario at issue here, and reached the opposite conclusion: the provision of a cell phone number as a point of contact does not constitute "prior express consent" to

receive robodialed voice or text messages. This 2003 conclusion was not out of step with the FCC's prior interpretations of "prior express consent," but reflects only the narrow factual application that each of the FCC's orders have had. This sensitivity to factual and technological context eliminates any basis for DCI's sweeping theory of "implied express consent."

A. The FCC already considered and rejected DCI's interpretation of "prior express consent" as applied to cell phones and text messages.

When the FCC addressed the context of robodialers and cell phones, its conclusions were sweeping and emphatic. *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014 (2003) ("2003 Cell Phone Order"). Industry representatives submitted "proposals to create implied consent," including in those situations where "the [cellular] subscriber provides his wireless number as a contact number to a business." *Id.* at 14117, ¶ 172 & n.623. The Commission considered those proposals—identical in substance to the view that DCI proposes here—and specifically rejected them. *Id.*

The Commission's rejections are fully consistent with its view of the TCPA and its application to cell phone subscribers. DCI dismisses the Commission's conclusions on these points as "overbroad" and subject to "exceptions" that went "unmentioned in [Mr.] Murphy's brief." Appellee's Br. 15. Lest there be any doubt about the Commission's specific rejection of proposals identical to DCI's request in

this case, here is the relevant section of the Commission's conclusions on cell phones in full:

> We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged." This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.

2003 Cell Phone Order, 18 FCC Rcd. at 14115, ¶ 165 (quoting 47 U.S.C. § 227(b)(1)(A)(iii)) (footnotes omitted). In other words, the only time the FCC has addressed the very scenario in this case—construing the meaning of "prior express consent" when a consumer has provided his wireless number as a contact number to a business, and the business uses an autodialer to send a text message via SMS to that consumer—the Commission endorsed Mr. Murphy's interpretation of the TCPA.

DCI attempts to dismiss the 2003 Cell Phone Order as "overbroad," "oblique," and "irrelevant" because the Commission uses the term "telemarketer" in the relevant section heading. This attempt fails, for two reasons. First, the language of the Order itself isn't so limited. DCI can dismiss the language as "overbroad," but the 2003 Cell Phone Order expresses the Commission's clear view that the bare provision of a cell phone number to a business is an insufficient

indication of "prior express consent" to be contacted by a robodialer. There's nothing specific to telemarketers in the Commission's conclusions here.

Second, and more importantly, the parties agree that this appeal is about the appropriate use of an "automatic telephone dialing system" such as the one DCI used to send Mr. Murphy unwanted text messages soliciting his business. "Telemarketing," as a term of art, is governed by section 227(c) of the TCPA; the use of "automatic telephone dialing system[s]" is governed by section 227(b) of the Act. At the district court, the parties disputed both provisions, but this appeal focuses solely on DCI's use of "automatic telephone dialing systems." And the paragraphs of the 2003 Cell Phone Order relevant to this dispute were *entirely* about section 227(b), and had nothing to do with "telemarketing" as used in section 227(c). *See* 18 FCC Rcd. at n.603 (citing 47 U.S.C. § 227(b)(1)); *id.* n.605 (citing 47 U.S.C. § 227(b)(1)(A)(iii); *id.* n.607 (citing 47 U.S.C. § 227(b)(1)(B)). DCI's argument that the 2003 Cell Phone Order is irrelevant simply because it refers off-handedly to telemarketers in an everyday, non-statutory use of the term, is incorrect. The paragraph in question deals exclusively with, to use the statute's own phrase, "[r]estrictions on use of automated telephone equipment." 47 U.S.C. § 227(b). Section 227(b) applies to *all* calls using "automated telephone equipment," whether telemarketing calls or not.

The 2003 Cell Phone Order resolves this appeal. It construes the very section of the statute disputed in this litigation, expressly applies to text messages, and plainly comes down in favor of consumers who have provided their phone number to businesses but did not give their prior express consent to receive, for example, ungrammatical text messages written in all caps with a pictures of strangers flashing money on their screen sent by a robodialer. If DCI does not like the result, according to its own view of the law articulated throughout the litigation, its fight is not with Mr. Murphy in district court, but with the FCC in the courts of appeals: Congress granted the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. If DCI disputes the FCC's conclusion that the company's actions violated the law, it should bring suit against the FCC to challenge that ruling.

B. The FCC's other interpretations of "prior express consent" are context specific and demonstrate its commitment to factual context when interpreting "prior express consent."

Rather than follow the only FCC order squarely addressing the scenario disputed here, DCI asks this Court to expand the meaning of two orders interpreting "prior express consent"—the 1992 order from a decade before and a 2008 order expressly limited to certain debt-collection calls. DCI would find in

those orders a broad rule of universal application that would create a rule of "implied express consent," in sharp contrast with the plain language of the statute.

The FCC never announced a rule that telemarketers and others soliciting business could infer express consent by a consumer's mere provision of a contact number. In 1992, the Commission, in its first order interpreting the TCPA, faced the specific question of whether a business "would unintentionally incur liability by placing calls to individuals who provided a number at one of the 'prohibited destinations' (for example, a hospital or an emergency line) as the number at which that individual could be reached." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8768 ¶ 29 (1992) ("The 1992 Residential Landline Order"). In other words, some companies and individuals did not want to trigger liability simply because a number provided to them by a consumer happened to be the kind of number they could not contact under the TCPA.

This is the factual context of the 1992 Order. In response to that concern of unintended liability, the Commission concluded that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given." *Id.* at 8769, ¶ 31. By its very language, and by the factual context used to explain its conclusion, the order is

limited to those scenarios where businesses are "placing calls" to numbers provided by the customers themselves. *Id.* at 8768, ¶ 29.

The technological context is narrower still. While the statute comprehensively anticipates telephone calls made "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service," 47 U.S.C. § 227(b)(1)(A)(iii), the 1992 Residential Landline Order was aimed at landline phones, especially those at residences. DCI tries to argue, inexplicably, that the FCC's interpretation of prior express consent "does not apply to landline phones." Appellee's Br. 12. But the relevant section of the 1992 Residential Landline Order is clear that it is targeting "residential telephone subscribers" and that the prohibitions it interprets are "residential prohibitions." *See* 1992 Residential Landline Order, 7 F.C.C. Rcd. at 8768 ¶¶ 27, 31. The Order elsewhere addresses residential landlines several times in articulating its general applicability, *see*, *e.g.*, *id.* ¶¶ 4, 5, and dozens of more times throughout, *see, e.g.*, *id.* ¶¶ 23, 33, 34.

In fact, the order addressed the factual context of cell phones just once, and then to explain that calls made using autodialers "by cellular carrier to cellular subscribers (as part of the subscriber's service) for which the called party is not charged" are acceptable under the TCPA. *Id.* ¶ 43. The Commission exempted these calls because "customers are not charged" and because the calls are aimed at

practices such as "monitor[ing] service or issu[ing] warnings to 'roamers' that they are moving out of the carrier's service area." *Id.*

The 1992 Residential Landline Order—the backbone of DCI's defense and the district court's judgment—is therefore, on its own face, of limited factual relevance. It barely addressed cell phone usage at all, and nowhere addressed the practice of sending text messages to cell phone subscribers. The FCC cannot be faulted for the omission: at the time it published the 1992 Order, text messaging did not exist. *See* Appellant's Br. 10.

The Commission's subsequent orders make clear that the 1992 Residential Landline Order was meant to apply to its specific technological context. In 1995, for example, the Commission interpreted a synonymous statutory term in an abutting provision of the TCPA—"prior express invitation or permission," 47 U.S.C. § 227(a)(3)—in the context of solicitations via fax and telephone. The Commission's conclusions about the factual predicate for "prior express invitation" for such solicitations was very different: "We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements, as the Coalition's proposed definition suggests." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12409 ¶ 9 (1995) ("1995 Fax and Phone Solicitation Order"). The reason for this different

interpretation was not because of the difference between the terms "prior express permission" and "prior express consent"; "consent" and "permission" are synonyms.[1] The different standard is based on technological, not linguistic difference.

DCI attempts to brush aside the relevance of the 1995 order in a single sentence: "The 1995 definition of 'express invitation or permission' applies to advertising messages sent to fax machines and did nothing to disturb the FCC's 1992 Order." Appellee's Br. 15. But the 1995 order's different treatment of different technology is precisely the point. The 1995 Fax and Phone Solicitation Order demonstrates that the differences in what a consumer can conceivably expect as a result of furnishing his information is highly contingent on the specific context. The 1995 order did nothing to "disturb" the 1992 order because in 1992 the Commission did not establish a principle of universal applicability (as DCI argues); it was limited to the technological context of its time, and the factual predicates it addressed.

DCI attempts a similar misreading of the FCC's 2008 order regarding debtor-creditor relations, arguing that that order's interpretation of "prior express consent" somehow annuls the 2003 Cell Phone Order and creates a blanket

[1] *See* "Consent," *Black's Law Dictionary* (9th ed. 2009) ("Agreement, approval, or *permission* as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent.") (emphasis added).

reinterpretation of the meaning of "prior express consent" in all circumstances. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559 (2008) ("2008 Debtor-Creditor Order"). But if the 1992 Residential Landline Order already provided that reinterpretation—meaning, that anyone who provides a phone number to any business has given consent to receive any kind of contact at that number from a robot, forever after—the 2008 Debtor-Creditor Order would have been wholly superfluous.

Rather than "revisit[ing]" an issue the Commission had already decided, Appellee's Br. 13, the 2008 Debtor-Creditor Order addressed a very specific context. Here is the Order's introductory paragraph, in its entirety:

> In this Declaratory Ruling, we address a Petition for Expedited Clarification and Declaratory Ruling filed by ACA International (ACA). In this ruling, we clarify that autodialed and prerecorded message calls to wireless numbers *that are provided by the called party to a creditor in connection with an existing debt* are permissible as calls made with the "prior express consent" of the called party.

Id. at 559 ¶ 1 (2008) (emphasis added). DCI argues that this specific limitation—provided in the introductory paragraph and reiterated throughout the order—somehow "expressly reaffirmed the general rule that providing a telephone number constitutes 'prior express consent' for purposes of [the TCPA] and affirmed that this general rule also applies to calls made to mobile phones." Appellee's Br. 14. But the 2008 Debtor-Creditor Order, on its own terms, states otherwise, both in its

introduction and dozens of times throughout the rest of the order. *See, e.g., id.* ¶¶ 8-10, 14, 17. The order's conclusion again makes this resoundingly clear:

> IT IS FURTHER ORDERED that the Request for Clarification filed by ACA International in CG Docket 02-278 on October 4, 2005 and supplemented by ACA on April 26, 2006, IS GRANTED *insofar as ACA seeks clarification that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt* are permissible as calls made with the "prior express consent" of the called party, AND in all other respects, IS DENIED.

Id. ¶ 17 (emphasis added).

Finally, DCI argues that the Commission's most recent determination that "prior express consent" to be contacted by a robodialer must be expressed in writing, *see In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order,* 27 FCC Rcd. 1830 (2012) ("2012 Written Consent Order"), somehow represents a stark revision of the Commission's previous view that "prior express consent" means "prior implied consent." Appellant's Br. 33. The 2012 Written Consent Order, however, *explicitly* left in place its factually specific determination that some consumers who provide their phone numbers to some businesses are deemed to have provided their "prior express consent." 2012 Written Consent Order, 27 FCC Rcd. at 1833 & n.20 ("The Commission has addressed prior express consent in other contexts, including the provision of telephone numbers.") (citing 1992 Residential Landline Order). The 2012 Written Consent Order, then, is no more a sweeping revision of the FCC's prior

approaches than the 1992 order was a sweeping articulation of a rewriting of the TCPA.

DCI's success in this case depends on a revisionist history of the FCC's rulings. In that history, the Commission announced a sweeping ruling of general applicability that it never changed. As Mr. Murphy explained in detail in his opening brief, and as outlined here, this "history" never occurred. The FCC never provided a blanket authorization for companies, like DCI, to blast former customers with text-message solicitations on the basis of receiving telephone numbers on what amounts to a medical intake form. To the contrary, when the Commission specifically trained on these facts, it held that Congress meant what it said in the statute, and what Mr. Murphy has consistently argued throughout this litigation: Before DCI used a robodialer to send him the text message and picture begging him to come back to donate his blood plasma, the company should have received his prior, expressly stated consent to receive such messages in this way. DCI did not seek that consent, and has never argued that it did. The FCC's inapplicable ruling from twenty years ago does not justify that conduct.[2]

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[2] DCI twice references another case pending review in this Court, *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 11-61936, 944 F. Supp. 2d 1226 (S. D. Fla. May 8, 2013) (11th Cir. No 13-14008). First, it cites the FCC's amicus brief in that case and argues that brief accepts DCI's theory of the Commission's interpretations of "prior express consent." Appellee's Br. 16. But the FCC's amicus brief does not support that proposition in the slightest. The brief addresses a single issue: whether "a district court has jurisdiction under the Hobbs Act to review an FCC order in a

C. The FCC's recent letter opinion, filed with the Second Circuit, refutes DCI's position entirely.

In a letter recently filed in the Second Circuit, the FCC clarified the nature of its previous rulings on the question of "prior express consent." F.C.C. Opinion Letter in *Albert A. Nigro v. Mercantile Adjustment Bureau, LLC*, No. 13-1362, 2014 WL 2959062 (2d Cir., June 30, 2014) ("FCC Opinion Letter"). After explaining that the TCPA's purpose is to "protect telephone users 'from unwanted communications that can represent annoying intrusions into daily life,'" the Commission addressed the issue of those who would solicit business from consumers using autodialers. *Id.* at *1 (citing *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling, 29 FCC Rcd. 3442, 2014 WL 1266074 (¶ 1) (2014) ("GroupMe Ruling")). To implement the "'the consumer protection policies and goals underlying the TCPA,' the Commission has established different consent criteria for different types of calls." FCC Opinion Letter at *2 (citing GroupMe Ruling, 29 FCC Rcd. at 3444 (¶ 8) (summarizing

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TCPA case when plaintiff does not challenge the validity of the order." FCC Br. 2. The brief expressly refuses to address the disputed issue of what "prior express consent" means in that case. *Id.* at 2, 10.

Second, DCI accuses "the parties" in *Mais* (one of whom is another client of Mr. Murphy's counsel) of "confusingly" briefing the issues in that case. Appellee's Br. 31. But DCI's real beef isn't with the *Mais* "parties"—it's with the *defendant's* decision not to embrace the same sweeping view of the 1992 order that DCI has staked its case on here. It says something about the weakness of DCI's position that even a similarly situated defendant is unwilling to go so far.

various factual contexts where different kinds of behavior can constitute "prior express consent").

Given the great variety of purposes a consumer may have in providing a contact number, the Commission explained that "[a]n individual's consent, once obtained, is 'not unlimited.'" FCC Opinion Letter at *2 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, 27 FCC Rcd. 15391, 15397, ¶11 (2012)). The Commission's explanation of how consent is determined is worth citing in full:

> The Commission has specified that "the scope of the consent" is based upon "the facts of each situation." GroupMe Ruling, 29 FCC Rcd. at 3446 (¶ 11). The Commission has determined, for example, that "[c]onsumers who provide a wireless phone number for a limited purpose"— for service calls only, for example—"do not necessarily expect to receive telemarketing calls that go beyond the limited purpose," and thus have not given their consent to receive telemarketing calls.

FCC Opinion Letter at *2.

The point of citing the FCC's recent clarification of the meaning of "prior express consent" is to demonstrate how factually sensitive its determinations of "prior express consent" have been. Thus, the FCC can speak coherently about prior express consent being appropriately inferred in some contexts—residential landline customers who provide their phone number to a telemarketer, for example, have consented to receive calls at that number. *See, e.g.,* 1992 Residential

Landline Order, 7 F.C.C. Rcd. at 8768 ¶ 29. But not all factual contexts allow the same inference: Cell phone subscribers who provide their cell phone numbers as their primary contact, for example, have not given express consent to receive text messages at that number. 2003 Cell Phone Order, 18 FCC Rcd. at 14115.

II. Whether Mr. Murphy gave DCI "prior express consent" to send him solicitous text messages is, at the very least, a question of fact that must be resolved by a jury.

Mr. Murphy argued in his opening brief that the 2003 Cell Phone Order and the plain text of the statute—unimpeded as they are by the FCC's other orders and rulings—require reversing the district court as a matter of law. But even if this Court disagrees, the question becomes a factual one: Did Mr. Murphy's behavior in this case constitute granting "prior express consent" to receive text messages from an autodialer? That question, at the very least, must be resolved by a jury. *Cf. Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1256 (11th Cir. 2014) (finding that the scope of consent under the TCPA, when disputed, is a proper question for a jury).

A. Determining the "weight of social practice" is the role of the jury

DCI cites several district court cases to support its application of the 1992 Residential Landline Order to text messages. Appellee's Br. 21-26. But DCI confuses the issue. This case doesn't turn on the "overwhelming weight of social practice" that suggests that "distributing one's telephone numbers is an invitation

to be called, especially when the number is given at another's request." *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039 at *5 (N.D. Ala., Nov. 9, 2012). The question here is whether filling out a medical registration form in order to sell one's blood plasma is an invitation to receive aggressive text messages and color advertisements two years later. To the extent there is any ambiguity on the "weight of social practice," that ambiguity must be resolved by a jury.

The cases that DCI cites are, almost without exception, consistent with this conclusion. They deal either with voice calls placed in response to a number listed, and are therefore inapplicable to the present factual context, or with scenarios that only illustrate the importance of context when determining whether a consumer has provided "prior express consent" to be contacted via robotext. As Mr. Murphy argued in his opening brief, a consumer's receipt of a promotional text message hours after providing a cell phone number, at a company's specific request for such, is a factually different scenario than Mr. Murphy's contact two years after the fact. *See Pinkard*, 2012 WL 5511039, at *2. And a consumer's initiation of a text conversation that is acknowledged by a single, immediate text receipt is also more plainly indicative of his "prior express consent" to receive such a response. *Emanuel v. Los Angeles Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, *3 (C.D. Cal. Apr. 18, 2013). Finally, a customer's receipt of a text message "within seconds" that contained further instructions on registering for a desired service is even more

consistent with that intent. *Aderhold v. Car2go N.A., LLC*, 2014 WL 794802 *8 (W.D. Wash. Feb. 27, 2014).[3]

Similarly, cases where the customers and companies maintain a business relationship are materially different from cases where, as here, there has been no contact between the parties for an extended period. *See Baird v. Sabre Inc.*, 2014 WL 320205 (C.D. Cal. Jan. 28, 2014) (consumer received text messages from an airline inquiring about trip notification services before the trip had occurred); *Roberts v. PayPal, Inc.*, No. 12-622, 2013 WL 2384242, *4 (N.D. Cal. May 30, 2013) (ongoing PayPal customer received text message regarding promotional opportunities for using PayPal).[4]

Mr. Murphy's relationship with DCI is different, as is DCI's use of robodialed text messages. There was no ongoing relationship. DCI sent its messages two years after he listed his telephone number on the medical intake form (which was not identified as a cell phone number capable of receiving texts, as it was in *Pinkard*). And nothing on the form ever suggested that future solicitations for his business would occur through an autodialer.

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[3] Even in these cases, the district courts never addressed the FCC's conclusions about the impermissibility of inferring express consent in the 2003 Cell Phone Order.

[4] As DCI points out (at 23), Mr. Murphy mischaracterized the holding in *Roberts* in his opening brief. *See* Appellant's Br. 29. He apologizes for the inadvertent error.

The remaining cases DCI cites are, by its own admission, relevant only to calls received by cell phone—not texts. Although DCI equates text messages and voice calls, the logic of this equivalence is flawed because it ignores the factual context of these two methods of communication. Very clearly, Mr. Murphy agrees that text messages sent by autodialers are subject to the TCPA—this proposition is the entire basis of his suit. It does not follow, however, that every regulatory determination on the customs of voice calls applies automatically to the customs of text messages. That Mr. Murphy provided a telephone number that he did not identify as a cell phone provides factual context that bears on whether he consented to receive text messages at that number.

Most tellingly, DCI relies upon an out of date case for the proposition that the time between the provision of the contact information and the subsequent contact is irrelevant. In *Kolinek v. Walgreen Co.*, the court indeed concluded that "consent under the TCPA does not expire on its own; it must be revoked." 2014 WL 518174 at *3 (N.D. Ill. Feb. 10, 2014). But the *Kolinek* court reconsidered that decision, in light of the FCC's clarifications about the factual sensitivity of determining prior express consent. In *Kolinek v. Walgreen Co.*, 2014 WL 3056813 (N.D. Ill. July 7, 2014), the court granted the plaintiff's motion for reconsideration. The reason is fully consistent with the FCC's view of a fact-specific inquiry required before concluding that a consumer has given "prior express consent" to

be contacted by a robodialer. The court concluded that, "[i]n retrospect," it should have recognized that "the FCC considers the scope of a consumer's consent to receive calls to be dependent on the context in which it is given." *Id.* at *3.

The *Kolinek* court got it right the second time. Determining whether a consumer has given prior express consent is highly dependent on the facts of the case. Unlike the other cases DCI cites—including *Roberts*, where the plaintiff and defendant had an ongoing business relationship—the nature of the relationship between Mr. Murphy and DCI, and Mr. Murphy's provision of his cell phone number to DCI two years before, preclude a finding that he gave his prior express consent to receive text messages from an autodialer as a matter of law. As discussed in Part I, the law requires the opposite conclusion. But if this Court disagrees and finds that it is a question of fact, then a jury must decide it.

III. There will be no deluge of liability if the decision below is reversed and the case proceeds to trial, because there is no evidence that other companies behaved as DCI has done.

Finally, DCI asserts that a plain-language reading of the statute and the application of the FCC's 2003 Cell Phone Order would result in "billions, if not trillions, of dollars in liability across the economy." Appellee's Br. 34. DCI provides no factual support of any kind for so startling a statistic because there isn't any.

Indeed, federal agencies receive at least 200,000 robocall complaints per month,[5] and yet there are less than 200 suits filed per month nationwide under the entire statute.[6] While the consumers harassed by unlawful robotexts or robocalls deserve the protection Congress provided in the TCPA, there is no evidence that DCI's abuse of this technology is a common practice sufficient to trigger trillions of dollars in liability among other companies, especially those who have read the applicable statutory and regulatory laws regarding impermissibility of such practices.

* * *

DCI wants the law to allow it to take blood donors' contact information, preserve that information indefinitely, and put that information into its robodialers to find an easy audience for its business solicitations. But the law doesn't allow that, for good reason. That theory of the law would justify an onslaught of unsolicited text and voice messages from every individual and company ever to have received a cell phone number, under any circumstances. Instead, Congress required a company with these kinds of marketing intentions to get the consumer's "prior express consent" to receive such contact. Whatever the FCC has held for landline

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[5] *See* "McCaskill Gives Telecom Industry Deadline to Examine Technologies to Combat Robocalls," August 16, 2013, *available at* http://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-gives-telecom-industry-deadline-to-examine-technologies-to-combat-robocalls

[6] Patrick Lunsford, TCPA Lawsuits Really Are Growing Compared to FDCPA Claims, InsideARM.com, Oct. 22, 2013, *available at* http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/

telephones, it has explicitly concluded that companies cannot infer express consent to send robodialed text messages simply because a cell phone subscriber has provided his phone number as a contact number. DCI's argument, then, is not with the courts, nor with Mr. Murphy; if the company wants its view of the law adopted, it should challenge the FCC's 2003 Cell Phone Order and, more fundamentally, lobby Congress to amend the TCPA.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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July 29, 2014

CERTIFICATE OF SERVICE

I certify that on July 29, 2014, I electronically filed the foregoing reply brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: July 29, 2014

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Deepak Gupta

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,102 words.

Dated: July 29, 2014

/s/ Deepak Gupta
Deepak Gupta