United States Court of Appeals for the Eleventh Circuit

No. 18-14499-J

MELANIE GLASSER,
individually and on behalf of all others similarly situated,
Plaintiff - Appellant,

versus

HILTON GRAND VACATIONS COMPANY, LLC,
Defendant - Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, CONSUMER FEDERATION OF AMERICA IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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DISCLOSURE OF CORPORATE STATUS

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Association of Consumer Advocates (NACA) is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. NACA is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. It is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

January 24, 2019

Respectfully submitted,

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D), *Amici Curiae* submitting this brief are consumer protection organizations that work to protect consumers from the scourge of unwanted robocalls. *Amici* have advocated extensively on behalf of consumers, to protect their interests related to robocalls, before the Federal Communications Commission (FCC), and before the federal courts. Their activities have included numerous filings and appearances before the FCC urging strong interpretations of the Telephone Consumer Protection Act (TCPA). *Amici* have also filed numerous *amicus curiae* briefs before the federal courts of appeals representing the interests of consumers and defending the TCPA as a primary means to protect Americans from unwanted automated calls.

All parties have consented to the filing of this amicus brief.

STATEMENT OF ISSUES

Amici adopt the Appellant's statement of issues.

STATEMENT OF FACTS

Amici adopt the Appellant's statement of facts.

January 24, 2019

Respectfully submitted,

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STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Amici state: (1) no party or parties' counsel authored this brief in whole or in part; (2) no party or parties' counsel has contributed any money that was intended to fund preparing or submitting the brief; and (3) no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

January 24, 2019

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ARGUMENT

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The core issue in this case is whether Hilton Grand Vacations Company (Hilton) should be permitted to make millions of automated telemarketing calls to the cell phones of American consumers without having the prior express written consent required by the Telephone Consumer Protection Act (TCPA). 47 C.F.R. § 64.1200(a)(2).

Hilton established parallel, otherwise indistinguishable systems to conduct its marketing campaign. One system used fully automated dialers to call the residences of potential customers. The other system, at issue in this case, had a trivial distinction: human clicking agents.

These human clicking agents do not participate in the calls, and simply have the job of repeatedly clicking a single computer button, which sends telephone numbers on an already created list to an automated dialer in an another state. Each time the agent clicks, another number from the list is sent to the dialer. Like all automated dialers, the dialer at issue in this case placed the calls when no agent was on the line, and then the computer (not a human being) attempted to transfer the calls to Hilton's sales agents, who would try to sell Hilton's products to potential customers answering their cell phones.

The system used to call cell phones used these clicking agents only because it was explicitly created to avoid the TCPA's prohibition against

making autodialed telemarketing calls to a cell phone without the consumer's prior express written consent. But this system not only resulted in mass unwanted automated calls to cell phones; it also produced the same problems of dropped calls and delays after answering the phone that calls made by all autodialers produce.

The critical question for this Court's review is whether a telemarketer should be permitted to intentionally evade the requirements of a consumer protection statute in a way that allows it to continue to perpetrate the harms to consumers the statute was expressly designed to prevent: the invasion of privacy and harassment of automated calls.

I. THIS COURT SHOULD NOT COUNTENANCE HILTON'S ATTEMPTED EVASION OF THE TCPA.

A. Hilton's Robocalls Exemplify the Skyrocketing Problem of Unwanted Telemarketing Calls.

Unwanted robocalls are an invasion of privacy. As was forcefully stated by Senator Hollings, the sponsor of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 ("The Committee believes that Federal legislation is necessary to

protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.").

The congressional findings accompanying the TCPA repeatedly stress the purpose of protecting consumers' *privacy:*

> (5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy* and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of *intrusive*, nuisance calls to their homes from telemarketers.

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C.A. § 227).

The TCPA is an essential privacy protection law intended to protect consumers from the intrusions of unwanted automated and prerecorded calls to cell phones. Except in the case of an emergency, and with an exception for calls to collect federal government debt, the TCPA permits these calls *only if* the consumer has given "prior express consent" to receive them. 47 U.S.C. § 227(b)(1)(A)(iii*). It is this consent to be called that the defendant seeks to avoid*. Hilton has created an entirely automated system for blasting cell phones with telemarketing calls. And the consent must be written if the call is a telemarketing call. 47 C.F.R. § 64.1200(a)(2).

Hilton claims that these calls do not fall under the protections of the TCPA, because of the insertion of a human being who clicked a computer button to push numbers from already created lists to the dialer in a different state. Doc.104-1, at 15-16. The extent to which the clicking agent had any discretion, or indeed exercised any "human-like" skills, is the subject of a factual dispute between the parties. But the legal principle at issue in this case is whether such an automated system can be the basis of avoiding the clear protections of the TCPA.

Despite the clear prohibitions in the TCPA, Americans are facing an escalating problem with robocalls. The calls are unrelenting. The callers will not stop, despite consumers' pleas. The Federal Trade Commission's (FTC) Biennial Report to Congress reveals a surge in consumer complaints about robocalls in 2017, with 4.5 million complaints filed in 2017 compared to 3.4 million in 2016. Federal Trade Commission, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007 (Dec. 2017). This rise in complaints is consistent with an increased use of intrusive and disruptive robocall technology. But the problem is far worse than the FTC's complaint numbers indicate. Industry data shows that over three *billion* robocalls are now made *every month*, many of which are unwanted and illegal. The number of robocalls made each month increased from 831 million in September 2015 to

4.7 ***billion*** in December 2018—a 466% increase in three years. *See* www.robocallindex.com.

Complaints about unwanted robocalls continue to pour in to government agencies. Private litigation and public enforcement have not kept pace with the problem—both the number of calls and the number of complaints by consumers increase every month.

Hilton, the defendant in this case, exemplifies this onslaught of automated calls. It made 15,900,000 calls within a six-month period. Over 2.6 calls were made every second, 24 hours a day, 365 days a year. Doc. 104-3, at 29.

B. The TCPA Must Be Construed to Further Its Consumer Protection Purposes.

When it enacted the TCPA, Congress explicitly stated that "federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services." S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973.

The TCPA is remedial legislation that is entitled to a liberal construction to protect consumers from the plague of unwanted robocalls. *See, e.g., Parchman v. SLM Corp.,* 896 F.3d 728, 738-739 (6th Cir. 2018); *Daubert v. NRA Grp., L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp.*, 847

F.3d 1037, 1047–48 (9th Cir. 2017); *Leyse v. Bank of Am.*, 804 F.3d 316, 327 (3d Cir. 2015); *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265, 271 (3d Cir. 2013). In particular, it should be interpreted "in a manner tending to discourage attempted evasions by wrongdoers." *Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C.*, 883 F.3d 459, 474 (4th Cir. 2018) (quoting *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949)).

C. Defendant's Calls Were Exactly the Same As Experienced by Consumers, and Just as Invasive, as Other Automated Calls.

The evidence in the case indicates that the recipients of Hilton's calls are likely to have experienced the typical invasiveness and annoyance from these automated calls as that they do from calls that are unquestionably covered by the TCPA: numerous abandoned calls (when the phone rings and no one is on the line), and forced hold times between answering the call and the caller speaking. *See, e.g.,* Deposition of Ryan Logan, a technical sales consultant with the manufacturer of the automated system, at 104:1-21 (Sept. 15, 2017) (discussing the settings for this system to deal with abandoned calls and waiting times before the agent came on the phone). Indeed, the automated system allows adjustments for waiting times and abandoned calls, by making adjustments to the software controlling the pacing of the calls. *See, e.g.,* Deposition of Erik Beekman, at 94:3-11 (Aug. 31, 2017):

> Q. … "Is that the number of called parties who are on the line after the call connects, but have not yet spoken to a sales agent, they're waiting for their call to be picked up?"
>
> A. "Yes, they are waiting for a sales agent to become available."

Instead, the rate of abandoned calls was determined by the settings to system's software, as the manufacturer explained: "The top way to control your abandon rate is to change the settings in the 'governor' . . . . which controls the number of dials per available agent that an IPA user can make." Doc. 104-15, at 2.

The bottom line, from the perspective of the consumers receiving the calls, was that their experience was exactly what the TCPA was created to protect against: Hilton made a huge number of automated telemarketing calls, which resulted in dropped calls, and those persons who answered their phones were often made to wait until a live agent came on the phone—two of the fundamental problems with autodialed calls that the TCPA was intended to prevent.

D. Defendant's System was Created with the Deliberate Intention to Evade the TCPA and Should Be Viewed Accordingly.

There is evidence in the record that Hilton's dialing system was created for the deliberate purpose of evading TCPA coverage despite automatically dialing the telephone numbers. One of Hilton's exhibits describes the two systems used:

> HGVC utilizes two separate instances of Customer Interaction Center (CIC) for contact center services. One instance (referred to as the Dialer instance) provides inbound call distribution and automatic dialing capabilities. The Dialer was to be used for customer contacts that did not fall under TCPA requirements (i.e. opt-in or calls to landlines).
>
> The second instance of CIC . . . was to be used for customer contact that fell under TCPA. This system . . . uses our . . . application . . . to allow calls to be manually dialed and once connected to a live speaker, transferred to an agent.

Doc. 98-2, at 3.

Another document provides an illustration of the two systems side by side. Doc. 104-7, at 2. The two systems appear to be identical *except for* the addition of the superfluous clicker agent for the TCPA-covered calls.

The courts have frowned on deliberate efforts—such as Hilton's—to evade the TCPA and other consumer protection rules. *See, e.g., Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C.*, 883 F.3d 459 (4th Cir. 2018) ("Because the TCPA is a remedial statute, it 'should be liberally construed and … interpreted … in a manner tending to discourage attempted evasions by wrongdoers.'") (quoting *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949)); *Gentry v. Harborage Cottages-Stuart, L.L.L.P.,* 654 F.3d 1247 (11th Cir. 2011) (requiring the party seeking to avoid the consumer protection statute to show a "legitimate business purpose" for its actions); *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 653 (8th Cir. 1996) (where there was evidence of intention to evade the law, violations of the law were presumed); *Miller v. Payco-*

General American Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) ("deliberate policy … to evade the spirit of the notice statute [the Fair Debt Collection Practices Act], and mislead the debtor into disregarding the notice" violated the law) (citation omitted); *Kenro, Inc. v. Fax Daily, Inc.,* 962 F. Supp. 1162, 1171-1172 (S.D. Ind. 1997) (allowing defendant's actions to avoid the TCPA would make its protections "effectively … meaningless").

Courts should look skeptically at deliberate attempts to evade, rather than comply with, the law. Hilton's use of a separate system with clicker agents who have no ability to decide what number will be dialed, no ability to decide when the number will be dialed, no ability to dial a number, and no ability to actually speak to the potential customers, appears to be designed only to evade the TCPA rather than comply with it. It was error for the trial court to grant summary judgment where the design of the dialing system was a transparent attempt to evade the TCPA while retaining all the features of automated dialing.

II. THERE ARE DISPUTED FACTS ABOUT WHETHER THE DEFENDANT'S SYSTEM WAS A TCPA-COVERED AUTODIALER.

The TCPA defines an automated telephone dialing system (ATDS) as follows:

> (1) The term "automatic telephone dialing system" means equipment which has the capacity—

> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) to dial such numbers.

47 U.S.C. § 227(a).

The definition requires that the calls be dialed automatically. *See, e.g., Blow v. Bijora, Inc.*, 855 F.3d 793, 802 (7th Cir. 2017) (a dialing system is an autodialer even if people upload the telephone numbers to it and even if it dials numbers only when agents press a key to indicate they are available to receive a call).

There are several conflicting and critical factual disagreements that were not resolved by the lower court, but which go to the heart of the factual inquiry in this case: whether the system requires so much human intervention that it falls outside the definition of an automated telephone dialing system (ATDS) under the TCPA. For example, the lower court's decision cites conflicting testimony in the record about whether Hilton's system has the capacity to dial by itself. Citing Hilton's expert, the lower court found that "an 'agent actually initiates the manual dial.'" 341 F. Supp. 3d at 1307–08. Yet, the court also noted this same expert's statement that "If there are no available agents [and] you click the "make call" button, it will not make a call." 341 F. Supp. 3d at 1308. This is an indication that the computer, rather than the clicking agent, is in charge of the dialing of the calls, because the computer stops the calls from being dialed in some instances. The court also noted that the plaintiff's expert

"pointed out that since the software function on the CIC server dials the number, the IMC System dials numbers without human intervention." 341 F. Supp. 3d at 1312.

Yet the court found as a fact, preliminary to its conclusion of law, that the system was not an ATDS, and that the clicker agents' activity in clicking the button constituted sufficient human intervention in the dialing process because it was "integral" to the dialing process. But at the same time, the court noted several uncontroverted facts that undermine its determination that the system had too much human intervention to qualify as an ATDS under the TCPA:

- That the clicker agents do not actually dial telephone numbers and do not operate a telephone. ("Accordingly, and as Logan explained, although these operators were 'not ten-digit dialing' or 'keying in all the 10 digits,' they were manually clicking a button to initiate dialing." 341 F. Supp. 3d at 1308.)

- That the telephone numbers are actually dialed by software in a computer server hundreds of miles away from where the clicker agents work. ("A computer actually dialed the number." 341 F. Supp. 3d at 1307 (citing Dkt. 104, at 2, 18).)

- The rate of dialing is limited by the software. ("If there are no available agents [and] you click the 'make call' button, it will not make a call." 341 F. Supp. at 1308.)

- Although Hilton's "agents clicked on the 'Make Call' button to initiate a call, that only placed the number in a queue to be called, and a computer actually dialed the number." 341 F. Supp. 3d at 1307.

So, while recognizing these facts, the court made the legal conclusion that the system did not meet the definition of an ATDS because it required too

much human intervention. 341 F. Supp. 3d at 1314. At the same time, the court appeared to ignore other facts that also are very relevant to this issue of whether there was sufficient human intervention to avoid the ATDS definition:

- The system resulted in abandoned calls because it causes more numbers to be called than there are waiting sales agents available to come on the phone when a call connects. *See* section I.C, *supra.*

- The dialer manufacturer testified that the clicker agents have no ability to skip a telephone number. They must either click the button for the telephone number that pops up into the desktop application or cease working entirely. Doc. 140-4, at 37-38.

- All of the clicker agents were in Orlando, Florida. *See* Doc. 104-1, at 26. The sales agents were in various locations. *Id.* The dialer (*i.e.*, the server that actually dials the numbers) was in Florence, Kentucky, hundreds of miles away from the clicker agents. Doc. 104-1, at 15-16.

In light of these disputed issues of highly material fact, the trial court erred in granting summary judgment to Hilton.

III. THE LOWER COURT MISINTERPRETED AND MISAPPLIED THE DEFINITION OF AUTOMATIC TELEPHONE DIALING SYSTEM.

A fundamental error in the decision below is that the District Court treated the D.C. Circuit's opinion in *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 691-92 (D.C. Cir. 2018), as setting standards for the TCPA's definition of an ATDS. In *ACA Int'l*, the D.C. Circuit started by *describing* the FCC's 2015 ruling and noting contradictions in that ruling. At one point in this description, the D.C. Circuit noted that the FCC's order took the position that an ATDS must be able to generate and dial numbers. *Id.* at 702 ("It follows

that the ruling's reference to 'dialing random or sequential numbers' means generating those numbers and then dialing them.") But, two paragraphs later, the D.C. Circuit went on to say that the FCC's 2015 ruling "also suggests a competing view." *Id.*

The D.C. Circuit did not attempt to resolve these contradictions or determine how the statutory definition should be interpreted. Instead, it merely set aside the 2015 order, citing its "lack of clarity" about the definition (as well as concerns about possible overbreadth). *Id.* at 703. Indeed, as *ACA Int'l* was a Hobbs Act appeal, the D.C. Circuit had jurisdiction only to "enjoin, set aside, annul, or suspend" the FCC's order. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). It did not have jurisdiction to make a substantive ruling about the meaning of the ATDS definition.

Here, the court below erroneously treated *ACA Int'l* as deciding that an ATDS must both generate numbers and dial them. First, the court below recited the D.C. Circuit's *description* of the FCC's 2015 order as if it were the D.C. Circuit's holding:

> The [D.C. Circuit] court concluded that 'it follows that the ruling's reference to "dialing random or sequential numbers" means *generating those numbers and then dialing them'* and '[t]he Commission's prior declaratory rulings reinforce that understanding.' *Id.* (emphasis added). It follows that Plaintiff's focus on the dialing of the numbers is misplaced. Nothing in the

> record demonstrates that Defendant's IMC System generated numbers and then called them.

341 F. Supp. 3d at 1310. (emphasis in original).

The lower court then went on to say: "*ACA Int'l* makes it clear that an autodialer must *both* generate the numbers and dial them. Accordingly, it matters not that the computer actually dials the number forwarded to it by the clicking agent." 341 F. Supp. 3d at 1312.

However, the *ACA Int'l* decision does *not* stand for the proposition that a system must generate and then dial the numbers. The 2003 and 2008 FCC orders (which the lower court held were still valid) recognized that systems that use lists of numbers to dial (in other words, numbers that the systems themselves do not generate) will meet the definition of an ATDS. *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2008 Declaratory Ruling), 23 FCC Rcd. 559 (2008); 2003 Order, 18 FCC Rcd. 14,014 (2003).

By applying the wrong standard, the District Court committed reversible error. Systems that dial from lists, such as the one used in this case, have been repeatedly found to meet the test for an ATDS under the TCPA, including in the comprehensive decision recently issued by the Ninth Circuit in *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041, 1052 (9th Cir. 2018). ("Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system

means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.") *See also Reyes v. BCA Fin. Servs., Inc.*, 2018 WL 2220417, at *2-13 (S.D. Fla. May 14, 2018) (denying plaintiff's motion for summary judgment but finding that a predictive dialer that autodials phone numbers from a set list of numbers supplied by third parties is an ATDS); *Swaney v. Regions Bank*, No. 13-544, 2018 WL 2316452, at *2 (N.D. Ala. May 22, 2018) (denying defendant's motion for summary judgment and concluding that a calling system that generates text messages and sends them to phone numbers that were provided by a customer and entered into a database without a predictive algorithm was an ATDS).

The lower court should have held that the dialing system at issue here meets this statutory standard. The system stores numbers to be dialed, and then dials them. The system is fully automated, and the human involvement in making calls is merely an illusion—an appearance of human intervention designed to evade the protections of the TCPA. At the very least, as argued in section II, *supra*, the lower court should have heard testimony to resolve disputed facts about the level of human intervention.

IV. THE ILLUSORY HUMAN INVOLVEMENT IN THIS DIALING SYSTEM IS INSUFFICENT TO EVADE THE TCPA.

The FCC has said that an automated telephone dialing system under the TCPA does not include a system that uses human intervention, but has provided little meat to these bones. *In Re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014 ¶ 132 (2003). The test for whether a system is excluded from the ATDS definition cannot mean *any* human intervention, because a human is always required to set up a system and turn it on. *See, e.g., Blow v. Bijora, Inc.*, 855 F.3d 793, 802 (7th Cir. 2017).

The Ninth Circuit made the same point in its *Marks* decision:

> We also reject Crunch's argument that a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever. By referring to the relevant device as an "*automatic* telephone *dialing* system," Congress made clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control. 47 U.S.C. § 227(a)(1) (emphasis added); *see ACA Int'l*, 885 F.3d at 703 (" '[A]uto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers."). *Common sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions.*

904 F.3d 1041, 1052–53 (emphasis added).

In *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017), the Seventh Circuit decided a case very similar to the present case. The dialing platform there—a mass text-messaging system—imported a list of telephone numbers. Then a

human had to take action to send a message through the platform. As the court described, "[t]he messages are drafted by humans, who decide when the message will be sent, and press a button to either send the messages or schedule a future sending." *Id.* at 801. The court held that the system was an ATDS, because "human involvement is in fact unnecessary at the precise point of action barred by the TCPA: using technology to 'push' the texts to an aggregator that sends the messages out simultaneously to hundreds or thousands of cell phone users at a predetermined date or time." *Id.* at 802. Here, as in *Blow*, a human presses a button (or, more accurately, clicks on a screen), but the result is only that the call is pushed out to a dialer hundreds of miles away, which automatically dials the calls.

Moreover, even if such a system could in theory be considered to lie outside the ATDS definition, the facts show that the human intervention was illusory. The designers of the system created the appearance of human intervention simply so that users could avoid having to comply with the TCPA. There was clearly a dispute between the parties about the degree of discretion or decision-making authority employed by clicker agents, and the extent to which their clicks were purely mechanical. *See* section II, *supra*.

Allowing the insertion of an automaton—a human functioning mechanically, replacing a machine but replicating its functions—into a calling system to remove the calling system from the TCPA would gut the TCPA's

fundamental prohibition against autodialed calls to cell phones without the called party's consent. Callers would use this workaround to swamp cell phones with millions of unwanted automated calls. The TCPA should be interpreted to prohibit, not encourage, such an evasion. *Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C.*, 883 F.3d 459, 474 (4th Cir. 2018).

CONCLUSION

The Defendant in this case, Hilton Grand Vacations Company, LLC. perpetrated over 15 million automated telemarketing robocalls to the cell phones of American consumers. This is exactly the type of activity that Congress meant to address and limit through the consumer protections of the TCPA by requiring those callers to have prior express consent for the calls. A transparent attempt to evade those consent requirements by using a person to mindlessly click a button on a computer screen to push a list of numbers to an automated dialing system hundreds of miles away, resulting in a multiplicity of calls, some of which were abandoned, and others in which there was a silence when answered, should be viewed with great skepticism by this Court. The critical question is whether a telemarketer should be permitted to intentionally evade the requirements of a consumer protection statute in a way that allows it to continue to perpetrate the harms to consumers the statute was expressly designed to prevent: the invasion of privacy and harassment of automated calls.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Garamond font. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(a) because, excluding parts of the documents are exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4405 words.

January 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of *Amici Curiae*, the National Consumer Law Center, the National Association of Consumer Advocates, and the Consumer Federation of America, on counsel for all parties, electronically through the ECF System, on this 24th day of January 2019.

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