UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENNY BROWN, et al.,

Plaintiffs,

v.

DIRECTV, LLC, et al.,

Defendants.

Case No. CV 13-1170 DMG (Ex)

ORDER RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [414]

Before the Court is Plaintiffs Jenny Brown and Carmen Montijo's second motion for partial Summary judgment ("MSJ") [Doc. # 414]. The motion is fully briefed. [Doc. ## 425, 430.] The Court held a hearing on the motion on March 25, 2022. For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' MSJ.

I.

BACKGROUND

On December 1, 2021, the Court granted in part Plaintiffs' first MSJ against Defendant DirecTV, LLC as to liability for a subset of their class action claims under the Telephone Consumer Protection Act ("TCPA"). [Doc. # 401 ("First MSJ Ord.").] The Court also denied DirecTV's MSJ and its motion to decertify the Class. *Id.* The factual

background discussed in that Order is incorporated by reference here. *See id.* at 2-5.[1] Most of these same facts are equally applicable to Plaintiffs' present MSJ. To the extent the facts differ, the Court discusses these distinctions as they arise in its discussion below. The Court also incorporates by reference the legal standard for a summary judgment motion, as described in the prior Order. *See id.* at 6-7.

II.
DISCUSSION

A. Comparison with the First MSJ

The claims at issue in Plaintiffs' first MSJ involved certain telephone calls for which it was uncontroverted that the calls were placed by two of DirecTV's outside debt collection agencies ("OCAs"), iQor and Credit Management, LP ("CMI"), used a prerecorded message, and were made to cell phones. *Id.* at 8; *see also* 47 U.S.C. § 227(b)(1)(A) (prohibiting non-emergency calls to a cell phone using an artificial or prerecorded voice without prior express consent). The Class in this case is defined to include only those individuals who have not been a customer of DirecTV at any time since October 1, 2004. First MSJ Ord. at 6. Plaintiffs demonstrated that their list of calls included Class Members by selecting those with "wrong number" disposition codes. A wrong number code indicated that the call recipient had conveyed to the caller that it had reached the wrong number—*i.e.*, that the called party was not the DirecTV customer that the OCA intended to reach. DirecTV presented no evidence that any Class Member had given prior express written consent,[2] so the Court granted Plaintiffs summary judgment as to liability for these calls. *Id.* at 10, 14-15.[3] The Court deferred judgment as to total

[1] All page references herein are to the page numbers inserted by the CM/ECF system.

[2] Prior express consent is an affirmative defense upon which DirecTV bore the burden of proof. See *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017).

[3] The Court also determined based on the uncontroverted evidence that iQor and CMI were DirecTV's agents, and DirecTV had ratified their conduct, so it could be liable for the calls made by them. First MSJ Ord. at 17-24.

damages, however, pending a final determination at the claims administration phase that each claimant is a Class Member, using the objective and largely ministerial process of checking the claimant's information against DirecTV's customer database. *Id.* at 9-10, 14.

Now, Plaintiffs move for summary judgment on a set of calls made by three other OCAs of DirecTV—AFNI, Inc.; Diversified Consultants, Inc. ("DCI"); and Enhanced Recovery Company, Inc. ("ERC"). Much of the evidence with respect to these calls is largely identical to those made by CMI that were the subject of the first MSJ. With respect to AFNI and ERC, Plaintiffs have compiled lists of calls on which to move for summary judgment that are much the same as their lists for iQor and CMI. It is uncontroverted that each consists of calls made to cell phones that were prerecorded and contain a "wrong number" code. PSUF 241-45. Additionally, the agreements between DirecTV on the one hand and AFNI, DCI, and ERC on the other were identical to each other and to the agreement with CMI. Pls.' Statement of Undisputed Facts ("PSUF") ¶¶ 193-213 [Doc. # 430-1]; *see also* SUF 74-94 [Doc. # 389-1].[4] Like with CMI, these agreements provided DirecTV the power to give AFNI, DCI, and ERC interim instructions—including to fire their management, recall accounts, or stop making certain calls at any time—so they establish an agency relationship between DirecTV and each OCA. *See* First MSJ Ord. at 4-5, 20-21.

The evidence differs, however, concerning two areas: (1) ratification of AFNI, DCI, and ERC's TCPA-violating conduct, and (2) Plaintiffs' *prima facie* case with respect to DCI's calls.

B. Ratification

Like with CMI, DirecTV knew that AFNI, DCI, and ERC were skip tracing, making prerecorded calls, and reporting "wrong numbers." PSUF 53, 188-89, 209, 210, 223-24, 266. DirecTV also received monthly reports from them and conducted site visits of their

[4] PSUFs 1-187 are from Plaintiffs' First MSJ. PSUF 188 and onwards were submitted with the instant MSJ.

facilities, just as it did with CMI. PSUF 214-22, 224. And in November 2013, DirecTV audited all of its OCAs for TCPA-compliance. PSUF 119-21.

Unlike in the first round of briefing with respect to CMI, however, this time DirecTV introduces AFNI, ERC, and DCI's responses to the 2013 audit. The responses varied quite widely—AFNI provided over 100 pages of policy and training documents, while DCI responded with all of two sentences. *See* Germann Decl., Ex. 3, 4 [Doc. ## 425-8, 425-9]. In its response, AFNI admitted that it made prerecorded calls, but explained how its dialing vendor "scrubs cell phone numbers daily as phone numbers are loaded" in order to "block any automated calls to a cell phone that is included in accounts that do not have prior express consent." Germann Decl., Ex. 3 at 2. ERC's response was a more concise eight pages, but it too explained how it used a scrub to identify cell phone numbers and block automated calls to them. Germann Decl., Ex. 2 at 10 [Doc. # 425-7] ("Upon placement, ERC scrubs all phone numbers provided by our client . . . . Once the phone numbers are identified as cell phones, ERC disables the number from dialing on our predictive and agentless dialers by placing the characters 'PNC' (Please Never Call) in front of the telephone number.").

Viewing the evidence in the light most favorable to DirecTV, these audit responses from AFNI and ERC create a genuine dispute of material fact as to whether DirecTV knew or should have known that these OCAs were violating the TCPA. Although DirecTV knew that the OCAs were skip tracing and making prerecorded calls to wrong numbers, the call data it received did not indicate whether the numbers belonged to cell phones. Given the ubiquity of cell phones during this time, DirecTV cannot rely on the absence of any information about cell phones one way or the other to claim that it had no reason to know that TCPA-violating calls were made. That would amount to willful blindness. But where the OCAs offered some concrete assurances that in fact cell phones were treated differently, and were precluded from receiving prerecorded calls, a reasonable jury could find that DirecTV had no reason to know that any calls would violate the TCPA. Therefore,

Plaintiffs' MSJ as to DirecTV's liability for AFNI and ERC's calls to Class Members is **DENIED**.[5]

DCI's response to the 2013 audit, however, was less compelling. Its entire response amounted to one sentence stating that it used a scrub service to "verify that cellular numbers are being properly identified and handled accordingly," and another promising that it "honors written and verbal requests to stop calls phone numbers to consumers [*sic*]." Germann Decl., Ex. 4 at 4 [Doc. # 425-9]. Stating that cell phone numbers are being "handled accordingly" is completely uninformative, and honoring explicit requests to stop calling a number does not address the problem of reaching a wrong number in the first instance. To accept this response as a sufficient assurance of TCPA compliance, without further investigation, amounts to willful blindness. DirecTV nonetheless continued to accept the benefit of DCI's practices[6] without further investigation and without repudiation until December 4, 2015. DirecTV therefore ratified the violations. *See* First MSJ Ord. at 22-23.

C. DCI Prerecorded Calls

Though Plaintiffs have established that DirecTV ratified DCI's calls, their evidence as to the calls themselves has gaps. Unlike with the other OCAs and except for a relatively small subset of DCI's calls, Plaintiffs do not have direct evidence via call data from DCI that any specific calls they identified were prerecorded. Instead, Plaintiffs rely on

[5] Plaintiffs also have not established that DirecTV gave AFNI or ERC actual authority to make prerecorded calls to the cell phone numbers of wrong customers. Although the agreements instructed the OCAs to skip trace and acknowledged that they would be making prerecorded calls, *see* PSUF 209-10, it did not specifically order them to combine the two practices.

[6] DirecTV newly argues that it did not accept the benefits of the TCPA violations because the proceeds that it received from the OCAs—loan payments—necessarily only came from customers, not non-consenting non-customers. But DirecTV accepted the benefit of the aggressive calling strategy as a whole. That same strategy, which resulted in a higher rate of violations, also would have led the OCAs to reach a higher proportion of customers, from which DirecTV benefited. *See Friddle v. Epstein*, 16 Cal. App. 4th 1649, 1656 (1993) ("[A] principal is not allowed to ratify the unauthorized acts of an agent to the extent that they are beneficial, and disavow them to the extent that they are damaging."); *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1075 (9th Cir. 2019) (defendant "accepted the benefits—loan payments—of the collectors' calls while knowing some of the calls may have violated the TCPA").

testimony from a DCI principal who estimates that "approximately 70% of the calls made on DirecTV accounts during that time" were made using a prerecorded system. Leszczynski Decl. ¶ 3 [Doc. # 365-20]. Plaintiffs therefore move on 70% of the 1,689,720 DCI calls that they identify as placed to cell phones with a wrong number code, for a total of 1,182,805 calls. PSUF 250. Plaintiffs also move on 54,288 DCI calls that do have codes within the call data that indicate they are prerecorded. PSUF 249.

For the calls without prerecorded notations, Plaintiffs' methodology is not sufficient to warrant summary judgment in Plaintiffs' favor. Plaintiffs cannot simply choose 70% of calls—an otherwise random 70% selection—and have the Court enter judgment as to all of them. They have not selected the actual 70% of the total calls that were in fact prerecorded. As to each call on their list, there is still a 30% chance that it was not prerecorded. At summary judgment, the Court must draw all reasonable inferences in favor of the non-moving party—a 30% chance that there is no liability therefore amounts to a genuine dispute of material fact. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (party with burden of persuasion at trial must establish elements of its claim "beyond controversy" to obtain summary judgment).

Plaintiffs argue that they are entitled to rely on statistical evidence in a class action. Reply at 13-14; *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (plaintiff class may rely upon statistical evidence "by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action"). Plaintiffs note that the preponderance of the evidence standard is commonly thought of as a "greater than 50%" standard, so evidence that 70% of calls were prerecorded would be more than enough for any one Class Member to establish liability in an individual action. Even if this were true with respect to a *jury* finding of liability, an individual plaintiff armed

with nothing more than general evidence of a 70% chance of liability would not be entitled to *summary judgment*.[7]

Moreover, the statistical evidence that Plaintiffs seek to use is not the kind that the Supreme Court contemplated in *Tyson Foods*. The *Tyson Foods* Court approved the use of expert testimony calculating the average amount of unpaid time that an employee spent "donning and doffing." *Id.* at 450-51. An individual plaintiff could use this same evidence to show how much donning and doffing time she should be compensated for, in the absence of her own memory or records, if the fact that she actually spent time donning and doffing was established. *Id.* at 455. Here, Plaintiffs seek to use a certain percentage likelihood of liability to *prove* liability. Plaintiffs' methodology is more akin to the analysis that the Supreme Court disapproved of in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, the Supreme Court considered an approach where "a sample set of the class members would be selected," and the claims of those class members would be assessed in depositions by a special master. 564 U.S. at 367. "The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.* The Supreme Court rejected this "Trial by Formula," which would deprive Wal-Mart of the right to litigate defenses to individual claims. *Id.* Plaintiffs essentially seek to do the same thing—take a percentage of presumptively valid claims and multiply it by the statutory damages amount to arrive at a class recovery. Treating 70% of class claims as presumptively valid would give some Class Members a windfall, recovering damages for a call that was not in fact prerecorded, while depriving

[7] If the individual plaintiffs provided direct testimony that the call he or she received was prerecorded, then statistical evidence that 30% of calls were not prerecorded might not suffice to defeat summary judgment. But such individual direct testimony is lacking in this class action.

other Class Members of their right to a recovery for calls that were in fact prerecorded, but were excluded by Plaintiffs' random 70% sample.[8]

It is worth noting the distinctions between the 70% method and using the wrong number codes to identify Class Members, which DirecTV has also objected to on the grounds that it will deprive it of the right to raise individual defenses. DirecTV argued in the prior MSJ briefing that wrong number codes are not a reliable proxy for non-customers, because call recipients will often falsely tell a debt collector that they have reached the wrong number when in fact they are the debtor-customer that the caller intended to reach. The Court found that this presented an issue only towards ascertaining class membership, which was not a bar either to class certification or summary judgment. First MSJ Ord. at 10-15. DirecTV treats the issue of whether a person is a "non-customer" as an essential element of Plaintiffs' claim. But non-customer status is not an element of a TCPA violation. It is an objective, entirely factual constraint placed upon the class definition. *See id.* at 14 n.18. Moreover, Plaintiffs have provided a preliminary proposal for a tentatively manageable plan to determine whether each call recipient is a non-customer Class Member. *See id.* at 9-12.[9]

Whether a call was prerecorded, however, is not merely a question of class membership. It is an essential element of Plaintiffs' claims, for which Plaintiffs carry the burden of proof. Plaintiffs also cannot rely on the claims administration process to fill in the gaps. While verifying non-customer status is a seemingly straightforward, ministerial process involving looking up the claimant in DirecTV's customer database, the same cannot be said for determining whether a DCI call was prerecorded. No data about

[8] Plaintiffs point out that each called party answered an average of 10 calls from an OCA, so the odds of a Class Member receiving at least one prerecorded call is near certain (1 – (0.3 x 0.3 x 0.3 x 0.3 x 0.3 x 0.3 x 0.3 x 0.3 x 0.3 x 0.3) = 99.9999940951%). But total damages are not calculated per Class Member; they are calculated per call. And for each call, no matter how many of them each Class Member received, the likelihood that it was not prerecorded will still be 30%.

[9] The Court will allow the parties full briefing on the precise parameters of the claims administration process.

prerecorded calls exists for this set of DCI calls. The only way to prove the call was prerecorded on an individual basis would be with individual testimony from each claimant attesting to that fact. That process—repeated across potentially over a million claimants—is unworkable. It would also impermissibly defer a question not of ascertainability, but of liability, to the claims administration phase.

D. DCI Answered Calls

DirecTV also argues that summary judgment is not warranted for DCI calls because Plaintiffs have no evidence that any of the calls they selected were actually answered. This applies not just to the calls without a prerecorded notation, but also to the 54,288 that do have a prerecorded notation. Unlike with the call data from other OCAs, the DCI data does not have information on call duration. Plaintiffs used call duration to filter out those calls that were unanswered, by excluding those where the call duration field was zero or blank. Peters-Stasiewicz Decl. ¶ 5 [Doc. # 415-5]; Reply at 10. It also appears (though the testimony is not a model of clarify) that Plaintiffs' expert selected all calls to the same phone number after a wrong number code was added—not simply all calls with a wrong number code, as she did with the other OCAs. Peters-Stasiewicz Decl. ¶ 12. Plaintiffs therefore cannot use the wrong number codes themselves as proof that the call was answered—*i.e.*, because the called party must have actually answered the phone to convey that it was a wrong number. Plaintiffs insist in an argumentative brief that their expert did not include calls with codes such as "DP [Call Dropped]," "NA [No answer]," and "LB [Line busy]." [Doc. # 432 at 6-7.] But their expert does not actually say that in her declaration or expert report. *See* Peters-Stasiewicz Decl.; Peters-Stasiewicz Report [Doc. # 365-4]. She only says that she "excluded all codes that confirmed any communication with a DIRECTV customer." Peters-Stasiewicz Decl. ¶ 12. Unsupported representations by counsel are not evidence.

Only 5-10% of DCI's automated calls were answered by a live person, and no prerecorded message played if a voicemail or answering machine was detected. Second Leszczynski Decl. ¶¶ 5-6 [Doc. # 425-12]. Plaintiffs have not established that they have

selected only those 5-10% of DCI's calls that were answered. Therefore, summary judgment as to all of DCI's calls is **DENIED**.

E. Spoliation

In their Reply, Plaintiffs suggest that an adverse inference should be drawn against DirecTV for its failure to maintain DCI call records with data indicating the calls were prerecorded or answered, pursuant to Federal Rule of Civil Procedure 37(e). Reply at 15-17.[10] Plaintiffs point to a letter that DirecTV's parent company, AT&T, sent to DCI in December 2019 instructing it to destroy "customer account data," as part of the termination of their relationship. Peterson Decl., Ex. 1 [Doc. # 430-3]. An adverse inference based on the failure to preserve electronically stored information is only permissible if the party acted with "intent to deprive" the opposing party of the information. Fed. R. Civ. P. 37(e)(2). Plaintiffs have not established that AT&T's letter to DCI to delete "customer account data" amounts to an intent to deprive Plaintiffs of call data, especially when DirecTV also reminded DCI of its obligation to preserve data in a letter just a few months earlier. *See* Germann Decl., Ex. B [Doc. # 431-7]. And DCI and DirecTV did in fact produce call data for millions of calls. Plaintiffs, in their Opposition to the Sur-Reply, complain about a laundry list of DirecTV's preservation failures, but none are relevant to or shed light on this particular issue, which is that DCI call data was in fact produced, but for the vast majority, codes regarding prerecorded calls and call duration are not present. [*See* Doc. # 432.]

Moreover, while Rule 37(e) also allows the Court to "order measures no greater than necessary to cure the prejudice" from the missing data, it is unclear what measures

[10] This new spoliation argument caused DirecTV to request leave to file a sur-reply brief. [Doc. # 431.] Because the argument was newly raised in the Reply, the Court **GRANTS** DirecTV's request and considers its attached Sur-Reply. [Doc. # 431-4.] The Court has also considered Plaintiffs' Opposition to the request for a sur-reply—which effectively functions as an Opposition to the Sur-Reply itself. [Doc. # 432.]

Plaintiffs expect the Court to take here. As discussed above, simply selecting 70% of calls and presuming that they were prerecorded creates its own problems.[11]

F. LiveVox Data

Buried in a footnote of Plaintiffs' Reply is the tantalizing but noncommittal hope that other records that do indicate which DCI calls were prerecorded may become available at some later date. Reply at 19 n.45. This bread crumb became a focal point of the hearing on Plaintiffs' motion. Plaintiffs' counsel represented that they have been in contact with LiveVox, DCI's dialing vendor, which confirmed that it possesses and will produce archived call records for DCI's calls, and these records may contain some of the missing data, including whether the calls were prerecorded. Plaintiffs suggested that they should be able to supplement their motion with these records when they become available. Plaintiffs could not give any solid assurances as to how long it would take for the records to be produced and analyzed, or whether the records would indeed include the key missing data.

The parties stipulated back on August 27, 2021 that any late production from LiveVox would be deemed timely. [Doc. # 368.] Seven months have passed since then, and Plaintiffs still do not have the records. In the interim, they have filed two summary judgment motions. After the first round of MSJs, the parties stipulated to a briefing schedule for Plaintiffs' second MSJ. In approving the stipulation to allow for a second MSJ, the Court warned the parties that this second motion should be the final one. [Doc. # 410.] Now, Plaintiffs want a third bite at the apple. In explaining why they had not

[11] Plaintiffs also suggest a burden-shifting framework that the Supreme Court has approved of in wage-and-hour cases, where "when employers violate their statutory duty to keep proper records" and the plaintiff-employee "produces sufficient evidence to show the amount and extent of [unpaid] work as a matter of just and reasonable inference," the burden then shifts to the employer to produce precise evidence of the amount of work performed or to rebut the inference. *Tyson Foods*, 577 U.S. at 456 (citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687-88 (1946)). Plaintiffs cite to no case deploying this framework in the TCPA context. Nor is it feasible, as Plaintiffs' evidence of a "just and reasonable inference" only works to show the percentage of valid claims in the aggregate, not to prove up a factual matter in an individual case. As discussed, *Tyson Foods* makes clear that representative evidence can only be used in a class action if it would be used in the same manner in an individual action.

obtained the LiveVox data sooner, or waited to bring their second MSJ until after the data became available, Plaintiffs essentially said that they thought the record was sufficient for them to obtain summary judgment without it, so they did not think it was worth the expense. Now that it appears the data is necessary, Plaintiffs want the Court to delay ruling on their motion until they can get it.

G. Treble Damages

Finally, Plaintiffs argue that DirecTV should be liable for treble damages for those calls that were made to the same phone number after a wrong number code had already been applied. For these calls, Plaintiffs, argue, DirecTV knew that the called party was a non-customer that did not provide consent. MSJ at 21-23; *see* 47 U.S.C. § 227(b)(3) (treble damages for violations that are "knowing" or "willful").

DirecTV's evidence that some people lie about the call being to a wrong number, however, creates a genuine dispute of material fact as to this issue. For the small number of calls that were made after a "wrong number" had been reported, DirecTV and the caller may have had reason to believe that the called party misrepresented that they had reached a wrong number. Moreover, DirecTV would have had no reason to intentionally call non-customers to attempt to collect a debt that they knew the person did not owe.

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III.

CONCLUSION

In light of the foregoing, the Court **ORDERS** as follows:

1. For the calls made by AFNI and ERC that are the subject of Plaintiffs' motion, the MSJ is **GRANTED** to the extent Plaintiffs have shown the calls to Class Members violated the TCPA, but **DENIED** as to DirecTV's liability for them via ratification or any other theory of secondary liability.

2. For the calls made by DCI, Plaintiffs' MSJ is **DENIED** as to liability for any one call, but to the extent Plaintiffs are ultimately able to prove liability for any specific calls at trial, summary adjudication is **GRANTED** as to DirecTV's ratification of them.

3. Plaintiffs' MSJ as to treble damages is **DENIED**.

IT IS SO ORDERED.

DATED: March 31, 2022

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE