APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1592

CRAIG CUNNINGHAM, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge, (1:16-cv-00545-LO-TCB).

Argued: January 24, 2018 Decided: April 24, 2018

Before TRAXLER and FLOYD, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by published opinion. Judge Floyd wrote the opinion in which Judge Traxler and Senior Judge Shedd joined.

ARGUED: Aytan Yehoshua Bellin, BELLIN & ASSOCIATES LLC, White Plains, New York, for Appellant. James P. Rouhandeh, DAVIS, POLK & WARDWELL, LLP, New York, New York, for Appellee. **ON BRIEF:** Roger Furman, Los Angeles, California, for Appellant. Neil H. MacBride, Washington, D.C., Paul S. Mishkin, DAVIS POLK & WARDWELL LLP, New York, New York; Attison L. Barnes, III, Stephen J. Obermeier, WILEY REIN LLP, Washington, D.C., for Appellee.

FLOYD, Circuit Judge.

Greg Cunningham alleges that he received an autodialed, prerecorded phone call from General Dynamics Information Technology, Inc. ("GDIT") advertising the commercial availability of health insurance, without having given his prior express consent, in violation of the Telephone Consumer Protection Act ("TCPA"). The district court granted GDIT's motion to dismiss for lack of subject matter jurisdiction on the ground that GDIT is immune from suit under the *Yearsley* doctrine, which immunizes government contractors from suit when the government authorized the contractor's actions and the government validly conferred that authorization. *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940).

On appeal, Cunningham argues that the district court erred in conferring *Yearsley* immunity and consequently dismissing the suit for three distinct reasons. First, he asserts that the *Yearsley* doctrine does not apply as a matter of law to federal claims. Next, he asserts that GDIT fails to qualify for *Yearsley* immunity both because the government did not authorize its actions and because the authorization was not validly conferred. Finally, he asserts that even if *Yearsley* immunity applies, *Yearsley* is a merits defense from liability rather than a jurisdictional immunity. We find these arguments unpersuasive, and now affirm the district court's dismissal for lack of subject matter jurisdiction.

I.

A.

Pursuant to the doctrine of sovereign immunity, the United States is immune from private civil actions absent an express waiver. *Kerns v. United States*, 585 F.3d 187, 193–94 (4th Cir. 2009) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Under the concept of derivative sovereign immunity, stemming from the Supreme Court's decision in *Yearsley*, 309 U.S. at 20–21, agents of the sovereign are also sometimes protected from liability for carrying out the sovereign's will. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 341–42 (4th Cir. 2014) (internal quotation marks omitted) (interpreting *Yearsley* as recognizing that private employees should receive immunity from suit when they

perform the same functions as government employees). This immunity derives from "'the government's unquestioned need to delegate governmental functions,'" and the acknowledgement that "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996)). "[U]nder *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *In re KBR*, 744 F.3d at 342 (citing *Yearsley*, 309 U.S. at 20–21).

B.

On appeal, we review whether the district court erred in conferring *Yearsley* immunity on GDIT's phone call to Cunningham.[1] As relevant here, the Affordable Care Act ("ACA") directs the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS") to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan. *See* 42 U.S.C. § 18083(a), (b)(2), (e). CMS maintains the HealthCare.gov website, through which individuals may enroll for

[1] Cunningham filed this claim as a putative class action, alleging that GDIT made hundreds of thousands of autodialed, prerecorded phone calls in violation of the TCPA. For convenience, we refer only to the disputed call to Cunningham.

health coverage under the ACA using an online application. The online application requires visitors to provide their name and phone number, and accept CMS's privacy policy by affirmatively clicking an "Accept" box acknowledging, *inter alia*, that CMS may use the phone number provided to contact them with more information.

To carry out their statutorily mandated obligations under the ACA, CMS awarded a contract to Vangent, Inc., which subsequently merged into GDIT, for contact center operations support for CMS programs, including the HealthCare.gov website. Under the contract, GDIT was required to make phone calls from January 1, 2015, through May 16, 2016, to inform individuals about their ability to buy health insurance through the health insurance exchanges created by the ACA. In accordance with this instruction, CMS authorized GDIT to use an autodialer to make the calls, provided a script for each call, and provided a list of phone numbers for each call. Section 17 of the CMS-GDIT contract also required GDIT to "maintain a corporate compliance program" that included "[a]n internal monitoring and auditing function to help ensure compliance with statutes [and] regulations," and "[a]n enforcement and disciplinary process to address violations of applicable statutes [and] regulations. . . ." J.A. 731–32.

On December 1, 2015, pursuant to the ACA's statutory mandate, CMS sent GDIT approximately 2.65 million telephone numbers and directed GDIT to call each of those numbers over the next five days in

accordance with their contract. The numbers were divided into seven lists specifying the exact day that GDIT was to call each number and which of the scripts CMS provided that GDIT was to use for each call. One of CMS's lists directed GDIT to call Cunningham's cell phone and approximately 680,000 other numbers the next day, December 2, 2015. GDIT made the autodialed, prerecorded call to Cunningham's cell phone on December 2, 2015. When Cunningham did not pick up, the prerecorded message left the following approximately 30-second voicemail message:

> Hello! This is an important message from HealthCare.gov. The deadline to enroll in a 2016 health insurance plan is coming soon. You may be able to qualify for financial help to make health insurance more affordable. With financial help, most people can find plans for $75 or less per month. Visit HealthCare.gov today to see how much you can save. If you have questions, you can call the Health Insurance Marketplace to talk to a trained enrollment specialist at 1-800-318-2596. That's 1-800-318-2596. We are available 24 hours a day and the call is free. Don't forget—the deadline to enroll is Tuesday, December 15th. If you've already taken action and have 2016 health coverage, please ignore this message. Thank You! Goodbye.

J.A. 28. This message was identical to the script CMS provided GDIT.

Cunningham alleges that he received this autodialed, prerecorded phone call from GDIT advertising

the commercial availability of health insurance without having given his prior consent, in violation of the TCPA.[2] As relevant here, the TCPA prohibits any person, absent the prior express consent of the recipient, from "mak[ing] any call . . . using any automatic telephone dialing system . . . to a paging service [or] cellular telephone service. . . ." Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)(3). The TCPA also authorizes a private right of action for conduct violating the Act. § 227(b)(3). However, "[t]he United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Thus, GDIT would also be immune from liability for making this phone call if derivative sovereign immunity applies.

Cunningham commenced this putative class action suit against GDIT on May 16, 2016, seeking damages and injunctive relief as authorized under the TCPA. *See* 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B), (b)(3).

---

[2] GDIT asserts that Cunningham did in fact consent to the phone call by starting an application on the HealthCare.gov website on November 18, 2015, providing his cell phone number, and affirmatively accepting the privacy policy that stated applicants may be contacted with more information. However, the merits of whether Cunningham gave consent are not before the Court; we are solely considering the applicability of the *Yearsley* doctrine, and this disputed fact is inconsequential to our analysis. *See Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 453 (4th Cir. 2012) (holding that disputes over whether plaintiff would be able to prove the elements of his cause of action "must be resolved either by a Rule 56 motion or by trial," and were not relevant to whether the court had jurisdiction).

GDIT moved to dismiss for lack of subject matter jurisdiction on the ground that GDIT is immune from suit under the *Yearsley* doctrine.[3] *See* Fed. R. Civ. P. 12(b)(1). On October 18, 2016, the district court issued an interim order concluding that GDIT was entitled to *Yearsley* immunity, and granted limited jurisdictional discovery for Cunningham to contest this determination. The district court issued this order, in part, because it concluded that CMS had "authorized and instructed GDIT to do *exactly* what it did." J.A. 259. Discovery lasted 75 days and included six subpoenas, four Touhy requests, numerous document requests, six depositions of GDIT and CMS employees, and supplemental briefing on the issue. On May 1, 2017, the district court granted GDIT's motion to dismiss for lack of subject matter jurisdiction on the ground that GDIT was immune from suit under the *Yearsley* doctrine. This appeal followed.

II.

In reviewing a district court's order dismissing an action for lack of subject matter jurisdiction, this Court reviews conclusions of law de novo and findings of fact for clear error. *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004). To conclude that a district court's factual finding is clearly erroneous, the reviewing court must be "left with the definite and firm

[3] GDIT also filed motions to dismiss for failure to state a claim and failure to join CMS as a necessary party. Fed. R. Civ. P. 12(b)(6), (7).

conviction that a mistake has been committed." *HSBC Bank USA v. F & M Bank N. Va.*, 246 F.3d 335, 338 (4th Cir. 2001) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

III.

In his first claim on appeal, Cunningham asserts that the *Yearsley* doctrine does not apply as a matter of law to federal claims. Instead, he claims that *Yearsley* only applies when a federal contract or federal directive displaces *state* law to absolve government contractors from *state* law liability. Finding nothing in *Yearsley* or its progeny that limits its application solely to state law liability, we disagree.

We begin our analysis with the language in *Yearsley* itself. In describing the immunity, we find no language indicating that the Supreme Court intended to limit its holding to claims arising under state law. *See Yearsley*, 309 U.S. at 20–21 ("[I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." (citations omitted)). Additionally, the Supreme Court identified instances when government contractors were not immune from liability, and notably did not mention federal law claims. *See id.* at 21 ("Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found

to be either that he exceeded his authority or that it was not validly conferred." (citations omitted)). The test the Supreme Court outlined for conferring *Yearsley* immunity, therefore, omitted any requirement that the claim arise under state law and omitted any reference to exempting federal law liability from its reach. *Yearsley*'s progeny have also failed to make any such distinction. *See, e.g., Campbell-Ewald*, 136 S. Ct. at 672–73 (reaffirming the basic requirements of *Yearsley* applicability without implying that its grant of immunity was limited to state law liability).

Yearsley immunity has also been applied to federal causes of action and, most recently, the Supreme Court even addressed *Yearsley* in relation to the TCPA—the same federal law at issue here. *See, e.g., id.* at 672 (concluding that *Yearsley* may immunize violations of the TCPA); *Yearsley*, 309 U.S. at 22–23 (applying *Yearsley* immunity to a claim arising under the Takings Clause of the Constitution); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988) (concluding that a military contractor could assert a *Yearsley* defense to a federal cause of action).[4]

[4] Cunningham also argues that even if *Yearsley*, standing alone, could be interpreted to apply to claims arising under federal law, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), limited *Yearsley*'s applicability to state law claims. The Supreme Court implicitly rejected this argument in *Campbell-Ewald* when it analyzed whether a federal contractor was immune from suit under *Yearsley* for violations of the TCPA—a federal law. 136 S. Ct. at 672–74. Additionally, as we stated in *In re KBR, Boyle* is inapposite to determining the applicability of derivative sovereign immunity. *In re KBR*, 744 F.3d at 342 n.6 (distinguishing between the *Boyle* preemption analysis and the *Yearsley* immunity

Consequently, we hold that the *Yearsley* doctrine applies to claims arising under federal law.

IV.

Next, Cunningham attacks the merits of the district court's decision by asserting that GDIT fails to satisfy either prong required under *Yearsley*. We disagree.

"[U]nder *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *In re KBR*, 744 F.3d at 342 (citing *Yearsley*, 309 U.S. at 20–21). Recently, the Supreme Court reaffirmed this test and expressly stated that as long as the authorization was validly conferred, "'there is no liability on the part of the contractor' who simply performed as the Government directed." *Campbell-Ewald*, 136 S. Ct. at 673 (quoting *Yearsley*, 309 U.S. at 20–21). Authorization is "validly conferred" on a contractor if Congress authorized the government agency to perform a task and empowered the agency to delegate that task to the contractor, provided it was within the power of Congress to grant the authorization. *See Yearsley*, 309 U.S. at 20; *In re KBR*, 744 F.3d at 342, 344 n.7.

---

analysis). Therefore, we decline to address Cunningham's arguments related to *Boyle*.

Conversely, "[w]hen a contractor violates both federal law and the Government's explicit instructions, . . . no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." *Campbell-Ewald*, 136 S. Ct. at 672; *see also Yearsley*, 309 U.S. at 21; *In re KBR*, 744 F.3d at 345 ("[*Yearsley*] suggests that the contractor must adhere to the government's instructions to enjoy derivative sovereign immunity; staying within the thematic umbrella of the work that the government authorized is not enough to render the contractor's activities 'the act[s] of the government.'" (alteration in original) (quoting *Yearsley*, 309 U.S. at 22)); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (stating that a government contractor is not liable under *Yearsley* if the work was done under the contract and in conformity with the contract terms, but may be liable for damages from acts "over and beyond acts required to be performed" or acts "not in conformity" with the contract).

A.

Turning to the first step, we analyze whether the government authorized GDIT's actions. *In re KBR*, 744 F.3d at 342; *see also Yearsley*, 309 U.S. at 20–21. The ACA directs CMS to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan. *See* 42 U.S.C. § 18083(a), (b)(2), (e). CMS contracted with GDIT to carry out this statutory mandate, and the contract required GDIT to call individuals about health insurance options. On

December 1, 2016, CMS provided GDIT with a list of approximately 680,000 phone numbers, including Cunningham's cell phone number, and instructed GDIT to call the numbers on December 2, 2016, and leave a prerecorded message. The contract also permitted GDIT to use an autodialer to make the call. On December 2, 2016, GDIT used an autodialer to call Cunningham's cell phone number and left a voicemail with the exact script CMS had provided to GDIT. Quite plainly, GDIT performed exactly as CMS directed: GDIT called the number CMS instructed GDIT to call, on the prescribed day, and followed CMS's provided script when leaving the message.

Without contesting these facts, Cunningham nonetheless asserts that GDIT did *not* perform as CMS directed. Cunningham argues that Section 17 of the CMS-GDIT contract required GDIT to follow applicable laws, and that by failing to independently obtain prior consent from each name on the list provided by CMS to ensure compliance with the TCPA, GDIT violated the contract, requiring this Court to find that CMS did not authorize GDIT's actions. This argument is unavailing. There is no indication that GDIT was authorized to contact these individuals other than to place the automated call, and GDIT was not permitted to deviate from the script provided. Deposition testimony from Naomi Johnson, the CMS Contracting Officer Representative, confirmed that CMS did not direct GDIT to obtain consent from the individuals on the call lists CMS provided, did not direct GDIT to investigate the numbers provided, and did not expect

GDIT to obtain consent before making the calls. Therefore, we conclude that GDIT did not violate the contract by failing to independently obtain consent to make the phone call CMS instructed it to make.

Notably, this scenario is vastly distinguishable from the facts of *Campbell-Ewald*. In that case, plaintiffs similarly alleged that a government contractor violated the TCPA by failing to get prior consent to send text messages as part of a recruiting campaign for the United States Navy. *Campbell-Ewald*, 136 S. Ct. at 667. There, however, the contract expressly provided that it was the *contractor*'s responsibility to generate a list of the phone numbers of those who had opted in to receive the marketing, and the government's approval of sending the message was conditioned on this consent. *Id.* at 673–74. The contractor, therefore, failed to adhere to the contract by not obtaining prior consent to send these messages and, by failing to obtain prior consent, had also violated the TCPA. *Id.* at 672–74. As a result of violating "both federal law and the Government's explicit instructions," the Supreme Court held that the contractor was not entitled to derivative sovereign immunity. *Id.* at 672.

Consequently, because GDIT adhered to the terms of its contract with CMS, we conclude that the government authorized GDIT's actions, satisfying step one of the *Yearsley* analysis.

B.

In analyzing the second step of the *Yearsley* immunity analysis, we consider whether the government "validly conferred" the authorization for GDIT to make this phone call. *In re KBR*, 744 F.3d at 342; *see also Yearsley*, 309 U.S. at 20–21. GDIT made this call pursuant to CMS's statutory mandate to administer the ACA and keep applicants informed about their eligibility for enrollment in a qualified health plan. *See* 42 U.S.C. § 18083(a), (b)(2), (e). There does not seem to be any dispute that the government can delegate the authority to make this automated phone call to GDIT. Instead, Cunningham argues that the government cannot "validly confer" the authority to engage in conduct that violates the law, and thus that CMS did not validly confer authority to GDIT to call him because making the phone call without prior consent violated the TCPA.[5] With this argument, Cunningham

[5] In response, GDIT argues that even if the government directed GDIT to make this phone call without obtaining prior consent, the federal government and its common law agents are not subject to the TCPA, and therefore the government could not have directed the phone calls be made in *violation* of the TCPA because they were not required to comply with the TCPA. For this argument, GDIT points to a 2016 declaratory ruling issued by the Federal Communications Commission ("FCC") whereby the FCC interpreted § 227(b)(1)'s prohibition of calls made by any "*person*" as "not includ[ing] the federal government or agents acting within the scope of their agency under common-law principles of agency." *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, CG Docket No. 02-278, 31 F.C.C. Rcd. 7394, 7398 (2016); *see id.* at 7394 ("[T]he TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a

misinterprets the scope of *Yearsley*'s second step. The question is not whether informing applicants of their enrollment eligibility violated the law, but rather whether Congress had the authority to assign GDIT to complete that task. *See Yearsley*, 309 U.S. at 20; *In re KBR*, 744 F.3d at 342, 344 n.7. The purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, and thus, it cannot be that an alleged violation of law per se precludes *Yearsley* immunity. Consequently, we reject Cunningham's overinclusive interpretation of what constitutes a "valid conferral" of authority under this prong. We conclude that the government validly conferred the authorization for GDIT to make this phone call, satisfying step two of the *Yearsley* immunity analysis.

Therefore, because the government authorized GDIT's actions and that authorization was validly conferred, we hold that the district court did not err in concluding that GDIT was entitled to derivative sovereign immunity for this claim.

V.

Finally, Cunningham asserts that even if the district court properly conferred *Yearsley* immunity on GDIT, the district court nonetheless erred in treating

---

contractor does not comply with the government's instructions."). Because we conclude that Cunningham's claim fails even if the government is subject to the TCPA, we decline to address this argument.

the *Yearsley* doctrine as immunity from suit and dismissing the case for lack of subject matter jurisdiction, rather than treating the doctrine as a merits defense to liability. *See* Fed. R. Civ. P. 12(b)(1). In advancing this argument, Cunningham asserts that neither the Supreme Court nor this Court has squarely addressed the issue of whether the *Yearsley* defense is jurisdictional, and that the "immunity" provided by *Yearsley* is not necessarily a jurisdictional immunity. We again disagree.

As an initial matter, it is clear that "[i]f the basis for dismissing a *Yearsley* claim is *sovereign immunity*, then a *Yearsley* defense would be jurisdictional" because "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009) (emphasis added) (ultimately concluding that *Yearsley* immunity does not deprive the court of subject matter jurisdiction); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Recently, in *In re KBR*, this Court reaffirmed that we treat the *Yearsley* doctrine as derivative sovereign immunity that confers jurisdictional immunity from suit. There, as here, the district court had dismissed the claim for lack of subject matter jurisdiction based on *Yearsley* immunity. *In re KBR*, 744 F.3d at 343. We stated that "[t]he concept of *derivative sovereign*

immunity stems from the Supreme Court's decision in [*Yearsley*]," and that when the *Yearsley* doctrine applies, "a government contractor is *not subject to suit*." *Id.* at 342 (emphases added); *see also id.* at 344 ("*Yearsley* recognizes that private employees can perform the same functions as government employees and concludes that they should receive *immunity from suit* when they perform these functions." (emphasis added)). Ultimately, this Court concluded that the record did not contain enough evidence to determine whether the contractor was entitled to derivative sovereign immunity, and vacated the district court's decision and remanded for further fact finding. *Id.* at 345. *See also Butters*, 225 F.3d at 466 (acknowledging the "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have *derivative sovereign immunity*" and describing *Yearsley* as derivatively extending sovereign immunity to a private contractor acting pursuant to a contract with the United States (emphasis added)); *id.* (favorably referencing the Fifth Circuit's affirmance that a private individual "was *immune from suit*" when it followed the sovereign's orders (emphasis added) (citing *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 384–84 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (5th Cir. 1996) (table decision))).

Although Cunningham argues that *In re KBR* cannot stand for the proposition that *Yearsley* immunity is jurisdictional because we did not affirm the jurisdiction-based dismissal of the claim, we reject this contention. This Court's express statements regarding

Yearsley immunity and its implicit approval of using a Rule 12(b)(1) motion to dismiss to dispose of a case when the *Yearsley* doctrine applied compel us to conclude, once again, that the *Yearsley* doctrine operates as a jurisdictional bar to suit and not as a merits defense to liability. *See also Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 646 (6th Cir. 2015) (acknowledging that the Fourth Circuit has held that *Yearsley* immunity is jurisdictional).

Cunningham's argument that the Supreme Court's recent decision in *Lewis v. Clarke* undermines this precedent is also unavailing. 137 S. Ct. 1285, 1291 (2017). Cunningham argues that *Lewis* confirms that incanting the word "immunity" does not necessarily result in immunity from suit, and that "sovereign immunity" is implicated only where "the sovereign is the real party in interest," i.e., "whe[re] the remedy sought is truly against the sovereign." *Id.* at 1290–92 (holding that the Indian tribe's sovereign immunity did not bar a tort suit against a tribal employee to recover for his personal actions when he was operating a vehicle within the scope of his employment on state lands). Cunningham's reliance on *Lewis* is misplaced. In *Lewis*, the Supreme Court distinguished between suits against individual employees and suits against governmental instrumentalities, and expressly stated that "a suit against an arm or instrumentality of the State is treated as one against the State itself." *Id.* at 1293 (favorably referencing cases extending sovereign immunity to private healthcare insurance companies that were "essentially state instrumentalities,"

including *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71–71 (2d Cir. 1998)); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (stating that sovereign immunity from suit extends to "certain actions against state agents and state instrumentalities"). Because GDIT is an entity rather than an individual employee, and was fulfilling CMS's statutory mandate under the ACA by making this phone call to Cunningham, *Lewis* is inapplicable. *See Pani*, 152 F.3d at 71–72 (stating that a government agent that "acts on behalf of the [government] in carrying out certain administrative responsibilities that the law imposes" can be entitled to sovereign immunity, and citing cases holding the same). Thus, under these facts, *Lewis* does not undermine this Court's precedents holding that *Yearsley* immunity is a jurisdictional bar to suit, nor does it undermine our affirmance that derivative sovereign immunity be conferred on GDIT in this case.

Notwithstanding that *Yearsley* immunity operates as a jurisdictional bar to suit, we recognize that discovery may be appropriate before granting a Rule 12(b)(1) motion to dismiss on this basis. *See Kerns*, 585 F.3d at 193 (describing appropriate evidentiary proceedings when a court is considering a claim under Rule 12(b)(1)). When, as here, a party "challenges the veracity of the facts underpinning subject matter jurisdiction, the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts." *Id.; see also United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009). Here, the parties participated in 75 days of

limited discovery on the applicability of *Yearsley*, which included six subpoenas, four Touhy requests, numerous other document requests, six depositions of GDIT and CMS employees, and supplemental briefing on the issue. We are satisfied that this discovery provided Cunningham with appropriate procedural safeguards and provided sufficient information for the district court to rule on GDIT's motion.

Consequently, we hold that the district court did not err in treating *Yearsley* applicability as a jurisdictional bar to suit and granting GDIT's Rule 12(b)(1) motion to dismiss on the basis that GDIT is immune from suit under the *Yearsley* doctrine.

VI.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CRAIG CUNNINGHAM, on behalf of himself and others similarly situated, *Plaintiff*, v. GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC., *Defendant.*	Civil No. 1:16-cv-00545 Hon. Liam O'Grady

MEMORANDUM OPINION

(Filed May 1, 2017)

This matter comes before the Court again on Defendant General Dynamics Information Technology, Inc.'s ("GDIT") motion to dismiss for lack of subject matter jurisdiction. On September 9, 2016, the Court heard oral argument on the Motion. This hearing came after an initial round of briefing. Upon consideration of the briefs and arguments at that time, the Court deferred ruling on Defendant's motion, but instead allowed Plaintiff Craig Cunningham to seek discovery on the issue of *Yearsley* immunity. That discovery period is now complete, and the parties have fully briefed the motion for a second time. (Dkt. No. 66). The Court

dispensed with a second oral argument, and the motion is now ripe for resolution. For the reasons that follow, the Court hereby **GRANTS** GDIT's motion to dismiss.

I. BACKGROUND

The factual details of this case were set forth in this Court's October 18, 2016 Order (Dkt. No. 47) (hereinafter "October Order") and will not be repeated unnecessarily here. Nonetheless, Plaintiff has highlighted a few additional facts that he believes are relevant to this motion. These additional facts are included below, along with an overview of Plaintiff's claim.

In 2011, the Centers for Medicare and Medicaid Services (CMS) entered into a contract with Vangent, Inc. pursuant to authority that was granted to CMS under the Affordable Care Act (ACA). Under this contract, Vangent was tasked with handling communications regarding 1-800-MEDICARE communications, the healthcare.gov website, and the "Healthcare Marketplace Call Center." In April of 2013, GDIT assumed Vangent's position under the contract. *See* CMS-GDIT Contract, Mod. 30 at 69-70 (Dkt. No. 71-2) (hereinafter "the Contract" or "Modification 30").

In the October Order, the Court noted that the "statement of works" that GDIT submitted as evidence of the Contract was in a "track changes" or redline format. October Order at 9. The Court therefore determined that it could not accept the validity of the Contract on its face. Discovery has since confirmed

that the contract is indeed valid and authentic. *See* Lester Dep. I at 11:4-12, 12:2-19, 13:20-14:14-16, 15:11-12 (Dkt. No. 71-5) (explaining the nature of Deborah Lester's authority as a contracting officer for CMS); Lester Dep. II at 11:7-18 (Dkt. No. 71-3) (explaining that Modification 30 was authorized in Ms. Lester's capacity as contracting officer for CMS). Plaintiff does not dispute the legal effect of the Contract or its Modifications.

Among other things, the Contract required that GDIT make calls from January 1, 2015 through May 16, 2016 to inform individuals about their ability to buy health insurance through the health insurance exchanges created by the ACA. In accordance with this instruction, CMS (1) authorized GDIT to use an autodialer to make calls; (2) provided a script for the calls; and (3) provided a list of phone numbers for GDIT to call.

Pursuant to this direction, on December 2, 2016, GDIT used an automatic telephone dialing system to call Plaintiff's cell phone. When Plaintiff did not pick up, a pre-recorded or artificial voice left the following message:

> Hello, this is an important message from healthcare.gov. The deadline to enroll in a 2016 health insurance plan is coming soon. You may be able to qualify for financial help to make health insurance more affordable. With financial help, most people can find plans for $75 or less per month. Visit healthcare.gov today to see how much you can

> save. If you have questions, you can call the health insurance marketplace to talk to a trained enrollment specialist at 1-800-318-2596. That's 1-800-318-2596. We are available 24 hours a day and the call is free. Don't forget, the deadline to enroll is Tuesday, December 15. If you've already taken action, and have 2016 health coverage, please ignore. Thank you. Goodbye.

Within minutes of receiving this call, Plaintiff called the number provided and learned that GDIT was responsible for making the call.

Plaintiff alleges that he did not consent to this call. He further alleges that this call was made using an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act (TCPA) and that "thousands [of] persons throughout the United States" received these messages. He asserts that this is a violation of the TCPA, because it constitutes a telemarketing or advertising call without prior express consent, as those terms are defined in the TCPA. Plaintiff therefore brings this claim on behalf of himself and two separate classes of individuals who received these or similar calls.

In support of his position, Plaintiff now highlights a few key terms in the Contract that he believes are relevant for the purposes of *Yearsley* immunity. First, he notes that Section 17 of the Contract required GDIT to maintain a corporate compliance program that required internal monitoring and auditing to "help ensure compliance with statutes, regulations, and the

company's code of business ethics and conduct . . . " Modification 30 at 69-70. Second, he stresses that the Contract does not explicitly direct GDIT to make telephone calls without obtaining prior express consent. *See* Opp'n at 5-6 (citing deposition testimony from Naomi Johnson and Deborah Lester).

Third, Plaintiff spends a significant amount of time discussing Section 4.1.1 of the Contract, which instructs:

> The contractor shall answer inbound calls and provide complete responses to all telephone and TDD/TTY inquiries. If required, the contractor shall make outbound calls to support customer service needs. Outbound calls may include both live CSR outbound calls as well as auto-dial message campaigns (**subject to state law**) utilizing system generated call technology.

Modification 30 at 6 (red-line format removed and emphasis added). The deposition testimony in this case has clarified that the "subject to state law" insertion into Modification 30 was provided in response to GDIT's concerns about making calls in Alaska and Arizona. *See* Lester Dep. II at 8:11-9:17; Bartenhagen Dep. at 79:12-80:1 (Dkt. No. 71-6) (explaining that Alaska and Arizona were excluded from some of GDIT's calling campaigns).

Furthermore, Plaintiff has uncovered emails which show that GDIT was aware of the Telephone Consumer Protection Act (TCPA) and its requirements. Initially,

he points out that GDIT confirmed (via email) that it may only call individuals during certain times in order to comply with the TCPA. *See* Davis Dep. at 38:3-42:18 (Dkt. No. 73-5). Next, he highlights that GDIT sent an email to CMS on March 12, 2015 that announces the consent requirements of the TCPA. Johnson Dep. II, Cunningham Ex. 14 at 88 (Dkt. No. 73-4). It reads:

> The Telephone Consumer Protection Act of 1991 (TCPA) was passed by the United States Congress in 1991 and signed into law by President George H. W. Bush as Public Law 102-243. It amended the Communications Act of 1934. The TCPA is codified as 47 U.S.C. 227.
>
> The TCPA restricts telephone solicitations (i.e., telemarketing) and the use of automated telephone equipment. The TCPA limits the use of automatic dialing systems, artificial or prerecorded voice messages, SMS text messages, and fax machines. It also specifies several technical requirements for facsimile machines, auto dialers, and voice messaging systems.
>
> The Telephone Consumer Protection Act (TCPA) (47 U.S.C. 227, 47 CFR 54.1200) prohibits the use of an 'automatic telephone dialing system' to contact "any telephone number assigned to a . . . cellular telephone service" without "express prior consent" from the party being called.

Id. This email also highlights the legal requirements that apply in Alaska and Arizona law. *Id.*

II. STANDARD OF REVIEW

In this case, GDIT challenged the factual bases for jurisdiction in a 12(b)(1) motion. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). When this happens, courts may consider evidence outside of the pleadings to resolve the disputed jurisdictional facts. *Id.* When the jurisdictional facts are "inextricably intertwined with those central to the merits, the district court should resolve the relevant factual disputes only after appropriate discovery." *In re KBR, Inc. Burn Pit Litigation*, 744 F.3d 326, 334 (4th Cir. 2014). Where the court is satisfied that it has a full record before it, it may grant a motion to dismiss based on the parties' submissions, including affidavits and testimony. After 75 days of jurisdiction-related discovery, the issue is now ripe for review.

III. DISCUSSION

The legal conclusions made in the Court's October Order have not been disturbed in any way by discovery. *See* October Order at 5-8; *see also United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (explaining the Fourth Circuit's law-of-the-case principles). Accordingly, GDIT "is not subject to suit if (1) the government authorized [GDIT's] actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014) (citing *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21-22 (1940)).

Plaintiff's factual discovery has firmly established that both of these elements have been satisfied. As the October Order noted, the Contract directed GDIT to perform a series of duties, which included, among other things:

> (1) answering inquiries and making outbound calls regarding the ACA; (2) using autodialing technology to initiate outbound telephone calls to individuals who had begun the enrollment process for health coverage at Healthcare.gov; (3) providing the exact script that Mr. Cunningham received to remind applicants of their enrollment deadline; and (4) providing a list of applicants' phone numbers that included Mr. Cunningham's number.

October Order at 8. Therefore, although Plaintiff raises some additional legal arguments regarding the applicability of *Yearsley* immunity, he has done absolutely nothing to draw into question the fact that CMS "authorized and instructed GDIT to do *exactly* what it did (to the word) in delivering the message that it left on Plaintiff's message machine." *Id.* This conclusion bestows immunity on GDIT and requires the Court to dismiss the Complaint.

A. Plaintiff's Arguments

In light of the factual realities confronting him. Plaintiff's arguments are necessarily narrow, and it is useful to highlight the uncontested points in this motion. Plaintiff has not challenged the legitimacy of the authority granted by the ACA. Indeed, the Supreme

Court has conclusively put that issue to bed. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015). Moreover, he has not challenged that Ms. Lester had the authority to contract with GDIT. In accordance with that concession, he does not dispute the validity of the CMS-GDIT Contract or Modification 30. Furthermore, Plaintiff admits that CMS directed GDIT to "download a list of telephone numbers – which included Plaintiff's cell phone number – and directed GDIT to make autodialed, prerecorded calls on December 2, 2016 to those telephone numbers using the script [provided]." Opp'n at 9.

These factual concessions leave Plaintiff with three creative legal arguments. First, he argues that *Yearsley* immunity only extends to violations of state law and is therefore unavailable for federal statutes such as the TCPA. Second, he asserts that federal agencies cannot "validly confer" authority to engage in conduct that violates a federal statute. Third, he posits that the TCPA and the Contract required GDIT to obtain express written consent and nothing in the Contract directed GDIT to make calls without separately obtaining that consent. These arguments are unconvincing.

Where it applies, the law is clear that *Yearsley* protects federal contractors from both state and federal causes of action. Indeed, *Yearsley* itself was a case that arose under the Takings Clause of the Fifth Amendment. *See W.A. Ross Const. Co. v. Yearsley*, 103 F.2d 589, 592 (8th Cir. 1939), aff'd, 309 U.S. 18, 60 (1940). More

recently, the Supreme Court conducted a fulsome analysis of *Yearsley* immunity in the context of the TCPA – the same statute at issue here. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) ("[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.")). Moreover, the Fourth Circuit has not deviated from this rule. *See Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (finding that *Yearsley* immunity shielded defendant from liability in a suit brought under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*)

Seeking to avoid this overwhelming caselaw, Plaintiff cites to *Boyle v. United Technologies Corp.* in support of the contention that *Yearsley* immunity is only applicable to state law claims. 487 U.S. 500 (1988). This citation is inapposite. First, *Boyle* does not in any way limit itself to state causes of action. It is true that *Boyle* dealt with state law, but that is only because the plaintiff's claims arose under state law in that case. Accordingly, the Supreme Court's analysis in *Boyle* drew on principles of federal preemption and "uniquely federal interests" to reach its conclusion. The same principles of federalism were simply not present in *Yearsley*, and they are not present here.

Second, the *Boyle* doctrine is different in nature from *Yearsley* immunity; *Boyle* articulates a preemption *defense*, while *Yearsley* sets forth jurisdictional bar to suit. *See* October Order at 6-8 (explaining why *Yearsley* immunity is jurisdictional in nature); *see also*

In re KBR, 744 F. 3d at 342 n.6 (distinguishing between the *Boyle* preemption analysis and the *Yearsley* immunity analysis). Thus, the two doctrines are fundamentally distinct. One possible explanation for this distinction is the fact that *Boyle* dealt with a procurement contract rather than a performance contract. *Boyle*, 487 U.S. at 506-07 (discussing the federal interest in protecting contracts for the procurement of equipment). In a procurement contract such as the one in *Boyle*, the government contractor is providing products to the government so that the government may perform its tasks. By contrast, in a performance contract like this one and the one at issue in *Yearsley*, the contractor stands in the shoes of the government and executes tasks that would otherwise be performed by a federal agency. Thus, the principle underlying *Yearsley* is not that "uniquely federal interests" preempt plaintiff's claims, but rather that contractors should not be punished for their "compliance with all federal directions" when they are performing governmental tasks. *Campbell-Ewald*, 136 S. Ct. at 673 n.7 As such, even if the applicability of *Boyle*'s preemption doctrine is restricted only to state claims, it does not follow that *Yearsley* immunity is similarly limited.

Plaintiff's second argument does not fare any better. He argues that "government agencies cannot `validly confer' authority to engage in conduct that violates a federal statute." Opp'n at 14. This argument has rhetorical appeal at first blush, but its acceptance would completely undermine the purpose of *Yearsley* immunity. The law makes clear that the "validly conferred"

prong of *Yearsley* focuses on the constitutional power to delegate tasks to private contractors. *See* October Order at 5 (quoting *In re KBR*, 744 F.3d at 344 n.7). Looking beyond the validity of that grant of authority would require the Court to assess the merits of a claim before even making its jurisdictional determination. Thus, as Defendant frames it, Plaintiff's argument "puts the cart before the horse." Reply in Supp. at 10.

By way of illustration, it is useful to point out that CMS could not be sued under the TCPA because it enjoys sovereign immunity by virtue of its status as a federal agency. *See Radin v. United States*, 699 F.2d 681, 685 (4th Cir. 1983) ("[A]ny claim for monetary relief against [a federal agency] would have to be paid with public funds, thereby making the United States the real party in interest. The claim for damages against this federal agency is barred by sovereign immunity unless Congress has expressly or impliedly consented to suit . . . "). When dealing with sovereign immunity, whether derivative or otherwise, the key issue is waiver. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States . . . is immune from suit save as it consents to he sued."); *see also In re KBR*, 744 F.3d at 333 (discussing the waiver provisions of the FTCA). Unlike some other federal statutes, the TCPA contains no waiver provisions. *See United States v. Gaubert*, 499 U.S. 315, 319 n.4 (1991) ("The [Federal Tort Claims Act], subject to various exceptions, waives sovereign immunity from suits for negligent or wrongful acts of Government employees."). As such, because GDIT followed CMS's instructions to a "T", it does not

matter whether the underlying call would have violated the TCPA. Because CMS cannot be sued under this statute, neither can GDIT, so long as it followed CMS's precise directions.

Having established these principles, Plaintiff's third argument also fails. Plaintiff alleges that, under the Contract, Defendant had an obligation to seek express written consent before calling Mr. Cunningham.[1] The evidence in this case conclusively establishes that no such requirement existed. This is most apparent in the deposition testimony of Naomi Johnson:

> Q. Did CMS ever direct GDIT to make [auto-dial] calls and to get prior informed consent? A. No. *Id.* at 52:14-16
>
> Q. Is it also fair to say that CMS didn't direct GDIT to investigate those numbers or who provided those numbers? A. Yes. That's correct. *Id.* at 53:14-17.
>
> Q. And, is it fair to say also, that CMS didn't expect GDIT to get consent before auto-dialing? A. Correct. *Id.* at 54:3-5

[1] Given the nature of the Court's decision, it need not assess whether GDIT actually complied with state and federal law in this case by failing to obtain consent. Nonetheless, it is worth noting that GDIT made a concerted effort to comply with all rules and regulations, and even insisted that it not be required to call individuals in Alaska and Arizona for fear of violating their laws. *See* Johnson Dep. II, Cunningham Ex. 14 at 88 (Dkt. No. 73-4) (explaining in an email the federal and state legal requirements for calls of this nature); Bartenhagen Dep. at 79:12-80:1 (Dkt. No. 71-6) (explaining that Alaska and Arizona were excluded from some of GDIT's calling campaigns).

Thus, nothing in CMS's instructions required GDIT to obtain express consent. Moreover, stepping back for a moment, it would have been an onerous task indeed for GDIT to separately obtain the written consent of every one of thousands of individuals whose numbers were on the list that GDIT downloaded on December 2, 2016. If obtaining consent were truly a contractual term, one would expect the statement of works to address procedures for recording these expressions of consent. In this case, without specific instructions in the Contract or any evidence to the contrary, the Court will not impose such a term on GDIT.

B. Procedural Questions

The final question to address is whether the Court has the authority to dismiss the case with prejudice notwithstanding the fact that *Yearsley* immunity acts as a jurisdictional bar in the Fourth Circuit. *See* October Order at 6-7 (discussing the circuit split on whether *Yearsley* immunity is jurisdictional or not)

Initially, it is worth noting that the circuit split discussed in the October Order has very little practical meaning where, as here, the parties engaged in a fulsome discovery process to ensure that immunity is appropriate. In disagreeing with the Fourth Circuit's determination that *Yearsley* immunity is jurisdictional, the Sixth Circuit stated that "*Yearsley* immunity is, in our opinion, closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits

rather than for jurisdiction." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 980 (2016). But this statement ignores the fact that, "[w]here additional fact development is necessary on the issue of subject matter jurisdiction, courts have the power to order discovery on that question." October Order at 8 (quoting *Rich v. United States*, 811 F.3d 140, 145 (4th Cir. 2015)). Thus, in ordering the parties to engage in 75 days of discovery, the Court can now conclusively establish the *merits* of the subject matter jurisdiction inquiry. Whether this is done through summary judgment or through a 12(b)(1) inquiry is of no practical import.

Having decided the merits of the jurisdictional inquiry in GDIT's favor, the issue of whether Plaintiff's complaint should be dismissed with or without prejudice is squarely before the Court. Typically, a "dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice." *In re Camp Lejeune N. Carolina Water Contamination Litig.*, No. 1:11-MD-2218-TWT, 2016 WL 7049038, at *34 (N.D. Ga. Dec. 5, 2016) (quoting *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229 (11th Cir. 2008) and collecting cases). On the other hand, "the bar of sovereign immunity is absolute: no other court has the power to hear the case, nor can the [Plaintiffs] redraft their claims to avoid the exceptions to the FTCA." *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988); *see also id.* at 35 ("[F]or all practical purposes, there is no other forum where the Plaintiffs could bring these

claims without meeting the same sovereign immunity obstacle . . . "). Thus, when courts dismiss claims on sovereign immunity grounds, they frequently do so with prejudice. *See, e.g.*, *Int'l Fed'n of Prof'l & Tech. Engineers v. United States*, 934 F. Supp. 2d 816, 820 (D. Md. 2013), *aff'd sub nom. Int'l Fed'n of Prof'l & Tech. Engineers v. Haas*, 599 F. App'x 477 (4th Cir. 2014) ("[T]he United States is dismissed from this action, and the claims against it are dismissed with prejudice."); *Best Med. Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230, 233 (RD. Va. 2012) ("The Court GRANTS Defendant's Motion, finding subject matter jurisdiction lacking as to all Defendants, and thus DISMISSES Plaintiffs' claims with prejudice.").

The Court finds that a dismissal with prejudice is appropriate here. Without jurisdiction, the Court is not empowered to consider the merits of Plaintiff's substantive TCPA claim. However, that does not take away from the fact that the Court has fully considered and analyzed the factual merits of the jurisdictional inquiry. In doing so, it has established that GDIT is entitled to derivative sovereign immunity under *Yearsley*. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing, *United States v. Mine Workers of Am.*, 330 U.S. 258, 291 (1947) ("[A] federal court always has jurisdiction to determine its own jurisdiction."). Thus, any additional litigation of this issue in a different court would amount to an unnecessary drain on judicial resources.

Put differently, the Court's decision undoubtedly has preclusive effect as to the issue of *Yearsley* immunity. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("Issue

preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.") (internal quotation marks omitted). Therefore, because the resolution of the *Yearsley* issue acts as a complete bar to any future suit against GDIT on this TCPA claim, the case may not be re-litigated in any other forum, and dismissal with prejudice is appropriate.

IV. CONCLUSION

For these reasons, the Court finds that GDIT is entitled to derivative sovereign immunity under *Yearsley* and its progeny. 309 U.S. 18 (1940). As such, Mr. Cunningham's claims are hereby **DISMISSED** with prejudice. An appropriate Order shall issue.

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

May 1, 2017
Alexandria, Virginia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CRAIG CUNNINGHAM, on behalf of himself and others similarly situated, *Plaintiff,* v. GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC., *Defendant.*	Civil No. 1:16-cv-00545 Hon. Liam O'Grady

ORDER

(Filed Oct. 18, 2016)

After receiving an automated call from General Dynamics Information Technology, Inc. ("GDIT"), Craig Cunningham filed this suit on May 16, 2016 alleging violations of the Telephone Consumer Protection Act ("TCPA"). In response, GDIT filed, *inter alia,* a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). [Dkt. No. 19]. For the reasons that follow, the Court defers ruling on Defendant's motions and permits Mr. Cunningham a limited period of discovery on the issue of *Yearsley* immunity.

I. BACKGROUND

On December 2, 2016, GDIT used an automatic telephone dialing system to call Mr. Cunningham's cell phone. When Mr. Cunningham did not pick up, a pre-recorded or artificial voice left the following message:

> Hello, this is an important message from healthcare.gov. The deadline to enroll in a 2016 health insurance plan is coming soon. You may be able to qualify for financial help to make health insurance more affordable. With financial help, most people can find plans for $75 or less per month. Visit healthcare.gov today to see how much you can save. If you have questions, you can call the health insurance marketplace to talk to a trained enrollment specialist at 1-800-318-2596. That's 1-800-318-2596. We are available 24 hours a day and the call is free. Don't forget, the deadline to enroll is Tuesday, December 15. If you've already taken action, and have 2016 health coverage, please ignore. Thank you. Goodbye.

Within minutes of receiving this call, Mr. Cunningham called the number provided and learned that GDIT was responsible for making the call.

Mr. Cunningham alleges that this call was made using an automatic telephone dialing system within the meaning of the TCPA and that "thousands [of] persons throughout the United States" received these messages. He asserts that this is a violation of the TCPA, because it constitutes a telemarketing or

advertising call without prior express consent, as those terms are defined in the TCPA. Mr. Cunningham therefore brings this claim on behalf of himself and two separate classes of individuals who received these or similar calls.[1]

For its part, GDIT does not dispute any of the factual allegations in Mr. Cunningham's Complaint, but it does dispute the legal conclusions that Mr. Cunningham draws and adds some facts of its own by attaching exhibits to its motion to dismiss for lack of subject matter jurisdiction.

The primary exhibit is a Declaration is [sic] from Deborah Lester, who is a contracting officer in the Office of Acquisition and Grants Management of the Centers for Medicare & Medicaid Services ("CMS"), which is an operating division of the U.S. Department of Health and Human Services ("HHS"). Ms. Lester's declaration explains that CMS is the component of HHS that is responsible for administering the Affordable Care Act ("ACA"). In furtherance of its duties under the ACA, CMS entered into a contract with GDIT to "answer incoming inquiries and make outbound calls regarding the ACA." In a subsequent contract modification, CMS required GDIT to use autodialing

[1] Class A includes all individuals all persons [sic] who received these calls without prior express consent from Defendant for four years prior to filing the suit (within the Statute of Limitations). Compl. ¶ 22. Class B includes individuals who received similar calls without consent after October 16, 2013 when the law was amended to include a prohibition on automatic telephone dialing systems and pre-recorded voices. Compl. ¶ 9.

technology to initiate outbound calls. In addition, "[t]hrough subsequent technical direction, CMS directed GDIT to call individuals who had begun the enrollment process for health coverage at Healthcare.gov. The purpose of the calls was to inform these individuals about healthcare insurance coverage under the ACA."

A statement of work for this project was attached as an exhibit to Ms. Lester's declaration. In relevant part, Paragraph 4.1.1 of this agreement reads:

> The contractor shall answer inbound calls and provide complete responses to all telephone and TDD/TTY inquiries. If required, the contractor shall make outbound calls to support customer service needs. Outbound calls may include both live CSR outbound calls as well as auto-dial message campaigns (subject to state law) utilizing system generated call technology.

The Declaration went on to explain that Mr. Cunningham created an account and started an online application for enrollment at healthcare.gov. In applying for this policy, Mr. Cunningham certified that he agreed to the site's privacy policy, which, in pertinent part, reads:

> **When you request information**: We collect information including your email address or mobile phone number to deliver alerts or e-newsletters. We use this information to complete the subscription process and provide you with information. You can opt out of these

> communications at any time by editing your *subscription preferences*.

The underlined section represents a hyperlink that directs users to a site that allows them to opt out of marketplace messages. The privacy policy goes on to state:

> How CMS uses information collected on HealthCare.gov
>
> When sending you marketplace messages: CMS uses the email address (or mobile phone number) you provide us to send emails or Short Message Service (SMS) messages related to the Health Insurance Marketplace, if you have given us permission to send you such emails and text messages. CMS also may use the phone number you provide to call you about Marketplace coverage.

When Mr. Cunningham began his application, he certified that he read and agreed to these privacy policies. He also provided his phone number as part of his application process.

According to Ms. Lester, in December 2015, CMS created a list of numbers for an autodial campaign by compiling individuals who had started their application in Healthcare.gov but had not yet completed the enrollment process. Mr. Cunningham's number was included in this list. The purpose of this list was to remind consumers that the deadline for open enrollment was nearing an end and to notify them of their possible eligibility for federal financial assistance. CMS provided the script for the call, which was

identical to the script that Mr. Cunningham heard on his voicemail.

II. STANDARD OF REVIEW

In a 12(b)(1) motion, the defendant may challenge subject matter jurisdiction in two ways. First, the defendant may argue that the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based." *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). Under these circumstances, the plaintiff is entitled to the same procedural protection as a 12(b)(6) motion and all facts alleged in the complaint are taken as true. *Id.*

Alternatively, the defendant can challenge the factual bases for jurisdiction, as GDIT does here. *Id.* When this happens, courts may consider evidence outside of the pleadings to resolve the disputed jurisdictional facts. *Id.* However, courts should only resolve these motions "after appropriate discovery." *In re KBR, Inc. Burn Pit Litigation*, 744 F.3d 326, 334 (4th Cir. 2014).

III. DISCUSSION

The primary question presented in GDIT's motion to dismiss for lack of subject matter jurisdiction is whether derivative sovereign immunity (also referred to as "*Yearsley* immunity" or "federal contractor immunity") is a jurisdictional issue that can be resolved at this stage of the litigation.

The basis for derivative sovereign immunity comes from the Supreme Court case *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), which dealt with the liability for federal contractors performing public works. Based on *Yearsley*, the Fourth Circuit has held that it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity." *Butters v. Vance Int'l Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). More recently, the Fourth Circuit distilled *Yearsley* down to a two-part test: "Under *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014) (citing *Yearsley*, 309 U.S. at 21-22). Though the court did not explicitly address the question of whether the issue was jurisdictional, the order on appeal in *In re KBR* was a motion to dismiss for subject matter jurisdiction under Rule 12(b)(1), and the court did not take issue with that classification, presumably because sovereign immunity itself is undeniably a jurisdictional question. *Id.*; *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued").

Notably, in *In re KBR, Inc.*, the Court considered and rejected claims that the nature of derivative sovereign immunity had been altered after the Supreme Court's decisions in *Boyle v. United Technologies Corp.*,

487 U.S. 500 (1988), and *Filarsky v. Delia*, 132 S. Ct. 1657 (2012). In doing so, the Court explained that § 1983 qualified immunity discussed in *Filarsky* serves the same purposes as derivative sovereign immunity, even if it does not take the same procedural form. *In re KBR, Inc.* 744 F.3d at 344. Those purposes include: (1) combatting 'unwarranted timidity' that can arise from the fear of liability; (2) ensuring that talented candidates are not deterred from public service; and (3) preventing the 'harmful distractions' that can arise in carrying out the work of the government. *Id.* Moreover, derivative sovereign immunity serves the additional purpose of allowing the government to delegate certain activities in the public interest, thereby saving taxpayer money and assisting in efficient governance. *See Butters*, 225 F.3d at 466. In *KBR*, however, the court ultimately determined that it did not have enough information to make a final decision regarding the application of *Yearsley* immunity and it therefore remanded the case to the district court for further fact finding on the subject. 744 F.3d at 351.

The Ninth and Eleventh Circuits have both acknowledged the jurisdictional nature of derivative sovereign immunity. *See Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) ("To the extent that the work performed by McLaughlin, Inc., was done under its contract with the Bureau of Public Lands, and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants."); *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331,

1343 (11th Cir. 2007) (discussing but declining to apply the theory of derivative sovereign immunity as it was articulated in that case). The Sixth and Fifth Circuits, however, have announced a different reading of *Yearsley*. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009) (finding that "*Yearsley* does not discuss sovereign immunity" and its application does not deprive courts of subject matter jurisdiction); *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 646 (6th Cir. 2015) (acknowledging that the Fourth Circuit held derivative sovereign immunity to be jurisdictional, but disagreeing on the basis that *Yearsley* immunity is "closer in nature to qualified immunity . . . which is an issue to be reviewed on the merits").

In a very recent case, the Supreme Court examined the applicability of *Yearsley* in the context of the TCPA. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). There, the Navy had contracted with the defendant to engage in a multimedia recruiting campaign that included sending text messages to young adults who had "opted in" to receiving the Navy's promotional materials. *Id.* Plaintiff brought suit when he received one of those text messages despite the fact that he was a 40-year old man who had not opted into the advertising campaign. *Id.* In answering the question of federal sovereign immunity, the Court held: "When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." *Id.* at 672.

Hence, the Court's holding reinforces that immunity for federal contractors is not unqualified, and it is potentially applicable for violations of the TCPA. *Id.* Nonetheless, the majority opinion reiterated that "government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States. *Id.* (internal citations and quotations omitted). Moreover, it repeated its statement in *Yearsley* that "there is no liability on the part of the contractor who simply performed as the Government directed." *Id.* at 673 (internal quotation marks omitted). The Court specifically noted that, "[c]ritical in *Yearsley* was not the involvement of public works, but the contractor's performance in compliance with all federal directions." *Id.* at 685 n.7. Thus, the Supreme Court did not comment on whether "derivative" or "federal contractor" immunity is jurisdictional, but it did reiterate that, (1) whatever immunity it confers is not absolute; and (2) *Yearsley* is still good law.

Though the resolution of this circuit split is open for academic debate, the binding Fourth Circuit precedent controls the case at hand. Moreover, the Fourth Circuit's decision that *Yearsley* immunity is jurisdictional does not limit this Court's ability to properly evaluate whether derivative sovereign immunity applies in this case, as other circuits have suggested. Where additional fact development is necessary on the issue of subject matter jurisdiction, courts have the power to order discovery on that question. *See Rich v. United States*, 811 F.3d 140, 145 (4th Cir. 2015). Thus,

in cases where the validity or scope of the federal contractor's grant of authority is in doubt, courts may take the necessary steps to ensure that the factual predicates for *Yearsley* immunity exist before dismissing a case for subject matter jurisdiction. *Id.* This is one of those cases.

Mr. Cunningham is entitled to a limited period of discovery to develop whether *Yearsley* immunity applies. On its face, the Declaration of Deborah Lester provides strong evidence to support GDIT's claims of immunity. The Declaration states that Ms. Lester had authority to enter into contracts with GDIT, and that she did so in order to obtain assistance in administering the ACA. The Declaration goes on to describe the duties assigned to GDIT under the contract, which included, among other things: (1) answering inquiries and making outbound calls regarding the ACA; (2) using autodialing technology to initiate outbound telephone calls to individuals who had begun the enrollment process for health coverage at Healthcare.gov; (3) providing the exact script that Mr. Cunningham received to remind applicants of their enrollment deadline; and (4) providing a list of applicants' phone numbers that included Mr. Cunningham's number. Thus, the contract, as described by Ms. Lester, appears to have authorized and instructed GDIT to do *exactly* what it did (to the word) in delivering the message that it left on Mr. Cunningham's message machine.

That said, the Court cannot accept Ms. Lester's statements wholesale without giving Mr. Cunningham an opportunity to contest those facts. *Yearsley* immunity is not something to be taken lightly. Where it applies, it shields federal contractors from liability for potentially significant harms. As such, sworn statements from government officials on their own cannot ordinarily supply the basis for granting immunity. Instead, courts must look to the actual grant of authority at issue before deciding the *Yearsely* question. Evidence of that authority will often come in the form of contracts or statements of works between the government and its contractor. In this case, GDIT did submit a statement of works as an exhibit to Ms. Lester's Declaration; however, that document was produced in an apparent draft or "track changes" format. In that format, it is impossible to tell whether the contract between GDIT and CMS is even valid or enforceable. Therefore, on the current record, the Court cannot conclusively say that GDIT was authorized to call Mr. Cunningham in the manner that it did.

IV. CONCLUSION

The discovery permitted in this case is strictly cabined to the issue of *Yearsley* immunity. Specifically, Mr. Cunningham may seek documents and testimony regarding whether GDIT had actual authority to make the automated calls complained of and whether that authority was validly conferred. He may not seek discovery on any unrelated issues, including merits questions or questions of class certification.

For the reasons stated above, it is hereby **ORDERED** that the parties shall have 45 (forty-five) days to complete discovery only on the issue of *Yearsley* immunity.

/s/ Liam O'Grady
Liam O'Grady
United States District Judge

October 18, 2016
Alexandria, Virginia

APPENDIX D

FILED: May 22, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1592
(1:16-cv-00545-LO-TCB)

CRAIG CUNNINGHAM, on behalf of himself and all others similarly situated

Plaintiff-Appellant

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC.

Defendant-Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

42 U.S.C. § 18081(e)(4)(A)(i)

(e) Actions relating to verification

. . . .

(4) Inconsistencies involving other information

(A) In general

If the information provided by an applicant under subsection (b) (other than subsection (b)(2)) is inconsistent with information in the records maintained by persons under subsection (c) or is not verified under subsection (d), the Secretary shall notify the Exchange and the Exchange shall take the following actions:

(i) Reasonable effort

The Exchange shall make a reasonable effort to identify and address the causes of such inconsistency, including through typographical or other clerical errors, by contacting the applicant to confirm the accuracy of the information, and by taking such additional actions as the Secretary, through regulation or other guidance, may identify.

42 U.S.C. § 18083(a), (b) & (e):

Streamlining of procedures for enrollment through an Exchange and State medicaid, CHIP, and health subsidy programs

(a) In general

The Secretary shall establish a system meeting the requirements of this section under which residents of each State may apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, applicable State health subsidy programs. Such system shall ensure that if an individual applying to an Exchange is found through screening to be eligible for medical assistance under the State medicaid plan under title XIX [42 U.S.C. 1396 et seq.]1, or eligible for enrollment under a State children's health insurance program (CHIP) under title XXI of such Act [42 U.S.C. 1397aa et seq.], the individual is enrolled for assistance under such plan or program.

(b) Requirements relating to forms and notice

(1) Requirements relating to forms

(A) In general

The Secretary shall develop and provide to each State a single, streamlined form that –

(i) may be used to apply for all applicable State health subsidy programs within the State;

(ii) may be filed online, in person, by mail, or by telephone;

(iii) may be filed with an Exchange or with State officials operating one of the other applicable State health subsidy programs; and

(iv) is structured to maximize an applicant's ability to complete the form satisfactorily, taking into account the characteristics of individuals who qualify for applicable State health subsidy programs.

(B) State authority to establish form

A State may develop and use its own single, streamlined form as an alternative to the form developed under subparagraph (A) if the alternative form is consistent with standards promulgated by the Secretary under this section.

(C) Supplemental eligibility forms

The Secretary may allow a State to use a supplemental or alternative form in the case of individuals who apply for eligibility that is not determined on the basis of the household income (as defined in section 36B of Title 26).

(2) Notice

The Secretary shall provide that an applicant filing a form under paragraph (1) shall receive notice of eligibility for an applicable State health subsidy program without any need to provide additional information or paperwork unless such information or paperwork is specifically required by law when information provided on the form is inconsistent

with data used for the electronic verification under paragraph (3) or is otherwise insufficient to determine eligibility.

. . . .

(e) Applicable State health subsidy program

In this section, the term "applicable State health subsidy program" means –

(1) the program under this title for the enrollment in qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402 [42 U.S.C. 18071];

(2) a State medicaid program under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.];

(3) a State children's health insurance program (CHIP) under title XXI of such Act [42 U.S.C. 1397aa et seq.]; and

(4) a State program under section 18051 of this title establishing qualified basic health plans.

---

47 U.S.C. § 227(a)(1) & (b)(1)-(3):

Restrictions on use of telephone equipment

(a) Definitions

As used in this section –

(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.

. . . .

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States –

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice –

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or

any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

. . . .

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines –

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

---

47 C.F.R. § 64.1200(a), (b) & (f):

Delivery Restrictions

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio

common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

. . . .

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to

residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

. . . .

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

. . . .

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

. . . .

---

48 C.F.R. § 1.602-1(b):

Authority

. . . .

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

Fed. R. Civ. P. 12(b)(1):

Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

. . . .

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) Lack of subject-matter jurisdiction

. . . .

A motion asserting any of these defenses must be made before pleading if a responsible pleading is allowed. . . .

APPENDIX F

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 156

LAWRENCE YEARSLEY AND GEORGE YEARSLEY,

PETITIONERS,

vs.

W. A. ROSS CONSTRUCTION COMPANY

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1939

CERTIORARI GRANTED OCTOBER 9, 1939

. . . .

[fol. 12] Amended Petition.

Filed: December 23, 1937.

Come now the plaintiffs and for cause of action against the defendants allege:

(1) That the defendant Ross Construction Company is a corporation engaged in the general construction of roads and bridges, with its principal place of

business or office, in Kansas City, Missouri, and is a non-resident of the State of Nebraska and a citizen and resident of the State of Missouri.

(2) That the plaintiffs are, and have at all times mentioned herein, been citizens and residents of Otoe County, Nebraska, and are the owners of an undivided two-thirds interest in and to two hundred fifty (250) acres of land and accretions thereto the Missouri river, in Section 31, Township 8, Range 15, in Otoe County, Nebraska, and the defendant A. M. Stephenson is a citizen and resident of Otoe County, Nebraska, and is the owner of the remaining undivided one-third interest in said real estate; that said defendant A. M. Stephenson has refused to join with the plaintiffs in this action and is therefore made a party defendant as he is jointly interested in the matters and things hereinafter complained of.

(3) That during a period of about three years last past, the defendant, Ross Construction Company, a corporation, as aforesaid, has been engaged in construction work on the Missouri river, changing the course of said river, and during said period of time has built dykes in said river and used large boats with paddles and pumps to produce artificial erosion to wash away land along said Missouri river banks and in so doing has washed and taken from plaintiffs' said farm, up to this date, one hundred (100) acres, more or less, of good pasture land, of the value of $50.00 per acre.

(4) That during the month of July, 1937, by reason and because of the large dykes built by defendant

Ross Construction Company, a corporation, in the Missouri River as aforesaid, in close proximity to plaintiffs' farm lands, the waters of said river were cast upon and caused to wash over forty acres, more or less, of blue grass pasture, depositing mud and sand over the entire forty acres of a depth from four inches in places to three feet, completely [fol. 13] destroying the blue grass thereon and damaging said land in the sum of $75.00 per acre.

(5) Plaintiffs further allege that the said defendant, Ross Construction Company by and through its servants, agents and employees, have gone upon plaintiffs' farm lands and trespassed thereon by cutting trees and brush, all to plaintiffs' damage in the sum of $2000.

Wherefore, plaintiffs pray that they have and recover of the defendant, Ross Construction Company, a corporation, the sum of $8,000.00 damages, together with interest and costs.

LAWRENCE YEARSLEY, and
GEORGE YEARSLEY,
Plaintiffs,

By D. O. Dwyer,
W. L. Dwyer,
Their Attorneys.

State of Nebraska,
Cass County. – ss.:

Lawrence Yearsley, Plaintiff, being sworn on oath, says that he has read over the foregoing amended petition, and that the facts therein alleged are true, as he verily believes.

LAWRENCE YEARSLEY.

Subscribed in my presence and sworn to before me this 19 day of November, 1937.

(Notarial Seal) W. L. DWYER,
Notary Public.