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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LORI WAKEFIELD, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. VISALUS, INC., a Nevada corporation, Defendant-Appellant.	No. 21-35201 D.C. No. 3:15-cv-01857-SI OPINION (Filed Oct. 20, 2022)

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted May 11, 2022
Portland, Oregon

Before: Marsha S. Berzon, Richard C. Tallman, and Morgan Christen, Circuit Judges.

Opinion by Judge Tallman

COUNSEL

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TALLMAN, Circuit Judge:

Lori Wakefield, seeking to represent herself and a now certified class of similarly situated individuals, initiated this action against ViSalus, Inc. under the Telephone Consumer Protection Act ("TCPA"), alleging that ViSalus unlawfully sent her and the other class members automated telephone calls featuring an artificial or prerecorded voice message without prior express consent. *See* 47 U.S.C. § 227(b)(1). During the relevant timeframe, the Federal Communications Commission ("FCC") rules were amended to define "prior express consent" to require, among other things, a written disclosure explicitly stating that, by providing a signature and phone number, the recipient consented to receive calls featuring an artificial or prerecorded voice. *See* 16 C.F.R. § 310.4(b)(1)(v)(a)(i).

Wakefield and other class members ("Plaintiffs") had signed up with ViSalus to purchase or sell purported weight-loss products. When their interest as customers or promoters waned, ViSalus sought to get their continued participation through targeted robocalls. Wakefield then brought federal statutory claims in response to these calls.

Because ViSalus did not provide the required written disclosures to Plaintiffs before making the calls at issue, ViSalus petitioned the FCC for a retroactive waiver of the written prior express consent rule. ViSalus did not, however, plead prior express consent as an affirmative defense. After a three-day trial the jury returned a verdict against ViSalus, finding that it sent 1,850,440 prerecorded calls in violation of the TCPA. Because the TCPA sets the minimum statutory damages at $500 per call, the total damage award against ViSalus was $925,220,000.

Nearly two months later, the FCC granted ViSalus a retroactive waiver of the heightened written consent and disclosure requirements. ViSalus then filed post-trial motions to decertify the class, grant judgment as a matter of law, or grant a new trial on the ground that the FCC's waiver necessarily meant ViSalus had consent for the calls made. Alternatively, ViSalus filed a post-trial motion challenging the $925,220,000 statutory damages award as being unconstitutionally excessive. The district court denied these motions, and ViSalus timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm the district court's refusal to decertify the class, grant judgment as a matter of law, or grant a new trial, but we reverse and remand to the district court for further proceedings regarding the constitutionality

of the nearly one-billion-dollar statutory damages award.[1]

I

A

"Americans . . . are largely united in their disdain for robocalls," and the Federal Government has received a "staggering" number of complaints about robocalls in recent years. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). In response to the public's disdain for these calls, and the "nuisance" and "invasion of privacy" that they produce, Congress passed the Telephone Consumer Protection Act of 1991 ("TCPA"). Pub. L. 102-243, § 2(5), (6), (10), 105 Stat. 2394 (1991). Under the TCPA, it is unlawful for any person to initiate a telephone call using any "automatic telephone dialing system or an artificial or prerecorded voice" without the "prior express consent" of the recipient. 47 U.S.C. § 227(b)(1)(A). Recipients of calls that violate the TCPA can sue "to recover for actual monetary loss from such a violation, or to receive $500 in damages

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[1] ViSalus filed a motion requesting the panel to take judicial notice of (1) the FCC's notice seeking public comment on ViSalus's petition for retroactive waiver; (2) Wakefield's petition for reconsideration submitted to the FCC; and (3) the FCC's order denying Wakefield's petition for reconsideration. ViSalus argues that notice should be taken of these documents because they are public records maintained by the FCC and are relevant to whether Plaintiffs were prejudiced by ViSalus's failure to raise a consent defense before trial. Because we conclude that ViSalus waived a consent defense, *see infra*, Part II.B, this motion is **DENIED** as moot.

for each such violation, whichever is greater." *Id.* § 227(b)(3)(B).

The TCPA is enforced by the FCC, which is authorized by statute to enact rules to implement the law. *See*, *e.g.*, *id.* § 227(b)(2). The TCPA does not define the phrase "prior express consent." The FCC's Orders and Rulings interpret and clarify the term.

Prior to October 2013, the Orders and Rulings provided that the TCPA's prior express consent requirement was satisfied if the recipient voluntarily provided the caller with his or her phone number to use for a purpose related to the subject of the calls. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044–46 (9th Cir. 2017) (interpreting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752 (1992)). But in 2012, the FCC issued a new rule, effective October 16, 2013 ("2012 Rule"), that required all requests for a recipient's express consent to include, among other things, a clear and conspicuous written disclosure informing the recipient that by providing a telephone number and signature, the person authorizes the caller to deliver telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice. 16 C.F.R. § 310.4(b)(1)(v)(a)(i); *see also In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1863 (2012).[2]

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[2] The full text of Section 310.4(b)(1)(v) defines an abusive telemarketing act or practice to include any outbound telephone call with a prerecorded message except when:

Shortly after the 2012 Rule was issued, two entities petitioned the FCC for guidance on whether written consents obtained prior to the 2012 Rule's effective date were valid even if the writing did not specifically authorize the use of a prerecorded voice or include other information required by the 2012 Rule. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8012–14 (2015). In its order of June 18, 2015, the FCC acknowledged some ambiguity in its 2012 Rule and granted the two petitioners a retroactive waiver of the Rule. *Id.* at 8014–15. In short order, seven more entities petitioned for, and were granted similar retroactive waivers for failure to comply with the 2012 Rule. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 11643 (2016).

> In any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that: (i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person; (ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and (iv) Includes such person's telephone number and signature.

16 C.F.R. § 310.4(b)(1)(v)(A)(i-iv).

B

Defendant-Appellant ViSalus is a multi-level marketing company that sells purported weight-loss products direct to consumers. ViSalus's success depends on individuals signing up with ViSalus as either "customers" who only purchase products, or "promoters" who can also earn rewards by referring ViSalus products to new customers. Promoters and customers become part of the ViSalus network by completing an enrollment application. During the relevant time, these applications asked individuals to voluntarily provide a phone number to ViSalus. The enrollment applications varied as to what communication options they provided applicants. Some applications provided checkboxes to indicate the applicant's communication preferences—for example, for email, phone, or text message communications; some provided a check box where the applicant could indicate a desire to "receive communications from ViSalus regarding special discounts and promotions;" and some provided no checkbox for communication preferences at all. None contained any written disclosures that the applicant was, by responding to inquiries about receiving communications, consenting to future automated or prerecorded calls from ViSalus.

ViSalus often communicated with its customers and promoters who had provided a phone number. ViSalus would call promotors for the purpose of sharing promotions, updates, and news, and it would call customers to inform them about current sales and special promotions.

From 2012 to 2015, ViSalus began systematically placing telephone calls as part of what it termed a "WinBack" campaign, designed to entice former promoters and customers to return to or reactivate their ViSalus memberships by offering promotional pricing on ViSalus products. These calls were initially placed by an "outreach team." By 2015, to increase the efficiency of ViSalus's "outreach," the company turned to a "Progressive Outreach Manager" automated system that allowed it to make tens of thousands of calls with the push of a button. A large volume of the calls placed using this system featured pre-recorded messages.

Lori Wakefield enrolled to be a ViSalus promoter in 2012, and voluntarily provided her phone number to ViSalus on her enrollment application. After discontinuing her relationship with ViSalus a few months later and receiving written confirmation of the termination of the relationship in March of 2013, Wakefield had no further contact with the company until April 2015, when she received five prerecorded audio messages from ViSalus on her home phone as part of the WinBack Campaign.

C

Wakefield instituted this lawsuit in October 2015, alleging that ViSalus had violated the TCPA by sending unsolicited telemarketing calls featuring artificial or prerecorded voices without her prior express

consent.[3] ViSalus answered the complaint, alleging that Wakefield could not make out a claim under the TCPA. ViSalus did not plead that it had consent for the calls it made to Plaintiffs.

After a brief class discovery period, Wakefield moved to certify her TCPA claims for class treatment. The district court thereafter granted the motion in part, and certified a class including:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such call at the time such call was made.

Following certification, ViSalus amended its discovery answers regarding consent. Roughly two weeks later—and nearly two years after Wakefield first filed her complaint—ViSalus petitioned the FCC for a retroactive waiver of the 2012 heightened prior express consent requirements. In that petition, ViSalus asserted that it should be granted a retroactive waiver because it was "similarly situated" to the nine other petitioners who had already received waivers. ViSalus did not immediately inform either the Court or Wakefield that it had filed the petition with the FCC.

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[3] Wakefield also pleaded that ViSalus had violated regulations establishing the Do Not Call Registry, 47 U.S.C. § 227(c), and Oregon's Stop Calling Law, Or. Rev. Stat. § 646.

Nearly nine months after requesting the retroactive waiver, ViSalus brought to the district court's attention that it intended to raise consent as a defense at trial. The district court responded that ViSalus had waived a consent defense by failing to plead the defense in its answer, and instructed ViSalus to file a motion to amend its answer if it wanted to raise the issue at trial. ViSalus did file a motion to amend its answer, but then later withdrew the motion, stating "ViSalus does not claim that . . . Plaintiff's or the class's claims are barred by them giving ViSalus prior express written consent."[4]

The case went to trial in April 2019. Wakefield presented her case over three days. ViSalus declined to put on any evidence of its own, and instead argued in closing that Wakefield had not proven her case by a preponderance of the evidence. The jury returned a verdict against ViSalus, finding that it had placed 1,850,440 calls in violation of the TCPA. Because the TCPA sets minimum statutory damages at $500 per call, the court ordered ViSalus to pay "an aggregate amount not to exceed $925,218,000" for the class, and $2,000 for Wakefield herself.

Nearly two months after the jury issued its verdict, the FCC approved ViSalus's petition for a retroactive waiver of the prior express consent rule for all calls

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[4] ViSalus instead stated that it intended to offer evidence of consent to show that damages should not be trebled. The district court later barred ViSalus from presenting evidence of consent at the trial, holding that whether damages should be trebled was an issue reserved for the court, not the jury.

made on or before October 7, 2015. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 34 FCC Rcd. 4851, 4856 (2019). ViSalus filed notice with the district court the next day, alerting the court to the FCC's decision. ViSalus then moved the district court to decertify the class and grant judgment as a matter of law, or, alternatively, to grant a new trial on the ground that the FCC waiver necessarily meant ViSalus had consent for the calls made. ViSalus additionally filed a motion challenging the "astronomical" statutory damages award of $925,220,000 as unconstitutionally excessive.

The district court denied ViSalus's motions. First, the court noted that "for nearly two years now, ViSalus has known that it petitioned the FCC for a retroactive waiver, yet ViSalus decided to forego any argument or development of the record on what the consequences would be if the FCC ultimately granted ViSalus's request." The court pointed to ViSalus's express disclaimer of any consent defense and observed that ViSalus had never asked for a stay pending the FCC's resolution of its petition. The court also observed that the FCC's grant of a retroactive waiver was reasonably foreseeable because it had previously granted nine such waivers to similarly situated companies. Accordingly, the district court refused to consider the FCC waiver, finding that ViSalus's failure to assert a consent defense at trial was unreasonable and that excusing this failure would be prejudicial to Plaintiffs, who were unable to take discovery on the issue.

Second, the district court refused to reduce the statutory damages award. The court noted that no Ninth Circuit precedent existed to guide lower courts in reducing statutory damages awards that are found to be unconstitutionally excessive. The court further reasoned that it was within Congress's discretion to fix damages for a violation of the TCPA at $500, and that due process did not require the court to consider the constitutionality of the statutory damages award in the aggregate. This appeal timely followed.

II

ViSalus raises three issues on appeal: (1) whether Plaintiffs can establish a concrete injury in fact under Article III; (2) whether ViSalus's failure to assert a consent defense at trial is excused because the FCC's retroactive waiver constituted an intervening change in law; and (3) whether the $925,220,000 aggregate damages award violates due process because it is unconstitutionally excessive. We address each issue in turn.

A

ViSalus argues for the first time on appeal that Wakefield and other members of the certified class lack Article III standing to sue. We review this issue de novo, *see Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003), and hold that Plaintiffs have standing to bring this suit.

Article III limits federal judicial power to "Cases" and "Controversies," U.S. Const. art. III, § 2, and the Article III standing doctrine "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To show Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* A plaintiff establishes an injury in fact if the plaintiff suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). An injury qualifies as "concrete" if it is "real" rather than "abstract"—that is, "it must actually exist." *Id.* at 340.

Here, ViSalus contends that Plaintiffs lack standing because Wakefield "failed to meet her burden to prove any class member suffered a concrete injury in fact resulting from ViSalus's alleged violation of the TCPA." But Plaintiffs allege an injury from the receipt of unwanted telephone calls, and we have previously held in *Van Patten v. Vertical Fitness Group* that the receipt of "[u]nsolicited telemarketing phone calls" is "a concrete injury in fact sufficient to confer Article III standing." 847 F.3d at 1043; *see also Chennette, et al. v. Porch.com, Inc., et al.*, No. 20-35962, 50 F.4th 1217,

1225–26 (9th Cir. Oct. 12, 2022).[5] Plaintiffs therefore have standing.

ViSalus begrudgingly acknowledges, as it must, that under *Van Patten* the receipt of telephone calls in alleged violation of the TCPA is a concrete injury for Article III purposes. ViSalus nevertheless insists that *Van Patten* no longer controls in light of the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). We are unpersuaded.

In *TransUnion*, the Supreme Court reaffirmed the preexisting rule that an intangible injury qualifies as "concrete" when that injury bears a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 2204; *see also Spokeo*, 578 U.S. at 340 ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."). *TransUnion* therefore strengthens the principle that an intangible injury is sufficiently "concrete" when (1) Congress created a statutory cause of action for the injury, and (2) the injury has a close historical or common-law analog. 141 S. Ct. at 2204–07. This approach is the very same one we applied in *Van Patten*, when

[5] Many of our sister circuits have reached the same conclusion. *See Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 690–92 (5th Cir. 2021); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461–63 (7th Cir. 2020); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 958–59 (8th Cir. 2019); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93–94 (2d Cir. 2019); *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 653 (4th Cir. 2019); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 350–52 (3d Cir. 2017); *but see Salcedo v. Hanna*, 936 F.3d 1162, 1169–73 (11th Cir. 2019).

we looked to the Restatement of Torts' discussion of privacy torts and the widespread recognition among states of the right to privacy as evidence of a common-law analog to privacy violations. 847 F.3d at 1043. We also considered Congress's judgment that such violations are "legally cognizable injuries" when creating a remedy for unsolicited calls under the TCPA. *Id.* (quoting *Spokeo*, 578 U.S. at 340). Our analysis in *Van Patten* therefore not only survives *TransUnion*—it is strengthened by it.

Applying the test from *TransUnion* and *Van Patten* to the facts of this case, Plaintiffs have suffered a concrete injury in fact. First, Congress has created a statutory cause of action allowing Plaintiffs to sue. *See* 47 U.S.C. § 227(b)(1), (3). Second, Plaintiffs have asserted an injury with a close historical and common-law analog, since the receipt of unsolicited phone calls closely resembles traditional claims for "invasions of privacy, intrusion upon seclusion, and nuisance." *Van Patten*, 847 F.3d at 1043.[6] Because the receipt of

[6] *See also Cranor*, 998 F.3d at 691–92 (discussing common-law public nuisance); *Gadelhak*, 950 F.3d at 462 (drawing a comparison to intrusion upon seclusion); *Golan*, 930 F.3d at 959 (discussing the law of nuisance); *Melito*, 923 F.3d at 93 (agreeing with the comparison in *Van Patten* and *Susinno* to nuisance, intrusion upon seclusion, and privacy invasion torts); *Krakauer*, 925 F.3d at 653 (discussing intrusion upon seclusion as an example of long standing private law protections for "privacy interests in the home"); *Susinno*, 862 F.3d at 351–52 (focusing on intrusion upon seclusion); *cf.* Restatement (Second) of Torts § 652B (Am. L. Inst. 1977) (discussing intrusion upon seclusion).

"unsolicited telemarketing phone calls" is "a concrete injury in fact," *id.*, Plaintiffs have Article III standing to sue.[7]

B

ViSalus argues that the district court erred in refusing to consider the FCC's retroactive waiver when ruling on ViSalus's motions to decertify the class, grant judgment as a matter of law, or grant a new trial. Because ViSalus waived a consent defense and no intervening change in law excuses this waiver, we disagree.

As a preliminary matter, the district court properly concluded that ViSalus had waived a consent defense. "Express consent is . . . an affirmative defense for which the defendant bears the burden of proof," *Van Patten*, 847 F.3d at 1044, and a "defendant's failure to raise an 'affirmative defense' in his answer effects a waiver of that defense." *In re Adbox, Inc.*, 488 F.3d 836, 841 (9th Cir. 2007); *see also* Fed. R. Civ. Pro. 8(c). Here, ViSalus did not raise consent as a defense in its

[7] ViSalus also argues that standing is lacking because Plaintiffs consented to ViSalus's telephone calls, and "there is no harm that traditionally serves as the basis for litigation in American courts that is analogous to receiving a telephone call for which one consented." But determining whether Plaintiffs consented to ViSalus's calls requires an analysis of the merits of Plaintiffs' TCPA claim. *See Van Patten*, 847 F.3d at 1044 ("Express consent is . . . an affirmative defense for which the defendant bears the burden of proof."). Because the "threshold inquiry into standing 'in no way depends on the merits,'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)), this argument fails.

answer. And although ViSalus filed a motion to amend its answer to assert this defense, ViSalus withdrew that motion and did not seek to amend again.

The district court also properly concluded that the FCC's grant of ViSalus's petition did not excuse ViSalus's waiver of its consent defense. When a defendant fails to adequately plead an affirmative defense "an exception to the waiver rule exists for intervening changes in the law." *Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967)). For this exception to apply, however, the defendant must show that the defense, if timely asserted, would have been futile under binding precedent. *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004). This requirement rests on the principle underlying the intervening change in law exception, that a "waiver" requires the "intentional relinquishment or abandonment of a known right," *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), and a defendant cannot be deemed to waive the right to assert a defense if the defendant reasonably did not know the defense was available at the time of the purported waiver. Accordingly, the exception for an intervening change in law only "protect[s] those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007).

Here, ViSalus does not qualify for protection under the intervening change in law exception. Even if the FCC's retroactive waiver of the 2012 Rule did

constitute a change in law, ViSalus always reasonably knew, or should have known, that the FCC was quite likely to grant its petition. As the district court concluded, the nine waivers the FCC previously granted "foreshadowed the FCC's decision to grant ViSalus's petition such that ViSalus was not taken by surprise when its petition was granted." Aware of these prior waivers, ViSalus knew that a consent "defense was fairly available." *Bennett*, 362 F.3d at 7. Yet ViSalus made no effort to assert the defense, develop a record on consent, or seek a stay pending the FCC's decision. In the words of the district court,

> [t]his was not an instance in which a court, or, in this case, an agency, deviated from long-standing precedent in creating new law. Rather, the FCC, consistent with its string of nine prior waivers, granted ViSalus's petition for waiver *just as ViSalus requested.* ViSalus got exactly what it asked for.

Moreover, if ViSalus was truly unsure about whether or when the FCC would grant its Petition, then it should have asked the district court to stay the litigation pending the FCC's ruling. Instead, ViSalus made the strategic litigation decision to proceed to trial and defend on the ground that Plaintiffs had not proven their prima facie case by a preponderance of the evidence. Whether or not ViSalus's choice was wise with the benefit of hindsight, Federal Rules 50 and 59 do not exist to overturn "informed and presumptively strategic decisions on appeal." *See GenCorp*, 477 F.3d

at 374 (discussing the intervening-change-in-law exception in the context of Rule 60(b)(6)).

For these reasons, we hold that the district court did not err in refusing to consider the FCC's retroactive waiver of the 2012 Rule when ruling on ViSalus's motions.

C

ViSalus last argues that the Due Process Clause of the Fifth Amendment requires a reduction of the $925,220,000 statutory damages award. Whether a damages award violates due process is a question of law that we review de novo. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001).

ViSalus does not challenge the TCPA's statutory framework as to the $500 amount for a single violation; several courts have held that the TCPA's $500 civil remedy in isolation does not violate due process on a per violation basis.[8] Instead, ViSalus argues that even if the TCPA's statutory penalty of $500 per violation is constitutional, an aggregate award of $925,220,000 in this class action case is so "severe and oppressive" that it violates ViSalus's due process rights.

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[8] *See*, *e.g.*, *Centerline Equip. Corp. v. Banner Pers. Serv.*, 545 F. Supp. 2d 768, 777–78 (N.D. Ill. 2008); *Acct. Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.*, 329 F. Supp. 2d 789, 808–10 (M.D. La. 2004); *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090–91 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1165–67 (S.D. Ind. 1997).

Juries and legislatures enjoy broad discretion in awarding damages. The due process clauses of the Constitution, however, set outer limits on the magnitude of damages awards. In recent years, numerous cases have outlined criteria for evaluating when punitive damages awarded by a jury exceed constitutional limitations. *See*, *e.g.*, *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443 (1993); *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). How the Constitution limits the award of statutory damages is less developed.

Such constitutional due process concerns are heightened where, as here, statutory damages are awarded as a matter of strict liability when plaintiffs are unable to quantify any actual damages they have suffered from receiving the robocalls. *See Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *see also Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011) ("[The] TCPA is essentially a strict liability statute."). Under this strict liability standard, a court must evaluate an award of statutory damages "with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence" to the statute. *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

Over a century ago, the Supreme Court declared that damages awarded pursuant to a statute violate due process only if the award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 67. The

Supreme Court first announced the principle that statutory damages may exceed constitutional limitations in certain extraordinary circumstances in a case prior to *Williams, Waters-Pierce Oil Co. v. State of Texas.* 212 U.S. 86 (1909). *Waters-Pierce* observed "[t]he fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." *Id.*

Williams, reviewing the award of damages under an Arkansas statute prescribing penalties for railroads and other common carriers for charging more than the lawfully provided rate, extended the logic of *Waters-Pierce* beyond excessive civil fines to general statutory damages. *Williams*, 251 U.S. at 66. *Williams* also directed that the constitutional inquiry focus on extreme cases, the proportionality of the award to the "offense" in light of the statute's goals, and the overall reasonableness of the award. *Id.* at 66–67. And *Williams* stressed that a constitutional limit would be found only in the rare cases in which the award was "severe and oppressive," emphasizing the "wide latitude" possessed by legislatures in setting statutory penalties and the important government powers inherent in doing so. *Id.* at 66–67. *Williams* ultimately upheld the damages award at issue, holding the award not "wholly" disproportionate or "obviously" unreasonable in light of the statute's important purpose of "securing uniform adherence to established passenger rates" as

well as the "numberless opportunities for committing the offense." *Id.* at 67.

We have recognized the application of *Williams* to statutory awards on a per-violation basis, holding "[a] statutorily prescribed penalty violates due process rights 'only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *Williams*, 251 U.S. at 66–67). In *Citrin*, we applied the *Williams* test to a statutory award of $113,479.11 for a single violation. *Id.* at 1051. We reasoned that in the context of the statute at issue, which specified damages for noncompliance with the terms of a federal scholarship program placing early-career medical professionals in underserved areas, the award was "not so unreasonable that [it] violate[s] due process" given "the resources necessary to find a [replacement] doctor to practice" in those locations. *Id.*

Since *Citrin*, courts in this and other circuits have grappled with the constitutionality of statutory damages awards challenged in the aggregate where the award is unusually high because of either the large number of violations at issue in a single dispute or, most relevant to this case, the aggregation of damages in class action litigation. *See*, *e.g.*, *Golan*, 930 F.3d at 962–63; *Parker*, 331 F.3d at 22; *Montera v. Premier Nutrition Corp.*, 2022 WL 3348573, at *4–5.[9] In *Bateman*

[9] At least one California district court has discussed application of the *Williams* test to an aggregated damages award in the

v. American Multi-Cinema, Inc., 623 F.3d 708, 723 (9th Cir. 2010), we reserved the question whether an aggregated statutory damages award could violate due process. We now hold that, pursuant to *Williams*, aggregated statutory damages awards are, in certain extreme circumstances, subject to constitutional due process limitations.

Several considerations support the application of the *Williams* constitutional due process test to aggregated statutory damages awards even where the prescribed per-violation award is constitutionally sound. First, although *Williams* did not address an aggregated damages award, the logic of the case does not turn on the amount of the per-violation penalty. 251 U.S. at 66–67. Rather, *Williams* suggests a general reasonableness and proportionality limit on damages awarded pursuant to statutes, taking into account statutory goals. *Williams* imposes a constitutional limit on damages that are "so severe and oppressive" as to no longer bear any reasonable or proportioned relationship to the "offense." *Id.* at 67. *Williams* did not consider an "offense" narrowly; rather, the Court evaluated the importance of the proscribed conduct (overcharging fares) and the likelihood of violations, which the Court found to be high, noting the "numberless opportunities for committing the offense." *Id.* Thus, evaluation of an award's relationship to the "offense" requires consideration of the statute's public importance and deterrence goals. An aggregated award could, like

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TCPA context. *See Perez v. Rash Curtis & Assocs.*, No. 4:16-CV-03396-YGR, 2020 WL 1904533, at *9 (N.D. Cal. Apr. 17, 2020).

a per-violation award, be wholly disproportioned to the prohibited conduct (and its public importance) and greatly exceed any reasonable deterrence value. Thus, where aggregation has resulted in extraordinarily large awards wholly disproportionate to the goals of the statute, *Williams* implies a constitutional limit may require reduction.

Second, the goals of a statute in imposing a per-violation award may become unduly punitive when aggregated. And statutory penalties, unlike jury awards, are not generally disaggregated by purpose. Indeed, most statutes combine deterrence, compensatory, and punitive goals into a single lump sum per violation: "Although statutory damages amounts might be calculated in part to compensate for actual losses that are difficult to quantify, they are often also motivated in part by a pseudo-punitive intention to 'address and deter overall public harm.'" *Parker*, 331 F.3d at 26 (Newman, J., concurring) (quoting *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000)).

Compensation and deterrence aims can be overshadowed when damages are aggregated, leading to damages awards that are largely punitive and untethered to the statute's purpose. In *Parker*, the Second Circuit observed that aggregated class action damages and per-violation statutory penalties were both intended, in part, to create incentives for litigation. Coupled, they have the capacity to "expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages." *Id.* at 22; *see also Montera*, 2022

WL 3348573, at *1 ("The statutory damages in this case veer away from serving a compensatory purpose and towards a punitive purpose").

We have similarly observed that deterrence and compensation rationales lose force in certain large, aggregated awards. In *Six (6) Mexican Workers v. Arizona Citrus Growers*, for example, we reviewed an aggregated damages award in a class action lawsuit for violations of the Farm Labor Contractor Registration Act ("FLCRA") and found that the individual awards exceeded both "what was necessary to compensate any potential injury from the violations" and the awards, in the aggregate, exceeded "that necessary to enforce the Act or deter future violations." 904 F.2d 1301, 1309 (9th Cir. 1990). In short, aggregation can, in extreme circumstances, result in awards that may greatly outmatch any statutory compensation and deterrence goals, resulting in awards that are largely punitive.

Where a statute's compensation and deterrence goals are so greatly overshadowed by punitive elements, constitutional due process limitations are more likely to apply. Although we decline to apply the Supreme Court's tests developed in the line of cases including *BMW of North America*, 517 U.S. 559, and *State Farm*, 538 U.S. 408, outside the context of a jury's award of punitive damages, by analogy these cases teach that where statutory damages no longer serve purely compensatory or deterrence goals, consideration of an award's reasonableness and proportionality to the violation and injury takes on heightened constitutional importance. *See TXO Prod. Corp.*, 509 U.S. at

458 (noting that "reasonableness" is the focus of a due process inquiry regarding punitive damages); *BMW of North America*, 517 U.S. at 580–81 (discussing the "ratio" between a punitive damages award and the "actual harm inflicted on the plaintiff" as measured through compensatory damages—one of three factors important to a due process evaluation of a punitive damages award issued by a jury).

We thus conclude that the aggregated statutory damages here, even where the per-violation penalty is constitutional, are subject to constitutional limitation in extreme situations—that is, when they are "wholly disproportioned" and "obviously unreasonable" in relation to the goals of the statute and the conduct the statute prohibits. *Williams*, 251 U.S. at 67. As with punitive damages awarded by juries and per-violation statutory damages awards, a district court must consider the magnitude of the aggregated award in relation to the statute's goals of compensation, deterrence, and punishment and to the proscribed conduct.

Six Mexican Workers provides further guidance for determining whether a particular statutory damages award is disproportionately punitive in the aggregate. 904 F.2d at 1309. In that case, we adopted the factors the Fifth Circuit identified in *Beliz v. W.H. McLeod & Sons Packing Co.* to evaluate liquidated damages awards:

> 1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's

> culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case.

Id. at 1309 (quoting *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985)).

As the district court noted, *Six Mexican Workers* addressed a somewhat different issue than the one we face here: the case dealt with the reduction of damages per violation to an amount *within* a statutorily defined range. *Id.* at 1309–11. The FLCRA—the statute at issue in *Six Mexican Workers*—did not contemplate punitive penalties in the calculation of liquidated damages. *Id.* at 1309 (citing *Alvarez v. Longboy*, 697 F.2d 1333, 1340 (9th Cir. 1983)). But many statutes, like the one at issue here, set a statutory floor for damages, as opposed to a range, and in doing so, reflect punitive as well as compensatory and deterrence goals. This distinction does not undermine the relevance of the *Six Mexican Workers* factors to the constitutional due process test. *Six Mexican Workers* points courts to factors to help assess proportionality and reasonableness and so can guide trial courts in determining when an award is *extremely* disproportionate to the offense and "obviously" unreasonable. *Williams*, 251 U.S. at 67.

We stress that only very rarely will an aggregated statutory damages award meet the exacting *Williams* standard and exceed constitutional limitations where the per-violation amount does not. Legislatures are empowered to prescribe purely punitive penalties for

violations of statutes. In *Williams*, the Supreme Court made clear that the statutory damages at issue were "essentially penal, because [they are] primarily intended to punish the carrier for taking more than the prescribed rate" and yet the statute was "not contrary to due process of law" because "the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government." 251 U.S. at 66 (quoting *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885)). The Supreme Court, consistent with this reasoning, has long upheld statutory provisions imposing double or triple damages. *See*, *e.g.*, *Overnight Motor Trans. Co. v. Missel*, 316 U.S. 572, 584 (1942). Thus, just because an aggregate award becomes predominantly punitive does not render it constitutionally unsound.

Constitutional limits on aggregate statutory damages awards therefore must be reserved for circumstances in which a largely punitive per-violation amount results in an aggregate that is gravely disproportionate to and unreasonably related to the legal violation committed. Were that not so, applying the *Williams* test to reduce aggregated statutory awards would overstep the role of the judiciary and usurp the power of the legislature. Legislatures, in designing statutes, decide whether to set a floor or a ceiling for damages and often do so expressly in their text.[10] We

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[10] *Compare* The Fair Debt Collection Practices Act, 15 U.S.C. § 1692k (a)(2)(A-B), setting a ceiling for damages of $1,000 per individual and "$500,000 or 1 per centum of the net worth of the debt collector" if aggregated in a class action, *with* the TCPA, 47

are constrained by a statute's language and interpret statutes with awareness that Congress could have enacted limits as to damages, including in large class action litigation, provided discretion to courts to award damages within a given range, or limited liability in any number of ways.

In *Bateman*, for example, we noted that "the [Fair and Accurate Credit Transactions Act ("FACTA")] does not place a cap on . . . damages in the case of class actions, does not indicate any threshold at which courts are free to award less than the minimum statutory damages, and does not limit the number of individuals that can be certified in a class or the number of individual actions that can be brought against a single merchant." 623 F.3d at 718. "In the absence of such affirmative steps to limit liability," we held, "we must assume that Congress intended FACTA's remedial scheme to operate as it was written." *Id.* at 722–23. As a result, we concluded that to refuse to follow the statute's text, in that instance by limiting class action availability to avoid "'enormous' potential liability," would "subvert congressional intent." *Id.* at 723. Because the appropriate penalty for statutory violations is a legislative decision best left to Congress, courts should disregard the plain statutory language directing damages and allowing class action and other

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U.S.C. § 227(b)(3)(B), enacting a floor of $500 per specified violation and not specifying a cap as to aggregated damages; *see also Alvarez*, 697 F.2d at 1339–40 (interpreting the FLCRA, 7 U.S.C. § 2050(a) to impose a $500 ceiling on damages per plaintiff per violation).

aggregation only in the most egregious of circumstances.[11]

In the context of the TCPA, Congress permitted recipients of unsolicited telemarketing calls to "recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). Congress thus set a floor of statutory damages at $500 for each violation of the TCPA but no ceiling for cumulative damages, in a class action or otherwise. Yet, in the mass communications class action context, vast cumulative damages can be easily incurred, because modern technology permits hundreds of thousands of automated calls and triggers minimum statutory damages with the push of a button.

The district court here did not reduce the $925,220,000 statutory damages award in part because there was little Ninth Circuit authority directing a district court on how it should analyze damages that may be unconstitutionally excessive and appropriately reduce them. But *Six Mexican Workers* does provide some guidance, and we have endeavored in this opinion to provide more. Because the court did not apply the *Williams* test or *Six Mexican Workers* factors to determine the constitutionality of the damages award in this case, we remand so the court may assess in the

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[11] Again, *Bateman* left open the question whether aggregated statutory damages could be subject to constitutional due process limitations. 623 F.3d at 723.

first instance, guided by these factors and this opinion, whether the aggregate award of $925,220,000 in this class action case is so severe and oppressive that it violates ViSalus's due process rights and, if so, by how much the cumulative award should be reduced.

IV

We **AFFIRM** the district court's denial of ViSalus's motions to decertify the class, grant judgment as a matter of law, or grant a new trial, and **VACATE and REMAND** the district court's denial of ViSalus's post-trial motion challenging the constitutionality of the statutory damages award to permit reassessment of that question guided by the applicable factors. Each party shall bear its own costs. **AFFIRMED in part; VACATED in part; and REMANDED with instructions.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LORI WAKEFIELD, individually and on behalf of a class of others similarly situated,

Plaintiff,

v.

VISALUS, INC.,

Defendant.

Case No. 3:15-cv-1857-SI

ORDER

(Filed Feb. 16, 2021)

Michael H. Simon, District Judge.

After a three-day trial, the jury returned a verdict for Plaintiff Lori Wakefield, individually and on behalf of a certified class of others similarly situated, against Defendant ViSalus, Inc. The jury found that ViSalus had made 1,850,440 telemarketing calls using an artificial or prerecorded voice to mobile or residential telephones belonging to Wakefield or other class members in violation of the Telephone Consumer Protection Act (TCPA).

On September 24, 2020, Defendant ViSalus, Inc. filed its Renewed Motion for Judgment as a Matter of Law and for a New Trial. ECF 395. Wakefield opposes the motion. ECF 408. For the reasons below, the Court denies ViSalus's motion.

STANDARDS

A. Judgment as a Matter of Law

Under Rule 50(b) of the Federal Rules of Civil Procedure, judgment as a matter of law is proper if "the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (quotation marks omitted); *see also Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (explaining that a motion for judgment as a matter of law must be granted if "the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party"). Because a motion under Rule 50(b) is a renewed motion, "a party cannot properly 'raise arguments in its post-trial motion for judgment as a matter of law that it did not first raise in its Rule 50(a) pre-verdict motion.'" *Go Daddy*, 581 F.3d at 961 (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)).

A court reviews properly raised arguments challenging the factual sufficiency of a jury's verdict for substantial evidence. That means that "the jury's verdict must be upheld if there is 'evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion.'" *Id.* at 963 (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)); *see also Weaving*, 763 F.3d at 1111 (noting that substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion[,] even if it is possible to draw two inconsistent

conclusions from the evidence" (quotation marks omitted)).

In evaluating a motion for judgment as a matter of law, the Court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Experience Hendrix, L.L.C., v. Hendrixlicensing.com, Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014). Further, the Court may not make credibility determinations, weigh the evidence, or "substitute its view of the evidence for that of the jury." *Krechman v. City of Riverside*, 723 F.3d 1104, 1110 (9th Cir. 2013) (quotation marks and citation omitted).

B. Motion for a New Trial

Under Rule 59(a) of the Federal Rules of Civil Procedure, a district court may "on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "Rule 59 does not specify the grounds on which a motion for new trial may be granted." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). "Rather, the court is 'bound by those grounds that have been historically recognized.'" *Id.* (quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003)). "Historically recognized grounds include, but are not limited to, claims 'that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the

trial was not fair to the party moving.'" *Id.* (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)); *see also Shimko v. Guenther*, 505 F.3d 987, 993 (9th Cir. 2007).

A "trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski*, 481 F.3d at 729 (quoting *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)). In determining the clear weight of the evidence, "the district court has 'the duty . . . to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence.'" *Id.* (alterations in original) (quoting *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)).

DISCUSSION

ViSalus makes several arguments in support of its renewed motion for judgment as a matter of law. The Court has already rejected each and does so again.

ViSalus argues that Wakefield is not a typical class member because she never received any calls on a cell phone and because the landline on which Wakefield did receive ViSalus calls was only found to be a residential line after fact-finding specific to her and not available for other class members. ViSalus also argues that Plaintiff is not an adequate class representative

because she was not a successful ViSalus promoter but a disgruntled, failed promoter whose interests were adverse to the interests of absent class members who feel favorably about ViSalus or whose livelihood depends on ViSalus' continued operation.

The Court has previously rejected both arguments. The Court explained that representative claims are typical of the class so long as the claims are "reasonably co-extensive with those of absent class members." ECF 344 at 20 (quoting *Marlo*, 707 F.3d at 1042). Because Wakefield, like many class members, received an automated or prerecorded telemarketing message from ViSalus to which she did not give prior express written consent, Wakefield's claim is typical of those of absent class members. Meanwhile, ViSalus's argument that Wakefield is an inadequate representative lacks merit. ViSalus presented no evidence that absent class members feel more favorable to ViSalus. Given that ViSalus made most of the calls at issue as part of a campaign targeted at customers or promoters who had not placed an order within the prior 90 days, it is unlikely that the absent class members depended on ViSalus's continued operation.

ViSalus also argues that it is entitled to judgment as a matter of law or a new trial because Wakefield did not prove the following by a preponderance of the evidence: (1) each call was made to a mobile or residential line and what number of calls was made to each; (2) that calls made to residential lines were made to residential lines primarily used for non-business purposes; (3) that a prerecorded message or artificial voice

played on each call; (4) that each call constituted telemarketing; and (5) that class members did not consent or expect to receive telemarketing calls from ViSalus. ViSalus also argues that individual issues predominated over issues common to the class on each of the five above grounds. The Court addresses each in turn.

At the outset, the Court previously rejected each of ViSalus's arguments about class certification because those arguments "implicitly challenge whether a TCPA cases can ever be properly certified as a class." ECF 344 at 12. As the Court explained, any argument that implies a court can never properly certify a class in TCPA cases is unavailing because "many courts have concluded that there are many common questions of law and fact *inherent* in TCPA cases." *Id.* (citing *Fisher v. MJ Christensen Jewelers*, 2018 WL 1175215, at *4 (D. Nev. Mar. 6, 2018)).

The Court has also rejected each of ViSalus's specific arguments. ViSalus first argues that Wakefield did not prove by a preponderance of the evidence that each call was made to a mobile telephone or residential telephone line and that individual issues associated with determining whether a particular class member was called on a residential or a cellular telephone prevent class certification. The jury returned a special verdict, finding that Wakefield proved by a preponderance of the evidence that ViSalus made 1,850,436 telemarketing calls to a mobile telephone or residential telephone line of a class member other than Wakefield. Substantial evidence supports the jury's verdict. The jury saw the forms filled out by all individual members

who signed up to be promoters or customers of ViSalus—forms that asked for either a home telephone number or a mobile telephone number. The jury also received evidence about ViSalus's Progressive Outreach Manager (POM) system that ViSalus's outbound marketing department used to automatically make telephone calls. This evidence included spreadsheets documenting the results of each calling campaign as recorded by the POM system's disposition codes. From this evidence, the jury could have inferred from that the automated calls were to mobile telephones or residential telephone lines.

Nor do individual issues associated with determining whether a particular class member was called on a residential or a cellular telephone prevent class certification. Again, the jury found that all class members were called either on a residential landline or telephone. Under the TCPA, liability attaches to any call *either* to a residential landline *or* to a cellular telephone. *See* 47 U.S.C. § 227(b)(1). Statutory damages are the same for calls made to residential landlines and cellular telephones. *Id.* § 227(b)(3). ViSalus would be equally liable for calls made to either kind of telephone.

Next, ViSalus argues that Wakefield did not prove that calls made to residential lines were made to residential lines primarily used for non-business purposes and that individual issues predominated over issues common to the class in determining whether calls made to residential lines were made to residential lines primarily used for non-business purposes. Substantial

evidence supports the jury's verdict. The jury heard from a witness for Wakefield who testified that he removed from ViSalus's spreadsheet about 6,000 lines of data that he believed were linked to business and not residential telephones lines. ECF 316-1 at 45. From this information, the jury could have inferred that the remaining about 1.8 million phone calls were made to either cellular telephones or residential landlines that were not used primarily for business purposes.

ViSalus also argues that Wakefield did not prove that a prerecorded message or artificial voice played on each call and that individual issues in determining whether a prerecorded or artificial voice message played predominated issues common to the class. Again, substantial evidence supports the jury's verdict. The jury saw spreadsheets documenting the result of each of ViSalus's calls as recorded by the POM system's deposition codes. The jury had access to a manual explaining the meaning of each disposition code. The jury could have—indeed, appears to have—counted the disposition codes documenting that a message actually played and used that number to estimate the number of calls. Although whether the message actually played is a question that must be decided on an individualized basis, the spreadsheets documenting the outcome of each call provided an easily manageable answer to this question.

ViSalus further argues that Wakefield did not prove that each call constituted telemarketing and that individual issues in determining whether each call constituted telemarketing. Substantial evidence

supports the jury's verdict. The Court instructed the jury on what constituted telemarketing calls. ViSalus does not challenge those instructions The jury listened to many calls ViSalus made and concluded that those calls met the definition of telemarketing. The jury could infer that those messages were representative of all the messages used in the marketing campaign. ViSalus did not attempt to refute that inference by playing other messages for the jury or identifying calls on the spreadsheets it believed did not meet the TCPA's definition of telemarketing. ViSalus offered no evidence at trial to suggest that some of the calling campaigns at issue were not marketing campaigns such that individual issues of whether class members received marketing calls predominate.

Finally, ViSalus argues that Wakefield did not prove that class members did not consent or expect to receive telemarketing calls from ViSalus and that individual issues of whether class members consented or expected to receive telemarketing calls from ViSalus predominate. ViSalus relies heavily on an order from the Federal Communications Commission (FCC) granting ViSalus a retroactive waiver from complying with the 2012 express written consent requirements for calls where ViSalus "had obtained some form of written consent." ECF 321-1 at 2. The Court previously ruled that ViSalus waived reliance on the affirmative defense that it obtained prior written consent from class members because, despite knowing that it had sought an FCC waiver, "ViSalus did not plead as an affirmative defense that it obtained written consent for

the calls in a manner consistent with the FCC waiver that it sought." ECF 344 at 8. To the extent that ViSalus argues that substantial evidence does not support the jury's verdict or individual issues about whether class members consented to ViSalus's call predominate issues common to the class because some of the class members may have wanted to receive telemarketing calls from ViSalus, the Court has previously explained that the argument lacks merit because "[t]he harm that the TCPA protects against is the harm of being called without first giving prior express written consent," not receiving undesired calls. ECF 344 at 16-17.

Finally, the Court has weighed the evidence and, for the reasons provided above, does not find that it is against the clear weight of the evidence to find that ViSalus made 1,850,440 prerecorded or automated telemarketing calls to a mobile telephone or residential telephone line of a customer without that customer's prior written consent.

CONCLUSION

The Court DENIES ViSalus's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial (ECF 395).

IT IS SO ORDERED.

DATED this 16th day of February, 2021.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LORI WAKEFIELD, individually and on behalf of a class of others similarly situated, Plaintiff, v. **VISALUS, INC.**, Defendant.	Case No. 3:15-cv-1857-SI **JUDGMENT** (Filed Aug. 27, 2020)

Michael H. Simon, District Judge.

Based on the Special Verdict of the jury (ECF 282), the Court hereby enters Judgment in favor of the Certified Class, defined as follows:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such call at the time such call was made.

ECF 81; ECF 69 at 2. The following people are excluded from the Certified Class: (1) any United States Judge or Magistrate Judge presiding over this action and members of their families; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entity in which the Defendant or its parents have a

controlling interest and its current or former employees, officers, and directors; (3) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (4) persons who properly executed and filed a timely request for exclusion from the Certified Class; (5) Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

The dissemination of Class Notice (ECF 106): (a) constituted the best practicable notice to Class Members; (b) constituted notice that was reasonably calculated to apprise Class Members of the pendency of the Action, their right to exclude themselves, and the binding effect of the Judgment; and (c) met all applicable requirements of law, including the Federal Rules of Civil Procedure, the United States Constitution, and the Rules of this Court.

Consistent with Special Verdict of the Jury (ECF 282), (a) the Certified Class shall recover from Defendant ViSalus, Inc. ("ViSalus") $500 per call made in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, for an aggregate amount not to exceed $925,218,000; and (b) Plaintiff Lori Wakefield, for her individual claim, shall recover from ViSalus the amount of $2,000. Pursuant to 28 U.S.C. § 1961(a), Plaintiff and the Certified Class shall recover from ViSalus post judgment simple interest payable at the statutory rate of 0.13 percent per year commencing as of the date of this Judgment. Any motion for attorneys' fees, expenses, costs, or incentive awards shall be filed not later than 14 days after entry of this Judgment. Notice

of the motion shall be directed to Class Members pursuant to Fed. R. Civ. P. 23(h)(1), and any Class Member may object to the motion pursuant to Fed. R. Civ. P. 23(h)(2). Plaintiff shall file a motion for a proposed notice plan in accordance with Fed. R. Civ. P. 23(h)(2) within 28 days of the entry of this Judgment.

IT IS SO ORDERED.

DATED this 27th day of August, 2020.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LORI WAKEFIELD, individually and on behalf of a class of others similarly situated,

Plaintiff,

v.

VISALUS, INC.,

Defendant.

Case No. 3:15-cv-1857-SI

OPINION AND ORDER

(Filed Aug. 14, 2020)

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Michael H. Simon, District Judge.

Lori Wakefield ("Wakefield"), on behalf of herself and a certified class of similarly situated individuals (collectively, "Plaintiffs"), sued ViSalus, Inc. ("ViSalus"), alleging that ViSalus violated the Telephone Consumer Protection Act ("TCPA"). After a three-day trial, the jury returned a verdict finding that Defendant placed four prerecorded calls to Ms. Wakefield that violated the TCPA and 1,850,436 prerecorded calls to other class members that similarly violated the TCPA. Because the minimum amount of statutory damages for each violation of the TCPA is $500, the total amount of statutory damages against ViSalus is $925,220,000 (1,850,440 times $500). ViSalus challenges this award as unconstitutionally excessive. This case presents the issue of whether due process limits the aggregate statutory damages that can be awarded in a class action lawsuit under the TCPA. The Ninth Circuit has not yet answered this question.

BACKGROUND

ViSalus is a multi-level marketing company that sells weight-loss products and other nutritional dietary supplements. Individual members enroll with ViSalus to be "promoters," and promoters purchase products from ViSalus for resale to end users or other customers of the promoters. In late 2012, Wakefield enrolled as a promoter with ViSalus but did not sell any ViSalus products. After two months, she decided to cancel her ViSalus "membership" or enrollment.

Although Wakefield cancelled her account in early 2013, she received telephone solicitation calls from ViSalus in April 2015. Wakefield sued ViSalus, alleging that she and others received telephone calls promoting ViSalus products or services using an artificial or prerecorded voice without their consent, in violation of the TCPA. In June 2017, U.S. District Judge Anna Brown, who initially presided over this lawsuit, granted certification of a class consisting of:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such call at the time such call was made.

ECF 81 at 6.

The case proceeded to a three-day jury trial. The jury received evidence about ViSalus's Progressive Outreach Manager ("POM") system that ViSalus's outbound marketing department used to make telephone calls automatically. The jury saw the forms filled out by individual members who enrolled to be promoters of ViSalus, forms that asked for either a home telephone number or a cellular telephone number and contained no provision for a person to consent to receive automated or prerecorded telephone marketing calls. The jury heard testimony from Wakefield, including how she had enrolled to be a promoter with ViSalus and then cancelled her membership within a few

months but continued to receive unwanted automated telephone calls and voicemails promoting ViSalus's products. The jury also heard from Wakefield that she operates an informal daycare business out of her home, watching the children of a few of her husband's coworkers, but she does not use her home telephone to conduct any business related to her daycare work. ViSalus did not present any evidence or witnesses at trial.

The jury returned a special verdict, finding that: (1) Wakefield had proven that ViSalus made or initiated four telemarketing calls using an artificial or prerecorded voice and that those calls were made to a residential landline telephone belonging or registered to Wakefield, in violation of the TCPA; and (2) Wakefield, as class representative, also had proven that ViSalus made or initiated 1,850,436 telemarketing calls using an artificial or prerecorded voice to either a cellular telephone or a residential landline, belonging or registered to one or more class members, other than Ms. Wakefield, in violation of the TCPA. ECF 282. The jury also concluded that it could not tell from the evidence presented exactly how many of the 1,850,436 violative calls were specifically made to cellular phones and how many were made to residential landlines. ECF 282. In other words, the jury found that a total of 1,850,436 violative calls were made to either cellular phones or residential landlines but could not be more precise about how many calls were made to each. Because the TCPA's minimum statutory penalty is $500 per violation, ViSalus faces $925,220,000 in damages.

STANDARDS

An award of statutory damages may violate the Due Process Clause of the Fifth Amendment if it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *see also United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992). A court must evaluate an award of statutory damages "with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence" to the statute. *Williams*, 251 U.S. at 66-67. A court should be careful, however, not to usurp the legislature's role. Statutory fines "and the mode in which they shall be enforced, . . . and what disposition shall be made of the amounts collected, are merely matters of legislative discretion." *Id.* at 66 (simplified).

DISCUSSION

A. The Ninth Circuit Has Not Yet Decided Whether Due Process Limits Aggregate Statutory Damages in a Class Action, Including Under the TCPA

Consumers subjected to TCPA violations may bring against an alleged violator "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." 47 U.S.C. § 227(b)(3)(B). The TCPA, thus, sets a floor, or minimum, of statutory damages at $500 for each violation. *See Perez v. Rash Curtis &*

Assocs., 2020 WL 1904533, at *7 (N.D. Cal. Apr. 17, 2020) (rejecting argument that TCPA authorizes damages less than $500 per violation).[1] That statutory penalty is constitutional. *See Pasco v. Protus IP Sols., Inc.*, 826 F. Supp. 2d 825, 834 (D. Md. 2011) ("numerous courts have found the damages provisions of the TCPA to be constitutional"); *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (finding that minimum statutory penalty of $500 for each TCPA violation does not violate the due process).[2] Instead of challenging the statutory framework or an individual award, ViSalus argues that an aggregate award of $925,220,000 violates due process because it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67.

ViSalus argues by analogy to due process limits that the Supreme Court has placed on punitive damages. In that context, the Supreme Court has stated the factors that might limit, on due process grounds,

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[1] In *Perez*, a jury found in favor of Perez and a class, concluding that the defendant violated the TCPA 534,698 times. At $500 per violation, the district court entered judgment against the defendant in the aggregate amount of $267,349,000. The district court also rejected the defendant's argument that this award is unconstitutionally excessive. *Perez.*, 2020 WL 1904533, at *10-11. The defendant appealed, and this issue, among others, is now before the Ninth Circuit. *See Perez v. Rash Curtis & Assocs.*, Case No. 20-15946 (9th Cir.).

[2] ViSalus's argument to the contrary, relying upon *Six (6) Mexican Workers v. Arizona Citrus* Growers, 904 F.2d 1301, 1310 (9th Cir. 1990), is unpersuasive. In that case, the court reduced damages per violation to an amount within the statutory range.

an award of punitive damages. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (holding that a court must consider "the degree of reprehensibility of the defendant's conduct," the "ratio to the actual harm," and the disparity between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct."). Both the First Circuit and the Eight Circuit, however, have rejected this analogy and rejected extending these factors to aggregate awards of *statutory* damages. *See Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67, 70–71 (1st Cir. 2013) (applying *Williams* to affirm jury award of $675,000 for 30 violations of the Copyright Act and disregarding the *Gore* factors because "the Supreme Court held in *Williams* that statutory damages are not to be measured this way"); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012) (ordering reinstatement of jury's award of $222,000 in statutory damages for 24 violations of the Copyright Act). The Eighth Circuit in *Capitol Records*, however, noted that "[t]he absolute amount of the award, not just the amount per violation, is relevant to whether the award is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *Capitol Records*, 692 F.3d at 910 (*quoting Williams*, 251 U.S. at 67).

The Eighth Circuit continued this analysis in *Golan v. FreeEats.com, Inc*, 930 F.3d 950 (8th Cir. 2019). In that case, also involving a class action, the Eighth Circuit affirmed the reduction of $1.6 billion in TCPA statutory damages (3.2 million violations times $500

per call) to $32 million ($10 per call). *See id.* at 962. Further, the court in *Golan* held that its decision in *Capitol Records* permitted it to consider under a due process analysis the effect of the aggregate amount of damages instead of merely the amount per violation. *See id.* at 963. Citing *Williams*, the Eighth Circuit determined that $1.6 billion would be a "shockingly large amount" and thus violate due process. *Id.*

The Ninth Circuit has not yet addressed the question presented in *Golan* of whether the due process limits aggregate statutory damages in a class action. The closest analog appears to be *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010). In that case, the Ninth Circuit held that Rule 23(b) and the Fair and Accurate Credit Transactions Act ("FACTA") did *not* permit consideration of aggregate damages when deciding whether to certify a class. *Id.* The court in *Bateman* noted that FACTA "does not place a cap on these damages in the case of class actions, . . . and does not limit the number of individuals that can be certified in a class or the number of individual actions that can be brought against a single merchant." *Id.* at 718. The Ninth Circuit in *Bateman*, however, expressly reserved judgment on the question of "whether the district court may be entitled to reduce the award if it is unconstitutionally excessive," if the plaintiff won at trial. *Id.* at 723; *see also Parker v. Time Warner Entertainment* Co., L.P., 331 F.3d 13, 26 (2d Cir. 2003) (noting that aggregation of statutory damages in a class action suit might implicate due process "not to prevent [class] certification, but to . . . reduce the

aggregate damage award"); *j2 Global Comm., Inc. v. Protus IPSol*, 2008 WL 11335051, at*9 (C.D. Cal. Jan. 14, 2008). ("The Court finds that the question of excessive [TCPA] damages will be ripe for adjudication after issuance of a verdict . . . A due process challenge to excessive damages may be raised posttrial." (internal citations omitted)).

The Ninth Circuit did not reach this issue in *Bateman*, explaining that it "did not know the amount of damages [the plaintiff would] seek nor how many individuals [would] ultimately claim the benefit of any damages awarded should plaintiffs prevail." *Id.* Here, however, Wakefield prevailed at trial. She seeks $925,225,000 in damages for herself and the class based on 1,850,440 separate violations of the TCPA. Thus, it is no longer "unduly speculative" to evaluate the due process implications of ViSalus's massive liability. *Id.*

B. Due Process Does Not Require Reducing Aggregate Statutory Damages

In *Golan*, the Eighth Circuit drew a straight line from *Williams* to *Capitol Records* to *Golan*. *See Golan*, 930 F.3d at 961–962 (characterizing *Capitol Records* as affirming the *Williams* standard and *Golan* as indistinguishable from *Capitol Records*). In *Williams*, however, the Supreme Court held only that due process limits statutory damages "where the penalty prescribed [by the statute] is so severe and oppressive as to be wholly disproportioned to the offense and obviously

unreasonable." *Williams*, 251 U.S. at 66–67. The statute at issue in *Williams* was an Arkansas state law regulating intrastate transit rates. *See id.* at 64. The law prescribed a penalty of "not less than fifty dollars nor more than three hundred dollars" for each violation. *Id.* The Supreme Court analyzed the penalty for a *single* statutory violation and held that it comported with due process. This focus implies that the Supreme Court construed "penalty" to mean the fine for a single statutory violation, not for the aggregate amount of damages. The statute at issue in *Golan* and *Capitol Records* was the TCPA. That law prescribes a statutory penalty of at least "$500 in damages for each violation." 47 U.S.C. § 227(b)(3)(B). As discussed above, many courts have held that this penalty is constitutional.

Capitol Records then analyzed the constitutionality of an award of aggregate damages. The court stated in *dicta* that "the absolute amount of the award, not just the amount per violation, is relevant to whether the award is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Capitol Records*, 692 F.3d at 910 (simplified). But the court in *Capitol Records* gave no explanation for this conclusion. Nor did the court reconcile that conclusion with the penalty-level analysis employed by *Williams* and by the several cases considering this issue under the TCPA. *See id.*

The Court in *Golan* appears to have believed that its conclusion was mandated by *Capitol Records*. *See Golan*, 930 F.3d at 963 (stating that the argument

against consideration of the aggregate award is "plainly foreclosed by our precedents"). But the only precedent cited for that proposition was *Capital Records* and *Warner Brothers Entertainment v. X One X Productions*—another case that cited only *Capitol Records* itself. *See* 840 F.3d 971, 977 (8th Cir. 2016).

The Court here joins the district court in the Northern District of California in declining to adopt both the *dicta* on aggregate damages of *Capitol Records* and the later transformation of that *dicta* into *Golan*'s holding in the Eighth Circuit. *See Perez*, 2020 WL 1904533, at *8–11. The damages award here reflects the number of separate violations of the TCPA and that statute's minimum penalty of $500 per violation. The large aggregate number comes from simple arithmetic: the total damage award equals the number of violations multiplied by the minimum statutory penalty for each violation. The jury found that ViSalus violated the TCPA 1,850,440 times. The aggregate dollar amount of damages is determined by taking the jury's findings and applying arithmetic.

The Court declines to conclude that ViSalus's aggregate damages award should be reduced simply because ViSalus committed almost two million violations of the TCPA. ViSalus's understanding of the limitations on damages imposed by due process implies that a constitutional penalty for a single violation becomes unconstitutional if the defendant commits the violation enough times. As discussed above, that proposition is at odds with the Supreme Court's decision in *Williams* and would effectively immunize illegal conduct

if a defendant's bad acts crossed a certain threshold. "Someone whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct." *United States v. Dish Network L.L.C.*, 954 F.3d 970, 979-80 (7th Cir. 2020) ("*Dish Network II*"). Here, the jury found that ViSalus committed a stratospheric number of TCPA violations. It is no surprise that the TCPA's constitutionally-valid minimum penalty of $500 for each violation has catapulted ViSalus's penalty into the mesosphere.

C. The Plain Text and Legislative History of the TCPA Do Not Support a Limitation on Aggregate Damages

The *Bateman* court looked to the statutory damages provision of FACTA for evidence that Congress intended for courts to deny class certification when a defendant faced potentially enormous liability. *See Bateman*, 623 F.3d at 721. Similarly, the Court looks to the TCPA itself to determine whether reducing a jury's enormous award of statutory damages is consistent with congressional intent. The plain text and history of the TCPA is relevant to the Court's analysis if the Court is to heed the Supreme Court's admonition that statutory fines are "merely matters of legislative discretion." *Williams*, 251 U.S. at 66.

The TCPA creates a private right of action to recover the "actual monetary loss from [a TCPA] violation, or to receive $500 in damages for each such violation,

whichever is greater." 47 U.S.C. § 227(b)(3)(B). That statute also gives courts discretion to award up to treble damages for willful or knowing violations. *See id.* The TCPA does not limit aggregate damages, does not limit the number of actions that may be brought against a single defendant, and does not suggest any circumstances under which a court could award less than the minimum statutory damages. *Cf. Bateman*, 623 F.3d at 718 (noting the same features in FACTA). The first feature is especially important. When Congress has had concerns about gigantic statutory damages awards, it has placed caps, or limits, on aggregate damages. *See*, *e.g.*, 15 U.S.C. § 1640(a)(2)(B) (capping recovery under the Truth In Lending Act ("TILA") in response to the potential for enormous damages awards in class actions); 15 U.S.C. § 1692k(a)(2)(B)(ii) (capping recovery under the Fair Debt Collection Practices Act ("FDCPA")). But Congress remained silent when faced with the same issue in the context of the TCPA. That is persuasive evidence that Congress did not intend to cap TCPA damages.

It is also useful to analyze the TCPA in the context of other developments in class action law. Congress enacted the TCPA in 1991, well after the Supreme Court created the presumption that class actions are available absent express congressional intent to the contrary. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions

brought in federal court."). Thus, Congress expected class actions to be available when it enacted the statutory damages provision of the TCPA. *Cf. Bateman*, 623 F.3d at 716 (applying the same analysis to the availability of class actions and statutory damages under the Clayton and Sherman Acts). It follows that Congress did not intend to cap TCPA damages in class action lawsuits.

D. Even if Due Process Limited TCPA Damages, ViSalus's Proposed Method of Reduction is Arbitrary

ViSalus suggests that the Court reduce damages from $500 per call to no more than $1 per call. But like the defendant in *Perez*—a nearly identical case in the Northern District of California—ViSalus "does not identify any . . . Ninth Circuit authority on how a district court should reduce damages that are found to be unconstitutionally excessive." *Perez*, 2020 WL 1904533, at *8. Nor can the Court find any Ninth Circuit precedent on that issue. The reasoning of the district judge in *Perez* is persuasive and addresses nearly all ViSalus's arguments. ViSalus cites the same four out-of-circuit cases to argue for reducing the aggregate of statutory damages under the TCPA. *See Golan*, 930 F.3d 950 (affirming reduction of TCPA class action damages from $1.6 billion to $32 million); *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 951–52 ("*Dish Network I*") (reducing TCPA aggregate damages from $8.1 billion to $280,000,000 based on percentage of the defendant's after-tax profits); *Maryland v.*

Universal Elections, Inc., 862 F. Supp. 2d 457, 464–65 (D. Md. 2012) (first lowering award from $100 million to $10 million on plaintiff's request and then reducing damages again to $1 million); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900 (W.D. Tex. 2001) (lowering damages by more than 99.98 percent even though defendant's violations were willful). The courts in *Golan, Maryland*, and *Blastfax* failed to include any methodology or explanation of how the court reduced the allegedly unconstitutional damages. *See Perez*, 2020 WL 1904533, at *9 (noting that "each case . . . arbitrarily reduced the damages amount to a lower number without any well-reasoned analysis."). And the methodology employed by the district court in *Dish Network I*—the only cited case that included a methodology—was rejected and reversed by the Seventh Circuit on appeal. *See Dish Network II*, 954 F.3d at 980 (considering statutory text of the TCPA and instructing district court on remand to reduce damages based on the harm caused by the violations instead of the violator's ability to pay). ViSalus candidly admits that its proposed solution is motivated by its ability to pay. *See* ECF 358 at 6 (describing ViSalus's "[i]nability to pay" as a factor favoring reduction of the statutory damages award). But that was precisely the test that the Seventh Circuit rejected in *Dish Network II*.

Moreover, after the Seventh Circuit instructed the district court in *Dish Network II* to consider the harm caused by the defendant's violations, the district court in *Perez* decided not to apply that approach because the defendant there did not quantify the actual harm

suffered by the plaintiffs. *See Perez*, 2020 WL 1904533, at *9. The same is true here. ViSalus insists that this is "not a $100 million dollar case," "not even a $10 million dollar case," but "barely a $2 million dollar case." ECF 358 at 11. ViSalus, however, does not explain *why* this is a $2 million dollar case by tying that amount to the harm suffered by the class members. ViSalus also fails to explain why the Court should reduce damages to $2 million, rather than to some other figure. For these reasons, the Court here declines to apply the approach described by the Seventh Circuit in *Dish Network II*.

E. Cellular Telephones and Residential Landline Telephones

Finally, ViSalus correctly observes that the jury could not tell how many of the violative calls were made to residential landline telephones as opposed to cellular telephones. ViSalus contends that this uncertainty constitutes a failure by Plaintiffs to meet their burden of proof. *See* ECF 363 at 13 (arguing that the jury's "We cannot tell" finding precludes liability for calls made to landlines). But the distinction between landline telephones and cellular telephones is not relevant. Under the TCPA, liability attaches to any call made to either a residential landline telephone or to a cellular telephone. ViSalus is equally liable for calls made to either kind of telephone. *See* 47 U.S.C. § 227(b)(1). Similarly, the statutory damages do not differentiate between calls made to residential landline telephones and those made to cellular telephones. *See id.* § 227(b)(3).

ViSalus further distinguishes between primarily residential landlines and landlines used mainly for business. This distinction is legally relevant, but it was already addressed at trial. In its post-trial motion, ViSalus for the first time in this lawsuit offers declarations from promoters who used their landline telephones primarily for business purposes. ViSalus correctly argues that prerecorded calls made to business landline telephones do not violate the TCPA and thus do not create liability. ViSalus, however, incorrectly applies this legal proposition to the facts here.

At trial, Plaintiffs presented evidence of how they filtered out non-residential landline telephones from residential landline telephones. *See* ECF 362 at 17-18 (internal pagination). From the evidence presented at trial, the jury concluded that ViSalus made 1,850,440 prerecorded calls in violation of the TCPA to either residential landline telephones or to cellular telephones, although the jury could not distinguish between the two based on the evidence presented. The jury, however, did not need to make that distinction because both types of calls are prohibited by the TCPA and subject to the same statutory minimum penalty per violation. "If the jury verdict is supported by 'substantial evidence,' the reviewing court must let it stand." *Davis v. Mason Cty.*, 927 F.2d 1473, 1486 (9th Cir. 1991). Plaintiff presented at trial "evidence that reasonable minds might accept as adequate" to support the jury's conclusion that ViSalus made 1,850,440 calls that violated the TCPA. *Id.* This ends the Court's inquiry on this issue.

CONCLUSION

Defendant's Post-Trial Motion Challenging Statutory Damages as Unconstitutionally Excessive (ECF 358) is DENIED. Plaintiffs' Motion to Strike Defendant's Promotion Declarations (ECF 364) is DENIED as moot.

IT IS SO ORDERED.

DATED this 14th day of August, 2020.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LORI WAKEFIELD, individually and on behalf of a class of others similarly situated,

Plaintiff,

v.

VISALUS, INC.,

Defendant.

Case No. 3:15-cv-1857-SI

OPINION AND ORDER

(Filed Aug. 21, 2019)

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Michael H. Simon, District Judge

After a three-day jury trial that resulted in a verdict for Plaintiff Lori Wakefield on behalf of herself and a certified class of others similarly situated, Defendant ViSalus, Inc. ("ViSalus") has moved to decertify the class. In its motion, ViSalus raises several challenges to class certification, the evidence supporting the jury verdict, and the requirements for establishing liability under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. After considering whether class certification remains appropriate in light of the evidence introduced at trial, the Court finds that it is and denies Defendant's motion.

STANDARDS

An order granting or denying class certification may be altered or amended at any time before the entry of final judgment. FED. R. CIV. P. 23(c)(1)(C). Until a final judgment has entered, a class certification order is "not final or irrevocable, but rather, it is inherently tentative." *Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of S.F.*, 688 F.2d 615, 633 (9th Cir. 1982). This rule provides district courts with broad discretion to determine whether a class should be certified and to revisit that certification as appropriate "throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001). "[T]he judge remains free to modify [a certification order] in the light of subsequent developments in the litigation." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160

(1982). This gives the district court flexibility to address problems with a certified class as they arise up to and even after a jury trial. *See*, *e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (reviewing class certification order after jury trial). "A district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

The same standards used for analyzing class certification under Rule 23 of the Federal Rules of Civil Procedure are applied when determining whether to decertify a class. *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (2011). Because "[t]he party seeking [to maintain] class certification bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met," *United Steel, Paper, Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010), a plaintiff bears the burden throughout litigation to establish that certification remains proper, *Marlo*, 639 F.3d at 947-48; *accord Lightfoot v. District of Columbia*, 246 F.R.D. 326, 332 (D.D.C. 2007) ("As the proponent of continued class certification, Plaintiffs [retain] the burden of establishing that [all] of the requirements for class certification . . . are met.").

The district court also retains an independent obligation to perform a "rigorous analysis" to ensure that the requirements of Rule 23 are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). To pursue her claim on behalf of a class, "a plaintiff must demonstrate numerosity, commonality, typicality, and adequate representation of the class interest." *Marlo*,

639 F.3d at 946 (2009) (citing FED. R. CIV. P. 23(a)). In addition to these requirements, Rule 23(b) requires that a class may be maintained only if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

"Normally, the district court resolves factual issues related to class certification, making its findings based on the preponderance of the evidence, even if they overlap with the merits of the case." *Mazzei v. Money Store*, 829 F.3d 260, 268 (2d Cir. 2016) (citing *Amgen v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013)). Although the Ninth Circuit has not directly addressed how a jury's factual findings should be treated when determining factual issues in a post-trial motion for decertification, the Court finds the reasoning of the Second Circuit in *Mazzei* persuasive. In that case, the court similarly was faced with a post-trial motion for decertification that involved factual questions "both relevant to the (de)certification motion *and* an element of the class's merits claim." *Id.* (emphasis in original). The Second Circuit held that "when a district court considers decertification (or modification) of a class after a jury verdict, the district court must defer to any factual findings the jury necessarily made unless those findings were 'seriously erroneous,' a 'miscarriage of justice,' or 'egregious,'" thus applying the same standard used in a motion for a new trial based on the weight of the evidence. *Id.* at 269. When the

Court must make factual findings on issues not necessarily decided by the jury's verdict, it should do so using the preponderance of the evidence standard that normally applies when making a determination on class certification. *Id.*

BACKGROUND

ViSalus is a multi-level marketing company that sells weight-loss products and other nutritional dietary supplements, including energy drinks. Individual members sign up with ViSalus to be "promoters," and promoters purchase products from ViSalus and re-sell them to customers of the promoter. Plaintiff Lori Wakefield signed up to be a promoter with ViSalus in late 2012 but did not sell any ViSalus products and decided to cancel her ViSalus membership after two months. Although Plaintiff cancelled her account in March 2013, she received telephone solicitation calls from ViSalus in April 2015. Plaintiff brought claims against Defendant for violating the TCPA, alleging that she and a class of similarly situated individuals had received telephone calls promoting ViSalus products or services using an artificial or prerecorded voice without their consent. In an opinion issued on June 23, 2017, U.S. District Judge Anna Brown, who presided over this action until she took senior status in 2018, granted certification of a class consisting of:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an

> artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such call at the time such call was made.

ECF 81 at 6.

The case proceeded to a three-day jury trial. At trial, the jury received evidence about ViSalus's Progressive Outreach Manager ("POM") system that ViSalus's outbound marketing department used to automatically make telephone calls. The jury heard prerecorded messages promoting ViSalus' products and saw spreadsheets documenting the results of each calling campaign as recorded by the POM system's disposition codes. The jury saw the forms filled out by all individual members who signed up to be promoters or customers of ViSalus—forms that asked for either a home telephone number or a mobile telephone number and contained no provision for giving consent to receive automated or prerecorded telephone marketing calls. The jury heard testimony from Ms. Wakefield, the named plaintiff, and heard how she had signed up to be a promoter with ViSalus and shortly thereafter cancelled her membership but continued to receive telephone calls and voicemails promoting ViSalus products. The jury also heard from Ms. Wakefield that she runs an informal daycare business out of her home watching the children of a few of her husband's coworkers but does not use her home telephone to conduct any business related to her daycare work.

On April 12, 2019, the jury returned a special verdict, finding that (1) Ms. Wakefield had proven by a preponderance of the evidence that ViSalus made or initiated four telemarketing calls using an artificial or prerecorded voice to a residential telephone line (residential landline) belonging or registered to Ms. Wakefield in violation of the TCPA and (2) that Plaintiff, as class representative, had proven by a preponderance of the evidence that ViSalus made or initiated 1,850,436 telemarketing calls using an artificial or prerecorded voice to either (a) a mobile (cellular) telephone or (b) a residential telephone line (residential landline), belonging or registered to one or more class members, other than Ms. Wakefield, in violation of the TCPA. ECF 282. The jury also concluded that it could not tell from the evidence presented exactly how many of the 1,850,436 violative calls were specifically made to cellular phones or to landlines. ECF 282. In other words, the jury found that a total of 1,850,436 violative calls were made to either cell phones or landlines, but could not be more precise as to how many calls were made to each.

In 2012, the Federal Communications Commission ("FCC") issued a rule requiring that all requests for a consumer's written consent to receive telemarketing robocalls must include the telephone number that the consumer authorizes may be called with telemarketing messages, and clear and conspicuous disclosures informing the consumer that: (1) the consumer authorizes the seller to deliver telemarketing calls to that number using an automatic telephone dialing system or an artificial or prerecorded voice; and (2) the

consumer is not required, directly or indirectly, to provide written consent as a condition of purchasing any property, goods, or services. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1833 ¶ 7 (2012).

Promptly after the effective date of the new rule (October 16, 2013), two companies petitioned the FCC for a retroactive waiver of the new written consent requirements. These companies previously had obtained written consent from consumers, but the consent obtained did not meet the more demanding requirements set out in the new rule. In 2015, the FCC issued a declaratory ruling granting a retroactive waiver to those companies and allowing them to rely on previously obtained written consents for a limited period of time. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015). In reaching its decision, the FCC concluded that there was evidence in the record that the petitioners could have been reasonably confused as to whether their previously obtained written consents would remain valid after the new rule became effective. The 2015 declaratory ruling granted the companies a grace period through October 7, 2015 to come into compliance with the more demanding written consent requirements in the new rule. After October 7, 2015, the petitioners were required to come into full compliance with the new rule. The FCC also granted waivers to seven additional petitioners who demonstrated that they were similarly situated to the first two petitioners.

On September 14, 2017, nearly two years after Plaintiff filed her complaint and the FCC granted its first retroactive waiver, ViSalus petitioned the FCC for a retroactive waiver of the express written consent requirements created by the 2012 FCC rule. On June 13, 2019, nearly two months after the jury returned its verdict, the FCC granted ViSalus's petition for retroactive waiver but only as it applied to "calls for which the petitioner had obtained some form of *written* consent." ECF 321-1 at 2 (FCC Order) (emphasis in original).

DISCUSSION

ViSalus argues that the FCC's retroactive waiver given to ViSalus requires the Court to decertify the class because in light of the FCC waiver, the named Plaintiff lacks standing and consent becomes an individualized issue that predominates over class-wide issues. ViSalus also makes several arguments challenging the propriety of class certification not based on the FCC order, which can largely be grouped into six categories. First, ViSalus argues there are insufficient questions of law or fact common to the class and those common questions do not predominate over questions affecting only individual members. Second, ViSalus argues that the class is unmanageable because it will be too difficult to determine which class members heard which messages, and that a class action is not superior because it is procedurally unfair to ViSalus. Third, ViSalus argues that the class lacks numerosity because Plaintiff did not introduce evidence showing how many individuals both received and heard a

prerecorded telemarketing message. Fourth, ViSalus argues that Ms. Wakefield's claims are not typical of the class. Fifth, ViSalus argues that Ms. Wakefield is not an adequate class representative. Finally and sixth, ViSalus argues that the class, as certified, constituted an impermissible "fail-safe" class.

A. FCC Retroactive Waiver

On June 13, 2019, eight weeks after the jury returned its verdict, the FCC granted ViSalus a retroactive waiver from the 2012 express written consent requirements. The waiver, however, only applies to "calls for which the petitioner had obtained some form of *written* consent." ECF 321-1 at 2 (emphasis in original). In TCPA litigation, consent is an affirmative defense. *See Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1044 (9th Cir. 2017). ViSalus did not plead consent as an affirmative defense in its answer. Further, throughout this litigation, ViSalus has disclaimed any reliance on consent as a defense to liability:

> To expedite the pretrial issues before the Court, ViSalus represents that it does not intend to present evidence at trial that Plaintiff, individually, provided "prior express invitation or permission" to receive the subject telephone calls for purposes of 47 U.S.C. § 227(a)(4). . . . ViSalus did not in the Motion assert that it would present evidence of Plaintiff's or the class's "prior express written consent" under 47 C.F.R. § 64.1200(a)(2)-(3). . . . To set the record clear, ViSalus . . . does not claim that

> for Count II, Plaintiff's or the class's claims are barred by them giving ViSalus prior express written consent under 47 C.F.R. § 64.1200(a)(2)-(3).

ECF 145 at 2 (filed July 27, 2018). ViSalus did not plead as an affirmative defense that it obtained written consent for the calls in a manner consistent with the FCC waiver that it sought. The FCC has emphasized in each retroactive waiver that it has granted that "these waivers do not apply to calls for which there was not some form of *written* consent previously obtained prior to the 2012 rule change." ECF 321-1 at 6 (emphasis in original). Written consent obtained after the 2012 rule change became effective on October 16, 2013 must still meet the more stringent express written consent requirements. In addition, any calls made after October 7, 2015 must comply with the express written consent requirements stated in the 2012 rule. Thus, the FCC waiver does not apply to any consents obtained after October 16, 2013 or any calls made after October 7, 2015.

Although ViSalus knew that it had applied for a retroactive waiver from the FCC as early as September 2017, and knew that the FCC previously had granted waivers to many petitioners similarly situated to ViSalus, ViSalus did not plead consent as an affirmative defense, the parties did not conduct discovery on the issue of consent, and consent was not at issue in the jury trial.

Before the 2012 rule, callers met the express consent requirements merely by asking consumers to provide a telephone number. But the retroactive waiver does not apply to all consents obtained before the 2015 rule change; it only applies to *written* consent. The FCC's order does not address whether any phone numbers obtained in writing, and not orally, satisfy the criteria for the retroactive waiver.[1]

For nearly two years now, ViSalus has known that it petitioned the FCC for a retroactive waiver, yet ViSalus decided to forego any argument or development of the record on what the consequences would be if the FCC ultimately granted Visalus's request. Relatedly, ViSalus never asked to stay the litigation pending the FCC's ruling on ViSalus's petition. Throughout this litigation, ViSalus has expressly disclaimed and in no uncertain terms waived any affirmative defense of consent. It now, however, asks the Court to find after the jury's verdict that ViSalus obtained written consent from class members, thereby exempting it from liability under the FCC's retroactive waiver. At this late stage, the Court declines to delve into the factual

[1] Although ViSalus argues that it obtained "prior express written consent from consumers to call them with marketing messages under the 'old' prior express consent rules," ECF 177-1 at 8 (ViSalus's FCC Petition), it is not clear that asking for a phone number in writing and providing consumers an option to check "none" when asked how they preferred to be contacted (as ViSalus's forms do) would constitute "written consent." ViSalus has submitted a declaration from its Chief Operating Officer, Aldo Moreno, who states that it would now be impossible to determine whether class members checked boxes indicating that they gave ViSalus permission to contact them. ECF 330 at 2.

dispute surrounding whether ViSalus obtained written consent from class members.

Plaintiff argues that ViSalus has waived the affirmative defense of consent. An exception to the general rule of waiver exists when there has been an intervening change in the law recognizing an issue or a defense that was previously not available. *Big Horn Cty. Elec. Co-op v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). "The intervening-change-in-law exception to our normal waiver rules . . . exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc., v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). Parties are excused from waiver only when there is an intervening change in the law *and* there was strong precedent before the change such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144 (1967)); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003). Courts do not require parties to read "the handwriting on the wall." *Id.* at 143.

This exception does not excuse ViSalus's failure to raise the issue sooner. ViSalus was not diligent when it failed to raise the consent defense earlier, with full knowledge that its application with the FCC was pending. Had ViSalus been diligent, the Court would have had the advantage of a developed record on the issue of whether ViSalus obtained written consent. The relevant precedent, here the FCC's previous orders granting waivers to at least nine similarly situated

petitioners, foreshadowed the FCC's decision to grant ViSalus's petition such that ViSalus was not taken by surprise when its petition was granted. This was not an instance in which a court, or, in this case, an agency, deviated from longstanding precedent in creating new law. Rather, the FCC, consistent with its string of nine prior waivers, granted ViSalus's petition for waiver *just as ViSalus requested.* ViSalus got exactly what it asked for. Its failure to raise the consent issue given the likelihood that the FCC would grant its waiver petition was unreasonable, and Plaintiff would be unfairly prejudiced by being denied the opportunity to take discovery on the issue of consent and argue to the jury why ViSalus did not, in fact, obtain written consent. Knowing that the FCC waiver petition was pending, ViSalus could have made arguments contemplating the scenario in which its petition was granted. It chose not to do so and has thus waived the affirmative defense of consent.

ViSalus also also could have prepared for what it would do in the event its petition was granted. The parties could have engaged in discovery on the question of whether ViSalus obtained consent in written form, the jury could have been asked to determine whether any consent given was in written form, how many of those written consents were obtained before October 16, 2013, and how many otherwise violative calls were made after October 7, 2015. The Court holds that ViSalus has waived reliance on the affirmative defense that it obtained prior written consent from class members and

will not consider the FCC's recent order as a basis to decertify the class.

B. Commonality and Predominance

ViSalus argues that the class fails to meet the commonality requirement and that individualized issues predominate, and thus certification is improper under Rules 23(a)(2) and (b)(3). The Court will, like the parties in their briefing, analyze these two requirements together.

ViSalus highlights four specific areas where it contends that individualized inquiries dominate: (1) whether class members were called on residential landlines or mobile (cellular) telephones, (2) whether each call involved a telemarketing prerecorded message, (3) whether the message actually played, and (4) whether absent class members suffered any actual harm because some may have subjectively consented to receiving calls. "All questions of fact and law need not be common to satisfy the commonality requirement. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1041 (9th Cir. 2012) (alterations omitted) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)).

Some of ViSalus's arguments implicitly challenge whether a TCPA case can ever be properly certified as a class, because ViSalus argues that TCPA liability must depend on which specific message each class

member received, whether the class member actually listened to the message, and whether the class member suffered actual damages. To the contrary, many courts have concluded that there are many common questions of law and fact inherent in TCPA cases. As described in another TCPA class certification case, the common issues include

> [w]hether Defendants used a prerecorded voice to make the calls at issue; . . . whether the calls were telemarketing calls; whether the class members provided express, written consent to receive the calls; and whether Plaintiff and class members are entitled to damages under the TCPA.

Fisher v. MJ Christensen Jewelers, 2018 WL 1175215, at *4 (D. Nv. Mar. 6, 2018).

1. Type of Telephone Called

Turning to ViSalus's first argument, the Court does not agree that individualized issues associated with determining whether a particular class member was called on a residential landline or a cellular telephone prevent class certification. Under the TCPA, liability attaches to any call made *either* to a residential landline *or* to a cellular telephone, so ViSalus would be equally liable for calls made to either kind of telephone. *See* 47 U.S.C. § 227(b)(1). Similarly, the statutory damages do not differentiate between calls made to residential landlines and cellular telephones. *See id.* § 227(b)(3). The jury returned a special verdict finding

that all class members were called on either a residential landline or a cellular telephone. Although the jury reported that it could not tell how many calls were placed to each type of telephone, that further distinction is not relevant.

ViSalus further argues that individualized issues predominate in determining whether a landline is primarily used for business or residential purposes. ViSalus points to Ms. Wakefield's trial testimony about her informal home daycare business as an example of exactly how individualized these findings can be. The jury saw the sign-up forms that ViSalus used to collect telephone numbers, which ask only for a home phone number or a mobile phone number. *See* ECF 316-8 at 2. Plaintiff argued that the jury should make the reasonable inference that people filling out those forms responded truthfully and provided only, as requested, a home telephone number or a cellular telephone number and not a business number. Ms. Wakefield testified that she too responded truthfully to this form and provided a phone number used primarily for residential purposes, and the jury found Ms. Wakefield's testimony credible. The jury could read the sign-up forms to provide common proof that all class members provided either a residential telephone number or a mobile telephone number and ViSalus has only speculated that some class members might have used their home telephone lines for primarily business purposes.

For class members called on their mobile phones, no additional fact-finding could possibly affect ViSalus's liability. For those class members called on their

home telephones who also run a business out of their home, some additional fact-finding may be necessary before a specific potential class member may recover. But ViSalus does not identify any absent class members whom it contends use their home telephone number primarily for business purposes. And even if some class members did occasionally use home phone numbers for business, "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as . . . some affirmative defenses peculiar to some individual class members.'" *True Health Chiropractic, Inc., v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018) (quoting *Tyson Foods, Inc.*, 136 S. Ct. at 1045).

Additionally, at trial, Plaintiff's witness Mr. Davis testified that he searched the 406 POM spreadsheets ViSalus produced for common business firm designations and removed any columns of data that appeared to be linked to businesses. ECF 316-1 at 45. He testified that he removed about 6,000 lines of data that he believed were linked to businesses and not residential telephone lines. ECF 316-1 at 45. From this information, the jury could reasonably infer that the remaining telephone numbers in the POM spreadsheets were more likely than not either home telephone numbers or mobile telephone numbers. The jury concluded based on this evidence that more than 1.8 million phone calls were made to either residential landlines

or cellular telephones.[2] This Court will not disturb the jury's finding that a preponderance of the evidence supported the inference that 1.8 million phone calls were made to telephone lines that were either residential or cellular. And, because the TCPA makes a caller equally liable for calls to both cellular telephones and residential landlines, it does not affect ViSalus's liability that the jury could not determine the number of calls made to each type of telephone. *See* 47 U.S.C. § 227(b)(1).

2. Telemarketing Messages

ViSalus next argues that individual questions predominate over whether each prerecorded message was a "telemarketing" message under the TCPA. But all 406 calling campaign spreadsheets produced by ViSalus and used at trial were ones that it had identified as involving telemarketing messages within the definition of the TCPA. *See* ECF 316-12 at 2. The Court instructed the jury on what constitutes a telemarketing message and ViSalus does not, at this stage, argue that the jury instructions were erroneous. The jury listened to many of the prerecorded messages at trial and

[2] The Court separated calls to landlines and calls to cellular telephones on the verdict form to keep the record clear for post-trial briefing and appeal on the issue of whether Plaintiff had adequately proven whether a landline was used for business or residential purposes. The Court's decision to ask the jury to determine the number of calls made to cellular telephones (where it does not matter if the telephone was used for business purposes) and landlines (where it does) on the verdict form reflected no opinion of the Court on the sufficiency of Plaintiff's evidence.

concluded that they met the definition of telemarketing.

Although ViSalus argues that some of its outbound calling campaigns involved non-marketing messages, it did not produce any evidence of non-marketing messages at trial. The non-marketing calling campaigns (such as declined credit card calls) were not included in the 406 calling campaign spreadsheets introduced at trial, those messages were not played for the jury, and the jury did not rely on them in reaching its verdict. *See* ECF 316-12. At trial, the jury listened to many, but not all, of ViSalus prerecorded messages, and the jurors were entitled to infer that those messages were representative of all the messages used in the marketing campaigns documented in the 406 calling campaign spreadsheets. If ViSalus wanted to refute that inference, it could have played a message for the jury that did not meet the TCPA definition of a marketing message or pointed out which of the 406 marketing calling campaigns it believed did not meet the TCPA's definition of telemarketing. ViSalus offered no evidence at trial to suggest that some of the calling campaigns at issue were not marketing campaigns such that individual issues of whether class members received marketing calls predominate.

3. Artificial or Prerecorded Voice

ViSalus is incorrect in its characterization of the requirement that a class member must actually hear the message play for liability to attach under the

TCPA. As this Court stated in its previous order, and in the jury instructions, the requirement is that the message actually play, not that anybody hear it. *See* ECF 136, 149. This can be satisfied if the prerecorded message is left on a voicemail, for example, and the Court need not inquire at this stage whether each individual class member actually listened to the voicemail.

Although whether the message actually played is a question that must be decided on an individualized basis, the spreadsheets documenting the outcome of each call provided an easily manageable answer to this question. The jury could count the disposition codes documenting that a message actually played and use that number to estimate the number of calls. Indeed, it seems highly likely that this is the method that the jury used to find the number of phone calls. ViSalus's witnesses looked to disposition codes for information about what could have happened on each call, *see* ECF 307-12 at 2; ECF 307-4 at 61, Plaintiff's witness calculated the total number of calls with each disposition code in Trial Exhibit 36A, and the jury had access to the POM manual, which explained the meaning of each disposition code. At trial, both parties argued to the jury that it should look at the POM spreadsheets and disposition codes in reaching its verdict.

4. Subjective Consent

Finally, ViSalus's fourth argument, that individualized issues regarding consent compel decertification, without merit. At trial, ViSalus did not dispute that it

lacked legal consent for the calls. Under the TCPA, a plaintiff need not show actual injury or actual damages to prevail. *See Van Patten*, 847 F.3d at 1043. ViSalus argues that, although class members might not have given legally adequate consent to receive its telemarketing messages, some of the class members may have nonetheless wanted to receive those calls and thus have suffered no injury. The harm that the TCPA protects against is the harm of being called without first giving prior express written consent, and as the Ninth Circuit has made clear, a plaintiff alleging a violation of the TCPA "need not allege any *additional* harm beyond the one Congress has identified." *Van Patten*, 847 F.3d at 1043 (quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016)); *accord Meyer*, 707 F.3d at 1045 ("We agree with [plaintiff] that [defendant's] violation of the TCPA violated his right to privacy, an interest the TCPA intended to protect.").

In the Ninth Circuit, consent is an affirmative defense, *Van Patten*, 837 F.3d at 1044, and although a plaintiff bears the burden of showing the class satisfies the certification requirements of Rule 23, the burden of proving consent fell on ViSalus at trial. Therefore, the Court assesses "predominance by analyzing the consent defenses [a defendant] has actually advanced and for which it has presented evidence." *True Health Chiropractic*, 896 F.3d at 932 (refusing to consider "speculation and surmise"). ViSalus has provided no evidence that the class contained any members who consented, legally or subjectively, to receiving prerecorded telemarketing calls from ViSalus. *See Meyer*,

707 F.3d at 1042 (finding individualized issues of consent did not predominate because defendant "did not show a single instance where express consent was given before the call was placed"). Because Visalus did not dispute that it failed to obtain prior express written consent from any class member, consent is not an individualized issue, but instead one that can easily be answered on a class-wide basis. *See True Health Chiropractic*, 896 F.3d at 932 (holding that, where lack of legally adequate consent under TCPA was ascertainable simply by examining forms filled out by all class members, Rule 23(b)(3) predominance requirement was satisfied).

C. Manageability and Superiority

ViSalus also argues that the class is unmanageable because it will be impossible to determine which class members heard which messages, and class members are unlikely to remember whether they received a call from ViSalus years ago, which could make administering the class more difficult. ViSalus argues that the class members who actually listened to its calls would be too difficult to identify. But the Ninth Circuit has made clear there is no ascertainability prerequisite to class certification under Rule 23. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017). The Court notes that ViSalus appears to have kept good records of who was called in each calling campaign through the POM records, and feasible methods exist to determine which class members received phone calls. *See*, *e.g.*, *Booth v. Appstack, Inc.*,

2016 WL 3030256, at *8 (W.D. Wa. May 25, 2016) (finding "whether confirmation of TCPA Class members is performed via sworn self-identification, review of specific phone records, or another method, minimal individualized inquiry is required"). It is irrelevant for the purposes of liability which specific marketing message each class member received, so long as the message was a marketing one. And although ViSalus raises concerns with the manageability of the class throughout litigation and trial, the Court has encountered no difficulties managing the class, up to and including trial.

ViSalus also argues that superiority is not met because it would be procedurally unfair to put a company out of business without proof of actual harm. Under ViSalus's argument, a class action is not superior to other methods of adjudication because it would result in such a large damage award that ViSalus would be forced to go out of business. Although the statutory damages are high, the damages were computed based on the number of violative calls that the jury found ViSalus made and the statutory damages that Congress considered appropriate. The Ninth Circuit has held that "[t]o limit class availability merely on the basis of 'enormous' potential liability that Congress explicitly provided for would subvert congressional intent." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 723 (9th Cir. 2010). Had the jury found ViSalus's unlawful conduct to be less extensive, the damages would have been lower. ViSalus has not asked this Court for a remitter, or to reduce the award if it is unconstitutionally excessive, nor is a motion to decertify the

proper vehicle to make such a request. Given the potential number of class members (perhaps as high as 800,000), a class action is a superior method for adjudicating hundreds of thousands of individual claims.

D. Numerosity

ViSalus argues that there is no reliable evidence establishing a reasonable estimate of the number of individuals who both received and heard a telemarketing message, and so it is impossible to determine whether the class meets this Court's numerosity requirements. As discussed above, the Court has already held that the TCPA only requires that a message play, and it does not require, at the class certification stage, proof that every class member actually heard it. *See also* ECF 136. The jury concluded that more than 1.8 million automated telemarketing messages played. This Court, as a "rough rule of thumb" requires about 40 class members in order to satisfy the numerosity requirement. *See Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 372 (D. Or. 1998). Although the exact number of class members not precisely known, the Court finds that a preponderance of the evidence establishes that the class contains far more than 40 individuals.

E. Typicality

ViSalus argues that Ms. Wakefield's claims are not typical of the class. In pursuit of this argument, ViSalus attempts to subdivide this class into many

subclasses, for whom it contends Ms. Wakefield's claim is not typical of the sub-class. *See* ECF 306 at 30 (arguing that Ms. Wakefield is not representative of class members who subjectively wanted to receive phone calls from ViSalus, is not representative of class members who were successful promoters because she never sold any ViSalus products, is not representative of customers because she was a promoter, and is not representative of class members who were called on business lines or who never received telemarketing messages at all). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Marlo*, 707 F.3d at 1042 (quoting *Hanlon*, 150 F.3d at 1020). And "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016). Thus, even if the class includes some individuals who received calls from ViSalus on a business line or who received a call from ViSalus but no prerecorded message ever played, this fact alone does not render certification improper. *Id.*

Ms. Wakefield's claims are typical of the class because she received an automated or prerecorded telemarketing message from ViSalus without giving prior express written consent. The injury she suffered, the invasion of privacy caused by a telemarketing robocall, is co-extensive with the injuries that absent class members suffered and is not different in kind than the injury suffered by other class members.

F. Adequacy of Representation

ViSalus further argues that Ms. Wakefield was not an adequate class representative because, as a disgruntled former promoter, her interests were adverse to the interests of absent class members who feel favorably about ViSalus and its products and would not want ViSalus to be put out of business by a large damage award. ViSalus, however, has presented no evidence that any absent class members feel so warmly about ViSalus. Furthermore, most of the violative calls at issue were made as part of a "Winback campaign." Only customers or promoters who had not placed an order "within the last 90 days" were "eligible" to be called during the Winback campaign. ECF 307-13 at 2. Thus, any class member who was called as part of the Winback campaign was likely not a hypothetical absent class member "whose livelihood depends on the company's continued operations." ECF 306 at 41. This does not provide a basis for decertifying the class.

G. Fail-Safe

Lastly, ViSalus argues that the class should have never been certified because it is an impermissible "fail-safe" class. A "fail-safe" class is "one that is defined so narrowly as to 'preclude[] membership unless the liability of the defendant is established." *Torres*, 835 F.3d at 1138 n.7 (quoting *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010)). "As a result, we require no more than a reasonably close fit between

the class definition and the chosen theory of liability." *Id.* In this class action, class was defined as:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such a call at the time such call was made.

ECF 81 at 6. The class definition does not overlap perfectly with the chosen theory of liability because (1) the class includes phone calls made to business landlines, (2) the class includes calls where an artificial or prerecorded voice never actually played, and (3) the class includes calls that might not meet the definition of "telemarketing" under the TCPA. At trial, to establish liability, Plaintiff had to prove that the calls met the TCPA's definition of "telemarketing," that the calls were made to residential landlines or mobile phones, and that an artificial or prerecorded voice actually played. The class "definition is not a circular one that determines the scope of the class only once it is decided that a class member was actually wronged." *Kamar*, 375 F. App'x at 736. Thus, whether an individual is a member of the class is independent of ViSalus's liability, and the class is not "fail-safe."

CONCLUSION

After reviewing Defendant's arguments and the evidence presented at trial, the Court finds that the class certification was, and remains, proper and meets the requirements of Federal Rule of Civil Procedure 23. Defendant's Motion to Decertify the Class (ECF 306) is DENIED. Defendant's Motion to Strike Plaintiff's Sur-Reply (ECF 342) is also DENIED.

IT IS SO ORDERED.

DATED this 21st day of August, 2019.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge