

1 counterclaim alleging fraud and “fraud by nondisclosure.” (Dkt. No. 20.) The nature of the
2 allegation has evolved over the course of the litigation, but as it stands now: Counterclaimants
3 allege that Barton used the identity of another individual, Ivette Jimenez, to opt-in to text
4 messages. (*See* Dkt. No. 403 at 1–2.) Plaintiff Nathen Barton is a serial TCPA litigant,
5 proceeding *pro se*, and the crux of the counterclaim is that Barton is fraudulently manufacturing
6 TCPA claims to make money. (*See id.* at 3.)

7 Previously, Judge Richard Creatura denied Plaintiff’s motion to dismiss the counterclaim,
8 finding that it was stated with sufficient particularity to satisfy the requirements of Federal Rule
9 of Civil Procedure 9(b). (Dkt. No. 45 at 3–4.) At the time, the Court commented that “[t]he lack
10 of further factual detail sought by plaintiff can be addressed through discovery and does not
11 warrant dismissal at this stage.” (*Id.* at 4.) That was the first of several motions. As this Court
12 noted in its Order Granting Leave to File a Dispositive Motion (Dkt. No. 396 at 1), Plaintiff filed
13 numerous dispositive motions, including for summary judgment (Dkt. Nos. 122, 173, 181, 249,
14 251) and default (Dkt. Nos. 99, 327, 358, 368), all of which were denied or stricken. The first
15 three of Plaintiff’s motions for summary judgement (Dkt. Nos. 122, 173, 181) were stricken as
16 premature because discovery was still ongoing. (Dkt. No. 152, 194.)

17 In November 2022, both parties cross-moved for summary judgement on the underlying
18 dispute and counterclaim. (*See* Dkt. Nos. 247, 249, 251, and 253.) Judge Creatura denied those
19 motions, finding that there was disputed evidence triable by a jury. (Dkt. No. 276). In that
20 order, Judge Creatura noted that Defendants had produced “significant circumstantial evidence”
21 that Plaintiff had consented to text messages and engaged in a fraudulent scheme. (*Id.* at 4.)
22 That evidence included: evidence that the opt-in to text messages occurred after Plaintiff took
23 possession of the phone number, and deposition testimony of the former owner of the phone
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1 number, Ivette Jimenez, that she did not opt in. (*Id.* at 7, citing Dkt. No. 248-4 at 2, 248-3 at 4–
2 5.) Further, Plaintiff had used the same number in a different lawsuit in this district and had
3 founded a “TCPA University” to train people to collect “tens of thousands of dollars” in TCPA
4 claims. (*Id.*)¹ Based on this evidence, the Court concluded that “[a] reasonable inference can be
5 made that plaintiff consented to be contacted so that he may bring a TCPA claim as business.”
6 (*Id.* at 8.) The Court similarly denied summary judgement on the counterclaim for fraud, finding
7 that it was bound up in the same fact issues as to whether Plaintiff “provided consent to
8 manufacture a TCPA claim.” (*Id.* at 12.)

9 Following that denial of summary judgement, the parties began preparing for trial. As
10 relevant here, among those preparations was that the parties submitted Joint Stipulated Facts.
11 (Dkt. No. 378.) Those stipulated facts include significant concessions by Defendants and appear
12 one-sided, see *infra*, yet Defendants have not—to this point—challenged their legitimacy or
13 disavowed them. Plaintiff filed a Motion for Leave to File a Dispositive Motion seeking to file a
14 renewed motion for summary judgement on the counterclaim, largely on the basis of the
15 stipulations. (Dkt. No. 386.) This Court granted leave to file the renewed motion, observing that
16 the stipulated facts “cast doubt on Defendants’ ability to continue pressing their counterclaim.”
17 (Dkt. No. 396 at 1–2.) This motion, and Defendants’ response, followed. (*See* Dkt. Nos. 397,
18 403.)

22 ¹ Judge Creatura also relied on Defendants’ citation to another decision in this district finding
23 that Plaintiff had filed a frivolous and harassing TCPA lawsuit, *Barton v. Leadpoint, Inc.*, No.
24 C21-05372-BHS, 2022 WL 1746664, at *3 (W.D. Wash. May 31, 2022) (*see* Dkt. No. 276 at 7),
but that judgement has since been reversed by the Ninth Circuit. *See Barton v. LeadPoint, Inc.*,
No. 22-35691, 2023 WL 4646103, at *1 (9th Cir. July 20, 2023).

III DISCUSSION

Because the Court believes that the joint stipulations and Defendants' admissions will make it impossible for Defendants to carry their burden of proof on their counterclaim at trial, the Court GRANTS the motion for summary judgement.

a. Legal Standard

Under Federal Rule of Civil Procedure 56(a), summary judgement should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." But even when there is a factual dispute between the parties, the court must still determine if that dispute is "genuine." As the Supreme Court has explained, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (internal citations omitted). For that reason, the summary judgement inquiry "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 252. Further, not all evidence may be considered. "In general, only admissible evidence may properly be considered by a trial court in granting summary judgment." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980) (citing *United States v. Dibble*, 492 F.2d 589, 601–02 (9th Cir. 1970)).

Here, Defendant has asserted two counterclaims: fraud, and "fraud by nondisclosure." (Dkt. No. 20.) The elements of fraud in Washington law are:

(1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.

1 *Elcon Const., Inc. v. E. Wash. Univ.*, 273 P.3d 965, 970 (Wash. 2012). All nine elements must
2 be established by “clear, cogent, and convincing evidence.” *Id.*

3 b. Analysis

4 i. Fraud

5 Because of Defendant/Counterclaimant’s stipulations and admissions, and their lack of
6 independently supporting evidence, the Court finds that there is no longer a triable jury question
7 as to common law fraud. The Court starts its analysis with the parties’ stipulations, which are as
8 follows:

9 ¶4 During the times relevant to this lawsuit Joeseeph Deflgauw and the entities
10 under Joeseeph Deflgauw’s control simply assumed all the information submitted
11 during the “opt in” process was correct, and they didn’t take any actions to verify
12 the accuracy of the “opt in” information submitted. Likewise, they took no steps
13 to verify if the owner of the email address ivettealfredomartinez@gmail.com was
14 the same person who had use of the phone number (360) 910 1019.

13 ¶5 Xanadu could have verified that the person in possession of the phone
14 wanted Xanadu’s text messages by requiring them to respond to a question to
15 complete the ‘opt in’, or asking them to reply back with a specified response to
16 confirm the “opt in”.

15 ¶6 The language the Defendants’ claim Barton agreed to on
16 educationschoolmatching.com by checking a box and clicking submit said
17 entering in a phone number or email address on the website was only consenting
18 to receive messages from a specific list of partners. None of the text messages
19 Starter Home or Xanadu sent to (360) 910 1019 was from this specific list of
20 partners.

19 ¶7 Before Starter Home Investing Inc sent the seven text messages to (360)
20 910-1019 on April 1, 2021, advertising goods or services from Degree Locate,
21 Get Hope To Own, *credit-score-first.com*, *yourent2own.com*, Lawsuit Winning,
22 Lions Gate Loans, Honest Loans, and Classes & Careers, entities Degree Locate,
23 Get Hope To Own, *credit-score-first.com*, *yourent2own.com*, Lawsuit Winning,
24 Lions Gate Loans, Honest Loans, and Classes & Careers, Starter Home Investing
Inc. and Xanadu Marketing Inc. did not have the invitation or consent from
Barton to do so.

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1 ¶17 IP address 8.8.8.8 is the IP address of a Google Public DNS server.

2 ¶18 The opt-ins of phone number (360) 910-1019 on
3 *educationschoolmatching.com* during the times relevant to this lawsuit were from
4 IP addresses 71.238.123.34 and 8.8.8.8 and the same entity did them both.

(Dkt. No. 378 at 2–3.)

5 The signatures of both Plaintiff Nathen Barton, and attorney Donna Gibson on behalf of
6 defendants Joe Delfgaw, Starter Home Investing, Inc., and Zanadu Marketing, Inc. (also
7 referred to as “Xanadu”), appear on the stipulation. (Dkt. No. 378 at 4.) The language of the
8 stipulation appears to have been written by Plaintiff and is one-sided in his favor, yet for
9 whatever reason—be it strategic or lack of proper diligence—Defendants signed-on. In their
10 response to Plaintiff’s summary judgment motion, Defendants point out what they did not
11 stipulate to—the ultimate identity of the person who made the opt-in to consent to text messages
12 (*see* Dkt. No. 403 at 5)—but they *do not* claim that the stipulation is itself fraudulent or
13 inaccurate.

14 Thus, the Court will treat the stipulation as a binding statement of undisputed facts for
15 trial and for the purposes of this motion. The Supreme Court has “long recognized” that litigants
16 “[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the
17 record, were established.” *Christian Legal Soc. Chapter of the Univ. of California, Hastings*
18 *Coll. of the L. v. Martinez*, 561 U.S. 661, 676 (2010) (quoting *H. Hackfeld & Co. v. United*
19 *States*, 197 U.S. 442, 447 (1905)). “This entitlement is the bookend to a party’s undertaking to
20 be bound by the factual stipulations it submits.” *Id.* Likewise, the Ninth Circuit has commented
21 that “stipulations of fact, when fairly entered into, are controlling on the participating parties and
22 on the trier of fact without further evidence” (as opposed to stipulations of law, which do not
23 control). *Congoleum Indus., Inc. v. Consumer Prod. Safety Comm’n*, 602 F.2d 220, 223 (9th Cir.
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1 1979). And although the parties stipulated to these facts for trial, they are relevant for this
2 motion too, since “the facts to which a party has stipulated remain binding on that party
3 throughout the various phases of the same case.” *In re Jun Ho Yang*, 698 F. App'x 374 (9th Cir.
4 2017). The fraud counterclaim is a state law claim, and the Supreme Court of Washington has
5 likewise recognized that “factual stipulations are generally binding on the parties and on the
6 court.” *Ross v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 252, 257 (Wash. 1997); *ibid.* at 255
7 (“[b]ecause the facts were stipulated, there [was] no dispute of material facts.”).

8 In light of these stipulated facts and the lack of other supporting evidence, it will be
9 impossible for Defendants/Counterclaimants to carry their burden by “clear, cogent, and
10 convincing evidence” on all nine elements of fraud. The problems start from the first element,
11 representation of an existing fact. Defendants seem to conflate this element with falsity, offering
12 conclusory statements that Barton “entered false information into defendants/counterclaimants’
13 system during an opt-in” without citation to the record. (Dkt. No. 403 at 7.) The representation
14 itself is not the falsity (more on that later), but rather the fact of the opt-in: that the owner of the
15 (360) 910 1019 number consents to text messages via opt-in. But the parties stipulated that the
16 opt-in provided consent to text messages only for a “specific list of partners” and that “[n]one of
17 the text messages Starter Home or Xanadu sent to (360) 910 1019 was from this specific list of
18 partners.” (Dkt. No. 378 at 2, ¶ 6.) Assuming that to be true, Defendants/Counterclaimants
19 cannot claim they had a representation of consent to send text messages from the non-partner
20 entities to begin with.

21 The second element of fraud, materiality of the representation, is easily established.
22 Consent is a defense to a TCPA action (*see* 47 U.S.C. § 227(b)(1)(A)), the opt-in is a
23 representation of consent, and the identity of the person submitting the opt-in is at issue.

1 But the third element of fraud, falsity, is the core of the matter and where
2 Defendants/Counterclaimants have multiple obstacles. For one, Defendants/Counterclaimants
3 have stipulated away their claim. Paragraph 7 states that when the specified entities sent texts to
4 (360) 910 1019 they “did not have the invitation or consent from Barton to do so.” (Dkt. No.
5 378 at 2, ¶ 7.) That is entirely inconsistent with their theory of the case, which is that Barton—
6 and not Ivette Jimenez or anyone else—in fact consented to text messages by generating the opt-
7 ins in someone else’s name. Moreover, the parties stipulated that Defendants/Counterclaimants
8 have no way to prove or disprove the identity of an opt-in; rather they “simply assumed all the
9 information submitted during the “opt in” process was correct” and took “no steps” to verify the
10 identity of the opt-in. (Dkt. No. 378 at 2, ¶ 4.) Likewise, Defendants/Counterclaimants
11 answered in a request for admission that “[t]here is no way to verify” the identity of an opt-in
12 “short of contacting the number provided” and instead asserted that “[o]pt-ins are based on trust
13 that the person opting-in is honest and genuine and not misusing federal law to obtain profit.”
14 (Dkt. No. 250-14 at 28.) Their own declaration in opposition to summary judgement confirms
15 that “there is currently no way for us [t]o confirm[] that information,” referring to opt-in identity.
16 (Dkt. No. 404 at 3.) Defendants/Counterclaimants’ affirmative arguments fare no better. They
17 assert that “he HIMSELF stated that he received the text message, which was sent immediately
18 after the op-in” and clicked on it, referring to Barton, but offer no citation to the record, nor
19 explain how receiving the text message at issue is tantamount to giving consent for the text
20 messages. (*See* Dkt. No. 403 at 4–5.) In light of the above, the Court does not see how
21 Defendants/Counterclaimants can prove by *clear and convincing* evidence that it was in fact
22 Barton who submitted the opt-in.
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1 Even setting aside the stipulations, Defendants/Counterclaimants have failed to show that
2 there is a genuine dispute of material fact by reference to admissible evidence. In support of
3 their claim, Defendants/Counterclaimants produce a document showing the IP addresses and
4 other information associated with the opt-ins at issue. (Dkt. No. 404-1 at 1.) This appears to be
5 generated from a database of contacts, showing six entries in the name Ivette Jimenez for the
6 phone number 360-910-1019 and email address ivettealfredomartinez@gmail.com, with two of
7 the entries associated with IP address 71.238.123.34, two associated with IP address 8.8.8.8, and
8 two having no associated IP address. (*Id.*) The entries were made between April 1 and April 30,
9 2021. (*Id.*) Accompanying these is a printout from a public IP address geolocation website,
10 showing that the address 71.238.123.34 was located in Camas, Washington as of October 1,
11 2021. (*Id.* at 2.) Plaintiff Nathen Barton lives in Camas, WA. (Dkt. No. 397 at 13.)

12 Although this evidence is probative, there are several reasons why it is insufficient to
13 overcome the motion for summary judgement. For one, the evidence is inadmissible. Rule
14 56(c)(4) provides that “[a]n affidavit or declaration used to support or oppose a motion must be
15 made on personal knowledge, set out facts that would be admissible in evidence, and show that
16 the affiant or declarant is competent to testify on the matters stated.” *See also Dibble*, 429 F.2d
17 at 602 (rejecting an affidavit on summary judgment because it “was not made on personal
18 knowledge; it did not set forth facts as would be admissible in evidence; and it did not show that
19 [the affiant] was competent to testify to the matters stated therein.”). That requirement has not
20 been satisfied. The evidence is offered on the affidavit of Defendant Joe Delfgaw, the owner of
21 the telemarketing agencies who are co-defendants in the case (Xanadu Marketing, Inc. and
22 Starter Home Investing, Inc.). (Dkt. No. 404 at 1.) Delfgaw states that the IP addresses were
23 “confirmed by documents from Forward Control Software and Elite Marketing Services,” two
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1 entities that are presumably vendors to Delfgauw’s companies. (*See id.* at 3.) Delfgauw
2 provides no information about who generated this report who could be called at trial to
3 authenticate it, nor any details of when or how the data was collected and reported. As such, the
4 report (in its current form) is inadmissible hearsay. *See generally* Fed. R. Ev. 801; 901.² Nor
5 does Delfgauw state that he has personal knowledge of how the report was produced. Further,
6 the declaration provides no information at all about how the IP address geolocation was
7 generated, including who made the report.

8 Even if this evidence could be produced in an admissible form, it would not be
9 sufficient—at least not on the current record. Defendants/Counterclaimants provide threadbare
10 information as to what their evidence actually shows. There is no information for instance about
11 how accurate and specific an IP geolocation is, and whether the location of an IP address can
12 change over time (e.g., the opt-ins were made in April 2021, but the IP geolocation is from
13 October 2021). (*See* Dkt. No. 122 at 5, 11–12.) At best, Defendants/Counterclaimants can show
14 that someone in Camas, WA was responsible for two of six opt-ins in their record. That will not
15 be enough to prove by “clear, cogent, and convincing evidence” that Nathen Barton is the source
16 of the opt-ins.

17 Moving on to the other elements of fraud, factors four and five fail for the same
18 reasons—if Defendants/Counterclaimants cannot prove the falsity of the statement, they cannot
19 prove Barton’s knowledge of the falsity, nor his intent for them to act on it. Factor six likewise
20 assumes the falsity of the representation. Defendants/Counterclaimants can prove factor seven,
21 that they relied on the opt-in. But factor eight may be more difficult. Due to

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23 ² The IP addresses of opt-ins may be kept as a business record, but Defendants/Counterclaimants
24 fail to state that this report was “kept in the course of a regularly conducted activity of a
business” as opposed to being produced specifically for this litigation. *See* Fed. R. Ev. 803(6).

1 Defendants/Counterclaimants stipulating that they “simply assumed all the information
2 submitted during the “opt in” process was correct” and took “no steps” to verify that information
3 (Dkt. No. 378 at 2, ¶ 4) there is a question as to how reasonable their reliance on that information
4 is—though the Court need not resolve that question.³ As to factor nine, damages,
5 Defendants/Counterclaimants state that there would be damage to their “reputation and loss of
6 business,” which is plausible but not supported by any evidence. (Dkt. No. 403 at 8.)

7 Finally, the Court notes a global argument advanced by Defendants/Counterclaimants:
8 that because Barton is a serial TCPA litigant, he must be committing fraud here. (Dkt. No. 403
9 at 6.) They point to Barton’s TCPA University website. (*Id.*) They also cite to two cases where
10 they say it was “proven previously” that Barton “induced” contacts to create claims: *Barton v.*
11 *Leadpoint*, No. C21-5372 BHS 2022 WL 293135 (W.D. Wash. Feb. 1, 2022) (“*Leadpoint I*”)
12 and *Barton v. Walmart*, 254 So. 3d 796 (La. Ct. App. 2018). (*See id.* at 5–6.) In the specific
13 order from *Leadpoint I* that Defendants/Counterclaimants reference, the court denied a motion
14 for reconsideration, refusing to remove reference to Barton “manufacturing” a TCPA claim from
15 a prior order. However, Defendants/Counterclaimants fail to note that the Ninth Circuit
16 ultimately reversed an attorney fee award against Barton based on a frivolousness or bad-faith in
17 *Leadpoint I*, holding that “[t]he mere fact that Barton is a frequent TCPA litigant does not evince
18 bad faith, and there is no other evidence to that effect.” *Barton v. LeadPoint, Inc.*, No. 22-35691,
19 2023 WL 4646103, at *2 (9th Cir. July 20, 2023). Even more seriously, the claim regarding
20 *Barton v. Walmart* is a flatly false misstatement of law and fact: that case involved a *Douglas*
21 Barton who slipped and fell in a Walmart store and does not in any manner “prove” that Nathen

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23 ³ The Court notes that this analysis is limited to common law fraud under Washington State law,
24 and does not imply that reasonable reliance is an element of consent for purposes of a TCPA
claim.

1 Barton “induced” a TCPA claim. Accordingly, the Court will issue an Order to Show Cause
2 why Defendants’ counsel should not be sanctioned under Federal Rule of Civil Procedure 11(b)
3 based on what appears to be an attempt to mislead the Court about facts and circumstances that
4 clearly are inapplicable to the facts and issues raised in this litigation.

5 In sum, Defendants/Counterclaimants must be able to prove all nine factors of common
6 law fraud by “clear, cogent, and convincing” evidence, but they fail at multiple steps. For that
7 reason, summary judgement on the fraud counterclaim is granted.

8 ii. “Fraud by Nondisclosure”

9 The second counterclaim is easily dispensed with. Defendants/Counterclaimants have
10 not stated the elements for a “fraud by nondisclosure” claim in their answer/counterclaim (Dkt.
11 No. 39 at 12–13),⁴ and the only cause of action by that name the Court can identify in
12 Washington law involves failure to disclose defects in real property, which is not relevant here.
13 *See e.g., Gunnar v. Brice*, 565 P.2d 1212, 1214 (Wash. Ct. App. 1977); *see also Stieneke v.*
14 *Russi*, 190 P.3d 60, 68 (Wash. Ct. App. 2008) (describing the elements of fraudulent
15 concealment, the first of which is “the residential dwelling has a concealed defect.”). Another
16 court in this district, considering another case between this same *pro se* litigant and defense
17 counsel, granted summary judgment against a “fraud by nondisclosure” counterclaim for similar
18 reasons. *See Barton v. Serve All, Help All, Inc.*, 2023 WL 1965905 at *11 (W.D. Wash. Feb. 13,

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⁴ In a previous motion for summary judgement, Defendants/Counterclaimants stated that the elements of “fraud by nondisclosure” are (1) a party conceals a material fact; (2) the fact is within the concealing party’s knowledge; (3) the concealing party knows that the acting party will rely on this nondisclosure on the presumption that the fact does not exist; and (4) the concealing party has a legal/equitable duty to communicate the fact. (Dkt. No. 253 at 9.) They cite no legal authority that such a cause of action exists in Washington law. They instead cite a case interpreting Minnesota law, which does not state this purported standard and is of no relevance here. *Taylor Inv. Corp. v. Weil*, 169 F.Supp.2d 1046, 1064 (D. Minn. 2001).

1 2023). That court noted that under Washington law, “the duty to disclose arises only in the
2 context of an inherently fiduciary relationship or some type of special relationship of trust and
3 confidence giving rise to quasi-fiduciary duties of disclosure.” *Id.* (quoting *Baker Boyer Nat'l*
4 *Bank v. Foust*, 436 P.3d 382, 389 (Wash. Ct. App. 2018)). Accordingly, this Court will grant
5 summary judgment against the “fraud by nondisclosure” counterclaim.

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7 **IV CONCLUSION**

8 For the foregoing reasons, Plaintiff’s Motion for Summary Judgement on Defendants’
9 Counterclaim (Dkt. No. 397) is GRANTED. In light of the above, the Court invites a renewed
10 motion for summary judgment on the underlying TCPA claim, and once more encourages the
11 parties to discuss a settlement to their dispute. Plaintiff shall file his renewed motion for
12 summary judgment no later than November 22, 2024.

13 In addition, Defense counsel is ORDERED to show cause no later than November 12,
14 2024, why counsel should not be sanctioned under Federal Rule of Civil Procedure 11(b) for
15 citing a decision that is clearly inapplicable to the facts and issues raised in this litigation.

16 The Clerk is directed to calendar the events contained in this Order.

17 DATED this 1st day of November 2024.

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21 David G. Estudillo
22 United States District Judge
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