

Honorable David G. Estudillo

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff

v.

JOE DELFGAUW, XANADU  
MARKETING INC., STARTER HOME  
INVESTING INC, &  
JOHN DOE 1-10

Defendant(s).

CASE NO. **3:21-cv-05610-DGE**

MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON  
PLAINITFF’S CLAIMS

NOTED ON MOTION CALENDAR:  
12 / 10 / 2024

It is uncontested that collectively, the Defendants telephone solicited the 1019 phone number without consent on any level. Barton didn’t give them consent, and the consent they relied on wasn’t for calls to the non-partner entities. This motion for partial summary judgement asks the Court to find on issues for which there is no material debate:

- 43 calls initiated by Starter Home
- 16 calls initiated on behalf of Xanadu
- All TCPA damages should be trebled
- Joe Delfgaw is personally liable

**I. Setting the groundwork**

Barton has testified in Dkt. 252 he received the following calls:

Date	Call/Text	Calling Number	The screenshot location
4/1/2021	7 texts	<b>33959</b>	Dkt. 252 ¶10 & ¶11, NB307 & NB308
4/2/2021	1 text	(803) 618-8038	Dkt. 252 ¶12
4/2/2021	1 voice call	(360) 318-7867	
4/5/2021	1 text	365365	Dkt. 252 ¶13, NB385
4/5/2021	1 voice call	(360) 318-7867	
4/8/2021	1 text	365365	Dkt. 252 ¶13, NB385
4/12/2021	1 text	<b>33959</b>	Dkt. 252 ¶14, NB337
4/13/2021	1 voice call	(360) 230-6935	
4/13/2021	1 voice call	(360) 318-7867	
4/20/2021	1 voice call	(360) 230-6935	
4/25/2021	1 voice call	(360) 230-6935	
4/29/2021	1 voice call	(360) 318-7867	
4/30/2021	1 voice call	(360) 318-7867	
6/11/2021	1 text	94657	Dkt. 252 ¶17, NB395
7/13/2021	1 text	<b>33959</b>	Dkt. 252 ¶18, NB343
8/4/2021	1 text	94657	Dkt. 252 ¶19, NB400
8/11/2021	1 text	<b>33959</b>	Dkt. 252 ¶18, NB347
Joe Delfgauw was served the lawsuit on September 7, 2021. Dkt. 395 pg 29 ¶11			
9/21/2021	1 text	<b>33959</b>	Dkt. 252 ¶20, NB355
11/17/2021	1 text	<b>33959</b>	Dkt. 252 ¶21, NB362
11/17/2021	3 texts	<b>46758</b>	Dkt. 252 ¶22, NB410 & NB312
11/23/2021	1 text	<b>33959</b>	Dkt. 252 ¶23, NB365
11/25/2021	2 texts	<b>33959</b>	Dkt. 252 ¶24, NB368
11/25/2021	3 texts	<b>46758</b>	Dkt. 252 ¶25, NB417 & NB418
12/6/2021	2 texts	<b>33959</b>	Dkt. 252 ¶26, NB373
12/6/2021	4 texts	<b>46758</b>	Dkt. 252 ¶27, NB422 & NB423
12/8/2021	1 voice call	(360) 203-6631	
12/8/2021	1 voice call	(360) 203-6633	
12/8/2021	1 voice call	(360) 203-6634	
12/8/2021	1 voice call	(360) 203-6632	
12/9/2021	2 texts	<b>33959</b>	Dkt. 252 ¶29, NB377
12/9/2021	4 texts	<b>46758</b>	Dkt. 252 ¶30, NB428 & NB429
12/10/2021	1 voice call	(360) 203-6636	
12/10/2021	1 voice call	(360) 203-6632	
12/10/2021	1 voice call	(360) 203-6631	
12/17/2021	2 texts	<b>33959</b>	Dkt. 252 ¶ 32, NB380
12/17/2021	4 texts	<b>46758</b>	Dkt. 252 ¶33, NB435 & NB436

**Table 1 – The calls**

**Who owns the use of SMS Short Codes 33959 and 46758?**

It is uncontested the bolded SMS short codes 33959 and 46758 in Table 1 both belong to Starter Home. SMS stands for “short message service”,<sup>1</sup> SMS short codes can be used to send text messages,<sup>2</sup> and the TCPA applies to texts sent via SMS.<sup>3</sup>

**1. SMS Short Codes 33959 and 46758 belong to Starter Home Investing Inc.<sup>4</sup>**

4	<b>ADMISSION NO. 68:</b>	Admit or deny that SMS short code 33959 was registered to you
5		during the year 2021.
6	<b>ANSWER:</b>	
1	RESPONSE TO REQUEST FOR ADMISSION 68:	
2	Admit that the short code mentioned was registered to an assumed name of Defendant.	

11	<b>ADMISSION NO. 69:</b>	Admit or deny that SMS short code 46758 was registered to you
12		during the year 2021.
13	<b>ANSWER:</b>	
4	RESPONSE TO REQUEST FOR ADMISSION 69:	
5	Admit that the short code mentioned was registered to an assumed name of Defendant.	

*Delfgaw’s testifying on behalf of Starter Home – Dkt. 252-7 page 13 starting at line 23*

Q: Okay. Who owned the right to use SMS short code 46758 between March 31st, 2021, and December 31st, 2021.

A: Lending Cloud Autos.

Q: And what entity owns Lending Cloud Autos?

<sup>1</sup> *Krady v. Eleven Salon Spa*, 2017 WL 6541443, at \*3 (E.D.N.Y. July 28, 2017)

<sup>2</sup> *Pascal v. Concentra, Inc.*, Case No. 19-cv-02559-JCS, 5 (N.D. Cal. Aug. 20, 2019) ("To assess whether the use of an ATDS has been sufficiently pled . . . the message was sent from an SMS short code.")

<sup>3</sup> *Abbas v. Selling Source, LLC*, Case No. 09 CV 3413, 15 (N.D. Ill. Dec. 14, 2009)

<sup>4</sup> Dkt. 252-12. Requests are on page 6 and responses on page 20

1 A: Let me take a look. I believe that's me personally, but I'm going to take a quick  
2 look. Actually Starter Homes Investment it looks like owns that.

3 Q: Okay. And what entity owned the right to use SMS short code 33959 between  
4 March 31st, 2011 and December 31st, 2021.

5 A: That is Lending Cloud Homes.

6 Q: And what entity owns Lending Cloud Homes?

7 A: Starter Home Investments. Starter Homes.

8 See also Dkt. 378 ¶27: *The names LENDING CLOUD HOMES and LENDING  
9 CLOUD AUTO are the only other names Starter Home is allowed to do business  
10 under.*

11 **Elements of Barton's TCPA 64.1200(c)(2) claim:**

12 In Dkt 395 page 52 all parties agreed to the elements of the 64.1200(c)(2) TCPA claim:

- 13 1) the defendant initiated two or more calls to a residential telephone number, or someone  
14 else initiated the calls on the defendant's behalf.
- 15 2) the called phone number was registered on the FTC's National Do-Not-Call Registry  
16 more than 31 days before each call
- 17 3) the calls were initiated for the purposes of encouraging the purchase or rental of, or  
18 investment in, property, goods, or services.
- 19 4) the calls were initiated without the prior express consent of the called party.

20 The TCPA and its governing regulations do not define "residential telephone number"  
21 but in [Barton v. LeadPoint, Inc.](#), No. 22-35130, 2-3 (9th Cir. Jul. 20, 2023) the Ninth Circuit held  
22 **a phone number on the national do-not-call registry is presumptively residential.** Even if it  
23 wasn't, Kerrie Barton's testimony in Dkt 388-1 and Barton's own in-court testimony establishes  
24 it. The Court already backdoor ruled it is in Dkt. 276: *Courts have declined to find TCPA  
plaintiffs lack standing where the phone number [at issue] was not procured for the express  
purpose of receiving calls on which to base future TCPA litigation. Id at 10, 3:5.*

**Elements of Barton's TCPA 64.1200(d)(4) claim:**

In Dkt 395 page 52 all parties agreed to the elements of the 64.1200(d)(4) TCPA claim:

- 1) the defendant initiated two or more calls to a residential telephone number, or someone else initiated the calls on the defendant's behalf.
- 2) the called phone number was registered on the FTC's National Do-Not-Call Registry more than 31 days before each call
- 3) for the purposes of encouraging the purchase or rental of or investment in property, goods, or services
- 4) without providing "the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted."

**Elements of Barton's CEMA claim:**

Washington State's [Consumer Electronic Mail Act](#) (CEMA) RCW 19.190.010 defines "Commercial electronic text message" as *an electronic text message sent to promote real property, goods, or services for sale or lease* and RCW 19.190.060(1) prohibits initiating or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone or pager service that is equipped with short message capability unless RCW 19.190.070(1)(b) the subscriber has clearly and affirmatively consented in advance to receive these text messages.

CEMA and TCPA claims are usually considered together. <sup>5</sup>

**Uncontested Facts:**

1. The Defendants texted the 1019 number on the dates indicated in Dkt. 378 ¶1 with the messages shown in the exhibits attached to Dkt. 378.
2. During all times relevant to this lawsuit, only Xanadu Marketing Inc. or Starter Homes Investing Inc. sent text messages using SMS short codes 365365, 46758, 33959, or 94657. Dkt. 378 ¶10.

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<sup>5</sup> [Wick v. Twilio Inc.](#), Case No. C16-00914RSL, 6 (W.D. Wash. Nov. 1, 2016)

- 1 3. “The parties in this case have already agreed that the phone number (360) 910-1019 was  
2 registered on the FTC’s national do-not-call registry (“NDNCR”) by the Plaintiff and that  
3 element two above [of the jury instruction] is satisfied.” Dkt. 395 53:1-2.
- 4 4. “The parties in this case have already agreed that the purpose of all the calls was to  
5 promote property, goods, or services for sale or lease and that the Plaintiff has satisfied  
6 the third element [of the jury instruction] of this claim.” Dkt. 395 53:3-5.
- 7 5. All the calls they initiated were on behalf of non-partner entities, so Defendants fail to  
8 establish a consent defense under 47 CFR § 64.1200(c)(2)(ii). Dkt. 416, 7:18-20.
- 9 6. The contents of the 20 Texts are shown in the exhibits attached to Dkt. 378.

#### 10 **Applying the Uncontested Facts to the 64.1200(c)(2) TCPA Claim Elements**

11 **Element 1** – Defendants stipulated they called (texted) the 1019 phone number two more  
12 or times in a 12-month period of time. Dkt. 378 ¶1. Element two – Barton  
13 registered the 1019 phone number on the on the FTC’s national do-not-call  
14 registry – establishes that the 1019 number is presumed to be a residential  
15 phone number under *Barton v. LeadPoint, Inc.*

16 **Element 2** – “The parties in this case have already agreed that the phone number (360)  
17 910-1019 was registered on the FTC’s national do-not-call registry by the  
18 Plaintiff and that element two above is satisfied.” Dkt. 395 53:1-2.

19 **Element 3** – The Defendants agree “that the purpose of all the calls was to promote  
20 property, goods, or services for sale or lease and that the Plaintiff has satisfied  
21 the third element of this claim.” Dkt. 395 53:3-5. Their advertising nature is  
22 apparent on their face.

23 **Element 4** – Dkt. 416 appears to foreclose any defense argument that Barton consented to  
24 the calls. As the Court recognized, *the parties stipulated that the opt-in*

1           *provided consent to text messages only for a “specific list of partners” and*  
2           *that “[n]one of the text messages Starter Home or Xanadu sent to (360) 910*  
3           *1019 was from this specific list of partners.” Id at 7, 15-18.*  
4           *Defendants/Counterclaimants have stipulated away their claim. Paragraph 7*  
5           *states that when the specified entities sent texts to (360) 910 1019 they “did*  
6           *not have the invitation or consent from Barton to do so.” Id at 8, 2-4.*  
7           *Moreover, the parties stipulated that Defendants/Counterclaimants have no*  
8           *way to prove or disprove the identity of an opt-in; rather they “simply*  
9           *assumed all the information submitted during the “opt in” process was*  
10           *correct” and took “no steps” to verify the identity of the opt-in. Id at 8:7-10.*

11           Barton has testified he did not consent to their calls and the Defendants bear the burden  
12 of proof of this element at trial.

13           Given Rule 56's mandatory language, if there is no genuine issue of  
14 material fact and the movant is entitled to judgment as a matter of law,  
15 the court lacks "discretion" to insist that, in defiance of Rule 56, a trial  
16 will be held anyway . . . "the plain language" of Rule 56 "mandates the  
17 entry of summary judgment, after adequate time for discovery and upon  
18 motion, against a party who fails to make a showing sufficient to  
19 establish the existence of an element essential to that party's case, and on  
20 which that party will bear the burden of proof at trial." [York v. United](#)  
21 [States \(In re York\)](#), 78 F.4th 1074, 1088 (9th Cir. 2023).

19           To survive a motion for summary judgment, the adverse party must  
20 present affirmative evidence, which “is to be believed” and from which  
21 all “justifiable inferences” are to be favorably drawn. . . . When the  
22 record, however, taken as a whole, could not lead a rational trier of fact  
23 to find for the non-moving party, summary judgment is warranted.  
24 [Risinger v. Liberty Mut. Ins. Co.](#), C23-0435 TSZ, 2-3 (W.D. Wash. Sep.  
26, 2024).

### **Applying the Uncontested Facts to the 64.1200(d)(4) TCPA Claim Elements**

**Element 1** – Same as 64.1200(c)(2) element 1

1 **Element 2** – Same as 64.1200(c)(2) element 2

2 **Element 3** – Same as 64.1200(c)(2) element 3

3 **Element 4** – The Court can see for itself in the exhibits attached to Dkt. 378 and the screen  
4 shots in Dkt. 252 that none of the texts addressed in this motion provide “the  
5 name of the individual caller, the name of the person or entity on whose  
6 behalf the call is being made, and a telephone number or address at which the  
7 person or entity may be contacted.”

8 There is an implied **fifth** element – the plaintiff is the subscriber or customary user of the  
9 phone number. The Defendants have stipulated that the 1019 phone number is Barton’s (Dkt.  
10 20, 11:20 “providing his phone number” is an admission the 1019 phone number is Barton’s).  
11 (Dkt 39, 10, ¶3,1 “Counterclaimant STARTER HOME INVESTING INC is informed and  
12 believe and thereon allege that Counterdefendant NATHEN BARTON Obtained the phone  
13 number (360) 910-1019 in or about July 2020.”). See also Dkt. 252 ¶39 & ¶42. As the  
14 subscriber Barton has standing to sue. “We now hold that the owner and subscriber of a phone  
15 with a number listed on the Do-Not-Call Registry has suffered an injury in fact when unsolicited  
16 telemarketing calls or texts are sent to the number in putative violation of the TCPA.” [Hall v.](#)  
17 [Smosh Dot Com](#), 72 F.4th 983, 986 (9th Cir. 2023).

18 Every text message that violated 64.1200(c)(2) separately violated 64.1200(d)(4). The  
19 initiator of each violating message, and the entity on whose behalf it was initiated are jointly and  
20 severally liable for each violation.

21 **II. Which calls were initiated by Starter Home?**

22 **Starter Home initiated 43 text messages to the 1019 phone number**

1 Using admissions, testimony, and stipulations in Dkt. 378 ¶1, it is an uncontested fact  
 2 Starter Home initiated 20 text messages (the “20 Texts”) to the 1019 phone number. The  
 3 following texts were initiated from SMS short codes owned by Starter Home:

Dkt. 378 Exhibit	Date Sent	Texts
NB307	4/1/2021	5
NB308	4/1/2021	2
NB337	4/12/2021	1
NB343	7/13/2021	1
NB347	8/11/2023	1
NB355	9/21/2021	1
NB362	11/17/2021	1
NB365	11/23/2021	1
NB385	4/5/2021	1
NB385	4/8/2021	1
NB395	6/11/2021	1
NB400	8/4/2021	1
NB410	11/17/2021	2
NB412	11/17/2024	1
	total	20

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 14 Barton testified he received 8 additional text messages from SMS short code 33959:

- 15 1. Dkt 252 ¶24 – 11/25/2021 – two texts from SMS short code 33959
- 16 2. Dkt 252 ¶26 – 12/6/2021 – two texts from SMS short code 33959
- 17 3. Dkt 252 ¶29 – 12/9/2021 – two texts from SMS short code 33959
- 18 4. Dkt 252 ¶32 – 12/17/2021 – two texts from SMS short code 33959

19 Barton testified he received 15 additional text messages from SMS short code 46758:

- 20 1. Dkt 252 ¶25 – 11/25/2021 – three texts from SMS short code 46758
- 21 2. Dkt 252 ¶27 – 12/6/2021 – four texts from SMS short code 46758
- 22 3. Dkt 252 ¶30 – 12/9/2021 – four texts from SMS short code 46758
- 23 4. Dkt 252 ¶33 – 12/17/2021 – four texts from SMS short code 46758

1 Starter Home sent a total of 20+8+15=43 text messages to the 1019 number. Each  
2 violated 64.1200(c)(2), 64.1200(d)(4), and CEMA

3 **III. Which calls were initiated on Xanadu's behalf?**

4 Many texts were soliciting on behalf of Xanadu. Barton testified to personal knowledge  
5 of URLs opening websites. See the declaration associated with this motion ¶14 and Dkt. 252.

6 **Call #1:** The Defendants stipulated that they sent a 4/1/2021 text message containing the  
7 URL *buyzerodowns.com* as part of the 20 Texts. Dkt. 378-1 page 2. Entering that URL into a  
8 web browser opened webpage *GetHopeToOwn.com*. Dkt 252 ¶10 and ¶11. Xanadu owns  
9 *GetHopeToOwn.com*. Dkt. 378 ¶9.

10 **Call #2:** The Defendants stipulated that they sent a 4/1/2021 text message containing the  
11 URL *buy-zero-downs.xyz* as part of the 20 Texts. Dkt. 378-1 page 3. Entering that URL into a  
12 web browser opened webpage *GetHopeToOwn.com*. Dkt 252 ¶10 and ¶11. Xanadu owns  
13 *GetHopeToOwn.com*. Dkt. 378 ¶9. For video evidence of the *buy-zero-down.xyz* opening  
14 Xanadu-owned webpage *GetHopeToOwn.com* see exhibits NB323/NB324 on the USB drive in  
15 Dkt. 392.

16 **Call #3:** The Defendants stipulated that they sent a 4/1/2021 text message containing the  
17 URL *begin-here2day.xyz* as part of the 20 Texts. Dkt. 378-1 page 3. Entering that URL into a  
18 web browser opened webpage *xanaduMarketing.outgrow.us*. Dkt 252 ¶10 and ¶11. Xanadu uses  
19 *xanaduMarketing.outgrow.us*. Dkt. 378 ¶15, ¶31. See the video evidence in NB310/NB311 on  
20 the USB drive in Dkt. 392. showing *begin-here2day.xyz* opening webpage  
21 *xanaduMarketing.outgrow.us*.

22 **Call #4:** The 4/5/2021 text message (Dkt 252 ¶13) had the URL *clickto-startnow.club*  
23 and opening that URL opened webpage *theultimaterenttoownhomeprogram.com*, a Xanadu  
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1 website. Dkt. 378 ¶9.. All Defendants have stipulated they sent this text message to the 1019  
2 phone as part of the 20 Texts. Dkt. 378-1 page 10.

3 **Call #5:** The 4/8/2021 text message (Dkt 252 ¶13) had the URL *get.started.today.live* and  
4 opening that URL opened webpage *completetheseoffers.com*, a Xanadu website. Dkt. 378 ¶9.  
5 All Defendants have stipulated they sent this text message to the 1019 phone as part of the 20  
6 Texts. Dkt. 378-1 page 10.

7 **Call #6:** The 4/12/2021 text message (Dkt 252 ¶14) had the URL *get-your-start.xyz* and  
8 opening that URL opened webpage *xanadumarketing.outgrow.us*, a Xanadu website. Dkt. 378  
9 ¶15, ¶31. See the video evidence in NB339 on the USB drive in Dkt. 392.

10 **Call #7:** The 6/11/2021 text message (Dkt 252 ¶17) had the URL *increasemyscore.live*  
11 and opening that URL opened webpage *apexpagebuilder.com*, a Xanadu website. Dkt. 378 ¶9.  
12 See the video evidence NB396 on the USB drive in Dkt. 392. All Defendants have stipulated  
13 they sent this text message to the 1019 phone as part of the 20 Texts. Dkt. 378-1 page 11.

14 **Call #8:** The 7/13/2021 text message (Dkt 252 ¶18) had the URL *rounduplawsuit.live*, a  
15 Xanadu owned website. Dkt. 378 ¶9. All Defendants have stipulated they sent this text message  
16 to the 1019 phone as part of the 20 Texts. Dkt. 378-1 page 5.

17 **Call #9:** The 8/11/2021 text message (Dkt 252 ¶18) had the URL *improvemyscores.live*  
18 and opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt.  
19 378 ¶9. See the video evidence in NB349 on the USB drive in Dkt. 392. All Defendants have  
20 stipulated they sent this text message to the 1019 phone as part of the 20 Texts. Dkt. 378-1 page  
21 6.

22 **Call #10:** The 8/4/2021 text message (Dkt 252 ¶19) had the URL *increasemyscore.live*  
23 and opening that URL opened webpage, *apexpagebuilder.com*, a Xanadu owned website. Dkt.  
24 378 ¶9. See the video evidence in NB402 on the USB drive in Dkt. 392. All Defendants have

1 stipulated they sent this text message to the 1019 phone as part of the 20 Texts. Dkt. 378-1 page  
2 12.

3 **Call #11:** The 9/21/2021 text message (Dkt 252 ¶18) had the URL *roundupfiler.live*, a  
4 Xanadu owned website. Dkt. 378 ¶9. All Defendants have stipulated they sent this text message  
5 to the 1019 phone number as part of the 20 Texts. Dkt. 378-1 page 7.

6 **Call #12:** A 11/25/2021 text message (Dkt 252 ¶24) had the URL *open-here-now.xyz* and  
7 opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt. 378  
8 ¶9.

9 **Call #13:** A 11/25/2021 text message (Dkt 252 ¶25) had the URL *get-started.xyz* and  
10 opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt. 378  
11 ¶9. See the video evidence in NB411 on the USB drive in Dkt. 392.

12 **Call #14:** A 12/9/2021 text message (Dkt 252 ¶30) had the URL *pushtostart.website* and  
13 opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt. 378  
14 ¶9.

15 **Call #15:** A 12/17/2021 text message (Dkt 252 ¶32) had the URL *Imore-step.xyz* and  
16 opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt. 378  
17 ¶9.

18 **Call #16:** A 12/17/2021 text message (Dkt 252 ¶33) had the link *pushtostart.website* and  
19 opening that URL opened webpage *apexpagebuilder.com*, a Xanadu owned website. Dkt. 378  
20 ¶9.

#### 21 Call Summary

- 22 • 2 of the 20 Texts contained a URL for a Xanadu-owned website (#8 & #11).
- 23 • 8 more of the 20 Texts – (#1, #2, #3, #4, #5, #7, #9, #10 – contained a link that opened a  
24 website owned by Xanadu.

- 6 of 23 not-stipulated-to (43-20) texts – #6, #12, #13, #14, #15, #16 – opened a website owned by Xanadu.
- 2+8+6=16 calls on behalf of Xanadu. Each violated 64.1200(c)(2) and 64.1200(d)(4).

#### IV. Trebled TCPA damages

“A court may award treble damages if it finds that a defendant "willfully or knowingly" violated the TCPA . . . the Supreme Court has held that a willful violation includes "not only knowing violations of a standard, but reckless ones as well." . . . Conduct is reckless if it "is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.”<sup>6</sup> Awarding treble damages is a “low threshold”<sup>7</sup> if a court has “evidence that a defendant was aware or should have been aware that it called an individual after he or she asked that the calls stop”<sup>8</sup>

#### **Starter Home and Xanadu knowingly initiated all their calls without consent**

Starter Home and Xanadu had identical TCPA policies<sup>9</sup> which demonstrated they knew *[a] telephone number registered on the National Do Not Call Registry must not be called for telemarketing purposes unless the caller has an existing business relationship with the individual being called or the individual being called has given the caller express consent to be called. See* the highlighted portion of the policy’s second page.

It must be said that they willfully and knowingly solicited without consent. Delfgauw owns, controls, and manages the day-to-day operations of both Starter Home and Xanadu (infra),

<sup>6</sup> *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, 8 (9th Cir. Oct. 25, 2023)

<sup>7</sup> *Roylance v. Alg Real Estate Services Inc.*, 14-cv-02445-BLF, (N.D. Cal. Apr. 3, 2015)

<sup>8</sup> *Warman v. Law Office of Daniel M. Slane*, 14-CV-700(LJV), 13 (W.D.N.Y. Mar. 13, 2017)

<sup>9</sup> For Starter Home see RFP #1 on page 4 of Exhibit NB113. The actual policy starts on page 9. For Xanadu see RFP #9 on page 6 of Exhibit NB096. The actual policy starts on page 10.

1 and Xanadu owns the website that contained the consent block (*educationschoolmatching.com*)  
2 (Dkt. 378 ¶9). Starter Home initiated the texts – often on Xanadu’s behalf – for non-partner  
3 entities and that can’t be done un-knowingly, un-willfully, or un-recklessly.

4 But the parties stipulated that the opt-in provided consent to text  
5 messages only for a “specific list of partners” and that “[n]one of the text  
6 messages Starter Home or Xanadu sent to (360) 910 1019 was from this  
7 specific list of partners.” (Dkt. No. 378 at 2, ¶ 6.) . . . Defendants /  
Counterclaimants cannot claim they had a representation of consent to  
8 send text messages from the non-partner entities to begin with. Dkt. 416,  
7:15-20.

9 The Defendants didn’t screen their calling numbers against the FTC’s NDNCR because  
10 they didn’t have a Federal Trade Commission subscription account number:<sup>10</sup> *the Court directs*  
11 *that plaintiff has established that defendants did not have a Federal Trade Commission*  
12 *subscription account number when they contacted the phone number at issue* Dkt. 244, 6:11-13.

13 See the FTC’s website at [telemarketing.donotcall.gov/profile/create.aspx](https://telemarketing.donotcall.gov/profile/create.aspx):

14 To access the registry, your organization must designate someone as  
15 your Authorized Representative and create a profile. You will need to  
16 identify your organization as a Seller, Telemarketer, or Service Provider  
(TM/SP), or as Exempt. See "Registering and Subscribing to the  
Registry" for more.

17 Once your organization has created a profile, you can choose which area  
18 code subscriptions you want. **After you subscribe, your organization  
will be given a Subscription Account Number (SAN).**

19 The Defendants’ were aware via their own TCPA policy prevented calls to NDNCR  
20 numbers without express consent. They willfully and knowingly did it, or were so reckless in  
21 doing so the TCPA damages under 47 CFR § 64.1200(c)(2) should be trebled.

22  
23  
24 <sup>10</sup> Established under 15 U.S.C. § 6151

1 While on the subject of their TCPA policy, on page 3 it says [u]pon making a telephone  
2 solicitation, the caller must provide the recipient of the call the following information: Caller's  
3 name; Name and address or telephone number of the Company, or the representative to which  
4 the caller is affiliated. . . . A statement that informs the subject that the purpose of the call is to  
5 solicit the purchase of products and services. The Court can see for itself - no text message  
6 Barton received had the name, address, telephone number, or statement as is required by 47 CFR  
7 § 64.1200(d)(4). Given that they knew the requirement, the absence of it was willful and  
8 knowing. This violation is a separate from the 47 CFR § 64.1200(c)(2) NDNCR violations but  
9 like 64.1200(c)(2), § 64.1200(d)(4) was promulgated under 47 U.S.C. 227(c). *Barton v Alleviate*  
10 *Tax LLC.*, 3:2023-cv-06071, (W. D. WA. March 21, 2024).

### 11 **Starter Home and Xanadu added the 1019 number back into their calling lists**

12 The Defendants stipulated that they removed the 1019 phone number from their calling  
13 lists on September 7, 2021. Dkt. 394, 4:7-9. And Dkt. 395, page 29 ¶11: *He [Barton] filed this*  
14 *lawsuit against Joe Delfgauw, Starter Home and Xanadu on August 23, 2021. Joe Delfgauw was*  
15 *served on September 7, 2021, and the 1019 number was removed from Starter Home's and*  
16 *Xanadu's calling lists the same day.*" The Defendants stipulated that they sent text messages to  
17 the 1019 phone number *after* 9/7/2021, on 9/21/2021, 11/17/2021, and 11/23/2021. Dkt. 378 ¶1.  
18 All of the post-September 7 calls and texts should be trebled because it is self-evident the only  
19 way the Defendants solicited the 1019 phone number after removing it from their calling lists on  
20 September 7, 2021, was by putting it back in. This is sufficient to treble damages for all calls  
21 initiated after September 7, 2021.

## 22 **V. Joe Delfgauw is personally liable for the calls**

### 23 **The standard for personal liability**

1 Washington State Courts allows corporate officers to be held personally liable for the  
2 calls initiated by their companies:

3 *"Individuals who directly . . . violate the TCPA should not escape*  
4 *liability solely because they are corporate officers" and a corporate*  
5 *officer is deemed to have "made" a call, and thus liable under the TCPA,*  
6 *if the officer "had direct, personal participation in or personally*  
7 *authorized the conduct found to have violated the statute." His argument*  
8 *also ignores that Washington courts extend personal liability to*  
9 *corporate officers who supervised, directed, or approved wrongful*  
10 *business conduct. [Hoffman v. Logan](#), No. 81887-2-I, 9 (Wash. Ct. App.*  
11 *Jul. 26, 2021)*

### 12 **Delfgaww meets the standard generally**

13 Delfgaww has personally supervised, directed, and approved the wrongful business  
14 conduct that injured Barton. He is the president, secretary, and sole director of Xanadu (Dkt.  
15 389-1 page 2), and Starter Home (389-1 page 5). *Mr. Delfgaww actively controls the day-to-day*  
16 *operations of Xanadu and Starter Home,*<sup>11</sup> He must be significantly involved because as the  
17 day-to-day manager, he has few workers. Starting at Dkt. 398-1 12:19:

18 Q: Okay. How many people total work at Starter Home?

19 A: I don't know. I'd have to ask Nancy, my accountant, if any -- if we have any employees or  
20 contractors for Starter Home.

21 Q: Well, I guess when I say "work for," I am kind of lumping in contractors and employees.  
22 Would you think it's more like 5 or more like 50?

23 A: It would be five or less most likely, if it was that.

24 Q: Five or less. How many people work for Xanadu Marketing, Incorporated?

A: None.

25 Starter Home and Xanadu are small companies and Delfgaww has stipulated that he  
26 controls their day-to-day operations (supra). He can't help but be intimately involved in

---

27 <sup>11</sup> Dkt. 394 3:9-10.

1 supervising, directed, or approving the wrongful business conduct that led to Barton’s injury.

2 The record shows he was. Starting at Dkt. 398-1 17:9:

3 Q: What kind of decisions do you make for Starter Home on a day-to-day basis?

4 A: I mean I run the company. I assign people to do their jobs and so I guess I'm not exactly  
5 sure what you're -- what you're asking. I mean when you own a company and you're the  
6 manager, you tell people what to do.

7 Starter Home and Xanadu texted Barton because of an opt-in allowing solicitations from  
8 a specific list of partners, yet not a single call/text was from an entity on the partners list.

9 Delfgaw oversaw that. Starter Home and Xanadu removed the 1019 number from the calling  
10 list on 9/7/2021, and then went on to call/text it another 36 times. Delfgaw oversaw that.

### 11 **Delfgaw meets the standard specifically**

12 First, there is the soliciting for the non-partner entities thing. Given that Delfgaw  
13 manages the day-to-day operations of Starter Home – the initiator of all the calls addressed in  
14 this motion – for “five or less [workers] most likely, if it was that”, he fits the *[if] a corporate*  
15 *officer participates in wrongful conduct or with knowledge approves of the conduct, then the*  
16 *officer, as well as the corporation, is liable for the penalties* holding of [Grayson v. Nordic](#)  
17 [Constr. Co.](#), 92 Wn. 2d 548, 554 (Wash. 1979). Delfgaw is fully aware Starter Home and  
18 Xanadu are soliciting without consent and he personally set up his companies’ processes that  
19 allow it to happen. See Dkt. 398-1 deposition testimony starting at 53:18:

20 Q: What information do you have that I opted in on your web site?

21 A: . . . usually what happens is when someone receives a text message, they just simply reply  
22 "Stop," if they don't want to receive another text message, and that usually ends that, **if it**  
23 **was not the person who opted in.**

24 Delfgaw expects people he solicits without consent to reply stop. But one or two a  
month send him a demand letter instead. See Dkt. 398-1 deposition testimony starting at 65:11:

Q: In these other lawsuits, are the plaintiffs claiming that they themselves never opted in?

A: I would have to look at each individual lawsuit, **but we get demand letters once or twice**  
**a month of people saying they never did.**

1           :

2           Q: Well, how would you state it? Have you gotten a number of complaints from people  
3           saying, "I didn't opt-in that phone number?"

4           A: Define a number. Let's just say two a month on average, one a month -- I don't know.

5           He's gotten away with this for so long he has become entitled to it. See Dkt. 252-7  
6           deposition testimony starting at 32:25:

7           Q: What keeps someone from opting in their neighbor on your websites.

8           A: Because the neighbor usually responds stop or help.

9           :

10          Q: So do you think that you should be checking to see if telephone numbers have changed  
11          hands?

12          A: I believe that when people get a text that they don't want, they reply stop

13          The owner and manager of Starter Home doesn't think they should see if a phone number  
14          changed hands because he is counting on the recipients to reply STOP. Delfgaw knows it is  
15          more than phone numbers changing hands, he knows spam bots are busy entering real stolen  
16          information. See Dkt. 398-1 deposition testimony starting at 26:25:

17          Q: So on Validiform, would it surprise you to learn that the blog talks in detail about the  
18          spam bot opting in with real stolen information?

19          A: So it is commonly known in the marketing world that there are companies out there that  
20          try to get paid to absolutely enter in false information, whether it's a bot, whether it's a  
21          person. That's a pretty commonly known thing, yes.

22          Yet he doesn't even bother to try and verify the accuracy of his opt in data.

23                 During the times relevant to this lawsuit Joeseeph Delfgaw and the  
24                 entities under Joeseeph Delfgaw's control simply assumed all the  
                information submitted during the "opt in" process was correct, and they  
                didn't take any actions to verify the accuracy of the "opt in" information  
                submitted. Likewise, they took no steps to verify if the owner of the  
                email address ivettealfredomartinez@gmail.com was the same person  
                who had use of the phone number (360) 910 1019. Dkt. 378 ¶4.

                Delfgaw set this specific policy. See Dkt. 252-7 deposition testimony starting at 9:19:

                Q: Who in your organization is responsible for deciding that an opt-in is sufficiently verified  
                to solicit the phone number.

                A: Can you actually repeat that. I want to make sure that I answer that right.

1 Q: That's okay. What person in your organization is responsible for deciding that an opt-in is  
sufficiently verified to solicit the phone number.

2 A: So the developers are put through a scrubbing service called IPQS and if it comes back  
that that is a legitimate cell phone number, then that is our validation process.

3 Q: Who in your organization set that policy.

4 A: Me.

5 And see Dkt 407-4 deposition testimony starting at 48:25:

6 Q: Okay. What person is responsible for deciding that an opt-in is sufficiently verified to  
solicit that phone number associated with the opt-in.

7 A: We ping a service called IPQS . . . (not responsive answer)

8 Q: Who inside Xanadu decided to use that process.

9 A: Inside of Xanadu. That would probably be me because I talked with the different  
developers, server people, leads people, call center people, all of those to find a service  
that works good. So I guess that would be me.

10 His companies do nothing to verify the opt-in information. Dkt. 378 ¶4. More than this,  
11 Delfgaww chose not to use a captcha to filter out the spam robots that are opting in on  
12 *educationschoolmatching.com*. See Dkt 407-4 deposition testimony starting at 62:15:

13 Q: Would a captcha filter out robots that are opting in to *educationschoolmatching.com*?

14 A: It is my understanding that captchas will do that, yes. I don't know that. I'm not a  
developer either.

15 Q : So did you make the decision not to use captcha on *educationschoolmatching.com*?

16 A: THE WITNESS: So to answer the question as to who made the decision. We have  
17 historical data that shows that captchas break because they're not perfect. We also have  
18 historical data that shows that people get frustrated when they can't figure out the captcha  
sometimes and since we have tens of thousands of leads a day and never really have this  
19 kind of an issue, Mr. Burton, we decided that **it was better to have the conversion ratio  
be better for us** and not have the customers who really want to do business with us be  
frustrated.

20 :

21 Q: When you say that we made a decision, does that mean that you, Mr. Delfgaww were  
involved in that decision?

22 A: Yes, I was involved in that decision.

23 Q: Was that decision completely yours to make?

24 A: No. I mean I'm sure I have the final say.

1 Of course he does. He is the owner, chief officer, and manager of Starter Home and  
2 Xanadu. Delfgaww knows they are soliciting people who did not consent to his calls. He  
3 expects recipients to opt out, not his companies to obtain prior consent. He said fraudulent opt  
4 ins are a commonly known thing in the telemarketing world but choose not to use a captcha to  
5 filter them out because *it was better to have the conversion ratio be better for us*. He specifically  
6 does not look to see if individual opt ins are legitimate. “We go by the statistics of the opt-out  
7 rate”.. See Dkt. 364-7 deposition testimony starting at 21:13:

8 Q: IPQS . . . you said it pings the phone number and what else?

A: The email address

9 Q: when you ping it, what are you pinging it for? What are you trying to see?

10 A: . . . let’s say someone put in a fake phone number . . it has to be a real phone number and  
it has to be a real email address

11 Q: Okay. So it just tells you if the information is real . . . does it give you any information to  
whether who actually entered the – who or what entered the information? Does IPQS tell  
12 you who of what entered the information, real or not?

A: No, IPQS does not.

13 Q: What does? . . . **what process, if any, do you go through to see if it was legitimately  
entered into and opted into?**

14 A: **We go by the statistics of the opt-out rate** because most people that don’t want to  
receive texts just reply “Stop”.

15 This shows that Delfgaww is personally aware that Xanadu and Starter Home don’t care  
16 about the validity of each individual opt in. He knows many of the opt ins are fake yet does not  
17 want to scrub his calling lists against the FTC’s do not call list. See Dkt. 252-7 deposition  
18 testimony starting at 14:13:

19 Q: What person was responsible in 2021 for deciding to purchase or not purchase the Do  
Not Call List from the Federal Trade Commission Subscription Account Number system.

A: I believe the developer.

21 Q: So the developer decided not to buy the Subscription Account Numbers?

A: I don't know if he did or didn't.

22 Q: Were you aware of the Subscription Account Number system in 2021?

A: Am I aware that the Do Not Call exists?

23 Q: Are you aware that the Do Not Call List exists?

24 A: I am aware.

1 Q: Were you aware that you could obtain the Do Not Call List and scrub your calling lists  
against it?

2 A: I'm aware, but I made the decision because when someone opts-in, that trumps the Do  
Not Call List. So because we only text opt-in data, I didn't need it.

3 Delfgauw's companies don't use it. See Dkt. 364-7 testimony starting at 144:25:

4 Q: . . . does any one of [your companies] scrub their numbers using a SANS database?

5 A: . . . people have different interpretations of what the SANS database is. Do you mind me  
asking what your're referring to?

6 Q: The federal database that –

7 A: For do not call?

8 Q: Yes, sir. Yeah.

9 A: . . . so the – the SANS database – we had a subscription to DNC.com or DNC.org – I  
can't remember the name of the company

10 Q: Okay

11 A: But after three years of using it, we realized we didn't need it because everybody opts in  
and because everybody opted in, it superseded it, and we just didn't need to pay for it.

12 Q: Okay

13 A: It was \$1,700 a month and we didn't need it because everybody opts in at our sites

14 Delfgauw knows Xanadu and Starter Home are calling without consent – if nothing else  
the non-partner solicitations prove that – and his testimony shows he was motivated to pocket the  
\$1,700 a month and extra business the calls without consent generated.

15 **Delfgauw knowingly sent Barton text messages in violation of the terms of his contracts**

16 Barton would not have received the lawsuit related text messages in Dkt. 378-1 page 2,  
17 page 5 and page 7 had Delfgauw not knowingly and willfully violated the terms of his  
18 contracts.<sup>12</sup> The Defendants stipulated to sending all three.

19 Delfgauw is the President of Mountaintop Affiliate Network Inc. (“Mountaintop”). Dkt  
20 378 ¶36. Mountaintop is some sort of go-between between Tort Experts (LGNB LLC) (“Tort  
21 Experts”) and Xanadu. Xanadu identified Alex Jakimtschuk as a witness:<sup>13</sup>

22  
23 <sup>12</sup> See the Barton Dec. associated with this motion ¶16.

24 <sup>13</sup> Exhibit NB495 – Barton received this document from the Defendants on 11/18/2021. It was  
attached to the email marked as Exhibit NB494. See Barton Dec. ¶1.

1 Alex Jakimtschuk – Employee of Mountain Top Affiliate Network that handles defendant  
2 Xanadu’s account. Mr. Jakimtschuk has provided Mr. Winkler with information regarding  
3 damages.  
4 2623413 Ontario LTD. 2422 Robin Dr. Mississauga, ON L5K1S9

5 The second page of Exhibit NB494 included an email from Alex Jakimtschuk. Barton  
6 received some of Xanadu’s SMS (short message service) texts soliciting for Tort Experts and  
7 they were named in the Original Complaint, Dkt. 1.

8 **From:** Alex Jakimtschuk  
9 **Sent:** Wednesday, November 17, 2021 1:53 PM  
10 **To:** legal@xanadumarketing.com  
11 **Subject:** Damages Barton Vs. Xanadu

12 My name is Alexander Jakimtschuk and I work for The MountainTOP Network. As a result of the Nathan  
13 Barton Lawsuit, we were told by Tort Experts (LGNB LLC) to not allow Xanadu to SMS anymore. From  
14 Jan 1 2021 to September 8 2021 they earned 133, 592 dollars from sending SMS messages on that offer  
15 and they lost the ability for any future earnings because of this.

16 Kind Regards,



17 ALEX JAKIMTSCHUK  
18 BUSINESS DEVELOPMENT MANAGER  
19 THE MOUNTAINTOP AFFILIATE NETWORK

20 The Defendants counterclaim was almost entirely based on this loss of revenue. See the  
21 REVENUE column on page three of NB495 - \$161,105. Money flowed from Tort Experts,  
22 through Mountaintop, and to Xanadu and Starter Home. See the damages section of Dkt 170  
23 page 3: All defendants claimed the same \$161,105 in damages.

24 Barton wasn’t supposed to receive the Defendants’ text messages soliciting for Tort  
Experts because Tort Expert’s contract with Mountaintop prohibited SMS messages: *Joseph  
Delfgouw was aware that the contract between Tort Experts (LGNB LLC) and Mountaintop  
Affiliate Network Inc. prohibited using SMS messages to solicit Tort Experts (LGNB LLC)*

1 *products or services* Dkt 378 ¶38. Delfgaw is personally responsible for those texts Barton  
2 received: *Joseph Delfgaw personally approved of entities under Joseph Delfgaw’s control*  
3 *using SMS messages to solicit Tort Expert (LGNB LLC) products or services.* Dkt 378 ¶39. Tort  
4 Experts found out and forced Delfgaw’s businesses to stop: *Tort Experts (LGNB LLC) did not*  
5 *allow Xanadu Marketing Inc. to SMS anymore because Tort Experts (LGNB LLC) does not let*  
6 *any entity solicit Tort Experts (LGNB LLC) products or services via SMS messages* Dkt 378 ¶26.

7 Delfgaw confirmed this during discovery. See Delfgaw’s response to RFD #30:<sup>14</sup>

8	<b><u>PRODUCTION REQUEST NO. 30:</u></b>	Produce all contracts between Mountaintop
9		Affiliate Network Inc. and Tort Expert (LGNB LLC) that were in effect when Mountaintop
10		Affiliate Network Inc. was told not to allow Xanadu to SMS anymore.
11	<b><u>RESPONSE:</u></b>	
12		See attached

13 Contrast this Delfgaw’s next response RFD #31. Delfgaw knew the contract forbids  
14 SMS messages soliciting on Tort Expert’s behalf, but he never told Xanadu to stop SMSing.

16	<b><u>PRODUCTION REQUEST NO. 31:</u></b>	Produce all contracts between Mountaintop
17		Affiliate Network Inc. and Xanadu Marketing Inc. that were in effect when Mountaintop
18		Affiliate Network Inc. was told not to allow Xanadu to SMS anymore.
19	<b><u>RESPONSE:</u></b>	
20		Xanadu was never told not to use SMS Marketing.

21 Barton received at least two text messages because Delfgaw choose to ignore his  
22 contract with Tort Experts and solicit their goods and services to Barton without consent.

24 <sup>14</sup> See Exhibit NB179. Barton testifies to its accuracy in the associated Barton Dec. ¶15

1                                   **VI. Summary of the claims presented in the motion**

2   **Summary of the TCPA 64.1200(c)(2) Elements**

3                   In Dkt 395 page 52 all parties agreed on the elements of Barton’s 64.1200(c)(2) TCPA  
4 claim. This motion has demonstrated there are no material dispute of fact on each element.

5           1) the defendant initiated two or more calls to a residential telephone number, or someone  
6 else initiated the calls on the defendant’s behalf. 47 U.S. Code § 227(c)(5).

- 7                   • Starter Home stipulated to initiating the 20 Texts to the 1019 number.  
8                   • Evidence shows Starter Home initiated 43 texts to the 1019 number. Dkt. 252.  
9                   • Xanadu has stipulated two of the 20 Texts contained URLs to Xanadu-owned  
10 websites. #8 & #11.  
11                   • Video evidence shows that an additional 8 of the 20 Texts contained URLs that, when  
12 entered into a web browser, opened a Xanadu-owned webpage. #1, #2, #3, #4, #5, #7,  
13 #9, #10  
14                   • Barton provided evidence that 6 of the 23 not-stipulated texts – #6, #12, #13, #14,  
15 #15, #16 – contained a URL that when entered into a web browser, opened a webpage  
16 owned by Xanadu.  
17                   • “The parties in this case have already agreed that the phone number (360) 910-1019  
18 was registered on the FTC’s national do-not-call registry by the Plaintiff”. Dkt. 395  
19 53:1-2. The 1019 number is presumptively residential under *Barton v. LeadPoint,*  
20 *Inc.*

21           2) the called phone number was registered on the FTC’s National Do-Not-Call Registry  
22 more than 31 days before each call. [47 CFR § 64.1200\(c\)](#).

- 23                   • “The parties in this case have already agreed that the phone number (360) 910-1019  
24 was registered on the FTC’s national do-not-call registry by the Plaintiff”. Dkt. 395  
53:1-2.

25           3) the calls were initiated for the purposes of encouraging the purchase or rental of, or  
26 investment in, property, goods, or services. [47 CFR § 64.1200\(f\)\(15\)](#).

- 27                   • The Defendants agree “that the purpose of all the calls was to promote property,  
28 goods, or services for sale or lease and that the Plaintiff has satisfied the third element  
29 of this claim.” Dkt. 395 53:3-5.

30           4) the calls were initiated without the prior express consent of the called party. [47 CFR §](#)  
31 [64.1200\(f\)\(15\)\(i\)](#).

- See Element 4 on page 6.

5) There is an implied fifth element – the plaintiff is the subscriber or customary user of the phone number. See element 5 on page 8.

#### **The TCPA 64.1200(d)(4) Claim**

Once the 64.1200(c)(2) claim is established, the 64.1200(d)(4) claim is proven by looking at the content of the messages.

#### **The CEMA Claim does not require DNC registration or a residential number**

The elements of a CEMA claim are similar to the elements of a TCPA claim except CEMA does not require a residential number or registration on the FTC’s DNC list elements.

### **VII. Prebuttal of the pending response**

The Defendants are likely to recycle arguments from Dkt 255 that still don’t work.

A. Defendants in Dkt. 255 argued that the amended complaint only describes 21 solicitations in great detail so their can’t be more. They overlooked Dkt 83, 3:7-10: “Even after being personally served this lawsuit, Delfgaw did not prevent further solicitation calls to Barton. For at least four months after Delfgaw was personally served this Lawsuit, Defendants have placed or caused to be placed solicitation calls to Barton.” Given that the lawsuit was filed on August 23, 2021, four months after August is December. Barton does not have to describe every call in the complaint as this Court operates via notice pleading. As the Court said: *[t]he lack of further factual detail . . . can be addressed through discovery . . .* Dkt. 416, 2:9-11.

B. “Plaintiff’s argument appears to be that ownership of the phone number alone should automatically bestow standing upon him.” Dkt 255, 5:10-11. They are correct. “We now hold that the owner and subscriber of a phone with a number listed on the Do-

1 Not-Call Registry has suffered an injury in fact when unsolicited telemarketing calls  
2 or texts are sent to the number in putative violation of the TCPA.” *Hall*.

3 C. Barton need not pierce the corporate veil in the traditional sense. See *Hoffman* and  
4 *Grayson* supra.

5 D. Defendants are likely to argue that the only evidence of the calls beyond the 20  
6 stipulated in Dkt. 378 ¶1 stems from Barton’s “self-serving” testimony and will claim  
7 his screen shots evidence is hearsay. First, if the Defendants had not deleted the call  
8 records Barton wouldn’t need to rely on his own testimony. Dkts 412 & 418. Second,  
9 Statements from party opponents are not hearsay FRE 801(d)(2)(A). The  
10 Defendants have established in 378 ¶1 that the SMS short codes 33959, 94657, and  
11 46758 are communications from them so they are not hearsay.

12 To date this Court has refused to rule that the Defendants cannot benefit from their  
13 willful destruction of the calling records. Will the circuit court sort out if the  
14 Defendants can delete the call records to deprive Barton of the evidence, and use that  
15 lack of evidence to cause Barton to fail to recover damages for the 59 calls?

16 E. The Defendants are likely to argue the premises that *Barton has an unrelenting*  
17 *mission to take on these types of cases* and Barton is *getting text messages intended*  
18 *for someone else and does nothing about it other than file litigation*. Dkt. 420. In  
19 Dkt. 317 the Court ordered *[t]he defendants/counter plaintiffs should not be allowed*  
20 *to argue to the jury that Barton should have taken steps to prevent further calls . . .*  
21 *[t]he parties agreed*.

## 22 **F. Wrapping up**

### 23 **Issues this Court can resolve at summary judgment**

24 1. Starter Home is liable for 43 violations of 47 CFR § 64.1200(c)(2).

- 1 2. Starter Home is liable for 43 violations of 47 CFR § 64.1200(d)(4).
- 2 3. Starter Home is liable for 43 violations of CEMA at \$500 each, \$21,500 total.
- 3 4. Xanadu is liable for 16 violations of 47 CFR § 64.1200(c)(2).
- 4 5. Xanadu is liable for 16 violations of 47 CFR § 64.1200(d)(4).
- 5 6. Xanadu is liable for 16 violations of CEMA at \$500 each, \$8,000 total.
- 6 7. All 47 CFR § 64.1200(c)(2) damages should be trebled.
- 7 8. All 47 CFR § 64.1200(d)(4) damages should be trebled.
- 8 9. Joseph Delfgauw should be held jointly and severally liable for all damages.

9 **Issues remaining for trial**

- 10 1. One text message cannot be resolved at summary judgement.
- 11 2. The voice calls and the RCW 80.36.390(2) claims cannot be resolved at summary  
12 judgement.
- 13 3. Barton will ask the jury award \$500 for each violation of 47 CFR § 64.1200(c)(2) and  
14 \$500 for each violation of 47 CFR § 64.1200(d)(4).
- 15 4. The RCW 19.158 claims.

16 **Conclusion**

17 It is uncontested that Starter Home initiated the 20 Texts to the 1019 number and two of  
18 those texts directly linked to Xanadu owned websites. Barton has provided the Court picture  
19 evidence and testimony of 43 texts, 16 initiated on behalf of Xanadu.

20 Barton would provide the Defendants' call logs transmission records, but the Defendants  
21 stipulated that *[t]he Dialer data was deleted to deprive Barton of the evidence* (Dkt. 378 ¶30)  
22 after lying that it was lost due to a dialer update. Dkt. 412. Do you suppose in their response  
23 they will challenge some of the 43 texts because Barton doesn't have their call records, or will  
24 they contest the content (purpose) of the text messages?

1 The Defendants stipulated that the *purpose of all the calls was to promote property,*  
2 *goods, or services for sale or lease.* The Defendants have stipulated that *the phone number (360)*  
3 *910-1019 was registered on the FTC’s national do-not-call registry by the Plaintiff* and Barton  
4 testified to the same. Dkt. 252 ¶37.

5 Finally, Barton’s can’t exceed Dkt. 416’s eloquence on the Defendants’ lack of consent  
6 to initiate the calls at issue. To the extent the Court questions if the Defendants freely entered  
7 into the stipulations underpinning the consent issue, Dkt. 418 should settle it.

8  
9 s/ Nathen Barton  
10 (signed)

November 12, 2024  
(Dated)

11 Nathen Barton  
12 (469) 347 2139  
13 4618 NW 11<sup>th</sup> Cir  
14 Camas WA 98607  
15 [FarmersBranch2014@gmail.com](mailto:FarmersBranch2014@gmail.com)

16 **Declaration of Nathen Barton**

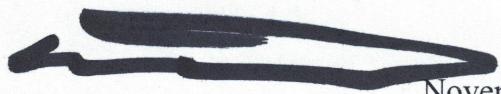
17 My name is Nathen Barton and I live at 4618 NW 11<sup>th</sup> Cir, Camas WA 98607. I am over the age  
18 of eighteen, and otherwise competent to be a witness in this matter. Except as expressly set forth  
19 herein, I make this declaration in my personal capacity and based on my personal knowledge.

- 20 1. Exhibit NB495 is a true and accurate copy of a document I received from the  
21 Defendants on 11/18/2021. Opposing Counsel attached it to an email she sent to me  
22 on 11/18/2021. A true and accurate copy of that email is shown in NB494.
- 23 2. NB323 is a true and accurate copy of a video I took. It is a true and accurate copy of  
24 what I observed. This video has been in my sole custody and control from the time I  
took it till the time I mailed it to the Court on the USB drive. I don’t know the exact  
date the video was taken but it would have been late in 2021 or early in 2022.

- 1 3. NB324 is a true and accurate copy of a video I took. It is a true and accurate copy of  
2 what I observed. This video has been in my sole custody and control from the time I  
3 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
4 date the video was taken but it would have been late in 2021 or early in 2022.
- 4 4. NB310 is a true and accurate copy of a video I took. It is a true and accurate copy of  
5 what I observed. This video has been in my sole custody and control from the time I  
6 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
7 date the video was taken but it would have been late in 2021 or early in 2022.
- 7 5. NB311 is a true and accurate copy of a video I took. It is a true and accurate copy of  
8 what I observed. This video has been in my sole custody and control from the time I  
9 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
10 date the video was taken but it would have been late in 2021 or early in 2022.
- 10 6. NB392 is a true and accurate copy of a video I took. It is a true and accurate copy of  
11 what I observed. This video has been in my sole custody and control from the time I  
12 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
13 date the video was taken but it would have been late in 2021 or early in 2022.
- 13 7. NB396 is a true and accurate copy of a video I took. It is a true and accurate copy of  
14 what I observed. This video has been in my sole custody and control from the time I  
15 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
16 date the video was taken but it would have been late in 2021 or early in 2022.
- 15 8. NB349 is a true and accurate copy of a video I took. It is a true and accurate copy of  
16 what I observed. This video has been in my sole custody and control from the time I  
17 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
18 date the video was taken but it would have been late in 2021 or early in 2022.
- 18 9. NB402 is a true and accurate copy of a video I took. It is a true and accurate copy of  
19 what I observed. This video has been in my sole custody and control from the time I  
20 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
21 date the video was taken but it would have been late in 2021 or early in 2022.
- 21 10. NB411 is a true and accurate copy of a video I took. It is a true and accurate copy of  
22 what I observed. This video has been in my sole custody and control from the time I  
23 took it till the time I mailed it to the Court on the USB drive. I don't know the exact  
24 date the video was taken but it would have been late in 2021 or early in 2022.

- 1 11. All of the interrogatory questions and response snapshots are true and accurate copies  
2 of the original documents.
- 3 12. All of the request for admissions and response snapshots are true and accurate copies  
4 of the original documents.
- 5 13. All of the request for documents and response snapshots are true and accurate copies  
6 of the original documents.
- 7 14. When I testified as to what links opened what webpages in Dkt. 252, I knew from  
8 personal experience what links opened what webpages. I typed the links into a web  
9 browser or clicked on the links in the text message and saw what web page opened,  
10 and then made a note of the result.

11 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
12 statements are true and correct.

13  November 12, 2024 Signed in Camas Washington  
14 Signed by Nathen Barton Date Clark County

15 **I. CERTIFICATE OF SERVICE**

16 I hereby certify that on November 12, 2024, I electronically filed the foregoing with the  
17 Clerk of the Court using the Court's CM/ECF System, which will automatically generate a  
18 Notice of Electronic Filing to all parties in the case who are registered users of the CM/ECF  
19 System, which includes the Defendant. The said Notice of Electronic Filing specifically  
20 identifies recipients of electronic notice.

21 /s/ Nathen Barton

22 Nathen Barton

LCR 7(e)(4) Certification

I hereby certify this motion contains 8,400 or fewer words.

s/ Nathen Barton  
Nathen Barton

November 12, 2024  
(Dated)