

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

DAVID VAN ELZEN,

Plaintiff,

Case No. 24-1206

v.

AMERICAN HOME SHIELD
CORPORATION,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT AMERICAN HOME
SHIELD CORPORATION'S STREAMLINED MOTION FOR SUMMARY JUDGMENT**

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I. Introduction

Plaintiff David Van Elzen is a frequent filer of TCPA lawsuits. In this, his thirteenth trip to the courthouse, he contends Defendant American Home Shield Corporation (“AHS”) contacted him about a home warranty he allegedly did not want. But the undisputed record shows that AHS only contacted him in response to a request to be contacted, made through an online form that was filled out with Plaintiff’s contact information, including his telephone number and street address. That consent form—which was provided before the allegedly non-compliant contact—entitles AHS to summary judgment on either of two independent grounds.

First, AHS has a complete consent defense. The online request for more information about home warranty products begins as a blank form, with empty fields for Plaintiff to provide contact information. After that contact information was entered, the form was transmitted to AHS by clicking a button with disclosures explaining that by submitting the form, Plaintiff was consenting to be contacted about home warranty products. Upon receiving this request, AHS then contacted Plaintiff. Though Plaintiff attempts to deny providing consent, that self-serving denial is not enough to create a genuine issue of material fact. Discovery has shown that before filing this lawsuit, Plaintiff took his desktop computer to an IT professional, and discovery has confirmed that records of his website visits were deleted. While some of those deleted files were recovered, it is impossible for even the computer forensics expert in this case to know what deleted files were not recovered. But we do know that around the same time as the online form was submitted to AHS, twelve-time-TCPA Plaintiff Van Elzen was visiting similar types of websites offering information on home-related products and services (like gutter installation). That, coupled with a consent form that correctly provided Plaintiff’s contact information, including telephone number and address, all create a sufficient record to grant summary judgment. *Johansen v. Efinancial LLC*, 2022 WL 168170, at *3 (W.D. Wash. Jan. 18, 2022), a case brought by one of Mr. Van

Elzen's counsel, had a similar factual record, and the court there granted summary judgment for defendant.

Second, summary judgment is independently appropriate because AHS acted under an understandable and reasonable belief that it had consent to contact Plaintiff. The TCPA was not designed to punish companies who maintain TCPA-compliant practices, and only contact consumers when they receive requests that on their face provide consent to be contacted. For that reason, the TCPA has a safe harbor provision. That provision covers AHS's contact with Plaintiff because AHS only contacted him after employing practices designed to secure valid consent, in compliance with the TCPA. Accordingly, the safe harbor provision provides a separate and independent basis to grant summary judgment in AHS's favor based on its reasonable belief that it had consent to contact Plaintiff.

II. Statement of Undisputed Material Facts

A. Plaintiff's Claims and Allegations

Plaintiff filed the instant lawsuit on behalf of himself and others similarly situated on September 22, 2024. ECF 1. In his complaint, Plaintiff alleges that AHS violated the TCPA by sending him four unsolicited text messages related to AHS's home warranty services. *Id.* ¶¶ 19–41. Plaintiff, however, is no stranger to litigation nor the TCPA. He filed his first of more than a dozen lawsuits over a decade ago, in 2012. Declaration of Timothy W. Loose (“Loose Decl.”) Ex. A *Van Elzen v. Halsted Fin. Servs.*, Compl., 12-cv-00740-WCG (E.D. Wis. 2012). Since 2016, Plaintiff filed at least 11 other complaints against other companies alleging violations of the TCPA—about one complaint a year. Loose Decl. Exs. B–L.

In those complaints, Plaintiff made allegations similar to those here, alleging the companies caused him harm through unsolicited calls and/or text messages. *See, e.g.*, Loose Decl. Ex. K *Van*

Elzen v. Cody Askins, Compl. ¶¶ 24–31 (alleging defendant caused Plaintiff harm, “occupied his phone line, and disturbed the use and enjoyment of his phone, in addition to the wear and tear on the phone’s hardware [and] the consumption of memory on the phone” by placing three unsolicited calls to Plaintiff).

B. Discovery into Plaintiff’s Internet Activity Before Filing the Complaint

Despite Plaintiff’s extensive litigation experience and familiarity with the discovery process, Plaintiff resisted AHS’s efforts to obtain basic information about his browsing history. Plaintiff initially provided the browser history for a single day from only one of his two devices and only one of the browsers on that device and refused to provide any additional information. *See* ECF 18 at 1. After extensive efforts, an inspection of both of Plaintiff’s devices was carried out by a third-party expert, subject to a mutually agreed protocol that included specific search terms relevant to the case, *see* ECF 25. After Plaintiff withheld 99% of the relevant search results, AHS was forced to bring a motion to compel, which the Court granted. *Id.* at 1. Once AHS was able to obtain the results, the discovery record concerning Plaintiff’s internet browsing history was marked by gaps and inconsistencies. AHS learned that before Plaintiff filed suit, he had taken his computer to a third-party IT vendor to do preparation work for purposes of bringing this very case, notwithstanding the preservation obligations that should have been well known to Plaintiff as a prolific and repeat TCPA litigant. Despite extensive discovery, and the assistance of a computer forensic expert, gaps remain and suggest, at minimum, that the relevant internet history may be incomplete or obscured.

Targeted discovery of Plaintiff’s laptop and internet browsers revealed spreadsheets cataloging portions of Plaintiff’s internet browsing history, including visits to third-party lead-generation sites in August 2024 that are consistent with a consumer path that could have directed

a user to AHS's site. Plaintiff testified that he took his laptop to an IT vendor on September 16, 2024—six days before filing the complaint. Loose Decl. Ex. P at 91. Mr. Van Elzen testified he requested to obtain his internet browsing history, in connection with a desire to bring this litigation. *Id.* Later forensic reports show that around the time of this visit to the IT vendor, items from Mr. Van Elzen's internet browsing history were deleted, some of which were recovered from an unemptied recycle bin in Mr. Van Elzen's laptop. Declaration of Michael Perry ("Perry Decl.") Exs. C–D. Plaintiff testified he did not know how or why the internet history files were deleted to the recycle bin, but testified that the deleted files were created by the IT vendor. Loose Decl. Ex. P at 87–88, 90. But when that IT vendor was deposed, the vendor denied creating them, and denied deleting them, and testified that he only provided Mr. Van Elzen with a tutorial on how he could access his browser history. Loose Decl. Ex. S at 18–20.

The forensic inspection of Plaintiff's laptop identified a web visit to myhomequote.com in August 2024, as well as deleted spreadsheets that were recovered from the laptop's recycle bin. Perry Decl. Exs. C and E. Those spreadsheets also identified a web visit in August 2024 to homebuddy.com. *Id.* Ex. E. Both sites offer products in the same genre as AHS, and present visually similar intake flows that request a user's name, email address, and telephone number and include partner lists that encompass AHS, as indicated by the screenshots below. Loose Decl. Exs. Q and R.



gives you a unique opportunity to get quotes from local gutter installers

David Van Elzen
Exhibit 36
Danielle Copland, CSR 08.25.25

+18335832785

100%

Dozens of lucrative options have been found by your request

Enter your phone number to get verbal quotes from local contractors:

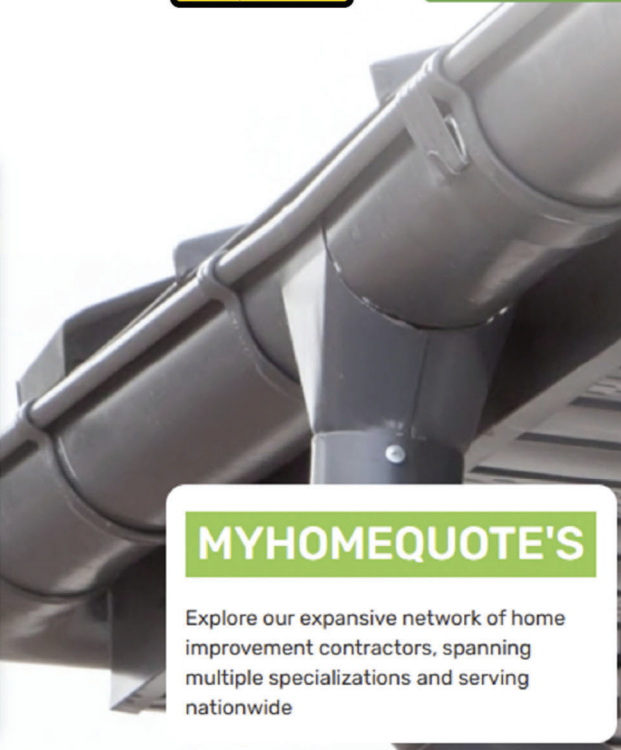
Enter phone number

By submitting this request, I provide my electronic signature and agree to MyHomeQuote's [Terms of Use](#) & [Privacy Policy](#) and **authorize marketing companies**, their contractors, and home improvement service product partners including QuinStreet ([our partners list](#)), HomeBuddy ([our partners list](#)), to send me offers via email as well as phone and text messages at the provided number. I understand that MyHomeQuote may contact me via SMS to provide updates regarding my request. Message and data rates may apply. Message frequency varies. Reply STOP to opt out. Only MyHomeQuote will send me SMS notifications. I agree to be contacted by the mentioned groups even if my contacts are registered in any state or federal Do Not Call list. I agree to be contacted by the listed groups, even if I'm on a federal/state do-not-call list. I understand marketing messages may be sent via autodialer or prerecorded voice. My consent isn't a purchase condition and can be revoked anytime. **California Notice.**

THIS QUOTE IS NOT PARTICIPATING OR AFFILIATED WITH ANY FREE OR GOVERNMENT ASSISTANCE PROGRAMS

BACK SUBMIT

Your data is secure



MYHOMEQUOTE'S

Explore our expansive network of home improvement contractors, spanning multiple specializations and serving nationwide

LeafFilter® Partner

David Van Elzen
Exhibit 40
Danielle Copland, CSR 09.25.25

One last thing!

And the final step.
What is your phone number?
A valid phone number is required to issue a formal estimate.

Phone number Submit my request

★★★★☆
122,094 reviews on TrustPilot

By clicking "Submit my request", I am providing my e-signature and agree that LeafFilter® may call or text me using an automatic dialing system or artificial or prerecorded voice, to arrange a convenient in-home estimate or for other marketing purposes related to home improvement. I understand consent is not required as a condition of purchase, and that I may revoke my consent at any time. Msg / data rates may apply.

Safe, Secure and Confidential

Despite the evidence showing that he did, Plaintiff said he did not recall visiting these lead sites, and he suggested any activity on these sites was accidental. Loose Decl. Ex. P at 104–05, 111–

12. The third-party forensic investigator explained in deposition that while some of the deleted files were recovered from the unemptied recycle bin, fully completed deletions of browser history would not be visible in forensic artifacts, and would not be recoverable. Loose Decl. Ex. O 47; Perry Decl. ¶¶ 13–15.

C. Plaintiff’s Information Was Submitted on AHS’s Website

AHS received Plaintiff’s contact information through the submission of an online form requesting a home warranty quote on AHS’s website. Specifically, on or around August 24, 2024, a prospective customer navigated to a warranty comparison page (<https://top10homewarrantyranking.com/>) that ranked different home warranty programs and allowed visitors of the page to click through to the ranked companies’ websites. Loose Decl. Ex. M at 7. An exemplar of the website <https://top10homewarrantyranking.com/> is included below:

10 Best Home Warranty of 2025

https://top10homewarrantyranking.com

HomeWarranty Reviews Knowledge

10 Best Home Warranty Companies of 2025

Compare & analyze Home Warranty Companies in USA

Last Updated: November 2025

Advertising Disclosure

SELECT HOME WARRANTY 9.2
\$150 off + 2 months free Claim offer →

CHOICE Home Warranty 9.8
Editor's Choice \$75 off + 1 month free Claim offer →

American Home Shield 8.9
\$150 off Select Plans Claim offer →

1 **Editor's Choice** **Choice Home Warranty** 9.8

✓ Fall Sale - \$75 off + 1 Month Free
✓ Covered more than 2.4M homes
✓ Handled more than 8M service requests
✓ 15,000+ local pre-screened technicians

View Plan
(844) 381-4571

2513 People visit this site today

2 **Select Home Warranty** 9.2

✓ Limited Sale: Up to 40% Off
✓ Replacement with file and claim 24/7
✓ A+ Accredited Business

View Plan
(855) 398-3352

3 **American Home Shield** 8.9

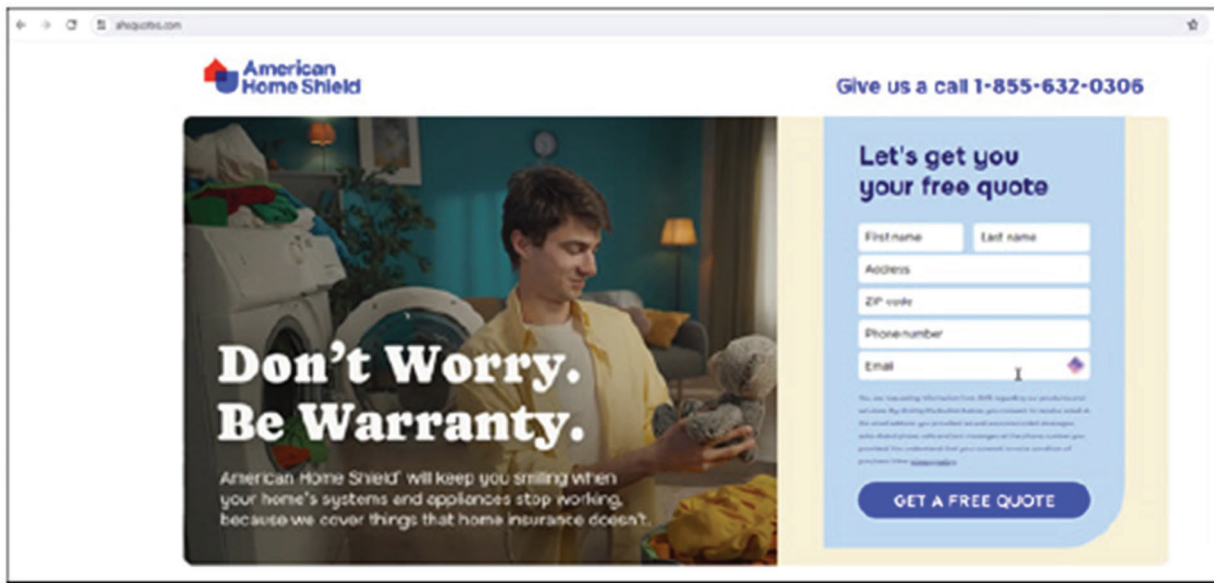
✓ Limited Time Offer: Get 50% Off
✓ Roof leak repair available
✓ More than 1.8 million customers served

View Plan

The consumer navigated to AHS’s website, ahsquotes.com, through the warranty comparison page, and there, submitted an online form requesting information about home warranties. Declaration of Kimberly Hoffman (“Hoffman Decl.”) ¶ 18.

The online form included pages that requested the consumer’s information, including phone number, street address, and email address. *Id.* ¶ 19. The consumer completed the form in

its entirety with the personal contact information for Van Elzen, including the phone number at which Plaintiff was contacted and the email address “Davidvanelzan@yahoo.com,” and then clicked a button to submit. *Id.* ¶ 18. An exemplar of how the information is presented on the screen is below:



Loose Decl. Ex. M at 7. To submit the quote request form, the consumer must agree to the following language, which appears immediately above the button that the consumer needs to click to submit his or her request:

“You are requesting information from AHS regarding our products and services. By clicking the button below, you consent to receive email at the email address you provided, as well as prerecorded messages, auto-dialed phone calls and text messages at the phone number you provided. You understand that your consent is not a condition of purchase. View privacy policy.”

The text “privacy policy” is hyperlinked and, if clicked on, directs viewers to AHS’s privacy policy. Hoffman Decl. ¶ 19.

D. AHS's Contacts with Plaintiff

After receiving the request for information about AHS's home warranty plans, AHS contacted Plaintiff via the telephone number submitted through the online form. *Id.* ¶ 20. AHS first sent a text message on August 24. *Id.* Ex. G. Hearing no response, AHS placed a call on August 26, but received an outgoing voicemail message. *Id.* ¶¶ 21–22. Hearing no response from the request to be contacted, AHS sent three follow-up text messages, and then ceased contact. *Id.* ¶¶ 20–22. The messages identified the sender as American Home Shield and thanked Plaintiff for “requesting information about [AHS's] home warranties.” *Id.* Ex. G.

During the telephone call on August 26, 2024, an AHS representative received an outgoing recorded voicemail message that identified the phone as belonging to “Dave Van Elzen,” which matched the identity of the individual in the online form. *Id.* ¶ 21. Plaintiff did not advise AHS that he did not want to be contacted until he consulted with the counsel who has represented him in 10 other TCPA cases. Following the discussion with counsel, Plaintiff's counsel contacted AHS on August 28, and asked that Plaintiff not be contacted. *Id.* Ex. H.

AHS then placed Plaintiff on AHS's DNC list and has not contacted Plaintiff since. *Id.* ¶¶ 23–24.

E. AHS's TCPA Compliance Policies and Procedures

AHS is an American company that provides homes warranty agreements to help homeowners manage repair and replacement of covered home systems and appliances. *Id.* ¶ 4. One of the ways in which AHS obtains new business is by responding via telephone communications to online requests from potential customers interested in learning more about its products.

To ensure that these communications comply with the Do-Not-Call (“DNC”) regulations under the TCPA (and other relevant regulations), AHS maintains written policies and procedures designed to ensure compliance with the TCPA and has implemented several steps to prevent telephone solicitations that violate the TCPA. *Id.* ¶ 5; *see also id.* Ex. A.

AHS’s Telemarketing Do-Not-Call Policy applies to all employees at AHS and its subsidiary companies, as well as “any company with whom AHS has contracted to provide teleservices.” *Id.* Ex. A. It explains that, because AHS “uses telephone solicitation to market its home warranty products, [it] must comply with the TCPA” and therefore, must (1) limit solicitation calls between 9 a.m. and 9 p.m., (2) “[m]aintain a ‘Do Not Call’ list and honor a consumer’s request not to be called,” and (3) “[h]ave a clearly written ‘Do Not Call’ policy.” *Id.* AHS “ensure[s] that all of its employees receive a copy of its ‘Do Not Call’ Policy” and “provide[s] adequate training for all employees” in the implementation of the Policy. *Id.* In addition to its comprehensive Telemarketing Do-Not-Call Policy, *id.*, there are several other policies, procedures, and practices in place at AHS that ensure it does not contact individuals on any DNC list without their consent, *id.* ¶¶ 4–17.

1. AHS’s Consent-Based Business Model

AHS’s business model is designed to prevent calls and text messages to any telephone number on any DNC list because AHS will only contact prospective customers who have expressly given AHS consent to contact them. *Id.* ¶¶ 5–9. AHS employs the Clickpoint lead management system to manage its outreach to potential customers. *Id.* ¶ 10. Clickpoint is a sophisticated software that automatically enforces DNC restrictions by systematically blocking outbound calls to any number on internal DNC lists and only allowing outbound calls within permissible hours. *Id.*; *see also id.* Ex. B at 6. Agents can only access and call leads that Clickpoint identifies as

compliant. *Id.* ¶ 10. The guide used to train agents on the Clickpoint management software explains that: “Clickpoint is designed to incorporate all calling restrictions. This means, if [agents] pull [a] lead, [they] can work it as Clickpoint will not send [them] a lead that is outside of appropriate calling times or violates any calling restrictions.” *Id.* Ex. B at 6.

The leads identified in the Clickpoint management software are generated from lists of existing customers and from prospective customers who submit a request for a quote or for additional information. *Id.* ¶¶ 6–10. Clickpoint does not provide agents with contact information for individuals that fall outside those two categories; therefore, in addition to ensuring individuals are not contacted outside of permitted hours and those on AHS’s DNC list are not called, Clickpoint only permits agents to contact those who have already given AHS permission to contact them. *Id.*

2. DNC List

As outlined in its Telemarketing Do-Not-Call Policy, *id.* Ex. A, AHS subscribes to the federal and state DNC lists and also maintains its own list of telephone numbers that its representatives may not contact, *id.* ¶ 15. The DNC list maintained by AHS is regularly updated based on inputs from agents and Clickpoint’s automatic logging of disposition entries. *Id.* Numbers added to this list remain suppressed for at least five years, in line with TCPA standards. *Id.* When a customer indicates that he or she no longer wants to be contacted by AHS, the customer’s information in Clickpoint is assigned a “Do Not Call” disposition. *Id.* ¶ 11. This internal disposition ensures that, absent a change in consent status from the called party, the telephone number is not contacted again. *Id.*

In compliance with the DNC rules, AHS does not sell, rent, lease, purchase, or use the National DNC Registry for any improper purpose. *Id.* ¶ 16. Moreover, AHS does not share the cost of accessing the National DNC Registry with other entities. *Id.*; *id.* Ex. F.

3. Training

AHS's training materials provide detailed guidance to its employees on how to follow AHS's policies and best practices that will ensure compliance with the TCPA. For example, the New Hire Training workbook, *id.* Ex. B, directs agents to use the Clickpoint lead management software for outbound activity, disposition every call, and strictly follow DNC requirements. Additionally, the Telesales Privacy Flags training document includes step-by-step instructions for telesales personnel to indicate in the Clickpoint system that a consumer should no longer be contacted. *See id.* Ex. C.

AHS also provides its agents with detailed explanations and examples of statements from customers and prospective customers that should prompt the agent to add the individual's contact information to AHS's DNC list, as well as a specific script to use when responding to consumers who wish to no longer be contacted by AHS. *See id.* (explaining that consumers should be put on the DNC if they make statements including "[d]o not call me again," "[d]o not mail me anything," and "[t]ake me off your call list"); *id.* Ex. D (providing a script for agents to explain to consumers that they will be placed on AHS's DNC list). These materials reflect AHS's expectation that agents adhere to established procedures for suppressing noncompliant leads and appropriately handling contact preferences.

AHS requires that third parties involved in telemarketing activities on AHS's behalf also agree to comply with the requirements of the TCPA. *See, e.g., id.* Ex. E (contract requiring

agencies working with AHS to “comply at all times with all applicable laws and regulations . . . including . . . the Telephone Consumer Protection Act”).

III. Legal Standard

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812 (7th Cir. 2017)). The party opposing the motion for summary judgment must “submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial.” *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted).

“The nonmoving party must do more than simply show that there is metaphysical doubt as to the material facts,” *id.*, and summary judgment is properly entered against a party “who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). If the evidence put forth by the nonmoving party “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).

IV. AHS Is Entitled to Summary Judgment on Plaintiff’s Claims

Summary judgment is appropriate here because there is no genuine dispute as to the fact that AHS received a request for a home warranty quote providing Plaintiff’s contact information

and consenting to being contacted by AHS at Plaintiff's phone number. It is undisputed that AHS had explicit written permission to contact Plaintiff and Plaintiff has not put forth "significantly probative" evidence to support his argument that he did not submit the request for a quote on AHS's website.

In addition, summary judgment is independently appropriate as it is undisputed that AHS contacted Plaintiff based on a reasonable, good-faith belief that it had Plaintiff's consent to contact him based on the online form it received, and that AHS "has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection." 47 U.S.C. § 227(c)(5). Because there is no genuine dispute about the fact that AHS believed it had consent to contact Plaintiff in compliance with the requisite regulatory safe harbor provisions of the TCPA, summary judgment should be granted for AHS on this alternative ground.

A. AHS Had Prior Express Written Consent to Contact Plaintiff

The TCPA regulations provide that a caller will not be subject to liability under the DNC rules if it first obtained "the subscriber's prior express invitation or permission" to contact them. 47 C.F.R. § 64.1200(c)(2)(ii). In 1992, as part of its initial rulemaking after the TCPA's passage, the Federal Communications Commission ("FCC") explained that "persons who knowingly release their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017) (quoting 7 FCC Record at 8769, ¶ 31).

Courts have found that consent to be contacted is provided where, as here, there is a submission of a web form with personal information and that web form provides clear and conspicuous disclosure that its submission constitutes an agreement to receive telemarketing calls.

Morris v. Modernize, Inc., 2018 WL 7076744, at *2–4 (W.D. Tex. Sept. 27, 2018). The court’s analysis in *Johansen v. Efinancial LLC*, 2022 WL 168170, at *3 (W.D. Wash. Jan. 18, 2022), is instructive on this point. There, an insurance company, Efinancial, received a request through its website for an insurance quote. *Id.* at *1. To submit this request for a quote on the website, “the user must enter his or her first name, last name, gender, date of birth, zip code, phone number, and email address, and must also consent to be called and otherwise contacted by Efinancial.” *Id.* The notice informing the user that by submitting the form he or she consents to be contacted was located “directly below the button used to submit” the form and clearly stated that, “by submitting information to request a life insurance quote, the person ‘consent[s] to receive offers of insurance from Efinancial, LLC at the . . . telephone numbers you provided.’” *Id.* at *3. The defendant argued that by receiving the plaintiff’s name and telephone number from a form submission on its website, it received consent for the contact. *Id.* Plaintiff (who was represented by the same counsel representing Mr. Van Elzen here) retorted that he did not submit the online form, and filed a sworn declaration to that effect. *Id.* The court found that plaintiff’s self-serving statement “failed to produce sufficient evidence to create a genuine issue of material fact” because the circumstantial evidence submitted by Efinancial was sufficient to show that it received consent to contact plaintiff and therefore was not in violation of the TCPA. *Id.* at *5.

The facts here are similar. Like the defendant there, AHS similarly received Plaintiff’s name and phone number through an online form submitted on AHS’s website requesting a quote for home warranties. Hoffman Decl. ¶ 18. As in *Johansen*, the name and contact information provided in the form matched the name and information of the person reached. And also as in *Johansen*, the online form informed the person submitting it that by clicking the button on the screen and submitting the information, the individual “consent[ed] to receiv[ing] email at the email

address [] provided, as well as prerecorded messages, auto-dialed phone calls and text messages at the phone number [] provided.” *Id.* ¶ 19. The language is presented in a clear and conspicuous manner as it is prominently displayed immediately above the button that individuals are required to click to submit the form. *Id.*; see also *Johansen*, 2022 WL 168170, at *3–5 (finding the notice was sufficient to support consent where similar language was located “directly below the button used to submit the information”). Finally, as in *Johansen*, AHS only made the contact in response to receiving the online submission with Plaintiff’s information requesting a home warranty quote. Hoffman Decl. ¶¶ 6, 18–20.

Besides a self-serving denial, Plaintiff has not produced any evidence to counter AHS’s showing that it received Plaintiff’s consent to contact him. Loose Decl. Ex. N at 1–2. Although Plaintiff disclaims visiting AHS’s site or any lead sites, Plaintiff has not provided sufficient evidence in support. The record instead contains pre-suit, self-curated browser-history spreadsheets that were later found in Plaintiff’s laptop’s recycle bin, conflicting testimony about who created those spreadsheets, and denials that are at odds with URL visits to lead-generation pages capable of routing a user to AHS. The third-party forensic investigator further testified that selective deletions of browser history may not be visible or recoverable, reinforcing that Plaintiff’s account leaves critical questions unanswered regarding what occurred and what was preserved. Conjecture that “someone else” submitted Plaintiff’s information—unsupported by probative evidence—cannot overcome AHS’s records reflecting consent or raise a triable issue. 2022 WL 168170, at *4–5.

As the court concluded in *Johansen*, 2022 WL 168170, at *3–5, plaintiff’s self-serving denial is insufficient to create a genuine issue of material fact in light of the total evidentiary record.

Because Plaintiff consented to being contacted by AHS regarding AHS's home warranty offerings, summary judgment should be entered in favor of AHS.

B. AHS Alternatively Qualifies for the Safe Harbor Defense

Summary judgment in favor of AHS is warranted on the independent ground that its call and text messages to Plaintiff come under the regulatory safe harbor provisions of the TCPA, which applies “[e]ven assuming a question of fact exists as to whether Plaintiff submitted the internet request” for a quote from AHS. *Johansen*, 2022 WL 168170, at *5. The TCPA provides that “[i]t shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.” 47 U.S.C. § 227(c)(5). Thus, if an entity has allegedly violated the TCPA, it can avoid liability if “[i]t can demonstrate that the violation” was through no fault of its own and “that as part of its routine business practice, it meets” certain “standards” outlined in the regulation. 47 C.F.R. § 64.1200(c)(2)(i). Here, AHS received Plaintiff's contact information, contacted him, and stopped contacting him promptly after he asked, which shows that AHS meets all the requirements of the safe harbor.

1. AHS Contacted Plaintiff via the Provided Contact Information

Courts have emphasized that the “crucial element” of the safe harbor is demonstrating that the alleged violative contact was “made in error.” *Klassen v. Advanced Mktg. & Processing, Inc.*, 2023 WL 11910565, at *4 (M.D. Fla. Mar. 1, 2023). Here, if the Court accepts Plaintiff's self-serving denial (which, as set forth above, is insufficient to create a genuine issue of material fact), then the result is that AHS's contact was made in a reasonably erroneous belief that it had consent to do so. *See Simmons v. Charter Commc'ns, Inc.*, 222 F. Supp. 3d 121, 135 (D. Conn. 2016),

aff'd, 686 F. App'x 48 (2d Cir. 2017). The “plain meaning of the word ‘error’ is ‘a mistake’” and, “regardless of whether Plaintiff or a third-party actor submitted the internet request, [AHS] would be understandably mistaken in its belief that Plaintiff had consented to [be contacted].” *Johansen*, 2022 WL 168170, at *6 (internal quotations omitted).

Here, AHS had no reason to believe Plaintiff was not the one who submitted the online form requesting to be contacted (and the evidence still supports the conclusion that it was Plaintiff, as described above). AHS received a form submission with Plaintiff’s contact information, including his phone number, requesting a home warranty quote. To submit the form, the person filling it out had to click a button immediately below the text stating: “By clicking the button below, you consent to receive email at the email address you provided, as well as prerecorded messages, auto-dialed phone calls and text messages at the phone number you provided.” Hoffman Decl. ¶ 19. The process to submit the online form provided clear and conspicuous notice to the person submitting it that they were authorizing AHS to contact them via the contact information submitted through the form.

AHS had no reason to believe that it had not received authorization to contact the number submitted through its online form. AHS’s reasonable belief that it had Plaintiff’s consent to contact him was further corroborated by the fact that, when an AHS representative called Plaintiff’s phone number, the outgoing voicemail message indicated that the phone belonged to Mr. Van Elzen and therefore matched the information AHS received through the online request for a home warranty quote. *See id.* ¶ 21.

Again, *Johansen* is instructive on this point. 2022 WL 168170, at *5–7. The defendant in *Johansen*, Efinancial, received a request for an insurance quote through an online form on its website that included the plaintiff’s contact information and provided clear notice that submitting

the form authorized Efinancial to reach out using the provided contact information. *Id.* at *3–6. Because Efinancial only contacted consumers who submitted forms on its website, the court reasoned that the defendant did not need to demonstrate a “procedural breakdown” in these circumstances because “it is not clear that procedural breakdown is the sine qua non of the safe harbor provision.” *Id.* Under the plain meaning of the word, “error” simply means a “mistake,” thus, “regardless of whether [the p]laintiff or a third-party actor submitted the internet request, Efinancial ‘would be understandably mistaken in its belief that Plaintiff had consented to the call.’” *Id.* (quoting Dkt. No. 39 at 21). If Plaintiff here did not in fact submit the online form requesting a quote from AHS, it is clear that AHS committed the same understandable mistake as that committed by Efinancial in *Johansen*.

The court in *Klassen* came to a similar conclusion when the defendant, vehicle service contract seller Protect My Car, reached out to the plaintiff under the mistaken belief that she had consented, and thus the requirements of the safe harbor defense were satisfied. 2023 WL 11910565, at *4–6. This conclusion is no surprise, as the facts in *Klassen* closely mirror those in *Johansen* and the present matter. In *Klassen*, the defendant received a lead through a third party that originated from a form submitted on an auto-insurance website. The form included the plaintiff’s “name, address, telephone number, e-mail address, and vehicular information.” *Id.* at *2. Immediately above the form’s “submit” button, the website had a disclaimer notifying the person completing the form that, by clicking “submit,” the person gave their “express written consent to receive marketing communications,” among other things. *Id.* at *1. Even though the plaintiff in *Klassen* demonstrated that the IP address that submitted the online form did not belong to the plaintiff, the Court found that the safe harbor defense applied because defendant “did in fact receive [the plaintiff’s] information and telephone number and made its calls under the mistaken

belief as to [the plaintiff's] consent without any knowledge or indication that [the plaintiff] did not make the submission.” *Id.* at *2, *4. AHS similarly had every reason to rely on the online form indicating Plaintiff consented to being contacted by AHS. As in *Klassen*, Plaintiff here has not “put forth any affirmative evidence to create a factual dispute concerning [AHS’s] mistaken belief that would preclude summary judgment.” *Id.* at *5. That is, Plaintiff has put forth no evidence to show that AHS did not receive a form that included Plaintiff’s name and telephone number and consent for AHS to contact that telephone number.

2. AHS Complies with the Standards Required by the Safe Harbor Provision

Because there is no genuine dispute of material fact that AHS contacted Plaintiff under the reasonable belief (mistaken or not) that Plaintiff provided written consent to be contacted by AHS, “the Court need not address whether PMC also met the standards set forth in C.F.R. § 64.1200(c)(2)(i)(A)–(E) to avoid liability” under the safe harbor defense. *Klassen*, 2023 WL 11910565, at *5. But even if those standards were relevant, AHS meets them.

The standards required by the safe harbor provision include: (1) “written procedures to comply with the national do-not-call rules”; (2) training of personnel on those procedures; (3) maintenance of a list of phone numbers that the entity cannot contact; (4) the use of “a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules”; and (5) the use of “a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database.” 47 C.F.R. § 64.1200(c)(2)(i)(A)–(E); *see also Mattson v. New Penn Fin.*, 2020 WL 6270907, at *4 (D. Or. Oct. 25, 2020) (listing these requirements for establishing the safe harbor defense).

AHS has a Telemarketing Do-Not-Call Policy that outlines procedures to comply with the “national do-not-call rules.” *See* Hoffman Decl. Ex. A. The Policy applies to all employees at AHS and its subsidiary companies, as well as “any company with whom AHS has contracted to provide teleservices.” *Id.* In its Policy, AHS commits to complying with the TCPA by reviewing the National DNC list, as well as any state equivalent. *Id.* AHS also commits to maintaining its own internal DNC list. *Id.* AHS therefore satisfies the requirement that it have a “written procedures to comply with the national do-not-call rules.” 47 C.F.R. § 64.1200(c)(2)(i)(A).

AHS trains its employees to follow its Do-Not-Call Policy and has ample materials that provide detailed guidance to employees on how to follow AHS’s relevant policies and best practices. For example, the New Hire Training workbook, Hoffman Decl. Ex. B, directs agents to use the Clickpoint lead management software for outbound activity, disposition every call, and strictly follow DNC requirements. These materials reflect the company’s expectation that agents adhere to established procedures for suppressing noncompliant leads and appropriately handling contact preferences. AHS also provides its agents with specific examples of statements from customers and prospective customers that should prompt the agent to add the individual’s contact information to AHS’s DNC list. *See id.* Ex. C (explaining that consumers should be put on the DNC if they make statements including “[d]o not call me again,” “[d]o not mail me anything,” and “[t]ake me off your call list”); *see also id.* Ex. D (providing script for agents to notify consumers that they will be placed on the DNC list if they make a “[d]o not call or do not solicit request”). Additionally, AHS ensures any third parties involved in telemarketing activities on AHS’s behalf also agree to comply with the requirements of the TCPA. *See, e.g., id.* Ex. E. AHS therefore complies with the requirement that it train its employees on its DNC policies and procedures. 47 C.F.R. § 64.1200(c)(2)(i)(B).

As outlined in its Telemarketing Do-Not-Call Policy, Hoffman Decl. Ex. A, AHS subscribes to the federal and state DNC lists, *id.* Ex. F, and also maintains its own list of telephone numbers that its representatives may not contact, *id.* ¶ 15. The DNC list maintained by AHS is regularly updated based on inputs from agents and Clickpoint’s automatic logging of disposition entries. *Id.* Numbers added to this list remain suppressed for at least five years, in line with TCPA standards. *Id.* When a customer indicates that he or she no longer wants to be contacted by AHS, the customer’s information in Clickpoint is assigned a “Do Not Call” disposition. *Id.* ¶¶ 11, 15. AHS therefore meets the requirements that it maintain a list of phone numbers that it cannot contact absent a change in consent status. 47 C.F.R. § 64.1200(c)(2)(i)(C).

Further, AHS’s business model is designed to prevent calls and/or text messages to any telephone number on any DNC list because AHS will only contact prospective customers who have expressly given AHS consent to contact them. AHS employs the Clickpoint lead management system to manage its outreach to potential customers. Hoffman Decl. ¶ 10. Clickpoint is a sophisticated software that automatically enforces DNC restrictions by systematically blocking outbound calls to any number on internal DNC lists and only allowing outbound calls within permissible hours. *Id.*; *see also id.* Ex. B at 6. Agents can only access and call leads that Clickpoint identifies as compliant. *Id.* ¶ 10. The guide used to train agents on the Clickpoint management software explains that: “Clickpoint is designed to incorporate all calling restrictions. This means, if [agents] pull [a] lead, [they] can work it as Clickpoint will not send [them] a lead that is outside of appropriate calling times or violates any calling restrictions.” *Id.* Ex. B at 6. AHS therefore meets the requirements that it use “a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules.” 47 C.F.R. § 64.1200(c)(2)(i)(D).

Lastly, in compliance with the DNC rules, AHS does not sell, rent, lease, purchase, or use the National DNC Registry for any improper purpose. *Id.* ¶ 16. Moreover, AHS does not share the cost of accessing the National DNC Registry with other entities. *Id.*; *id.* Ex. F. Therefore, AHS has “a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with [the law].” 47 C.F.R. § 64.1200(c)(2)(i)(E).

V. Conclusion

The undisputed record shows Plaintiff’s prior express consent and, alternatively, conduct coming under the TCPA’s safe harbor.

Beyond an insufficient self-serving denial, Plaintiff has failed to adduce any probative evidence supporting his asserted lack of consent and thus cannot create a genuine dispute under Rule 56. Alternatively, AHS is entitled to summary judgment on its affirmative safe-harbor defense because, even assuming a violation, the undisputed record shows any contact was made in error and that AHS has established and implemented, with due care, robust do-not-call compliance measures—including written procedures, personnel training, internal list maintenance, automated suppression through Clickpoint, and controls to prevent misuse of the national registry—that satisfy the TCPA’s safe harbor standards. Because no reasonable jury could find a violation on these facts, the Court should grant AHS’s motion and enter judgment in its favor on all claims.

Respectfully submitted,

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