IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, *et al.*,

Plaintiffs,

STEVE KRAMER, *et al.*,

Defendants.

Civil Action No. 1:24-cv-73-SM-TSM

LIFE CORPORATION AND VOICE BROADCASTING CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. THE AMENDED COMPLAINT LACKS ALLEGATIONS SUFFICIENT TO ESTABLISH THAT THE PLAINTIFFS HAVE CONSTITUTIONAL STANDING TO SATISFY ARTICLE III STANDING. 4

II. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH A VIABLE CLAIM UNDER THE VRA. 6

III. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH A CLAIM UNDER THE TCPA. 8

A. Neither Life Nor Voice "Initiated" the Subject Call. 9

B. Regardless, Plaintiffs Have Not Alleged Any Violation of the TCPA. 12

IV. PLAINTIFFS FAIL TO ALLEGE A VIABLE CLAIM UNDER NEW HAMPSHIRE ELECTION LAWS. 14

CONCLUSION 15

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Page(s)

Cases

Adzhikosyan v. CallFire,
No. CV 19-246, 2019 WL 7856759 (C.D. Cal. Nov. 20, 2019)......................................10, 12

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..4

Clark v. Avatar Techs. PHL, Inc.,
No. H-13-2777, 2014 WL 309079, (S.D. Tex. Jan. 28, 2014)....................................9, 10, 11

Equal Means Equal v. Ferriero,
3 F.4th 24 (1st Cir. 2021)..5

Every v. Town of Littleton,
No. 18-cv-43-SM, 2018 WL 4344998 (D.N.H. Sept. 11, 2018) 3, 4

Fair Fight Inc. v. True the Vote,
No. 2:20-CV-00302-SCJ, 2024 WL 24524 (N.D. Ga. Jan. 2, 2024).......................................6

Giragosian v. Ryan,
547 F.3d 59 (1st Cir. 2008)..4

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982)..5

In re Dish Network, LLC,
28 FCC Rcd. 6574 (2013)...9, 11

In re Rules & Reguls. Implementing the Tel. Consumer Prot. of 1991,
7 FCC Rcd. 8752 (1992)... 12-13

In re Rules & Reguls. Implementing the Tel. Consumer Prot. of 1991,
30 FCC Rcd. 7961 (2015)..9

Meeks v. Buffalo Wild Wings, Inc.,
No. 17-cv-07129-YGR, 2018 1524067 (N.D. Cal. Mar. 28, 2018), *aff'd sub nom. Meeks v. Blazin Wings, Inc.*, 821 F. App'x 771 (9th Cir. 2020)..............................10, 11

Nat'l Coal. on Black Civic Participation v. Wohl,
512 F. Supp. 3d 500 (S.D.N.Y. 2021)..6, 7

Nat'l Coal. on Black Civic Participation v. Wohl,
No. 20 Civ. 8668 (VM), 2021 WL 4254802 (S.D.N.Y. Sept. 17, 2021).................................8

RETRIEVED FROM DEMOCRACYDOCKET.COM

O'Brien v. New Hampshire Democratic Party,
89 A.3d 1202 (N.H. 2014) 14, 15

SEC v. Tambone,
597 F.3d 436 (1st Cir. 2010) 3

Selou v. Integrity Sol. Servs. Inc.,
No. 15-10927, 2016 WL 612756 (E.D. Mich. Feb. 16, 2016) 10, 11, 12

Sutliffe v. Epping Sch. Dist.,
584 F.3d 314 (1st Cir. 2009) 4

United States v. Nguyen,
673 F.3d 1259 (9th Cir. 2012) 6

Statutes

52 U.S.C. § 10307(b) 6

N.H. Rev. Stat. § 664:14-a 14, 15

N.H. Rev. Stat. § 664:14-b 14, 15

Other Authorities

47 C.F.R. § 64.1200(d) 9

FCC, *Rules for Political Campaign Calls and Texts*, https://www.fcc.gov/rules-political-campaign-calls-and-texts 13

S. Rep. No. 102-178 (1991) 9

RETRIEVED FROM DEMOCRACYDOCKET.COM

NOW COME Defendants Life Corporation ("Life") and Voice Broadcasting Corporation ("Voice"), by and through counsel, and respectfully submit this Memorandum of Law in Support of Motion to Dismiss, stating as follows:

INTRODUCTION

Plaintiffs seek to hold Life and Voice liable for the conduct of Defendant Steve Kramer, the "architect" of the robocalling "scheme" that is the subject of this lawsuit. ECF No. 65, Amended Complaint ("Am. Compl.") ¶ 68. Plaintiffs' Amended Complaint outlines in detail the steps Kramer, and Kramer alone, took to plan, generate and transmit the January 21, 2024 call that is the subject of the Amended Complaint (the "Subject Call"), and lacks well-pleaded facts to show that Plaintiffs are entitled to relief arising out of Life and Voice's alleged involvement. In fact, Plaintiffs' own allegations make clear that Defendant Kramer is entirely responsible for planning, creating, and sending out the Subject Call—there is no basis for liability as to either Life or Voice. The Court should dismiss Plaintiffs' claims against Life and Voice because: (a) Plaintiffs have failed to identify an actual, concrete injury sufficient to confer standing—particularly any injury fairly traceable to Life or Voice; (b) Plaintiffs have failed to articulate how Life or Voice could be liable under the Voting Rights Act ("VRA"); and (c) Plaintiffs have no claim under either the Telephone Consumer Protection Act ("TCPA") or New Hampshire Election Laws.

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF FACTS

Plaintiffs allege violations of the VRA, the TCPA, and the New Hampshire Election Laws arising from the Subject Call, a January 21, 2024 AI-generated phone call "commissioned" by Defendant Steve Kramer and allegedly sent to thousands of New Hampshire voters ahead of the primary election. Am. Compl. ¶¶ 2, 51. Defendant Kramer later allegedly admitted that he had "deliberately falsified the information transmitted via caller ID display" to disguise the identity of the caller of the Subject Call. *Id.* ¶ 58. Kramer also allegedly directed the creator of the AI-

generated phone call to delete his emails concerning the Subject Call. *Id.* According to the Amended Complaint, on January 19, 2024, Kramer provided the recording of the Subject Call to Voice, and Voice used Life's services and equipment to route a portion of the Subject Calls to Defendant Lingo Telecom, LLC ("Lingo") to disseminate the Subject Call. *Id.* ¶¶ 50–54. On February 25, 2024, following news coverage identifying Kramer as the "architect" of the Subject Call, Kramer "released a self-serving statement acknowledging his involvement in commissioning and distributing the New Hampshire Robocalls[.]" *Id.* ¶¶ 68–69.

As the Amended Complaint and news articles cited by Plaintiffs make clear, Kramer has admitted that he is solely responsible for the Subject Call. Neither Life nor Voice knew that the recording used by Kramer was an AI recording of President Bident's voice. Indeed, in news interviews regarding the Subject Call, Kramer stated that Life and Voice "***had no knowledge of the content of this call prior to delivery***." Alex Seitz-Wald, *Democratic operative admits to commissioning fake Biden robocall that used AI*, NBC News (Feb. 25, 2024), https://www.nbcnews.com/politics/2024-election/democratic-operative-admits-commissioning-fake-biden-robocall-used-ai-rcna140402 (emphasis added) (Am. Compl. ¶ 28 n.9). Due to his orchestration of the Subject Call, Kramer was indicted by the New Hampshire Attorney General's Office, and the Federal Communications Commission announced a proposed fine against him. Am. Compl. ¶¶ 70–71

RETRIEVED FROM DEMOCRACYDOCKET.COM

None of the named Plaintiffs have alleged any actual or imminent injury as a result of the Subject Call. They all quickly realized that it was bogus. Plaintiff Fieseher "realized the call was not legitimate" "[a]fter listening for 15 to 20 seconds." Am. Compl. ¶ 60. Plaintiff Marashio "was able to discern that the call was not legitimate." *Id.* ¶ 61. Plaintiff Gingrich "knew that the message was faked." *Id.* ¶ 62. None of the individual plaintiffs allege that they did not vote because of the

Subject Call. *See id.* ¶¶ 59–63. Plaintiffs League of Women Voters-US ("LWV-US") and League of Women Voters-NH ("LWV-NH") claim that they decided to devote, and will in the future devote, unspecified resources to combat robocalls, but these voluntary decisions by LWV-US and LWV-NH are not a sufficient injury and certainly cannot be attributed to any alleged conduct by Life or Voice.

Moreover, to the extent Plaintiffs seek injunctive relief against Defendants, their justification is entirely focused on conduct that is solely attributable to Defendant Kramer:

> The Defendants disseminated a convincing audio recording ostensibly of the President of the United States and leader of the Democratic Party to thousands of potential or likely Democratic voters who trust him, falsely and coercively stating that by participating in the New Hampshire Primary they would be lose [sic] their vote in the General Election. To add to the ruse, Defendants spoofed the call to deceive voters into believing the call came from another trusted source, a former leader of the local Democratic Party who was known to be spearheading efforts to help President Biden win a write-in campaign. The Defendants' pernicious combination of deepfake audio and spoofed caller ID can inflict untold damage on Americans' ability to cast their vote free of impairment. Moreover, if Defendants are not enjoined and punished, their conduct is likely to be adopted by others, thereby inflicting further harm to other voters.

Id. ¶ 90. As shown below, it was Defendant Kramer, ***not*** Life or Voice, who orchestrated the scheme to transmit the Subject Call to thousands of New Hampshire voters.

RETRIEVED FROM DEMOCRACYDOCKET.COM

STANDARD OF REVIEW

"When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must 'accept as true all well-pleaded facts set out in the complaint and indulge all reasonable inferences in favor of the pleader.'" *Every v. Town of Littleton*, No. 18-cv-43-SM, 2018 WL 4344998, at *1 (D.N.H. Sept. 11, 2018) (quoting *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010). "Although the complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a)(2), it must allege each of the essential elements of a viable cause of action and 'contain sufficient factual matter, accepted as true, to state a claim to relief that

is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The 'plausibility' standard is satisfied if the factual allegations in the complaint, along with reasonable inferences, show more than a mere possibility of liability." *Id.* (citation omitted).

"Generally, a court must decide a motion to dismiss exclusively upon the allegations set forth in the complaint and the documents specifically attached." *Id.* However, an exception exists, when a court deciding a motion to dismiss may also consider "documents incorporated by reference [in the complaint], matters of public record, and other matters susceptible to judicial notice." *Id.* (citing *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008)).

ARGUMENT

I. THE AMENDED COMPLAINT LACKS ALLEGATIONS SUFFICIENT TO ESTABLISH THAT PLAINTIFFS HAVE ARTICLE III STANDING.

Plaintiffs have failed to allege facts sufficient to support constitutional standing. "The irreducible constitutional minimum of standing contains three elements: (1) that the plaintiff suffered an injury in fact, (2) that there is a causal connection between the injury and the conduct complained of, and (3) that it is likely that the injury will be redressed by the requested relief." *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 325 (1st Cir. 2009) (citation and internal quotation marks omitted). "The burden of stating facts sufficient to support standing rests with the party seeking to assert federal jurisdiction." *Id.* (citation omitted).

Plaintiffs' claims fail because, even after amending their complaint, they have not alleged facts sufficient to show "injury in fact." Injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 325–26 (citations and internal quotation marks omitted). To meet the "injury in fact" requirement, "plaintiffs must show that [they] personally ha[ve] suffered some actual or threatened injury." *Id.* at 326 (alterations in original) (citations omitted). Plaintiffs Fieseher, Marashio and

RETRIEVED FROM DEMOCRACYDOCKET.COM

Gingrich all acknowledge in the Amended Complaint that they realized the calls were fake and voted anyway, thereby conceding that they suffered no concrete, particularized or actual injury. Am. Compl. ¶¶ 60–62. Even if Plaintiffs could articulate some actual injury, they have not alleged facts demonstrating that an injury was caused by Life or Voice—since their own allegations indicate that Life and Voice had no knowledge of the content of the call.

Moreover, the organizational plaintiffs LWV-US and LWV-NH allege only that they made their own decisions to expend resources to engage in advocacy related to the Subject Call and risks of AI-related content in elections. Am. Compl. ¶¶ 11, 72–77. Such allegations fail to meet Plaintiffs' burden to show a "concrete and demonstrable injury to the organization's activities" attributable to Life or Voice that is "more than simply a setback to the organization's abstract social interests." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (holding an organization suffers injury in fact when its key activities are "perceptibly impaired" and its resources "consequent[ly] drain[ed]"). Indeed, the First Circuit has rejected as insufficient allegations, like the organizational plaintiffs here, that voluntary spending on issue advocacy is sufficient to create Article III standing for an organization. *See Equal Means Equal v. Ferriero*, 3 F.4th 24, 29–31 (1st Cir. 2021) (finding expenses on education materials "to educate and inform [the organizations'] members, supporters and the general public" and "frustration of mission and diversion of resources to identify and counteract" defendant's unlawful actions insufficient to confer organizational standing) (citations omitted). Here, similarly, the voluntary expenditures focused on education of prospective voters regarding the Subject Call and related issues is insufficient to establish organizational standing. Regardless, since the Subject Call was entirely planned and executed by Kramer, there's no plausible causal link between the Subject Call and any alleged role by Life or Voice.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs utterly fail to allege facts sufficient to establish standing for any of their Counts, as required by Article III of the United States Constitution. For this reason, Life and Voice respectfully request that the Court grant their Motion to Dismiss.

II. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH A VIABLE CLAIM UNDER THE VRA.

Plaintiffs argue that Life and Voice violated Section 11(b) of the VRA through acts of intimidation or attempted intimidation, but the Subject Call is not actionable under VRA and Plaintiffs have failed to offer any facts connecting the alleged violation of VRA to ***Life or Voice's*** actions.

Section 11(b) of the VRA states that no person, "whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). Specifically, intimidation exists where a reasonable recipient would interpret an action or message, intended to deter a person's voting rights, as a threat of injury. *Nat'l Coal. On Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021). For example, courts have found acts that "inspire fear of economic harm, legal repercussions, privacy violations, and even surveillance can constitute unlawful threats or intimidation under the statute." *Id.* Such actions also include "making a voter fearful, compelling voter action or inaction, promising reprisal or distress, or restraining, controlling, or dominating a voter." *See Fair Fight Inc. v. True the Vote*, No. 2:20-CV-00302-SCJ, 2024 WL 24524, at *44 (N.D. Ga. Jan. 2, 2024). While nonviolent actions or threats can be unlawful intimidation, threats, or coercion under Section 11(b), *United States v. Nguyen*, 673 F.3d 1259, 1265 (9th Cir. 2012), whether actions violate Section 11(b) is fact-specific, and requires courts to assess the defendant's actions and a reasonable person's interpretation of the actions, *see Fair Fight Inc.*, 2024 WL 24524, at *38.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, the Subject Call was not intimidating, coercive, or threatening on its face. The call contained no inflammatory language that would put a reasonable listener in fear of threatened injury. *See* Am. Compl. ¶ 55. Plaintiffs' argument that there was a threat of a loss of vote in November (Am. Compl. ¶ 21) is an interpretation, at best, i.e., that the advice to "save your vote for the November election" was somehow a threat of the loss of the right to vote in November—a tortured interpretation that none of the Plaintiffs have alleged they actually believed. Unlike *Wohl*, referenced above, where the robocall at issue was targeted at minority voters and threatened that by voting, their personal information would be used by the policy department to enforce arrest warrants, by the CDC to track immunization status, and by credit card companies to pursue debt collection, 512 F. Supp. 3d at 506, here, the call contained no such threats.

RETRIEVED FROM DEMOCRACYDOCKET.COM

While Plaintiffs alleged that the use of President Biden's voice and caller identification of the former New Hampshire Democratic Party chair add authority and legitimacy to the call, *id.* ¶¶ 88, 90, this suggestion is undermined by Plaintiffs' own allegations that "the content of the message did not make sense" and they knew it was "not legitimate," *id.* ¶¶ 60–62. A reasonable listener—and, according to their allegations, ***all plaintiffs***—would know that the information conveyed was false and there was no threat to the listener's right to vote. Not a single plaintiff has alleged that they felt intimidated, coerced, or threatened. *See id.* At most, the call involved misinformation—which is not actionable without more. This is particularly true when not a single plaintiff has said that they were misled—in fact, they all have said they knew the Subject Call was a fake and did not rely on it. *Id.*

Most importantly, Plaintiffs have not articulated how ***Life or Voice*** could be liable, since—according to the Amended Complaint and incorporated materials—the call was entirely planned and executed by Defendant Kramer. To sustain a claim against Life and Voice under the VRA,

Plaintiffs must plead sufficient allegations to give rise to the "reasonable inference" that they knew about the "contents or purpose" of the Subject Call. *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 Civ. 8668 (VM), 2021 WL 4254802, at *5 (S.D.N.Y. Sept. 17, 2021) (finding allegations of knowledge sufficient for VRA violation based on extensive and specific allegations that defendant telecommunications provider was integrally involved and knew about the specific intent "to discourage mail-in voting and suppress voter turnout" including email correspondence using the phrase "we attack"). Here, Plaintiffs fail to allege a single well-pleaded fact in the Amended Complaint supporting any such inference regarding Life or Voice's awareness. To the contrary, and by Defendant Kramer's own admission as reflected in the Amended Complaint itself, the Subject Call was entirely planned and executed by Kramer and Life nor Voice had "***no knowledge***" regarding its content. *See* Am. Compl. ¶ 28 n.9 (referencing, Alex Seitz-Wald, *Democratic operative admits to commissioning fake Biden robocall that used AI*, NBC News (Feb. 25, 2024), https://www.nbcnews.com/politics/2024-election/democratic-operative-admits-commissioning-fake-biden-robocall-used-ai-rcna140402 (emphasis added)).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Because Plaintiffs (1) have not alleged any violation of the VRA on its face since the Subject Call does not involve any intimidation, threat, or coercion; and (2) certainly allege no facts that would make ***Life or Voice*** liable under Section 11(b) of the VRA since the only well-pled facts make clear they had no knowledge of the Subject Call, Plaintiffs' claim under the VRA (Count I) must be dismissed.

III. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH A CLAIM UNDER THE TCPA.

Plaintiffs also fail to allege facts sufficient to show Life or Voice can be held liable under the TCPA. First, Life or Voice did not "initiate" the Subject Call, which is required for TCPA

liability. Second, even if Life or Voice did "initiate" the Subject Call, Plaintiffs have not alleged any actual violation of the TCPA.

A. Neither Life Nor Voice "Initiated" the Subject Call.

In the context of certain unlawful telemarketing activities, the TCPA creates a cause of action against "a person or entity [that] initiate[s]" a telephone call. 47 C.F.R. § 64.1200(d). This "generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." *In re Dish Network, LLC*, 28 FCC Rcd. 6574, 6583 ¶ 26 (2013) (clarifying the definition of "initiate[]" for purposes of TCPA liability in response to three petitions for declaratory rulings on issues brought under the TCPA).

RETRIEVED FROM DEMOCRACYDOCKET.COM

To determine who is a call initiator, courts examine: "1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA." *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980 ¶ 30 (2015). In enacting the TCPA, Congress never intended to impose TCPA liability upon entities such as Life or Voice, middlemen in the telecommunications chain that transmit calls, because neither Life nor Voice "make[s]" calls—their clients or their clients' customers do. *See* S. Rep. No. 102-178, at 9 (1991). The legislative history of the TCPA makes clear that the statute "appl[ies] to the persons initiating the telephone call or sending the message and do[es] not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message." *Id.*

Further, courts across the country routinely dismiss TCPA claims against telecommunications providers. For example, in *Clark v. Avatar Technologies PHL, Inc.*, a plaintiff filed suit against Flowroute, a telecommunications provider, seeking "to impose TCPA liability on

Flowroute based on the allegation that [the plaintiff] used Flowroute's technology to make the challenged call." No. H-13-2777, 2014 WL 309079, at *2 (S.D. Tex. Jan. 28, 2014). The court granted Flowroute's motion to dismiss with prejudice because a spoofer, and "not Flowroute," initiated the call to the plaintiff's phone. *Id.* The court reasoned that "without more" the TCPA does not impose liability on "telecommunications carrier[s] whose systems are used by another to make an unlawful call to a cellular phone." *Id.*

Additionally, in *Selou v. Integrity Solution Services Inc.*, a plaintiff sued LiveVox, a contact center platform, for spoofed calls placed through the platform. No. 15-10927, 2016 WL 612756 (E.D. Mich. Feb. 16, 2016). Plaintiff alleged that LiveVox was "liable for enabling the [spoofer's] collection calls to plaintiff." *Id.* at *3. The court ruled otherwise, granting LiveVox's motion to dismiss the action with prejudice. *Id.* at *6. Because LiveVox provided "technological services through which its *customers* can make phone calls," the court reasoned that LiveVox functioned as a "carrier with no liability under the TCPA." *Id.* at *3; *see also Adzhikosyan v. CallFire*, No. CV 19-246, 2019 WL 7856759, at *3 (C.D. Cal. Nov. 20, 2019) (granting motion to dismiss TCPA action against a mass SMS messaging services provider when plaintiff's claim "[did] not allege that [the provider] decided whether, when, or to whom to send the messages") (citation omitted).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Similarly, in *Meeks v. Buffalo Wild Wings, Inc.*, a plaintiff sued Yelp—which provided a text messaging platform—for alleged violations of the TCPA relating to text messages sent by a restaurant through the Yelp app to check the plaintiff's place in line. No. 17-cv-07129-YGR, 2018 WL 1524067, at *2 (N.D. Cal. Mar. 28, 2018), *aff'd sub nom. Meeks v. Blazin Wings, Inc.*, 821 F. App'x 771 (9th Cir. 2020). Yelp moved to dismiss, arguing that the plaintiff failed to state a claim because Yelp, as an app provider, was not the entity that took the steps necessary to physically send the text message, but rather a "person[] or entit[y] . . . that might merely have some role,

however minor, in the causal chain that results in the" sending of the message. *Id.* at *4 (quoting *Dish Network, LLC*, 28 FCC Rcd. at 6583 ¶ 26). As such, Yelp argued that it did not initiate the text messages at issue. *Id.* at *2. The court agreed, granting Yelp's motion to dismiss the action with prejudice. *Id.* at *4. Even though Yelp facilitated the transfer of the messages, the court reasoned that "app users, i.e., the Buffalo Wild Wings restaurants . . . and not Yelp, decided whether, when, and to whom to send the text messages." *Id.*

According to the Amended Complaint, neither Life nor Voice "initiated" the Subject Call, and therefore neither can be liable under the TCPA. ***First***, Life did not initiate the Subject Call. According to the Amended Complaint, its sole role, if any, was to lease equipment to Voice—significantly more passive than the roles of the entities in *Clark*, *Selou*, and *Meeks*. As in *Clark*, *Selou*, and *Meeks*, Plaintiffs have ***not*** alleged that Life controlled the content of the call, or whether, when or to whom to send the Subject Call. In fact, Plaintiffs appear to concede that Life did not initiate the call at all, claiming only that Voice did so. Am. Compl. ¶ 53 (expressly alleging Voice, "using service and equipment provided by [Life], initiated" the Subject Call). Plaintiffs' conclusory statements are insufficient to adequately allege that Life's conduct rises to the level of involvement required for potential liability under the TCPA. Holding that Life could "initiate" a call would the legal equivalent of saying that the telephone company is responsible for the Subject Calls—a ridiculous conclusion that would expand the liability TCPA beyond all reasonable limitation.

Second, Voice also did not initiate the Subject Call. Although as noted above, Plaintiffs conclusory allege that Voice did so (*id.* ¶ 53), there are no well-pled facts that meet the standard for "initiation" set out by the courts and the FCC. According to the Amended Complaint, Voice was responsible only for the provision of the platform used to transmit the phone calls, not any of

RETRIEVED FROM DEMOCRACYDOCKET.COM

the key factors that determine the responsible party under the TCPA. Am. Compl. ¶¶ 50-51. Like Life, Voice was not responsible for the development of the Subject Call's content, what telephone number is shown when the call is made, what telephone numbers receive the calls, or what time the call is made. Plaintiffs even acknowledge that Voice "leases equipment and software ***to clients who wish to conduct election-related and other calling campaigns***" and its platform "allows ***clients*** to select the phone number and/or information that appears on the Caller ID display." Am. Compl. ¶¶ 30, 33 (emphases added). Voice cannot be held liable under the TCPA for the conduct of its customers. *See generally Selou*, 2016 WL 612756, at *3; *Adzhikosyan*, 2019 WL 7856759, at *3.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs' assertion that Life and Voice could be liable under the TCPA is particularly baseless since Defendant Kramer, not Voice or Life, took all of the steps needed to initiate these calls. *See* Am. Compl. ¶¶ 48–51, 68. Defendant Kramer: (1) commissioned a third-party "to create a deepfake recording impersonating the voice of President Joe Biden," Am. Compl. ¶ 48; (2) provided "a list of names and numbers" of individuals to receive the Subject Call, instructing Voice that "[c]all[s] should go out at 6:15 p.m. EST Sunday" and should be "finish[ed] by 8:45 p.m.," Am. Compl. ¶ 50; and (3) instructed Voice "to use a personal cell phone number belonging to [Plaintiff Sullivan] . . . as the phone number that would appear on the Caller ID display," Am. Compl. ¶ 51. The Amended Complaint undisputedly shows how Defendant Kramer, not Voice or Life, orchestrated and initiated the Subject Call. For these reasons, Plaintiffs have failed to allege a TCPA claim against Life or Voice.

B. Regardless, Plaintiffs Have Not Alleged Any Violation of the TCPA.

Plaintiffs' primary claim under the TCPA is that they "did not consent to receiving artificial or prerecorded-voice telephone calls." *Id.* ¶ 107. Plaintiffs misstate the legal requirement. Critically, the TCPA does not require consent for political calls made to ***landlines***. *In re Rules &*

Reguls. Implementing the Tel. Consumer Prot. of 1991, 7 FCC Rcd. 8752, 8774 ¶ 41 (1992) ("We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, ***political polling or similar activities which do not involve solicitation*** as defined by our rules.") (emphasis added). Indeed, the FCC's webpage regarding election-related calls make this clear: "Political campaign-related autodialed or prerecorded voice calls are permitted when made to landline telephones, ***even without prior express consent***." FCC, *Rules for Political Campaign Calls and Texts*, https://www.fcc.gov/rules-political-campaign-calls-and-texts (last visited June 25, 2024) (emphasis added).

Thus, even if Life or Voice could be deemed to have "initiated" the phone call—which, as detailed above, they cannot—Plaintiffs' TCPA claim must be dismissed because Plaintiffs received the Subject Call on their landline phones, for which no consent was required. *See* Am. Compl. ¶¶ 60–62 (alleging that each Plaintiff received the Subject Call on their "residential landline" and not their cell phones). Plaintiffs' complaint that Life or Voice violated the TCPA based on an alleged lack of consent is baseless—since consent is not required for the calls alleged in the Complaint.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs also complain that the Subject Call violated the TCPA because it did not have the required opt-out mechanism. *Id.* ¶ 117. That allegation is demonstrably false, since the transcription of the Subject Call quoted in the Complaint contradicts Plaintiffs' claim that the Subject Call lacked an adequate opt-out mechanism. *Compare id.* ¶ 117 (citing regulation requiring calls to include key press-activated opt-out mechanisms), *with id.* ¶ 55 ("If you would like to be removed from future calls, please press two now.").

As set forth above, neither Life nor Voice can be held liable for Plaintiffs other TCPA claims regarding the need for the message to identify the caller and telephone number of the caller (Am. Compl. ¶¶ 118-19), since according to the Amended Complaint's own allegations, Life and Voice had no "***no knowledge of the content of this call prior to delivery***." Alex Seitz-Wald, *Democratic operative admits to commissioning fake Biden robocall that used AI*, NBC News (Feb. 25, 2024), https://www.nbcnews.com/politics/2024-election/democratic-operative-admits-commissioning-fake-biden-robocall-used-ai-rcna140402 (emphasis added) (cited in Am. Compl. ¶ 28 n.9).

For these reasons, Life and Voice respectfully request this Court grant their Motion to Dismiss Count II of Plaintiffs' Amended Complaint.

RETRIEVED FROM DEMOCRACYDOCKET.COM

IV. PLAINTIFFS FAIL TO ALLEGE A VIABLE CLAIM UNDER NEW HAMPSHIRE ELECTION LAWS.

The Court should dismiss Counts III and IV against Life and Voice because Plaintiffs fail to meet the standing requirements as delineated by the New Hampshire Supreme Court in *O'Brien v. New Hampshire Democratic Party*, 89 A.3d 1202 (N.H. 2014). As the *O'Brien* court explained, "[t]he Robocall Statute confers standing to file a private action upon a specific cohort of persons: '*[a]ny person injured by another's violation of this section* may bring an action for damages and for such equitable relief . . . as the court deems necessary and proper.'" *Id.* at 1205 (quoting RSA § 664:14-a, IV(b)). *O'Brien* only specifically addresses RSA § 664:14-a, but its holding applies with equal force to RSA § 664:14-b because the latter statute contains the same determinative language as RSA § 664:14-a: "[a]ny person injured by another's violation of this section." The New Hampshire Supreme Court held that "a plaintiff [must] allege *each* of the following three elements in order to have standing: (1) a violation of the statute; (2) an injury; and (3) that the violation of the statute caused the injury." *O'Brien*, 89 A.3d at 1205.

Importantly, the *O'Brien* court ***rejected*** the plaintiff's argument that a violation of RSA § 664:14-a somehow, in and of itself, entitled the plaintiff to damages, given the provision of a minimum recovery of $1,000.00 for a prevailing plaintiff set forth in RSA § 664:14-a, IV(b). Said the court, "The provision establishing statutory damages does not absolve the plaintiff from satisfying the requirement that he allege injury and causation; rather, it relieves him only of the requirement to plead the amount of his damages." *O'Brien*, 89 A.3d at 1205. "The plain language of the statute requires that, in order to have standing, a plaintiff allege both injury *and* causation, i.e.[,] that the statutory violation caused him actual injury." *Id.* Based on these principles of standing, the *O'Brien* court affirmed the trial court's grant of summary judgment to the defendant, holding that "the plaintiff did not allege an injury flowing from the alleged statutory violation, and therefore, . . . does not have standing." *Id.* at 1207. Plaintiffs here have similarly failed to allege injury flowing from the alleged violations of RSA sections 664:14-a and RSA 664:14-b. The individual plaintiffs acknowledge in the Amended Complaint that they incurred no injuries—none of them failed to vote because of the Subject Call or claim to have been misled. LMV-US and LMV-NH allege only expenditures of resources to address AI-related election risks, expenditures that are attributable to LMV-US and LMV-NH's own decisions regarding their advocacy goals and not tied to any alleged conduct of Life or Voice.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Accordingly, Life and Voice respectfully request that this Court grant its Motion to Dismiss Count III and IV of Plaintiffs' Amended Complaint.

CONCLUSION

For the foregoing reasons, Life Corporation and Voice Broadcasting Corporation respectfully request that the Court grant Defendants' Motion to Dismiss.

DATE: June 25, 2024

Respectfully submitted,

/s/ Benjamin T. King
Benjamin T. King, NH Bar #12888
Douglas, Leonard & Garvey, P.C.
14 South Street, Suite 5
Concord, NH 03301
(603) 224-1988
Fax: (603) 229-1988
ATTORNEY TO BE NOTICED

Wayne E. George, NH Bar #1906
Morgan, Lewis & Bockius LLP
One Federal Street
Boston, MA 02110-4104
(617) 341-7596
Fax: (617) 341-1701
wayne.george@morganlewis.com
ATTORNEY TO BE NOTICED

Ezra D. Church, PA Bar #206072
(admitted *pro hac vice*)
Terese Schireson, PA Bar #320999
(admitted *pro hac vice*)
Morgan, Lewis & Bockius LLP
2222 Market Street
Philadelphia, PA 19103-3007
(215) 963-5000
Fax: (215) 3963-5001
ezra.church@morganlewis.com
terese.schireson@morganlewis.com
ATTORNEYS TO BE NOTICED

RETRIEVED FROM DEMOCRACYDOCKET.COM