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 REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs' Opposition to Life Corporation ("Life") and Voice Broadcasting Corporation's ("Voice") Motion to Dismiss only highlights Life and Voice's limited roles in the alleged robocalling "scheme" described in Plaintiffs' Amended Complaint. The lack of involvement, let alone willful conduct, by Life and Voice, ultimately dooms Plaintiffs' claims against them. In an attempt to justify their claims against Life and Voice, Plaintiffs group Life and Voice with the other Defendants in this case, but Plaintiffs' arguments lack bases in law and plausibly alleged facts. Moreover, Plaintiffs do not (and cannot) deny that Defendant Kramer is entirely responsible for planning, creating, and sending out the call that is the subject of this lawsuit. The Subject Call has been subject to investigation over several months by the FCC, the New Hampshire Attorney General, the bipartisan Anti-Robocall Multistate Litigation Taskforce, the US Department of Justice, and the USTelecom Traceback Group, and although the FCC has sought penalties as to Mr. Kramer and Lingo, there has been no finding of wrongdoing by Voice or Life. *See* Notice of Apparent Liability, *In re Steve Kramer*, FCC 24-59, 2024 WL 2717624 (F.C.C. May 24, 2024) ("NAL").[1] As the FCC Chairperson summed up after the agency's extensive investigation of the Subject Call: "We hold ***Steve Kramer*** responsible for the scam calls he set up." *Id.* ¶ 51 (emphasis added). For the reasons set forth more fully below and in Life and Voice's Motion to Dismiss (the "Motion"), the Court should dismiss Plaintiffs' claims against Life and Voice with prejudice.

II. PLAINTIFFS LACK STANDING TO SUE LIFE AND VOICE.

Plaintiffs argue they have standing to sue Life and Voice because "[t]he Individual Plaintiffs were harmed by receiving threatening, intimidating, and coercive robocalls" and that

[1] The Court may consider the NAL because it is referenced in and incorporated into Plaintiffs' Amended Complaint. *See* Am. Compl. ¶ 71; *Squeri v. Mount Ida Coll.*, 954 F. 3d 56, 61 (1st Cir. 2020) ("On a motion to dismiss, we may also consider 'documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.'") (citing *Lydon v. Local 103, Int'l Bhd.of Elec. Workers*, 770 F.3d 48, 53 (1st Cir. 2014)).

LWV-US and LWV-NH's core business activities were affected. Opp. at 3–4. However, Plaintiffs cannot identify any actual injury fairly traceable to Life and Voice since Plaintiffs do not, and cannot, deny that the Subject Call did not actually cause them not to vote or otherwise harm them. Instead, Plaintiffs claim that the Subject Call "interfered with the exercise of people's right to vote in the New Hampshire Primary." *Id.* at 3. But the test for standing is not whether people in general were harmed. Plaintiffs must "show that [they] personally ha[ve] suffered some actual or threatened injury." *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 326 (1st Cir. 2009) (alterations in original) (citations omitted). They have not done so. *See* Am. Compl. ¶¶ 60–62 (alleging that Plaintiffs Fieseher, Marashio and Gingrich all realized the calls were fake upon receiving them).

Nor have Plaintiffs shown they have suffered some actual or threatened injury caused by Life or Voice specifically. Plaintiffs point to allegations in the Amended Complaint that Life and Voice "distribute tens of millions of robocalls, generating millions in profit for the companies," "offer clients the ability to spoof Caller ID information," and "do not employ any controls to prevent spoofing or ensure clients aren't misusing their services." Opp at 3–4 (citing Am. Compl. ¶¶ 29, 33, 86). But again, these allegations do little to establish that they personally have suffered an "actual or threatened injury." *Sutliffe*, 584 F.3d at 326.

LWV-US and LWV-NH point to *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) to argue that they have suffered a concrete injury sufficient to confer standing. But this case actually supports the opposite conclusion. In *Alliance for Hippocratic Medicine*, the plaintiff medical associations argued that they had standing because they "incurr(ed) costs to oppose FDA's actions" and because "FDA ha[d] 'forced' the associations 'to expend considerable time, energy and resources' . . . engaging in public advocacy and public education." *Id.* at 394 (citation omitted). LWV-US and LWV-NH make similar contentions here,

stating that they have "expended resources providing additional guidance and training to staff tracking robocalls from its members or via media coverage, and in working directly with staff and any impacted state to provide education to voters who may be contacted via robocall and negatively impacted." Am. Compl. ¶ 74.

The United States Supreme Court in *Alliance for Hippocratic Medicine* rejected the medical associations' contentions that they obtained standing through their expenditure of resources, holding that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *All. for Hippocratic Medicine*, 602 U.S. at 394. Like in *Alliance for Hippocratic Medicine*, here, LWV-US and LWV-NH allege that they expended resources to engage in advocacy related to the Subject Call and risks of AI-related content in elections. Am. Compl. ¶¶ 11, 72–77. LWV-US and LWV-NH have not met their 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," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), and they should not be permitted to "spend [their] way into standing simply by expending money to gather information and advocate against" the alleged actions of Defendants here. *See All. for Hippocratic Medicine*, 602 U.S. at 394.

Even if the Court is persuaded that Plaintiffs have standing to assert their claims against Voice, the Court should at a minimum dismiss Life, as the allegations specific to Life in the Amended Complaint—that Life "provides communications services to Voice Broadcasting to enable calling capabilities on the Voice Broadcasting platform"—do not come close to alleging an injury in fact caused by Life. *See* Am. Compl. ¶ 36.

III. PLAINTIFFS FAIL TO ESTABLISH A VIABLE CLAIM UNDER THE VRA.

Plaintiffs' Reply confirms that extension of the VRA to the Subject Call would be an unjustified expansion of liability under this important statute. Their argument would extend potential liability to an arguably misleading statement when no Plaintiff or anyone else claims they were deceived and did not vote as a result, let alone that they were intimidated, threatened or coerced. Not a single person has said that. The Court should reject Plaintiffs invitation to stretch the VRA in this manner.

Plaintiffs specifically argue that their VRA claim should not be dismissed as to Life and Voice merely because Life and Voice's platform was used to convey the Subject Call. *See* Opp. at 8–9. The statute itself says that "[n]o person . . . shall intimidate, threaten, coerce, or attempt" those things. 52 U.S.C. § 10101(b). Plaintiffs have not alleged any well-pled facts indicating that Life and Voice engaged in this behavior. Importantly, Plaintiffs have not identified ***any*** authority that would extend the statute to include a technology provider whose platform was allegedly used to violate the law. The only cases they cite, the *Wohl* series of decisions, Opp. at 7–10, did allow claims to proceed against a technology provider, but the facts showed that the provider knew about and was integrally involved in the scheme to create the unlawful robocall message, including discussions of the intent to discourage mail-in voting and suppress turn-out, reference to the effort as an "attack," and recommendations by the messaging company for targeting the calls to zip codes with higher percentages of minority voters. *See Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 Civ. 8668 (VM), 2021 WL 4254802, at *5–6 (S.D.N.Y. Sept. 17, 2021) ("*Wohl II*"). As such, the situation in *Wohl* was dramatically different than the allegations here. *See* Mot. at 7–8. Plaintiffs fail to provide any binding legal authority that would support extension of the VRA to service providers with no knowledge of the allegedly unlawful scheme.

Furthermore, Plaintiffs' argument that Voice reviewed and had knowledge of the Subject Call's content when Voice allegedly sought permission to add an opt-out sentence on the end of the recording is a baseless attempt to hold Voice liable because Plaintiffs have not alleged that either Life or Voice knew Kramer lacked Kathy Sullivan's permission or that either knew the call was fake. In sum, because Plaintiffs fail to cite legal authority or facts to support the extension of VRA liability to Life or Voice, the Court should dismiss their VRA claim.

IV. PLAINTIFFS' TCPA CLAIM LACKS MERIT.

The Court should dismiss Plaintiffs' TCPA claim because Life and Voice cannot be deemed to have "initiated" the Subject Call, and even if they could, the Subject Call is exempt from the TCPA's prior express written consent requirement.

A. The Complaint Establishes that Kramer, and Not Life or Voice, Initiated the Subject Call.

In their Opposition, Plaintiffs cite the 2015 FCC Order as clarifying the standard for who "initiates" a call for TCPA liability. Opp. at 16 (citing *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980 ¶ 30 (2015) ("2015 FCC Order")). As Plaintiffs note, according to the FCC, the "caller" under the TCPA is "so involved in plac[ing] the call as to be deemed to have initiated it." *Id*. at 16–17 (citing 2015 FCC Order). In its 2015 Order, the FCC looked to several factors to determine whether an entity can be deemed to have initiated a call. As many courts, including those cited by Plaintiffs, have recognized, the primary factors to be considered in making this determination are whether a given entity decided (1) to send the message, (2) when to send the message, (3) to whom to send the message. 2015 FCC Order at 7980–84 ¶¶ 29–37; *see also* Mot. at 9–11.

Plaintiffs do not, because they cannot, dispute that it was Kramer that was responsible for each of these factors. The FCC's investigation, relied upon by Plaintiffs in the Amended

Complaint, makes this clear, finding that "[e]mail and text correspondence obtained from the parties involved reveals ***Kramer's orchestration*** of the illegal robocall campaign." NAL, 2024 WL 2717624, ¶ 9 (emphasis added). As the FCC further explained:

> 20. Kramer knowingly caused the calls at issue by directing—in detail—Voice Broadcasting to transmit spoofed calls. Kramer provided Voice Broadcasting with the date and time to make the calls, the list of voters to call, the recording of the message to be played, and the spoofed caller ID number to transmit with the calls.

NAL, 2024 WL 2717624, ¶ 20.

Notwithstanding these allegations making clear that Kramer is the caller under the TCPA, Plaintiffs argue that Life and Voice should be liable under the TCPA because they "were aware of unlawful conduct" occurring on their platform, Opp. at 21, yet the Amended Complaint is devoid of allegations of knowing conduct on the part of Life and Voice,[2] Mot. at 2, 8. A determination that Life and Voice initiated the Subject Call would be contrary to FCC guidance and precedent. *See* 2015 FCC Order; *see also* Mot. at 9–11 (citing various decisions to dismiss TCPA claims against telecommunications providers where providers did not decide "whether, when, or to whom to send the messages" at issue).

The cases cited by Plaintiffs support Life and Voice's position or are otherwise inapposite. For example, Plaintiffs rely on *Hurley v. Messer*, where the court found that certain defendants "knew about the illegal conduct [involving political robocalls], had a right to control the conduct

[2] Plaintiffs focus much of their argument on the fact that Voice allegedly "input [a] spoofed telephone number" in the Subject Call, at Kramer's request, but they do not assert that Voice willfully enabled fraudulent spoofing of telephone numbers. Opp. at 19, 21. Plaintiffs do not bring a claim against Life or Voice under the Truth in Caller ID Act, the law that makes it unlawful to spoof telephone numbers "with the intent to defraud, cause harm, or wrongfully obtain anything of value." 47 U.S.C. § 227(e). Even if they did, Plaintiffs' suggestion that Life and Voice should be liable for merely following Kramer's instruction to insert a particular phone number into the Subject Call contravenes the law, the FCC's guidance, and Congressional intent. *See In re Rules & Reguls. Implementing the Truth in Caller ID Act of 2009*, 26 FCC Rcd. 9114, 9121 ¶ 20 (2011) ("As for PRC's suggestion that we modify the rule to hold spoofing providers liable for transmitting inaccurate or misleading caller identification information on behalf of someone violating the Act, as discussed below, we choose to follow Congress' lead in not imposing additional obligations on spoofing providers.").

but, nevertheless, permitted the robocalls to be broadcast through their assigned telephone numbers" on their calling platform and therefore were "so involved in placing the calls that [they] could be deemed to have initiated them" within the meaning of the TCPA. No. 3:16-9949, 2018 WL 4854082, at *3, *4 (S.D. W. Va. Oct. 4, 2018). However, as discussed above, Plaintiffs do not allege that Life or Voice "knew about the illegal conduct." *See* Am. Compl. ¶ 33 (alleging that Voice's platform "allows clients to select the phone number and/or information that appears on the Caller ID display of the recipients of calling campaigns"); *id.* ¶ 51 ("On Sunday, January 21, 2024, Kramer instructed Voice Broadcasting to use a personal cell phone number belonging to Kathy Sullivan, a former New Hampshire Democratic Party Chair, as the phone number that would appear on the Caller ID display."). As such, Life and Voice are much more similar to another defendant in *Hurley* who was dismissed from the case because allegations that he had "directly participated in, had knowledge and the right to control the illegal conduct alleged herein, as the 'voice' of the subject prerecorded message," were "insufficient to show [the defendant] initiated the telephone calls as contemplated by the statute or the FCC rules." 2018 WL 4854082, at *3 (citation omitted).

Similarly, other cases cited by Plaintiffs, while potentially damning for Kramer, are not relevant to the alleged conduct of Life and Voice. *See Off. of Att'y Gen. v. Smartbiz Telecom LLC*, 688 F. Supp. 3d 1230, 1237 (S.D. Fla. 2023) (denying motion to dismiss TCPA claims where plaintiff alleged that defendant "was notified approximately 250 times of fraudulent calls it ha[d] transmitted" and continued to transmit the calls despite those warnings); *Mey v. All Access Telecom, Inc.*, No. 5:19-cv-00237-JPB, 2021 WL 8892199, at *4–5 (N.D. W. Va. Apr. 23, 2021) (second and third alterations in original) (citations omitted) (denying motion to dismiss TCPA claim where plaintiffs alleged that defendants "knew that the caller spoofed an invalid [all zero]

number, and [each] call [alleged in the complaint] was not for a lawful purpose, and that no subscriber could lawfully originate calls from that number," and "passed on the spoofed number 'as legitimate, knowing it not to be,'" among many other allegations that defendants knew about the unlawful conduct they were facilitating); *Cunningham v. Montes*, 378 F. Supp. 3d 741, 749 (W.D. Wis. 2019) (denying motion for summary judgment where among other acts, defendant set up and ran dialing campaigns for customers, loading call lists and audio files and then launching the campaign by hitting send, and therefore was so involved as to confer TCPA liability). For these reasons, Life and Voice did not "initiate" the Subject Call and Plaintiffs' TCPA claim should be dismissed.[3]

B. The Subject Call Is Exempt from Consent Requirements Under the TCPA.

The law is clear that prior express written consent is not necessary when a call (1) is made "to any residential line using an artificial or prerecorded voice" and (2) is "not made for a commercial purpose." 47 C.F.R. §§ 64.1200(a)(3), (ii). Plaintiffs do not deny that the Subject Call was placed to landlines only, or that it was not commercial in nature. Instead, Plaintiffs argue that the Subject Call was not political in nature and therefore cannot be exempt from the TCPA's prior express written consent requirements. Opp. at 21–22. Plaintiffs do not cite any case law for the proposition that the Subject Call cannot be subject to the TCPA's exemption for non-commercial calls made to landlines. Instead, Plaintiffs rely on and mischaracterize guidance from the FCC regarding the use of AI in calling campaigns, insinuating that the guidance says that the Subject Call is not subject to the exemption for non-commercial calls. *Id.* at 22–23. But the guidance says

[3] Although Plaintiffs argue in their Opposition that "Defendants" are "initiators" under the TCPA, the Amended Complaint alleges only that Voice did so. Am. Compl. ¶ 53 (expressly alleging Voice, "using service and equipment provided by [Life], initiated" the Subject Call). Accordingly, even if the Court finds that Plaintiffs' conclusory allegation that Voice "initiated" the call sufficient to state a TCPA claim, it should at a minimum dismiss the claim as to Life as there are no well-pled facts that meet the standard for "initiation" set out by the courts and the FCC.

nothing about the application or scope of the exemption for non-commercial calls, let alone how that exemption would apply in this case. *See In re Implications of A.I. Techs. on Protecting Consumers from Unwanted Robocalls & Robotexts*, No. CG23-362, 2024 WL 519167 (F.C.C Feb. 8, 2024). If the FCC intended political calls that are created with AI-generated voices to not be subject to the exemption for non-commercial calls and impermissible under the TCPA, then it could issue guidance and new rules governing calls using AI-generated voices. Furthermore, to the extent Plaintiffs claim that the call was not sufficiently "political" to be considered non-commercial, Opp. at 21–22, Plaintiffs themselves characterized the Subject Call as a political call in the Amended Complaint, alleging that Life and Voice disseminate "political phone calls" and that Life and Voice "[d]elivered a [p]rerecorded [p]olitical [m]essage" without required disclosures, Am. Compl. ¶¶ 86, 123.

Thus, even if Life or Voice could be deemed to have "initiated" the phone call—which, as detailed above and in Defendants' Motion, they cannot—Plaintiffs' TCPA claim must be dismissed because the Subject Call was exempt from the TCPA's consent requirements.

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

Plaintiffs do not deny that, to bring a claim under the New Hampshire election laws, they 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 v. N.H. Democratic Party*, 89 A.3d 1202, 1205 (N.H. 2014). Nor do they deny that none of them failed to vote as a result of the Subject Call. Instead, they point to the allegation that for one Individual Plaintiff, "it took several moments to realize the call was fake," and repeat their allegation that the Organizational Plaintiffs made expenditures based on their own decisions regarding voter education, neither of which are sufficient to establish standing. Opp. at 15. The Court should

dismiss Counts III and IV against Life and Voice because Plaintiffs lack standing to assert claims under the New Hampshire Election Laws.

VI. CONCLUSION

For the foregoing reasons, and because any amendment would be futile, Defendants Life Corporation and Voice Broadcasting Corporation respectfully request that the Court grant Defendants' Motion to Dismiss with prejudice. *See Winfield v. Town of Andover*, 305 F. Supp. 3d 286, 291 (D. Mass. 2018) (citing *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006)) (courts have discretion to deny leave to amend where amendment would be futile).

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Respectfully submitted,

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