

Express Consent Masterclass: Part 1

Capturing Valid Online
Consent—And Other
Important Consent Stuff



50,000 Foot View on Express Consent

- The TCPA requires consent to use automated technology to contact consumers *and* for calls to residential numbers on the DNC list
- Specifically the TCPA requires the “express consent” of the “called party”
 - Identity of the called party is still somewhat mysterious
- Carriers are increasingly requiring opted in consent for messaging as well
- Consent for informational messages is generally easy to come by but marketing consent is more challenging to obtain
- Obtaining consent via the internet is becoming far more challenging
 - Consumers denying they visited the website
 - Courts taking a very close look at website format
 - Seller may need to be specifically identified in disclosures
- Consent is revocable in most circumstances– but contractual terms can be used to prevent revocation in some jurisdictions

The Language of the Statute and Regs

- **47 U.S.C. 227.** The actual statute is pretty vague. Just says automated calls may be made “with the prior express consent of the called party.”
 - Important FCC rulings infer express consent any time a consumer provides a phone number directly to a caller for a purpose “closely related” to that about which the caller is calling
 - Written consent is narrowly read against the drafter, however.
- **47 CFR § 64.1200(a)(ii) & (iii)**—Regs require “express written consent” for any “call that includes or introduces an advertisement or constitutes telemarketing.”
 - “Telemarketing” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.
- **47 CFR § 64.1200(c)(ii)**—Reg for marketing calls to numbers on DNC says “permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed.”

When is Written Consent Needed?

- 1. Any call made to a cell phone (including business cell phones) using automated or prerecorded voice technology and contains marketing content;
- 2. Any call made to a residential landline using a prerecorded or artificial voice and contains marketing content;
- 3. Any call made to a residential landline on the DNC list for marketing purposes unless caller has an established business relationship or is responding to an inquiry;
- 4. Any prerecorded call to a residential landline in excess of the TRACED Act exemption limits (includes *informational calls*.)
 - TRACED Act limits are 3 calls per month for “commercial calls,” surveys and charitable calls, and up to 3 calls per week for healthcare related calls
 - TRACED Act implementation is currently stalled due to the paperwork reduction act so...it will be a while before this takes effect

Informational vs. Telemarketing

- Standard for consent for informational calling is much different
 - Just needs to be provided by the consumer to the caller for a purpose “closely related” to the purpose of the call
 - But merely entering a phone number into a field without clicking submit is not consent. See *Caplan v. Budget Van Lines*, Case No. 20-CV-130 JCM, 2020 U.S. Dist. Lexis 136865 (D. Nv. July 31, 2020).
- Dual purpose calls are treated as marketing
- Immediate responses to consumer-initiated requests for information are not marketing, but where to draw the line?

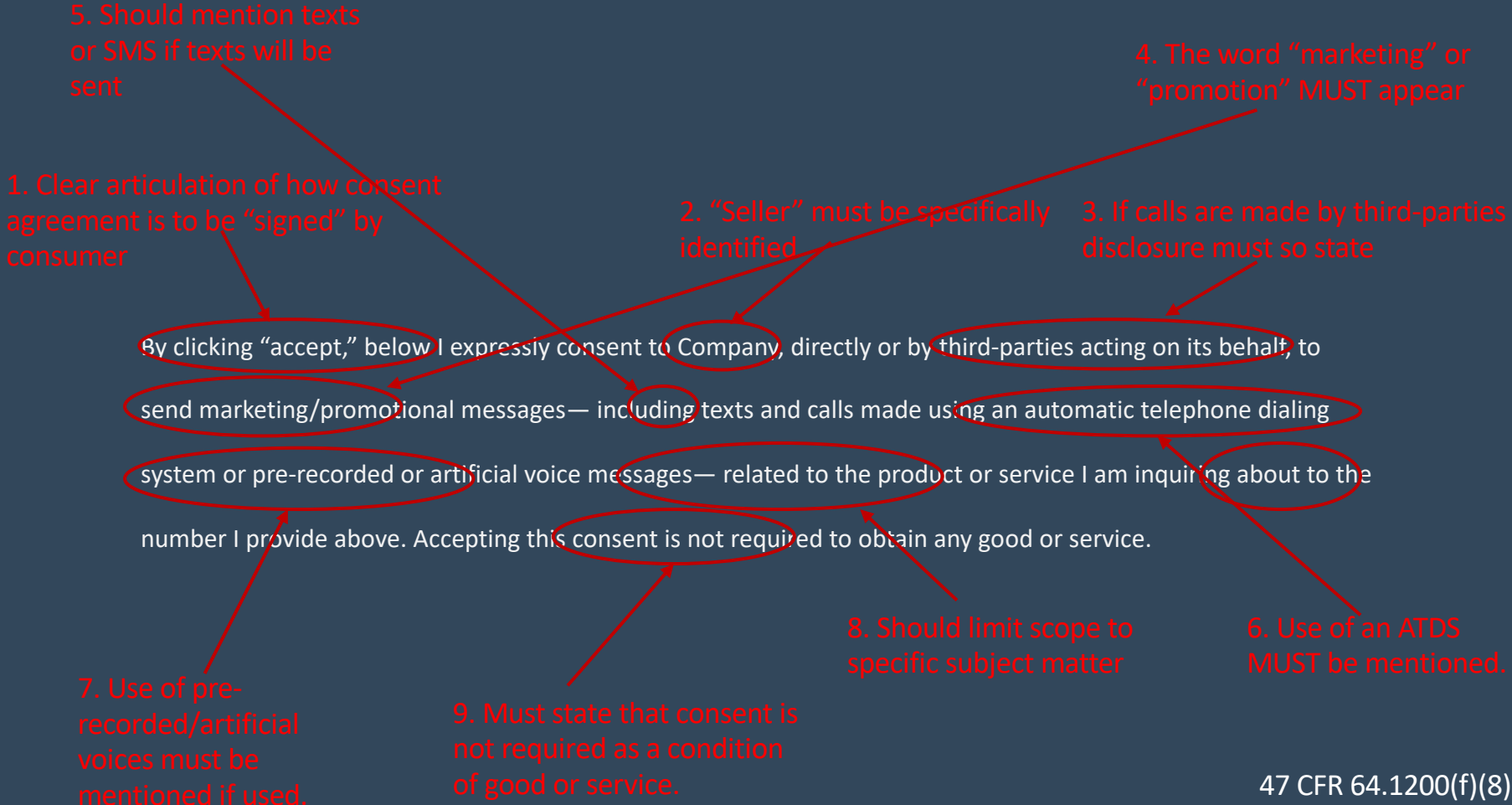
Whose Consent is Needed?

- Consent must come from the “called party”
- Four different possible “called parties” – the intended recipient, the actual recipient, the regular user of the phone and the subscriber to the phone.
- Courts typically find consent must come from the subscriber – but some courts recognize an exception where a phone number has recently changed hands
 - See *N. L. v. Credit One Bank, N.A.*, Nos. 19-15399, 19-15938 (9th Cir June 3, 2020)(Called party is not the intended recipient)
 - *Sandoe v. Boston Sci. Corp.*, Civil Action No. 18-11826-NMG, 2020 U.S. Dist. LEXIS 2800 (D. Mass. Jan. 8, 2020)(caller has right to rely on consent from former subscriber for a reasonable period of time)
- Causes problems:
 - Caller potentially liable for fat fingered phone numbers
 - Caller potentially liable where consumer provides fake or different number
 - Caller potentially liable where number changes hands without knowledge
- SOLUTIONS?

What is Prior Express Written Consent?

- **47 CFR § 64.1200(f)(9)**— The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
- **(i)** The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
 - **(A)** By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
 - **(B)** The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
- **(ii)** The term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

9 Part Test: Anatomy of a Valid TCPA Express Written Consent Disclosure



47 CFR 64.1200(f)(8)

Must the Seller Be Specifically Identified?

- Many online webforms do not specifically reference the name of an ultimate seller but merely advise the consumer that a “lender” or “service provider” will contact the consumer in response to their inquiry.
- Two recent cases suggest this practice is insufficient:
 - *Williams v. PillPack LLC*, C19-5282 TSZ, 2021 U.S. Dist. LEXIS 27496 (W.D. Wash. February 12, 2021)(Written consent for call center to call. Calls were subsequently warm transferred to seller, with consumer’s oral consent. The court expressed doubt that this was lawful and determined the issue was suitable for classwide treatment);
 - *Mattson v. New Penn Fin.*, No. 3:18-cv-00990-YY, 2020 U.S. Dist. LEXIS 197955 (D. Or. October 25, 2020)(district court found that because the lender is not specifically named in a disclosure that said only “up to 4 lenders” may call the consumer, the lender do not have a valid consent defense on Plaintiff’s DNC Claim. Plus, the lender may even have a bona fide error defense since the lender did not verify that they were specifically listed on the website.)

How to Capture Consent

- Online webforms are great— but can be problematic
- Contract terms
- Apps and web portals for demographic updates
- Recorded phone calls?
 - Good for informational consent but probably not marketing consent
- Text message consent

Huge 2020 Case Law Trend: Courts Refusing to Enforce Online Disclosures

- Numerous cases refused to enforce online disclosures in 2020.
- Courts are applying a holistic approach with an emphasis on whether a consumer is truly likely to understand they are accepting terms and conditions when submitting a web form.
- General things to keep in mind:
 - **Disclosure must be close to the acceptance button—while “above the button” is not necessarily required it is preferred;**
 - **Hyperlinks must be obvious and underlined or capitalized;**
 - **Disclosure must be in readable font—both in terms of size and color against background;**
 - **Website should not be cluttered or otherwise full of impertinent language in different font sizes and colors that might distract from the disclosure;**
 - **Disclosure should actually and clearly explain that by clicking the button the customer will actually be accepting the disclosure;**
 - **Disclosure must be apparent at the time the user clicks the submit button and cannot pop up only before or after the button is presented.**

Proximity of Disclosure Button

Arnaud v. Doctor's Assocs., 19-3057-cv, 2020 U.S. App. LEXIS 29504 (2nd Cir. Sept. 15, 2020)(“reasonable user would not find the terms and conditions link contained on the page to be conspicuous, since the link was at the bottom of the page, in relatively small font, and was introduced by no language other than the shorthand "T & Cs”)

UNENFORCABLE!

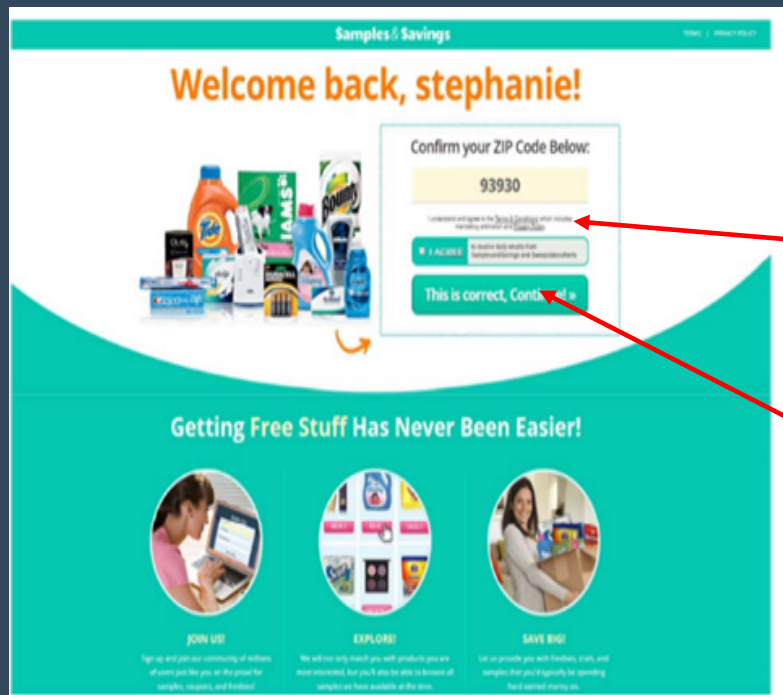


Phone number entered here

Disclosure way down here

Consumer Must Plainly Understand Clicking Button is Acceptance of Terms

Berman v. Freedom Fin. Network, CASE NO. 18-cv-01060-YGR, 2020 U.S. Dist. LEXIS 160406 (N.D. Cal. Sept. 1, 2020)(Website lay out did not afford sufficient notice to the consumer because there was no above-the-button language notifying the consumer that they were accepting disclosures by clicking the button);



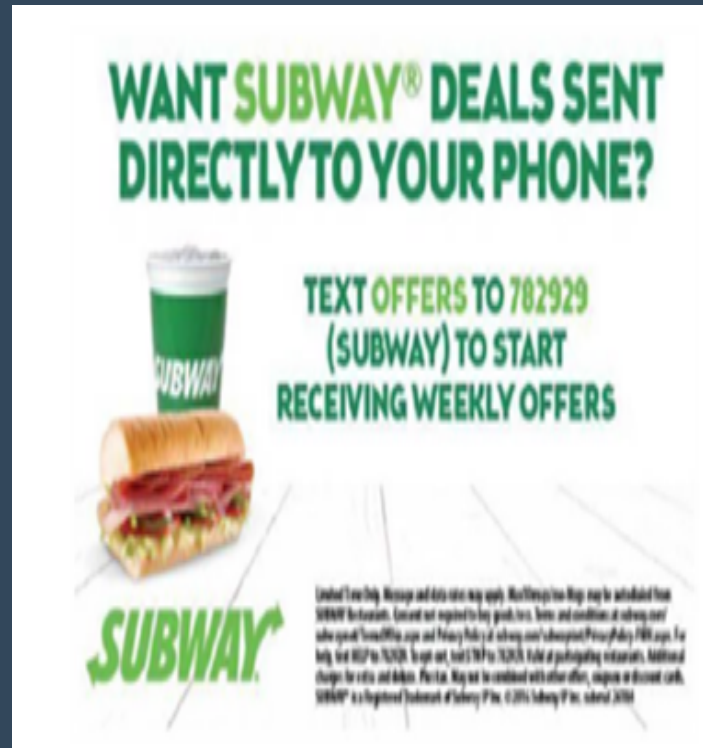
UNENFORCABLE!

Tiny little terms and condition notice

Button says nothing about accepting terms just “This is correct, Continue”

Site Must Clearly Inform That Terms Are Being Accepted

- Soliman, 2020 U.S. Dist. LEXIS 38183 (D. Conn. March 5, 2020)(page “actively” took attention away from terms and conditions, which were at the bottom of the page. The page did not specify that the consumer was accepting the hyperlinked terms and conditions)



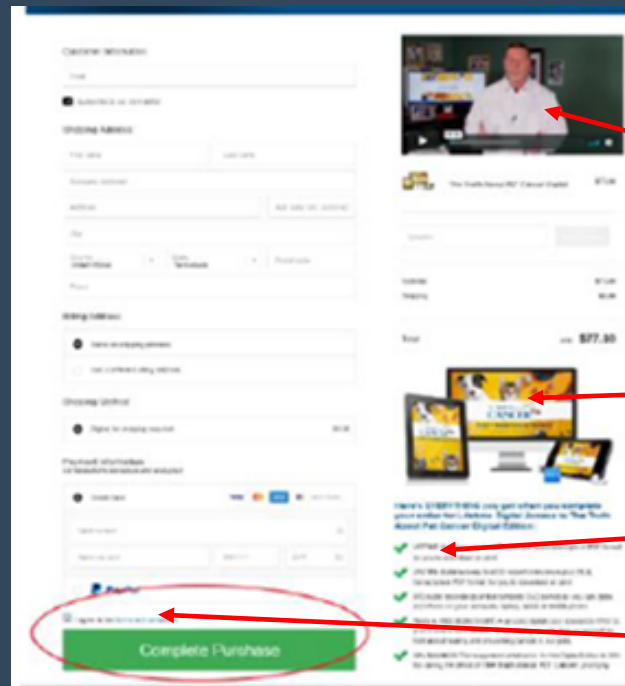
UNENFORCABLE!

Loud colorful call to action

Small, unreadable fine print that does not actually specify that terms will be accepted

Cluttered Pages Are a Bad Idea

- Shultz v. Ttac Publ, Case No. 20-cv-04375-HSG, 2020 U.S. Dist. LEXIS 198834 (N.D. Cal. October 26, 2020)(i) hyperlink not visible; ii) distracting video playing; iii) promotional material; iv) big green checkmarks on page obscure the import of the hyperlink);



UNENFORCABLE!

Distracting video

More distracting content

Weird green check marks that can confuse folks

Tiniest little "accept terms and conditions" box ever

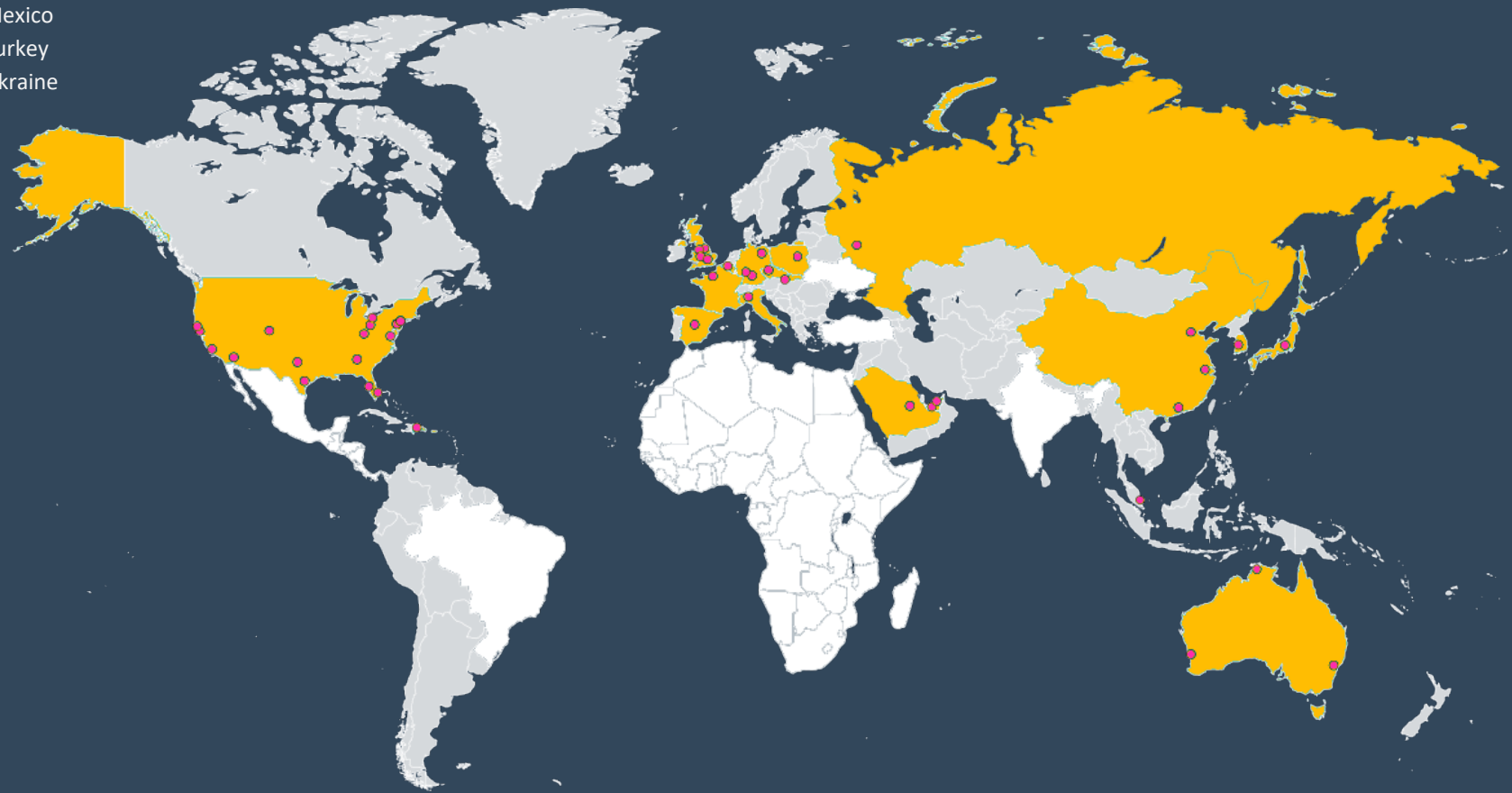
Revocation of Consent

- Consent can usually be revoked in any reasonable means but unreasonable revocation efforts will not suffice.
 - See, e.g., *Wright v. Usaa Sav. Bank*, 2020 U.S. Dist. LEXIS 90576 (E.D. Cal. May 22, 2020)(the Plaintiff failed to effectively revoke consent because a revocation letter was sent to an address that was not used for communication with consumers); see also *Miler v. Td Bank United States*, 2020 U.S. Dist. LEXIS 184658 (D. Or. Oct. 6, 2020)(delivery of a revocation letter to a card issuer’s corporate headquarters was not valid revocation to a retailer).
- Contractual consent is not revocable in all jurisdictions.
 - See e.g. *Medley v. Dish Network*, No. 18-13841, 2020 U.S. App. LEXIS 14122 (11th Cir. May 01, 2020)(general common law of contract provides that contract terms including consent provisions— cannot be unilaterally revoked)
- One consent is revoked it can be re-obtained—but must be in writing for marketing
 - *Lucoff v. Navient Sol., LLC*, No. 19-13482, 2020 U.S. App. LEXIS 37868 (11th Cir. December 4, 2020)(the Plaintiff said “no” when asked whether he consented but subsequently submitted a demographic form on the Defendant’s website).

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| Böblingen | New York | Mexico |
| Bratislava | Palo Alto | Turkey |
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| Cincinnati | Perth | |
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