No. 18-987

In the Supreme Court of the United States

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Petitioners,

v.

TRUE HEALTH CHIROPRACTIC, INC.;
MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a compelling reason to grant review in this case, where the Ninth Circuit already applied the standard advocated by Petitioners by holding that the party seeking class certification under Fed. R. Civ. P. 23(b)(3) bears the burden of showing common issues "predominate" over individual issues, and concluded that Respondents failed to establish predominance with respect to two of their proposed subclasses, but carried their burden with respect to one subclass.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners, who were Defendants below, are McKesson Corporation and McKesson Technologies, Inc. (collectively, "McKesson").

Respondents, who were Plaintiffs below, are True Health Chiropractic, Inc. ("True Health") and McLaughlin Chiropractic Associates, Inc. ("McLaughlin"). Neither Plaintiff has any parent corporation, and no publicly held company owns 10% or more of either Plaintiff's corporate stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 20.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

A. The TCPA and Class Certification Standards. 2

B. District Court Proceedings Leading to the Ninth Circuit's decision. 4

C. Ninth Circuit Proceedings. 7

D. District Court Proceedings on Remand from the Ninth Circuit's Decision........................... 9

REASONS FOR DENYING THE PETITION 10

I. The Ninth Circuit applied the rule that the party seeking class certification under Rule 23(b)(3) bears the burden of proving common issues "predominate," and there is no circuit split on that question 10

II. The Ninth Circuit correctly held that Plaintiffs carried their burden of proving predominance as to the Exhibit A-only Class, and correctly refused to allow McKesson's "speculation and surmise" to defeat Plaintiffs' showing 11

III. This case is a poor vehicle for deciding any class-certification issue because the district court refused to decide class certification on remand, instead granting McKesson's request to move for individual summary judgment.. 17

CONCLUSION.. 18

TABLE OF AUTHORITIES

Page

Cases

Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.,
757 F. 3d. 540 (6th Cir. 2014) 3

Bais Yaakov of Spring Valley v. FCC,
852 F.3d 1078 (D.C. Cir. 2017) 8

Bridging Communities Inc. v. Top Flite Fin. Inc.,
843 F.3d 1119 (6th Cir. 2016) 3, 13–14

City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.,
867 F.3d 434 (3d Cir. 2017) 3

Corley v. United States,
556 U.S. 303 (2009) 18

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 10

Gene & Gene LLC v. BioPay LLC,
541 F.3d 318 (5th Cir. 2008) 11

Gene & Gene, LLC v. BioPay, LLC,
624 F.3d 698 (5th Cir. 2010) 16

Holtzman v. Turza,
728 F.3d 682 (7th Cir. 2013) 3

In re U.S. Foodservice Inc. Pricing Litig.,
729 F.3d 108 (2d Cir. 2013) 13–14

TABLE OF AUTHORITIES - Continued

Page

Cases

Myers v. Hertz Corp.,
624 F.3d 537 (2d Cir. 2010) 11

Mims v. Arrow Fin. Servs., LLC,
565 U.S. 368 (2012) 3

McCurley v. Royal Seas Cruises, Inc.,
2019 WL 1383804 (S.D. Cal. Mar. 27, 2019) 14

Sandusky Wellness Ctr. v. ASD Specialty Healthcare,
863 F.3d 460 (6th Cir. 2017) 11, 16

Sandusky Wellness Ctr. v. MedTox Sci., Inc.,
821 F.3d 992 (8th Cir. 2016) 3

Simpson v. Lear Astronics Corp.,
77 F.3d 1170 (9th Cir. 1996)................................ 13

Thorn v. Jefferson-Pilot Life Ins. Co.,
445 F.3d 311 (4th Cir. 2006)................................. 11

True Health Chiropractic, Inc. v. McKesson Corp.,
896 F.3d 923 (9th Cir. 2018) 7

Van Patten v. Vertical Fitness Grp., LLC,
847 F.3d 1037 (9th Cir. 2017) 15

Zinser v. Accufix Research Inst., Inc.,
253 F.3d 1180 (9th Cir. 2001) 10

TABLE OF AUTHORITIES - Continued

Page

Statutes

47 U.S.C. § 227 (a)(5) 3, 15
47 U.S.C. § 227(b)(1)(A) 15
47 U.S.C. § 227(b)(1)(C) 3
47 U.S.C. § 227(b)(1)(C)(ii)...................................... 17
47 U.S.C. § 227(b)(3) 3

Rules & Regulations

Sup. Ct. Rule 10 11
Fed. R. Civ. P. 23 .... 10, 14
Fed. R. Civ. P. 23(b)(3) ....*passim*
Fed. R. Civ. P. 23(f) 7
Fed. R. Civ. P. 72(a) 13
47 C.F.R. § 64.1200(a)(4)(iv) 7

RESPONDENTS' BRIEF IN OPPOSITION

The petition seeks review of a decision of the United States Court of Appeals for the Ninth Circuit holding common issues "predominate" for purposes of class certification under Fed. R. Civ. P. 23(b)(3) with respect to one of three proposed subclasses (the "Exhibit A-only Class") of recipients of facsimiles (or "faxes") sent by McKesson. Plaintiffs allege these faxes were "unsolicited advertisements" that failed to comply with the requirements of the Telephone Consumer Protection Act of 1991 ("TCPA").

The Court should deny the petition because, contrary to McKesson's characterization, the Ninth Circuit applied the rule that the party seeking class certification under Rule 23(b)(3) has the burden of proving that common issues "predominate" over individual issues, including with respect to a defendant's affirmative defenses. The Ninth Circuit's ruling is consistent with every other circuit to address the issue, and there is no circuit split, contrary to the claims in the petition.

In addition, the Ninth Circuit correctly held, under the particular facts of this case, that Plaintiffs met their burden with respect to the Exhibit A-only Class, where the only evidence McKesson "actually advanced" for its defense that members of this subclass gave McKesson "prior express invitation or permission" to send fax advertisements consisted of standardized product-registration forms and End-User License Agreements ("EULAs"), and the question of

whether those documents constitute prior express permission can be decided in one fell swoop for all class members. The Ninth Circuit also correctly refused to allow McKesson's "speculation and surmise" that it *might* be able to show at some future time that unspecified members of the Exhibit A-only Class gave prior express permission in a manner other than a product-registration form or EULA to defeat Plaintiffs' showing.

Finally, this case is a poor vehicle for resolving any class-action issue because the district court on remand refused to decide Plaintiffs' renewed motion for class certification, instead granting McKesson leave to file a motion for summary judgment as to Plaintiffs' individual claims. McKesson's motion for individual summary judgment was filed May 20, 2019, and the hearing on the motion is set for August 1, 2019. No class has been certified, and it is possible no class will be certified. Review of the Ninth Circuit's class-certification decision would be premature under these circumstances.

STATEMENT OF THE CASE

A. The TCPA and Class Certification Standards.

The TCPA makes it unlawful for any person "to send, to a telephone facsimile machine, an unsolicited advertisement," unless (1) there is an "established business relationship" ("EBR") between the sender and the recipient; (2) the sender obtained the recipient's fax number in a permissible way, including the recipient's "voluntary communication" of the number

to the sender; and (3) the fax contains a compliant "opt-out notice" explaining how to stop future faxes. *See* 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). The statute provides an automatic $500 per violation, which the district court may increase to up to $1,500 for "willful[] or knowing[]" violations, along with injunctive relief. *Id.* § 227(b)(3).

"Class certification is normal" in TCPA cases under Fed. R. Civ. P. 23(b)(3) "because the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Holtzman v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). As the Court observed in *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 386 (2012), nearly all TCPA cases are class actions because the statutory damages do not justify individual suits. The circuit courts have affirmed class certification under Rule 23(b)(3) in TCPA fax cases, *see Turza*, 728 F.3d at 684; *Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014), or reversed denials of class certification, *see City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017); *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016); *Sandusky Wellness Ctr. v. MedTox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016).

B. District Court Proceedings Leading to the Ninth Circuit's decision.

Plaintiff True Health filed this suit in 2013, alleging McKesson sent it and a class of others unsolicited fax advertisements for McKesson's software products, including a fax for McKesson's "Medisoft" product in 2010. For the next two years, True Health (and McLaughlin Chiropractic, which was added as a named Plaintiff in 2014) attempted to discover the basis for McKesson's claim that it obtained "prior express invitation or permission" to send fax advertisements to putative class members. Over this period, McKesson refused to produce any evidence to support its permission defense with regard to any fax recipients other than the named Plaintiffs. McKesson advanced various justifications for its refusal, including that such evidence was not relevant to class certification, would be too burdensome to produce, or was too confidential to disclose, despite the existence of a protective order. (D. Ct. ECF No. 110, Ltr. Br. (Oct. 4, 2014)).

Plaintiffs moved to compel McKesson to produce any documents or other evidence supporting its permission defense, and McKesson presented its objections. (*Id.*) The magistrate judge rejected McKesson's objections and ordered McKesson to "produce documents relating to the permission defense." (D. Ct. ECF No. 127, Order Re: Joint Discovery Letters (Nov. 14, 2014) at 3).

McKesson argued that producing its permission-related documents would be too burdensome, and instead offered to serve a "supplemental interrogatory response indicating the method of conveying prior permission" and "the number of those recipients" in each evidentiary "category," provided that it not be required to identify each recipient by name, fax number, or other contact information. (D. Ct. ECF No. 133, Pls.' Joint Disc. Ltr. (Nov. 20, 2014) at 6). The magistrate judge accepted McKesson's proposal, in part, allowing McKesson to identify the "categories of permission" it claimed as to putative class members, but ordered McKesson to "identify the recipients that supposedly fall into each category of permission," rather than merely stating "the number of" recipients in each category, as McKesson proposed. (D. Ct. ECF No. 143, Order Re: Joint Discovery Ltr. (Dec. 5, 2014) at 4). McKesson objected to the magistrate judge's order, but the district court held the order was "well-reasoned, thorough, and correct in all respects." (D. Ct. ECF No. 148, Order Denying Motion for Relief from Nondispositive Pretrial Order of Magistrate (Dec. 19, 2014) at 1).

When McKesson failed to produce the required supplemental interrogatory response identifying which class members fell into which "category" of claimed permission, Plaintiffs moved to compel compliance with the discovery order, which the magistrate judge granted with the following instructions:

> Defendants shall produce an interrogatory response that (1) identifies each type of act that

> Defendants believe demonstrates a recipient's express permission to receive faxes (e.g. completing a software registration), (2) explains how that act qualifies as express permission, and (3) identifies each recipient allegedly giving that type of permission by name and contact information (including, at a minimum, fax and phone number). The effect of this interrogatory response should be to identify every putative class member who supposedly gave permission and explain how that class member gave permission.

(D. Ct. ECF No. 178, Order Granting in Part Pls.' Mot. Sanctions (Apr. 1, 2015) at 12).

McKesson did not object to the Sanctions Order. Instead, it produced a supplemental interrogatory response describing the three "categories" of permission it claimed to have obtained and attaching lists of recipients—designated as "Exhibit A," "Exhibit B," and "Exhibit C"—who fell into each of the three categories.

In their initial Motion for Class Certification, Plaintiffs sought to certify a single class that included all persons in each of the Exhibit A, B, and C categories. (D. Ct. ECF No. 209, Pls.' Mot. Class Certification (July 16, 2015) at 1). Plaintiffs argued that, since McKesson's faxes did not contain any "opt-out notice," the faxes violated the TCPA regardless of whether it obtained "prior express invitation or permission" under the FCC regulations implementing the TCPA, 47

C.F.R. § 64.1200(a)(4)(iv). (*Id.* at 17). Plaintiffs argued in the alternative that, even if McKesson could assert a permission defense where its faxes lacked compliant opt-out notice, that defense could be decided by subclass, according to the evidentiary categories and lists of recipients in McKesson's supplemental interrogatory response. (*Id.* at 18).

On August 22, 2016, the district court entered an order denying class certification on the grounds that McKesson could assert a permission defense without compliant opt-out notice and that "Plaintiffs have failed to satisfy the predominance requirement" with respect to McKesson's permission defense, without distinguishing between the persons in the Exhibit A, B, and C categories. (App. 34a). The district court did not mention Plaintiffs' alternative argument that the permission defense could be decided by subclass according to the categories of permission and lists of fax recipients produced by McKesson. (App. 21a–35a).

C. Ninth Circuit Proceedings.

Following the district court's denial of class certification, Plaintiffs timely petitioned for interlocutory review under Fed. R. Civ. P. 23(f), which the Ninth Circuit granted. On July 17, 2018, the Ninth Circuit issued its decision affirming in part and reversing in part. (App. 1a). The Ninth Circuit's decision is reported at *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018).

The Ninth Circuit affirmed the district court's ruling that Plaintiffs failed to meet their burden of establishing predominance as to the broad class encompassing all recipients on Exhibits A, B, and C, holding that opt-out notice is not required to assert a defense of express permission because the FCC regulation imposing that requirement was "invalidated" in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017). (App. 11–13a). The Ninth Circuit also affirmed that predominance was not met as to the 55 "putative class members listed in Exhibit C." (*Id.* 18a). The Ninth Circuit vacated and remanded as to whether "the class of putative class members with 2,701 unique fax numbers listed in Exhibit B would satisfy the predominance requirement of Rule 23(b)(3)." (*Id.* at 19a).

The Ninth Circuit reversed, however, as to "predominance" with respect to the Exhibit A-only Class, holding that "the claims of the putative class members listed in Exhibit A that remain after removing the claims in Exhibits B and C satisfy the predominance requirement of Rule 23(b)(3)." (*Id.* 18a). The Ninth Circuit reasoned that McKesson's supplemental interrogatory response "asserted only two consent defenses" as to this class: (1) that class members "gave consent by providing their fax numbers when registering a product purchased from a subdivision of McKesson"; and (2) that the Exhibit A-only class members "gave consent by entering into software-licensing agreements, or EULAs." (*Id.*) The Ninth Circuit found that "there is little or no variation in the

product registrations and the EULAs," and so "the predominance requirement of Rule 23(b)(3) is therefore satisfied" as to the Exhibit A-only Class, since "[c]onsent, or lack thereof, is ascertainable by simply examining the product registrations and the EULAs." (*Id.*) McKesson filed a petition for rehearing en banc, which was denied. (*Id.* 36a).

D. District Court Proceedings on Remand from the Ninth Circuit's Decision.

On remand from the Ninth Circuit, Plaintiffs filed a renewed motion for class certification seeking certification limited to the Exhibit A-only Class. (D. Ct. ECF No. 292, Pls.' Renewed Mot. Class Certification (Dec. 4, 2018) at 1). Following the close of briefing and hearing on that motion, the district court, over Plaintiffs' objections, ruled that instead of deciding class certification, it would allow McKesson to seek summary judgment against Plaintiffs individually on the issue of "whether voluntarily providing a fax number on product registration and/or agreeing to the End User License Agreement constitutes express permission." (D. Ct. ECF No. 322, Order Re: Summ. J. Procedure & Denying Defs.' Mot. Stay (Apr. 17, 2019) at 1). The district court entered a briefing schedule making McKesson's motion for summary judgment due May 20, 2019, and setting the motion for hearing on August 1, 2019. (D. Ct. ECF No. 324, Stip. & Order Re: Summ. J. Briefing Schedule (Apr. 22, 2019) at 1).

McKesson filed its motion for summary judgment on May 20, 2019, arguing it is entitled to summary

judgment on Plaintiffs' individual claims, and so the district court need never decide class certification. (D. Ct. ECF No. 325, Defs.' Mot. Summ. J.).

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit applied the rule that the party seeking class certification under Rule 23(b)(3) bears the burden of proving common issues "predominate," and there is no circuit split on that question.

The Ninth Circuit squarely held in this case that "[t]he party seeking class certification has the burden of establishing predominance," following established Ninth Circuit jurisprudence. (App. 15a (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)). The Ninth Circuit held this rule applies to affirmative defenses and that Plaintiffs in this case "retain[ed] the burden of showing that the proposed class satisfies the requirements of Rule 23, including the predominance requirement of Rule 23(b)(3)," with respect to McKesson's permission defense. (App. 16a).

The Ninth Circuit applied that rule, concluding that Plaintiffs failed to establish predominance with respect to the broad class covering Exhibits A, B, and C, as well as a stand-alone Exhibit C class. (App. 17a). The Ninth Circuit vacated and remanded with respect to a potential Exhibit B class, and reversed only with respect to the Exhibit A-only Class. (*Id.*)

Contrary to the characterization in the petition, the Ninth Circuit did not relieve Plaintiffs of their burden of proving predominance. (Pet. at 3). Rather, the Ninth Circuit required Plaintiffs to carry their burden, and held Plaintiffs satisfied it with respect to only one of three proposed subclasses, in accord with the other circuit court decisions McKesson cites in its petition. (Pet. at 15–20 (citing *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006); *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) ("*BioPay I*"); *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 468 (6th Cir. 2017)). McKesson's petition, at best, claims that the Ninth Circuit's decision contains "erroneous factual findings or the misapplication of a properly stated rule of law," a circumstance in which certiorari is "rarely granted" under Rule 10

In sum, the Ninth Circuit already applied the rule McKesson asks this Court to apply, and there is no circuit split on that issue. The petition should be denied.

II. The Ninth Circuit correctly held that Plaintiffs carried their burden of proving predominance as to the Exhibit A-only Class, and correctly refused to allow McKesson's "speculation and surmise" to defeat Plaintiffs' showing.

The Ninth Circuit held, with respect to the Exhibit A-only Class, that "the claims of the putative class

members listed in Exhibit A that remain after removing the claims in Exhibits B and C satisfy the predominance requirement of Rule 23(b)(3)." (App. 18a). The Ninth Circuit reasoned that McKesson's supplemental interrogatory response "asserted only two consent defenses" as to this class: (1) that class members "gave consent by providing their fax numbers when registering a product purchased from a subdivision of McKesson"; and (2) that the Exhibit A-only class members "gave consent by entering into software-licensing agreements, or EULAs." (*Id.* at 17a–18a). The Ninth Circuit held that "there is little or no variation in the product registrations and the EULAs," and so Plaintiffs met their burden of demonstrating predominance, given that "[c]onsent, or lack thereof, is ascertainable by simply examining the product registrations and the EULAs." (*Id.* at 18a).

Far from "shifting" the burden to McKesson, as the petition claims, the Ninth Circuit required Plaintiffs to establish predominance as to the Exhibit A-only Class. Plaintiffs were able to satisfy that burden under the particular facts of this case, where: (1) in response to Plaintiffs' multiple attempts to compel discovery, McKesson offered to state "the number of" fax recipients in each "category" of claimed permission without identifying the recipients (D. Ct. ECF No. 133, Pls.' Joint Disc. Ltr. (Nov. 20, 2014) at 6); (2) the magistrate judge accepted McKesson's proposal, in part, but ordered McKesson to "identify every putative class member who supposedly gave permission and explain how that class member gave permission"

(D. Ct. ECF No. 178, Order Granting in Part Pls.' Mot. Sanctions (Apr. 1, 2015) at 12); and (3) McKesson did not object to the magistrate judge's order.[1]

Just as the circuit courts are unanimous that the party seeking class certification bears the burden of establishing predominance, they also agree that, once a plaintiff has made that initial showing, the defendant cannot defeat predominance through "bald speculation" about an affirmative defense, *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013), including in the TCPA context by offering "surmise and speculation" that some class members might have given express permission, *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 80 (2017).

In *In re U.S. Foodservice*, for example, the defendant in a RICO class action argued it advanced an "overwhelming evidentiary record" that some class members "were not deceived as to the nature of its billing practices," thus defeating predominance. 729 F.3d at 120. The Second Circuit held the defendant was merely offering "bald speculation that some class members might have knowledge of a misrepresentation," and that if such speculation "were enough to

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[1] Because McKesson did not object to the magistrate judge's Sanctions Order, it cannot challenge that order in the district court or on appeal. Fed. R. Civ. P. 72(a); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996) ("[A] party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order.").

forestall certification, then no fraud allegations of this sort (no matter how uniform the misrepresentation, purposeful the concealment, or evident plaintiffs' common reliance) could proceed on a class basis . . . ." *Id.* at 122.

Similarly, in *Bridging Communities*, the Sixth Circuit reversed a denial of class certification in a TCPA fax case based on "speculation and surmise" regarding permission. 843 F.3d at 1125; *see also McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 1383804, at *24 (S.D. Cal. Mar. 27, 2019) (holding in TCPA call case that "defendant must actually produce evidence which shows prior express consent," and "courts will not presume that resolving such issues requires individualized inquiries"). The Ninth Circuit's refusal to allow McKesson's "speculation and surmise" regarding express permission to "tip the decisional scales in a class certification ruling" is consistent with the Second Circuit's decision in *In re U.S. Foodservice* and the Sixth Circuit's TCPA ruling in *Bridging Communities*, on which the Ninth Circuit expressly relied. (App. 17a).

The Ninth Circuit held that McKesson's burden of proving express permission on the merits "strongly affects" the predominance analysis because the court will consider only the evidence the defendant "has actually advanced," not that it "might advance." *Id.* Contrary to the characterization in the petition, the Ninth Circuit did not hold the burden on the merits "strongly affects" which party bears the burden of proving the Rule 23 elements, including Rule 23(b)(3)

predominance. Rather, the Ninth Circuit simply followed its holding in *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017), that the party making the call or sending the fax "should be responsible for demonstrating" the necessary "prior express consent" (for voice telephone calls or text messages), 47 U.S.C. § 227(b)(1)(A), or "prior express invitation or permission" (for fax advertisements), 47 U.S.C. § 227(a)(5). The Ninth Circuit did not "presume that predominance is satisfied for affirmative defenses unless the defendant proves otherwise." (Pet. at 4–5). It simply held that once the plaintiff establishes predominance based on evidence produced by the defendant, the courts will not "presume" that individual issues will overcome that showing.

The two TCPA decisions affirming denials of class certification cited in the petition are consistent with the Ninth Circuit's decision. In *BioPay I*, the plaintiff failed to establish predominance as to a broad class of all recipients of the defendant's faxes, where the defendant produced evidence showing that it "culled" its list of fax numbers from a variety of sources over time. 541 F.3d at 328. The defendant did not categorize these sources, and plaintiff did not propose any way to categorize the evidence by subclass. *Id.*

On remand, the district court granted class certification based on the plaintiff's "'new' theory" that it could identify class members who did not give express permission using a database newly produced by the defendant, but the Fifth Circuit reversed that ruling, holding that *BioPay I* was law of the case and the

plaintiff's new theory was barred because it "could have been advanced to the court in *BioPay I*" and the plaintiff failed to show "that the 'newly discovered' evidence could not have been discovered by proper diligence." *Gene & Gene, LLC v. BioPay, LLC*, 624 F.3d 698, 704–05 (5th Cir. 2010) ("*BioPay II*"). In this case, in contrast, Plaintiffs proposed their method of identifying members of the Exhibit A-only Class leading up to the initial class certification decision and in the first appeal to the Ninth Circuit.

In *Sandusky Wellness*, the plaintiff could not meet its burden of showing predominance as to a broad class of all fax recipients where the defendant produced "voluminous consent evidence," consisting of "various forms" spanning 450,000 pages. 863 F.3d at 468. The Sixth Circuit held the plaintiff could not satisfy predominance by proposing subclasses because "[t]o even create subclasses" would require a "painstaking sorting process" of those 450,000 pages, and it was not even clear whether "the forms could be easily categorized" in that painstaking process. *Id.* This case is different because the Exhibit A-only Class concerns two standardized form documents: the product-registration forms and the EULAs, per McKesson's supplemental interrogatory response.

In conclusion, the Ninth Circuit correctly held that Plaintiffs demonstrated predominance as to the Exhibit A-only Class, and the petition should be denied.

III. This case is a poor vehicle for deciding any class-certification issue because the district court refused to decide class certification on remand, instead granting McKesson's request to move for individual summary judgment.

On remand from the Ninth Circuit, McKesson argued that it should be permitted to seek summary judgment as to Plaintiffs' individual claims, and the district court agreed. McKesson filed its motion for summary judgment on May 20, 2019, arguing that Plaintiffs voluntarily provided their fax numbers in a product-registration form, and claiming that "[b]inding precedent dictates that the voluntary provision of a phone number constitutes prior express consent, permission, or invitation to be sent communications related to the context in which the individual provided the number." (D. Ct. ECF No. 325, Defs.' Mot. Summ. J. at 7).

Plaintiffs maintain that McKesson's motion for individual summary judgment will fail on the merits for the same reason McKesson's permission defense will ultimately fail as to the Exhibit A-only Class,[2] but the

[2] The product-registration forms and EULAs do not say anything about fax advertisements, and the TCPA states that the "voluntary communication" of a fax number is merely one element of the three-part safe harbor for unsolicited faxes sent pursuant to an EBR. 47 U.S.C. § 227(b)(1)(C)(ii). If voluntarily providing a fax number constituted "prior express invitation or permission" to send fax advertisements, then the statutory safe harbor would be superfluous. This Court reads a statute to give effect to all

fact remains that no final order on class certification has been entered by the district court in this action, and it is possible no such order will be entered. The Court's review of the Ninth Circuit's interlocutory decision on the predominance issue would be premature under these circumstances.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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provisions and avoid rendering any part "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009).