IN THE
SUPREME COURT OF THE UNITED STATES

No. A_____

MCKESSON CORPORATION; MCKESSON TECHNOLOGIES, INC.,

v.

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

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 16, 2018

IN THE
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No. A_____

MCKESSON CORPORATION; MCKESSON TECHNOLOGIES, INC.,

v.

TRUE HEALTH CHIROPRACTIC, INC.; MCLAUGHLIN CHIROPRACTIC ASSOCS., INC., individually and as representatives of a class of similarly situated persons,

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States:

Applicants McKesson Corporation and McKesson Technologies, Inc. (collectively "McKesson") request a 58-day extension from November 28, 2018, to and including January 25, 2019, within which to file a petition for a writ of

certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

The Ninth Circuit entered judgment on July 17, 2018. App., *infra*, 1a-20a. The Ninth Circuit extended the time within which to file a petition for panel rehearing and rehearing en banc to August 7, 2018. On that date, McKesson timely filed a petition for rehearing and rehearing en banc, which the Ninth Circuit denied on August 30, 2018, App., *infra*, 21a. A petition for a writ of certiorari is currently due on November 28, 2018. This application is being filed more than ten days before that date. *See* S. Ct. R. 13.5.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the opinion of the court of appeals, the order denying rehearing and rehearing en banc, and of the district court opinion are attached to this application. App., *infra*, 1a-31a.

1. This case involves an attempt to certify a class action under Federal Rule of Civil Procedure 23(b)(3) against McKesson under the Telephone Consumer Protection Act ("TCPA"). 47 U.S.C. § 227. The TCPA imposes certain conditions on unsolicited fax advertisements. 47 U.S.C. § 227(b)(1)(C). The statute defines an "unsolicited" fax as one that "is transmitted to any person without that person's

[1] To comply with S. Ct. R. 29.6, McKesson states that McKesson Corporation is a publicly traded company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock. McKesson Technologies, Inc. is now known as Change Healthcare Technologies, LLC. Change Healthcare Technologies, LLC is a wholly owned subsidiary of Change Healthcare Holdings, LLC, which is a wholly owned subsidiary of Change Healthcare LLC. McKesson Corporation is the ultimate beneficial owner of more than 10% of Change Healthcare LLC's membership interests.

prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). The TCPA creates a private right of action for a plaintiff who can show an "unsolicited advertisement" was sent in "violation of [Section 227(b)] or the regulations prescribed under" it. *Id.* § 227(b)(3)(A).

By its plain terms, the TCPA regulates only "unsolicited" fax advertisements. But an FCC regulation had purported to require senders to include opt-out notices on all faxes—solicited or unsolicited. 47 C.F.R. § 64.1200(a)(4)(iv). In 2014, the FCC declined requests to declare that this regulation did not apply to solicited faxes. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd. 13998, 14006-08 (Oct. 30, 2014). The D.C. Circuit, however, vacated that order. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (2017), *cert. denied*, 138 S. Ct. 1043 (2018). The court held that Section 64.1200(a)(4)(iv) is "unlawful to the extent that it requires opt-out notices on solicited faxes." *Id.* at 1083.

2. True Health Chiropractic, Inc. and McLaughlin Chiropractic ("True Health") sued McKesson under the TCPA based on faxes that a McKesson business unit sent during 2009 and 2010. App., *infra*, 5a-6a. The business unit sold practice management and electronic health records software primarily to physicians' offices. App., *infra*, 5a-6a. Through direct interactions and communications, these customers informed the business unit's employees that they preferred to receive communications via fax or otherwise invited or permitted the communications at issue to be sent by fax. App., *infra*, 8a-9a. The named plaintiffs were among the

business unit's customers who expressly consented to receiving such faxes. App., *infra*, 6a-7a.

Still, True Health filed a putative class-action complaint alleging that McKesson sent True Health fax advertisements violating the TCPA. App., *infra*, 5a. It alleged that none of the faxes contained an opt-out notice as required by the FCC regulations. App., *infra*, 5a. It sought to certify a class of those who received faxes from McKesson "where the faxes [did] not inform the recipient of the right to 'opt out' of future faxes." App., *infra*, 9a.

The district court denied True Health's request to certify a class under Rule 23(b)(3). It found that adjudicating the case on a classwide basis would require individualized mini-trials into whether individual class members consented to receive faxes. App., *infra*, 9a. The court relied on evidence showing that customers expressly asked in various ways to receive information by fax, including in oral and email conversations with sale representatives and when registering purchased software. App., *infra*, 26a-27a.

3. The court of appeals granted True Health's petition for interlocutory appeal under Federal Rule of Civil Procedure 23(f) and reversed in part. App., *infra*, 1a-20a. It rejected True Health's argument that it could rely on the absence of FCC-required opt-out notices to certify a class of all fax recipients, regardless of consent. App., *infra*, 11a-13a. The D.C. Circuit's decision invalidating that regulation was "binding on all circuits." App., *infra*, 12a-13a (citing *Bais Yaakov*, 852 F.3d at 1083).

But the court went on to hold that the district court abused its discretion by not certifying subclasses. The court acknowledged that Rule 23(b)(3) required that common answers to common questions predominate and that "[d]efenses that must be litigated on an individual basis can defeat" certification. App., *infra*, 15a. It also recognized that "[t]he party seeking class certification has the burden of establishing predominance." App., *infra*, 15a-16a.

Yet after holding that McKesson would bear the burden of proving consent as an affirmative defense at trial, the court of appeals held that this burden on the merits "strongly affects the analysis" at class certification. App., *infra*, 16a. According to the court, the burden on the merits meant that predominance should be assessed "by analyzing" only "the consent defenses McKesson has actually advanced and for which it has presented evidence" at class certification. App., *infra*, 16a-17a.

The panel then considered whether subclasses could be certified, organizing its discussion around three exhibits documenting certain customer-provided consent that had been produced in the early stages of the litigation. "Exhibit A" included all putative class members, each of whom had consented by providing their fax numbers at product registration and by entering into software-licensing agreements. App., *infra*, 17a. "Exhibit B" listed fax numbers of putative class members who consented by checking a box during product registration, completing a written consent form, and/or consenting during a phone outreach program. App., *infra*, 18a-19a. "Exhibit C" listed fax numbers of putative class members for whom

McKesson offered evidence that its consent defenses "would be based on individual communications and personal relationships between McKesson representatives and their customers." App., *infra*, 18a.

On Exhibit C, the panel held that the evidence showed "variation" in "communications and relationships" that was "enough to support denial of [sub]class certification." App., *infra*, 18a. On Exhibit B, the panel concluded that it "is possible that some or all of the putative class members" satisfy the predominance requirement but remanded for the district court to consider that question in light of the panel's holding on burden of proof. App., *infra*, 19a.

On Exhibit A, however, the panel concluded that "the claims of the putative class members" listed there "that remain after removing the claims in Exhibit B and C satisfy the predominance requirement." App., *infra*, 18a. According to the panel (and based on the record then before it), that subtraction would leave only consent defenses based on product registration and end user agreements. App., *infra*, 17a-18a. Because "there is little or no variation" in those means of consent, the panel concluded that the claims of those class members listed in Exhibit A—minus those in Exhibits B and C—satisfied the predominance requirement. App., *infra*, 18a

4. McKesson requests a 58-day extension of time within which to file a petition for a writ of certiorari seeking review of the Ninth Circuit's judgment and submits there is good cause for granting the request.

a. This case presents an important question about who bears the burden of proving the prerequisites for class certification under Rule 23(b)(3). The Ninth Circuit adopted a burden-shifting framework that conflicts with established precedent from this Court and other courts of appeals, and reached the opposite outcome from other courts of appeals addressing indistinguishable circumstances.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). A party seeking to litigate for a class thus bears the burden to "justify a departure from that rule" and must "affirmatively demonstrate" that the proposed class complies with Rule 23. *Id.* at 348, 350. As relevant here, "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014).

At least two other courts of appeals have rejected the burden-shifting framework adopted by the Ninth Circuit here. In particular, they have declined to shift the burden of disproving predominance at class certification onto defendants just because those defendants would have the burden of establishing affirmative defenses on the merits. The Fourth Circuit, for example, has "flatly held that 'when the defendants' affirmative defenses may depend on facts peculiar to each plaintiff's case, class certification is erroneous.'" *Gunnells v. Healthplan Services, Inc.*, 348

F.3d 417, 438 (2003) (citation and ellipses omitted). That court explained that "the standard justifications for allocating the burden of proving an affirmative defense to the defendant—efficiency and fairness—disappear when the thing to be proved is no longer the merit of the defense but compliance with Rule 23." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 322 (2006). "There is no reason to believe that the defendant is any better suited than the named plaintiffs to prove whether an issue is common to the class simply because the defendant bears the burden of proving the merits of that issue." *Ibid.* The Fourth Circuit thus applies the rule that certification is inappropriate when it "appears that [defendant's] affirmative defenses are not without merit and would require individualized inquiry in at least some cases." *Gunnells*, 348 F.3d at 438.

The Second Circuit follows a similar rule. Although a defendant "will ultimately bear the burden of proving the merits" of an affirmative defense, a plaintiff at class certification still must "show that more 'substantial' aspects of this litigation will be susceptible to generalized proof for all class members than any individualized issues." *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2010). Even when there is "a limited record" on an affirmative defense that "surely would not have sufficed to prove" it "on the merits," a district court does not abuse its discretion in denying certification after concluding only that individual inquiries "might be necessary." *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust,* 477 F. App'x 809, 813 (2d Cir. 2012).

The Ninth Circuit here took a fundamentally contradictory approach. After stating that plaintiffs "retain the burden of showing that the proposed class satisfies the requirements of Rule 23," the panel carved out an exception for affirmative defenses. According to the panel, its conclusion that McKesson "bears the burden of proving consent" on the merits "strongly affects the analysis" at class certification. App., *infra*, 16a. Based solely on that merits burden, the panel "assess[ed] predominance" at class certification "by analyzing the consent defenses McKesson has actually advanced *and for which it has presented evidence*." App., *infra*, 16a-17a (emphasis added). In short, the panel effectively shifted the evidentiary burden of establishing a lack of predominance to McKesson.

The Ninth Circuit's conflict-creating rule led it to reach the opposite conclusion from the Fifth and Sixth Circuit Courts of Appeals addressing indistinguishable circumstances—attempts by plaintiffs to certify classes under the TCPA in the face of the potential for individualized inquiries into consent defenses. Far from holding that consent's status as an affirmative defense "strongly affects the analysis, *cf.* App., *infra*, 16a, the Fifth Circuit found that "issue *irrelevant*" in *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (2008). Regardless of whether consent was an affirmative defense, the Fifth Circuit held that "the issue of consent will entirely determine how the proposed class-action trial will be conducted on the merits." *Ibid.* The defendant had presented evidence "that some of the fax advertisements it sent were solicited by the recipients, but which ones can only be decided on a case-by-case basis." *Id.* at 328. Under those circumstances, it was an

abuse of discretion by the district court to certify a class—the need for later "individual inquiries of the recipients * * * to sort out which transmission was consented to and which was not" defeated predominance. *Id.* at 328-29. After all, "the burden [was] on [plaintiff] to show that the requirements for class certification [were] satisfied," yet the plaintiff failed to "present[] facts or arguments" showing that individualized disputes over consent "will not exist as to a significant number of class members." *Ibid.*

The Sixth Circuit has concluded similarly to the Fifth Circuit and contrary to the Ninth Circuit here. *Sandusky Wellness Center v. ASD Specialty Healthcare*, 863 F.3d 460 (6th Cir. 2017). Relying on the decision in *Gene & Gene*, the Sixth Circuit found no abuse of discretion in denial of class certification on the ground that the need for a later "recipient-by-recipient inquiry" into consent defeated predominance. *Id.* at 467, 468-69. The Ninth Circuit here acknowledged *Sandusky*'s holding that a defendant "can produce evidence of a predominance-defeating consent in a variety of ways," but held that under the Ninth Circuit's burden-shifting rule, McKesson had failed to present sufficient evidence of such consent to defeat class certification. App., *infra*, 17a.

The additional time McKesson seeks here will allow counsel to investigate further the manner in which the Ninth Circuit's ruling conflicts with the decisions of this Court and of other courts of appeals.

b. In addition, counsel for McKesson had and have a number of other obligations during the period for preparation of the petition. Counsel recently filed

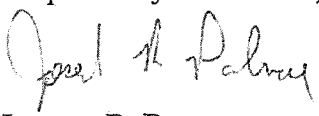
an opening brief on November 8 in *Nevro Corp v. Boston Scientific Corp.,* Nos. 18-2220, 18-2349 (Fed. Cir.); an opening brief on November 8 in *UCP Int'l Co. Ltd. v. Balsam Brands Inc.,* Nos. 18-2231, 18-2253 (Fed. Cir.); and an answering brief on November 13 in *Neev v. Alcon LenSx Inc.,* Nos. 18-1248, 18-1249 (Fed. Cir.). Counsel currently have a petition for rehearing en banc due November 16 in *Fulton v. Enclarity, Inc.,* No. 17-1380 (6th Cir.); an answering brief due December 3 in *Compartment IT2, LP v. Fir Tree, Inc.*, No. 18-15753 (9th Cir.); an answering brief due December 3 in *Curling v. Kemp,* No. 18-13951 (11th Cir.); an answering brief due December 3 in *Solo v. UPS*, No. 17-2244 (6th Cir.); an answering brief currently due December 14 in *FastVDO LLC v. Apple Inc.,* No. 18-1548 (Fed. Cir.); and an answering brief due December 19 in *Carl Zeiss AG v. Nikon Corporation,* No. 19-1068 (Fed. Cir.).

CONCLUSION

For these reasons, McKesson requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including January 25, 2019.

Dated: November 16, 2018

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I, Joseph R. Palmore, hereby certify that I am a member of the Bar of this Court, and that I have this 16th day of November, 2018, caused one copy of the Application For An Extension of Time Within Which To File A Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be served on the following counsel by third-party carrier and also by electronic mail.

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Dated: November 16, 2018

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Appendix

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRUE HEALTH CHIROPRACTIC, INC.; MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., individually and as representatives of a class of similarly situated persons, *Plaintiffs-Appellants*, v. MCKESSON CORPORATION; MCKESSON TECHNOLOGIES, INC., *Defendants-Appellees.*	No. 16-17123 D.C. No. 4:13-cv-02219-HSG OPINION

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Argued and Submitted October 17, 2017
San Francisco, California

Filed July 17, 2018

Before: Michael Daly Hawkins, William A. Fletcher, and Richard C. Tallman, Circuit Judges.

Opinion by Judge W. Fletcher

SUMMARY*

Telephone Consumer Protection Act / Class Certification

The panel affirmed in part and reversed in part the district court's denial of class certification in an action under the Telephone Consumer Protection Act.

Appellants sought to represent a class of plaintiffs who allegedly received unsolicited faxed advertisements from defendants in violation of the TCPA. The district court denied class certification on the ground that under Fed. R. Civ. P. 23(b)(3), individual issues related to affirmative defenses would predominate over issues common to the class. These "consent defenses" alleged that putative class members in various ways gave defendants "prior express invitation or permission" to send the faxes.

The panel concluded that the district court did not impose an "ascertainability" or administrative feasibility requirement for class certification. Agreeing with the Sixth Circuit, the panel held that there is no requirement that all faxes, whether consented or not, must contain an "opt-out" notice because the FCC's Solicited Fax Rule has been held invalid by the D.C. Circuit.

The panel nonetheless concluded that the district court erred in part in holding that appellants' proposed class or subclasses failed to satisfy the predominance requirement of

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Rule 23(b)(3). The panel held that in light of *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017) (holding that "express consent" is an affirmative defense to a claim brought under 47 U.S.C. § 227(b)(1)(A), a provision of the TCPA dealing with unsolicited telephone calls), "prior express invitation or permission" under § 227(b)(1)(C) is an affirmative defense on which the defendant bears the burden of proof. The panel affirmed the district court's denial of class certification with respect to one possible subclass and reversed the district court's holding that other possible subclasses could not satisfy the predominance requirement. The panel held that one subclass would satisfy predominance, and it remanded for a determination whether another subclass would also satisfy the requirement. The panel also remanded to allow the district court to address the requirements of Rule 23(a).

COUNSEL

Glenn L. Hara (argued), Anderson and Wanca, Rolling Meadows, Illinois; Willem F. Jonckheer, Schubert Jonckheer & Kolbe LLP, San Francisco, California; for Plaintiffs-Appellants.

Joseph R. Palmore (argued) and Seth W. Lloyd, Morrison & Foerster LLP, Washington, D.C.; Ben Patterson and Tiffany Cheung, Morrison & Foerster LLP, San Francisco, California; for Defendants-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

Appellants True Health Chiropractic and McLaughlin Chiropractic ("True Health") seek to represent a class of plaintiffs who allegedly received unsolicited faxed advertisements from appellees McKesson Corporation and McKesson Technologies, Inc. ("McKesson") between September 2009 and May 2010, in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"). The district court denied class certification on the ground that individual issues related to McKesson's affirmative defenses would predominate over issues common to the class. *See* Fed. R. Civ. P. 23(b)(3). We granted True Health's request for permission to appeal the order pursuant to Federal Rule of Civil Procedure 23(f). We affirm in part, reverse in part, and remand.

I. Background

A. True Health's TCPA Claim

The TCPA forbids certain unsolicited advertisements sent via phone or facsimile ("fax"). 47 U.S.C. § 227(b)(1). In enacting the TCPA, "Congress intended to remedy a number of problems associated with junk faxes, including the cost of paper and ink, the difficulty of the recipient's telephone line being tied up, and the stress on switchboard systems." *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015). The TCPA makes it unlawful to send "unsolicited advertisement[s]" via fax machine. 47 U.S.C. § 227(b)(1)(C). An advertisement is unsolicited if it includes "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). But unsolicited advertisements may be sent if (1) the sender and recipient have "an established business relationship," (2) the recipient voluntarily provided his or her contact information to the sender either directly or indirectly through "a directory, advertisement, or site on the Internet," and (3) the "unsolicited advertisement contains" an opt-out notice meeting certain statutory requirements. *Id.* § 227(b)(1)(C)(i)–(iii). In 2006, the Federal Communications Commission ("FCC") promulgated a regulation requiring that companies include opt-out notices in solicited as well as unsolicited advertisements (the "Solicited Fax Rule"). 47 C.F.R. § 64.1200(a)(4)(iv). Eleven years later, the D.C. Circuit held the Solicited Fax Rule invalid. *See Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017).

True Health's Second Amended Complaint ("SAC") alleges that McKesson sent to named plaintiffs and other putative class members unsolicited fax advertisements without their prior express permission or invitation, and without opt-out notices, in violation of 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)(iv). According to the SAC, McKesson sent the faxes at issue after having received a May 9, 2008, citation from the FCC warning it against sending unsolicited advertising by fax. The citation stated, "It has come to our attention that your company . . . apparently sent one or more unsolicited advertisements to telephone facsimile machines in violation of Section 227(b)(1)(C) of the [TCPA]." In its answer to the SAC, McKesson alleged that True Health and other putative class members in various ways gave McKesson "prior express

invitation or permission" to send the faxes. 47 U.S.C. § 227(a)(5). For ease of reference, we will refer to this as McKesson's "consent defenses."

B. Discovery

During discovery, True Health requested that McKesson produce "[a]ll Documents indicating that any person gave prior express invitation or permission to receive facsimile transmissions of any [McKesson advertisements]." True Health also asked McKesson to identify "each type of act that Defendants believe demonstrates a recipient's express permission to receive faxes" and to list which class members consented in each of the ways identified.

McKesson responded by listing three groups of consent defenses that it claimed relieved it of TCPA liability. McKesson attached to its response three exhibits, which corresponded to the three groups of asserted consent defenses, listing putative class members who purportedly consented in the specified manners. According to McKesson, each exhibit contains the "name and contact information (where available)" of faxes for each asserted consent defense. The exhibits are not in the record, but McKesson described the consent defenses it asserted against the putative class members in each exhibit.

Exhibit A lists putative class members that, according to McKesson, (1) provided their fax numbers when registering a product purchased from Physician Practice Solutions ("PPS"), a business unit of McKesson Technologies, and/or (2) entered into software-licensing agreements, called End User License Agreements ("EULAs"). Exhibit A, which

contains 11,979 unique fax numbers, lists all of the putative class members on whose behalf True Health brings suit.

Exhibit B, a subset of Exhibit A, lists putative class members that, according to McKesson, (1) "check[ed] a box during their software registration that indicated their express permission to be sent faxes as a preferred method of communication to receive promotional information," (2) "complete[d] a written consent form whereby they further provided their express permission to receive faxes," and/or (3) "confirm[ed]," via phone, "that they would like to continue to receive faxes and/or would like to change their communication method preferences" during an "outreach program to update contact information of certain preexisting customers." The putative class members listed in Exhibit B were identified "based on information currently residing in [a PPS internal database]." McKesson stated that Exhibit B may not list every putative class member that consented in the specified ways: "Other recipients of those faxes may have also indicated consent through one or more of the methods described above before receiving such faxes, but limitations of the database do not allow Defendants to identify those specific customers without individualized inquiries." Exhibit B lists 2,701 unique fax numbers.

Exhibit C, another subset of Exhibit A, lists putative class members that, according to McKesson, gave consent in individual "oral or email" communications with McKesson sales representatives. McKesson stated,

> "Often, because of . . . long-standing and well developed relationships, PPS sales representatives would learn and know that a particular customer exclusively preferred to

> receive faxes over, for example, emails. Other times, PPS sales representatives would notate that customer's preference for faxes by making a note that might be linked to the [PPS internal database]. . . . In some instances, customers specifically requested that they receive promotional information exclusively via fax."

McKesson stated further, as it did with respect to Exhibit B, that Exhibit C may not list every putative class member that consented in the specified ways: "Other recipients of those faxes may have also indicated invitation or permission through oral communications with their PPS representatives, and individualized inquiries must be conducted to specifically identify those customers." Exhibit C lists fifty-five unique fax numbers.

Regarding Exhibit C, McKesson submitted a declaration from sales representative Jeffery Paul and deposition excerpts of former sales representative Kari Holloway. Mr. Paul stated in his declaration that he "became familiar with [his] customers and . . . how to communicate with them[,]" and claimed that "[m]any customers specifically asked [him] to send them faxes instead of using alternative ways to communicate, such as emails." He further stated that "[i]t was commonplace for customers to ask [him] on a daily basis to send them information by fax, including information on promotions or upgrades[,]" and that "[c]ustomers specifically asked [him] to fax them information on discounts, promotions, and/or upgrades when available[.]" Ms. Holloway stated in her deposition, "Our existing customers oftentimes would request us to send faxes specifically." She also claimed, "The sales representatives had a decent handle

on who their customers were. It wasn't an enormous number so they knew the people and they knew the ways they would like to be communicated with."

C. Denial of Class Certification

True Health moved under Rule 23(b)(3) to certify the class of "[a]ll persons or entities who received faxes from 'McKesson' from September 2, 2009, to May 11, 2010, offering [certain McKesson services], where the faxes do not inform the recipient of the right to 'opt out' of future faxes." McKesson opposed the motion, contending, *inter alia*, that the proposed class did not satisfy the Rule 23(b)(3) predominance requirement, given that the consent defenses available against putative class members listed in Exhibits A, B, and C could not be resolved without individualized inquiries. True Health argued that the predominance requirement was met for the entire putative class, but requested in the alternative that the district court certify subclasses. At oral argument on the motion for class certification, the district court raised sua sponte the possibility of dividing the class into three subclasses, each corresponding to the putative class members in Exhibits A, B, and C.

The district court denied class certification, holding that individual issues in McKesson's various consent defenses defeated predominance under Rule 23(b)(3). The court's order did not address True Health's request for subclasses. True Health appealed.[1]

[1] True Health also moved for certification under Rule 23(b)(2). The district court denied the motion. True Health does not appeal that ruling.

II. Standard of Review

We review orders denying class certification as well as the underlying factual determinations for abuse of discretion. *Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1164 (9th Cir. 2014) (citing *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1066 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)). A district court abuses its discretion when it applies the wrong legal standard. *Jimenez*, 765 F.3d at 1167 (citing *Levya v. Medline Indust., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). We review de novo the district court's application of the law to the facts. *Mazza*, 666 F.3d at 588 (citing *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc)).

III. Discussion

True Health makes three arguments on appeal. First, it argues that the district court erred in applying an "ascertainability" requirement. Second, it argues that an opt-out notice is required for all faxes, both solicited and unsolicited, and that the district court erred in holding otherwise. Third, it argues that the district court erred in holding that True Health's proposed class or subclasses fail to satisfy the "predominance" requirement of Rule 23(b)(3). We disagree with the first two arguments but agree with the third. We discuss them in turn.

A. Ascertainability

True Health argues that the district court erred in imposing an ascertainability requirement for class certification in violation of *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124–25 (9th Cir. 2017). True Health's argument fails.

In its order denying class certification, the district court observed in passing that some courts have read an ascertainability requirement into Rule 23. It later noted in a parenthetical that another district court had denied certification, in part, on ascertainability grounds. Neither of these references to ascertainability show that the district court ascribed to the view that a class must be ascertainable, much less that the court applied such a requirement in this case.

Nor did the court violate *Briseno*. In *Briseno*, the defendant argued that a class must be "ascertainable" to be certified under Rule 23. *Briseno*, 844 F.3d at 1124. We understood defendant's argument to be that identification of class members must be "administratively feasible[.]" *Id.* at 1133. We held that there is no free-standing requirement above and beyond the requirements specifically articulated in Rule 23. *Id.* The district court's order in this case does not impose an administrative-feasibility requirement.

B. The Solicited Fax Rule

True Health argues that under the FCC's Solicited Fax Rule, 47 C.F.R. § 64.1200(a)(4)(iv), both solicited and unsolicited faxes are subject to the "opt-out" notice requirement of 47 U.S.C. § 227(b)(1)(C)(iii). That is, True Health argues that under the Solicited Fax Rule all

faxes—whether consented or not—must contain such a notice. If True Health is right, variations in the manner in which members of the proposed class may have given consent are irrelevant in determining McKesson's failure to include opt-out notices in its faxes, and therefore such variations are irrelevant to a determination of predominance under Rule 23(b)(3).

True Health's argument fails because the Solicited Fax Rule has been held invalid by the D.C. Circuit. The FCC promulgated the Solicited Fax Rule in 2006. The FCC then issued an order in 2014 interpreting the Solicited Fax Rule. *See* Order, *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, 29 FCC Rcd. 13,998 (2014). In *Bais Yaakov*, the D.C. Circuit vacated the 2014 FCC order on the ground that the underlying Solicited Fax Rule was invalid: "We hold that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes." 852 F.3d at 1083.

In *Bais Yaakov*, the D.C. Circuit decided multiple petitions for review that had been consolidated and transferred by the Judicial Panel on Multidistrict Litigation ("JPML"). *See Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 467 (6th Cir. 2017) (describing procedural history of *Bais Yaakov*). When the JPML consolidates challenges to an agency regulation and transfers them to a court of appeals, the court to which they are transferred becomes "the sole forum for addressing . . . the validity of the FCC's rules." *MCI Telecomms. Corp. v. U.S. W. Commc'ns*, 204 F.3d 1262, 1267 (9th Cir. 2000) (quoting *GTE S., Inc. v. Moirrison*, 199 F.3d 733, 743 (4th Cir. 1999)).

The decision of that court is then binding on all circuits. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008).

True Health argues that *Bais Yaakov*'s holding—that the Solicited Fax Rule is invalid—is not binding on us because the FCC's 2006 Solicited Fax Rule was not directly under review. True Health does not challenge the authority of the court in *Bais Yaakov* to invalidate the Solicited Fax Rule in the course of reviewing the FCC's 2014 order, but it argues that the only part of *Bais Yaakov* binding on this court was its ruling vacating the 2014 order.

Plaintiff Sandusky Wellness Center, represented by the same counsel as True Health in this case, made essentially the same argument to the Sixth Circuit last year. *See Sandusky*, 863 F.3d at 467–68. The Sixth Circuit disagreed with the argument, and so do we. It is, of course, true that *Bais Yaakov* reviewed a 2014 FCC order. But the validity of the 2014 order depended on the validity of the 2006 Solicited Fax Rule, and the court in *Bais Yaakov* squarely held that the underlying Solicited Fax Rule was invalid. We agree with the reasoning of the Sixth Circuit and hold that we are bound by *Bais Yaakov*.[2]

[2] In a separate 2015 order, the FCC retroactively waived the Solicited Fax Rule for more than one hundred companies, including McKesson. *See* Order, *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, 30 FCC Rcd. 8598, 8598, 8613 (2015). Because we hold that we are bound by the D.C. Circuit's decision holding that the Solicited Fax Rule is invalid, we do not address the parties' arguments concerning the effect of the 2015 FCC order.

C. Predominance

Finally, in the event that its Solicited Fax Rule argument is rejected, True Health argues that the district court abused its discretion in holding that McKesson's consent defenses foreclosed a finding of predominance under Rule 23(b)(3). Specifically, True Health argues that the district court erred in not certifying subclasses.

As a preliminary matter, McKesson argues that True Health has "forfeited" any argument that the district court should have certified subclasses. According to McKesson, "Plaintiffs . . . did not even make a cursory attempt" to "satisfy [their] burden" to "show that any proposed subclass complies with [the] requirements [of Rule 23]." We disagree.

"Although no bright line rule exists to determine whether a matter has been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (en banc) (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010)) (internal alteration omitted). In its motion for class certification, True Health argued, assuming the failure of its Solicited Fax Rule argument, that subclasses should be certified. True Health wrote,

> "Defendants' claims for prior express permission can easily be decided through creation of subclasses. For example, . . . Defendants admit their claim of express permission with respect to 39,495 transmission to 7,760 fax numbers is that they obtained permission in software-registration

> forms. The Court can easily decide whether listing a fax number on a software-registration form constitutes 'prior express permission' to receive fax advertisements at that number." (Citations omitted.)

Combined with the discussion of subclasses that took place during oral argument below, this was enough to alert the court that subclasses were sought, to indicate how they might be defined, and to preserve the issue for appeal.

When certification is sought for a litigation class, the predominance inquiry under Rule 23(b)(3) asks whether "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication[.]" *Mazza.*, 666 F.3d at 589 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). The common questions must have the "capacity . . . to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis omitted). Defenses that must be litigated on an individual basis can defeat class certification. *Id.* at 367. Yet "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as . . . some affirmative defenses peculiar to some individual class members.' " *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1778, at 123–24 (3d ed. 2005)). The party seeking class certification has the burden of establishing

predominance. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011) (citing *Zinser*, 253 F.3d at 1186).

1. Burden of Proof on Consent

We begin with the question whether True Health or McKesson bears the burden of proof on the issue of consent. While the appeal in this case was pending, we decided *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017). There, we held that "express consent" is an affirmative defense to a claim brought under a provision of the TCPA dealing with unsolicited telephone calls, and that the defendant bears the burden of proving such consent. *Van Patten*, 847 F.3d at 1044; *see also* 47 U.S.C. § 227(b)(1)(A). Section 227(b)(1)(C), at issue in our case and part of the same section of the TCPA, does not use the term "express consent." But it clearly provides that consent is a defense with respect to faxes, as does § 227(b)(1)(A) with respect to telephone calls. The requirements of § 227(b)(1)(C) apply to "unsolicited" faxes, which are defined as faxes sent "without [the recipient's] prior express invitation or permission." 47 U.S.C. § 227(a)(5). We see no distinction between "express consent" and "prior express invitation or permission" that would affect which party bears the burden of proving consent. We therefore hold that "prior express invitation or permission" is an affirmative defense on which McKesson bears the burden of proof.

Putative class members, of course, retain the burden of showing that the proposed class satisfies the requirements of Rule 23, including the predominance requirement of Rule 23(b)(3). *See Ellis*, 657 F.3d at 979–80. But the burden of proving consent strongly affects the analysis. Since McKesson bears the burden, we assess predominance by

analyzing the consent defenses McKesson has actually advanced and for which it has presented evidence. A defendant can produce evidence of a predominance-defeating consent defense in a variety of ways. *See*, *e.g.*, *Sandusky Wellness.*, 863 F.3d at 468–70. But we do not consider the consent defenses that McKesson might advance or for which it has presented no evidence. *See Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 80 (2017) ("We are unwilling to allow such 'speculation and surmise to tip the decisional scales in a class certification ruling[.]' " (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000)) . The consent defenses that McKesson has advanced and for which it has provided supporting evidence may be sufficiently similar or overlapping to allow True Heath to satisfy the predominance requirement of Rule 23(b)(3) with respect to those defenses. If so, a class or subclass of plaintiffs to whom such defenses apply may be certified, provided of course that the other requirements of Rule 23 are also satisfied.

2. Subclasses

True Health argues that three subclasses comprising the putative class members identified in Exhibits A, B, and C satisfy the predominance requirement of Rule 23(b)(3). We agree as to part of Exhibit A; we disagree as to Exhibit C; and we remand as to Exhibit B.

Exhibit A lists all putative class members, including those listed in Exhibits B and C. Their claims are based on faxes sent to 11,979 unique fax numbers. If we remove from Exhibit A all putative class members listed in Exhibits B and C, McKesson has asserted only two consent defenses. First,

McKesson asserts that some of the remaining putative class members gave consent by providing their fax numbers when registering a product purchased from a subdivision of McKesson. Second, McKesson asserts that some of them gave consent by entering into software-licensing agreements, or EULAs. We have examples of product registrations and EULAs in the record. McKesson has provided no further evidence relevant to these two defenses.

So far as the record shows, there is little or no variation in the product registrations and the EULAs. For both of these asserted defenses, the predominance requirement of Rule 23(b)(3) is therefore satisfied. Consent, or lack thereof, is ascertainable by simply examining the product registrations and the EULAs. We therefore conclude 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).

Exhibit C lists putative class members whose claims are based on faxes sent to fifty-five unique fax numbers. McKesson provided evidence in the district court that its consent defenses to these claims would be based on individual communications and personal relationships between McKesson representatives and their customers. The variation in such communications and relationships, as evidenced by the declaration of Mr. Paul and deposition testimony of Ms. Holloway, is enough to support denial of class certification under Rule 23(b)(3) for the putative class members listed in Exhibit C.

Exhibit B lists putative class members whose claims are based on faxes sent to 2,701 unique fax numbers. McKesson asserts several different consent defenses against these

putative class members. First, McKesson asserts that some putative class members listed in Exhibit B gave consent by "check[ing] a box during their software registration that indicated their express permission to be sent faxes as a preferred method of communication to receive promotional information." Second, McKesson asserts that some of them gave consent by "complet[ing] a written consent form whereby they further provided their express permission to receive faxes." Third, McKesson asserts that some of them gave consent by "confirm[ing]," via phone, "that they would like to continue to receive faxes and/or would like to change their communication method preferences" during an "outreach program to update contact information of certain preexisting customers."

It is possible that some or all of the putative class members in Exhibit B satisfy the predominance requirement. For example, the putative class members against whom the first defense would be asserted—those who "check[ed] a box during their software registration"—may be indistinguishable from those class members listed in Exhibit A who assertedly gave consent during product registration. If so, their claims would satisfy the predominance requirement of Rule 23(b)(3). Further, the claims of class members who assertedly gave consent by "complet[ing] a written consent form" may also satisfy the predominance requirement. Given the somewhat unclear state of the record, and given that the district court has not had an opportunity to address class certification in light of our intervening decision in *Van Patten*, we view these and other issues related to Exhibit B as best addressed in the first instance by the district court on remand.

Conclusion

On the current record, we affirm in part, reverse in part, and remand. We affirm the district court's denial of class certification with respect to a possible subclass of the putative class members with the fifty-five unique fax numbers in Exhibit C. We reverse the district court's holding that the other possible subclasses cannot satisfy the predominance requirement of Rule 23(b)(3). We hold that the subclass of putative class members with 9,223 unique fax numbers that would be created by taking out of Exhibit A the putative class members listed in Exhibits B and C would satisfy the predominance requirement of Rule 23(b)(3). We remand for a determination by the district court whether the claims and defenses applicable to some or all of 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). Finally, we remand to allow the district court to address the requirements of Rule 23(a), which the court did not reach in its earlier decision. We leave it to the district court, in its discretion, to allow supplementation of the record in light of *Van Patten* and this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

The parties shall bear their own costs.

FILED

AUG 30 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRUE HEALTH CHIROPRACTIC, INC. and MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., individually and as representatives of a class of similarly situated persons, Plaintiffs-Appellants, v. MCKESSON CORPORATION and MCKESSON TECHNOLOGIES, INC., Defendants-Appellees.	No. 16-17123 D.C. No. 4:13-cv-02219-HSG Northern District of California, San Francisco **ORDER**

Before: HAWKINS, W. FLETCHER, and TALLMAN, Circuit Judges.

Defendants/Appellees filed a petition for rehearing or rehearing en banc on August 7, 2018 (Dkt. Entry 32). The panel has voted to deny the petition for rehearing. Judge W. Fletcher votes to deny the petition for rehearing en banc, and Judges Hawkins and Tallman so recommend.

The full court has been advised of the petition for en banc rehearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing or rehearing en banc is **DENIED**.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC INC, et al.,

Plaintiffs,

v.

MCKESSON CORPORATION, et al.,

Defendants.

Case No. 13-cv-02219-HSG

ORDER DENYING MOTION FOR CLASS CERTIFICATION; DENYING AS MOOT MOTION FOR STAY; SETTING CASE MANAGEMENT CONFERENCE

Re: Dkt. Nos. 208, 209

Plaintiff True Health Chiropractic, Inc. filed this putative class action on May 15, 2013, alleging that Defendant McKesson Corporation ("McKesson") sent "unsolicited advertisements" by facsimile ("fax") in violation of the Telephone Consumer Protection Act ("TCPA"). *See* Dkt. No. 1. Plaintiff filed a First Amended Complaint on June 20, 2013, Dkt. No. 7, and a Second Amended Complaint ("SAC"), Dkt. No. 90, which added McLaughlin Chiropractic Associates, Inc. as a Plaintiff and McKesson Technologies, Inc. ("MTI") as a Defendant.

Pending before the Court is Plaintiffs' motion for certification of a nationwide class defined as: "[a]ll persons or entities who received faxes from 'McKesson' from September 2, 2009, to May 11, 2010, offering 'Medisoft,' 'Lytec,' or 'Revenue Management Advanced' software or 'BillFlash Patient Statement Service,' where the faxes do not inform the recipient of the right to 'opt out' of future faxes." Dkt. No. 209 ("Mot.") at 1. Defendants filed an opposition to that motion, Dkt. No. 220 ("Opp."), and Plaintiffs filed a reply, Dkt. No. 221 ("Reply").

The Court has carefully considered the arguments presented by the parties, both in their submissions to the Court and during oral argument, and for the reasons discussed below, DENIES Plaintiffs' motion for class certification.

I. BACKGROUND

The SAC alleges that Defendants violated the TCPA by sending "unsolicited advertisements" by fax. SAC ¶¶ 1-2. Plaintiffs contend that they had not invited or given permission to Defendants to send the faxes, SAC ¶¶ 14-18, but that even assuming the faxes were sent pursuant to a recipient's express permission or an "established business relationship," the requisite "opt-out notice" was absent, *id.* at ¶¶ 33-34.

The parties agree that there are approximately 11,979 unique fax numbers at issue. Dkt. No. 209-3; Dkt. No. 220-18.

II. CLASS CERTIFICATION STANDARD

Federal Rule of Civil Procedure 23 governs class actions, including the issue of class certification. A plaintiff "bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) ("A party seeking class certification must affirmatively demonstrate [her] compliance with the Rule.").

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). "Further, while Rule 23(a) is silent as to whether the class must be ascertainable, courts have held that the Rule implies this requirement as well." *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1178 (N.D. Cal. 2013); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010) (holding that a class "must be adequately defined and clearly ascertainable before a class action may proceed").

If the four prerequisites of Rule 23(a) are met, a court also must find that the plaintiff

"satisf[ies] through evidentiary proof" one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Plaintiffs assert that they meet the requirements of both Rule 23(b)(2) and 23(b)(3). Rule 23(b)(2) provides for certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) applies where there is "predominance" and "superiority": "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

III. DISCUSSION

Plaintiffs seek certification under either Rule 23(b)(2) or 23(b)(3). The Court finds certification under either rule inappropriate.

A. TCPA Provisions Applicable to Faxes

The TCPA provides that it shall be unlawful for any person:

> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--
>
> (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
>
> (ii) the sender obtained the number of the telephone facsimile machine through--
>
> (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
>
> (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,
>
> except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and
>
> (iii) the unsolicited advertisement contains a notice meeting

> the requirements under paragraph (2)(D),
>
> except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E)[.]

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." § 227(a)(5).

B. Certification under Rule 23(b)(2)

Defendants argue that Plaintiffs' attempt to certify an "injunction-only" class under Rule 23(b)(2) must fail because the TCPA provides for individualized monetary damages to class members. *See* Opp. at 24; *Dukes*, 131 S.Ct. at 2557 ("[Rule 23(b)(2)] does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."). Several courts have considered *Dukes* in the context of a TCPA claim and held that the individual monetary awards provided by the statute foreclose the certification of a 23(b)(2) class. *See Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 579 (S.D. Cal. 2013) (holding the availability of statutory damages renders "Plaintiffs' TCPA claims . . . ineligible for Rule 23(b)(2) certification" (citing *Dukes*, 131 S.Ct. at 2557)); *Balschmiter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 516 (E.D. Wis. 2014) ("[P]ermitting certification under Rule 23(b)(2) in TCPA cases would impermissibly allow the monetary tail to wag[ ] the injunction dog." (internal quotation marks omitted) (citing *Dukes*, 131 S.Ct. at 2557)); *Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303 (S.D. Cal. 2015) (same).

Given that each plaintiff is independently entitled to statutory damages under the TCPA, and that Plaintiffs expressly seek "actual monetary loss from such violations or the sum of five hundred dollars ($500.00) for each violation," *see* SAC ¶ 39, the Court finds certification under Rule 23(b)(2) impermissible. *See Dukes*, 131 S.Ct. at 2557 (holding that certification is improper for claims for "individualized relief," including claims that entail an "individualized award of

monetary damages").[1]

C. Certification under Rule 23(b)(3)

The predominance inquiry of Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Accordingly, the predominance analysis "focuses on the relationship between the common and individual issues in the case." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) (internal quotation marks omitted); *see also In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) ("Whether judicial economy will be served in a particular case turns on close scrutiny of the relationship between the common and individual issues." (internal quotation marks omitted)).

Undertaking the predominance analysis requires some inquiry into the merits, as the Court must consider "how a trial on the merits would be conducted if a class were certified." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (internal quotation marks omitted); *see also Zinser*, 253 F.3d 1180, 1189-90 (noting that district courts must consider as part of the predominance analysis whether a manageable class adjudication can be conducted); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (finding predominance "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication" (internal quotation marks omitted)); *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (same).

Here, Defendants argue that Plaintiffs cannot establish predominance because individual issues regarding prior express permission predominate over any common issues of fact. Defendants have provided evidence demonstrating that such individualized inquiries will be necessary. For example, Defendants' former sales representative Jeffrey Paul explained that he would have "numerous conversations with customers over the phone on a daily basis" and that it

[1] The Ninth Circuit affirmed the district court's provisional certification of a Rule 23(b)(2) class in *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036 (9th Cir. 2012). Although *Meyer* was a TCPA class, the Court finds *Meyer* does not dictate a different outcome here. Unlike the facts in *Meyer* where it appears plaintiffs sought only injunctive relief, here Plaintiffs explicitly seek individualized monetary relief. Thus, under *Dukes*, Rule 23(b)(2) certification would be impermissible.

"was commonplace for customers to ask [him] . . . to send them information by fax, including information on promotions." Dkt. No. 220-1 ¶¶ 2-4. Like other sales representatives working with him, Paul's "long-standing relationships and dealings with customers" allowed him to become "familiar with [his] customers' communications preferences." *Id.* at ¶¶ 4-6; *see also* Dkt. No. 220-15 at 4 ("[B]ecause of these longstanding and well developed relationships, PPS sales representatives would learn and know that a particular customer exclusively preferred to receive faxes over, for example, emails."). Relying on these individualized communications and relationships, representatives would send faxes as requested. Dkt. No. 220-1 at ¶ 3-4.

Another member of the sales team, Kari Holloway, *see* Dkt. No. 210-3 at 5, testified that "customers would request a lot of information via fax," and that she and other sales team members would send faxes either "in a bulk communication or a one-by-one fax," Dkt. No 220-13 at 5. She explained that they would send faxes to existing customers based on their communications with each fax recipient. *Id*. Customers would make specific requests for faxes "through oral conversations," and the "sales representatives had a decent handle on who their customers were. . . [and] the ways they would like to be communicated with." *Id.* at 6-7.

Moreover, Defendants' interrogatory responses list additional ways Defendants say they obtained prior express permission to send faxes. Some customers may have given permission by providing their fax numbers during the registration process. Dkt. No. 220-15 at 3. Others allegedly gave permission by checking a box during "their software registration that indicated their express permission to be sent faxes as a preferred method of communication." *Id.* at 4. And in some instances, customers completed written consent forms providing express permission to receive faxes. *Id.* Thus, in addition to the individualized oral and email communications sales team members had with customers, Defendants identify several other methods by which customers could have provided permission.

Although there are some common issues present, including whether the faxes are advertisements and whether the product registration forms constitute "express permission," the diversity of ways in which Defendants allegedly received permission suggests "that the issue of consent should be evaluated individually, rather than on a classwide basis." *Connelly*, 294 F.R.D.

at 578. The facts underlying the issue of "express permission" here are unlike cases in which consent was received through uniform means, thus facilitating generalized determinations under the law. *Compare Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 688 (S.D. Fla. 2013) (finding putative class members "went through the same or similar admissions process, during which they provided their phone numbers" and thus, the class "will prevail or lose together both on their claims and on [d]efendants' affirmative defense of consent")[2], *and Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 647 (W.D. Wash. 2007) (finding common issues predominated where defendants "obtained all of the recipients' facsimile numbers from the Manufacturers' News database," thus creating the common issue of "whether the recipients' inclusion in the Manufacturers' News database constitutes express permission to receive advertisements via facsimile") *with Connelly,* 294 F.R.D. at 578 (finding individual issues predominated where defendant argued that class members consented via "the individualized experience that each guest shared with Hilton," including by signing up for the loyalty rewards program over the phone, online, or through a paper application, or by reserving rooms online, over the phone, or through brick-and-mortar travel agencies), *Gannon v. Network Tel. Servs., Inc.*, No. CV 12-9777-RGK PJWX, 2013 WL 2450199, at *2 (C.D. Cal. June 5, 2013) (holding that where defendants provided evidence of varied ways in which class members consented, the class was not ascertainable or identifiable, because significant inquiry as to each individual would be required), *aff'd*, 628 F. App'x 551 (9th Cir. 2016), *and Gene*, 541 F.3d at 329 (noting that because defendant "culled fax numbers from a variety of sources," "individual inquiries of the recipients are necessary to sort out which transmission was consented to" and thus "class-wide proof of consent is not possible").

While the issue of whether any class member *actually* granted permission is not before the Court at this stage of litigation, the Court is required to determine at the class certification stage

[2] Unlike in this case, the plaintiffs in *Manno* expressly excluded "those individuals who had ***any communications*** with [defendant] prior to being called" from the class definition. 289 F.R.D. at 689-90 (emphasis in original). This approach conclusively eliminated the need for any individualized inquiry regarding consent.

"whether the issue of consent is a common issue with a common answer that predominates over any individual issues." *Blair v. CBE Grp., Inc.*, 309 F.R.D. 621, 630 (S.D. Cal. 2015). Defendants have presented sufficient evidence to establish that this Court would need to make detailed factual inquiries regarding whether each fax recipient granted prior express permission. And significantly, Plaintiffs have not offered their own satisfactory method of establishing a lack of "express permission" via class-wide proof. *See Zinser*, 253 F.3d at 1186 (party seeking class certification has the burden of meeting the class certification requirements); *Gene*, 541 F.3d at 328 (holding that plaintiff had not met its burden to show that the class certification requirements were satisfied where plaintiff failed to offer a "sensible method of establishing consent or lack thereof via class-wide proof"). This remains equally true whether the lack of consent is an element of a TCPA claim (as Defendants argue) or the presence of consent is an affirmative defense under the TCPA (as Plaintiffs claim). *See Gene*, 541 F.3d at 327 ("Whether established by [defendant] as an affirmative defense or by [plaintiff] as an element of the cause of action, the issue of consent will entirely determine how the proposed class-action trial will be conducted on the merits.").

Moreover, the Federal Communications Commission's ("FCC") grant of a retroactive waiver to Defendants does not affect this outcome. The waiver stems from a FCC regulation that requires even solicited faxes to include opt-out notice. *See* 47 C.F.R. § 64.1200(a)(3)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967-01, 25972 ("[E]ntities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future."). In August 2015, the agency retroactively excused Defendants from providing opt-out notice in faxes sent with prior express permission before April 30, 2015. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598, 8613 (2015) ("Waiver Order").

As a threshold matter, the Court notes that its consideration of the waiver does not violate separation of powers. Whereas the statute on its face pertains to *unsolicited* advertisements, the waiver relates only to *solicited* faxes, and stems directly from the agency's regulation of solicited

faxes. Because the waiver's scope is unrelated to Defendants' alleged liability for problems with unsolicited faxes, there is no retroactive release of *statutory* liability and thus no potential separation of powers issue. Accordingly, assuming *arguendo* that the FCC's promulgation of the regulation regarding solicited faxes was proper (notwithstanding the statute's facial limitation to unsolicited faxes), the FCC also must have authority "to determine when and how to apply [that] regulation, and to waive it for good cause." *See Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 14-CV-3232 (NSR), 2016 WL 1271693, at *5 (S.D.N.Y. Mar. 29, 2016); *see also Simon v. Healthways, Inc.*, No. CV1408022BROJCX, 2015 WL 10015953, at *6–7 (C.D. Cal. Dec. 17, 2015) (analyzing FCC waiver in denying motion for class certification in TCPA case involving faxes). The regulations provide that the FCC may waive any provision of the rules if good cause exists, *see* 47 C.F.R. § 1.3, and that is exactly what the FCC has done through its grant of waiver.

Turning to the waiver's impact on certification, the Court finds that because the waiver does not confirm or deny whether Defendants had express permission or invitation to send the faxes, it does not resolve the predominance problem here. *See* Waiver Order at 8610 (stating that the question of express permission "remains a question for triers of fact in the private litigation"). The waiver applies only once there is a determination that Defendants sent solicited faxes, and the Court therefore still would have to conduct the numerous individual inquiries described above to determine which advertisements were "solicited" and thus fall within the waiver's scope.

Because Plaintiffs have failed to satisfy the predominance requirement, the Court finds a class action would not be superior to other methods for fairly and efficiently adjudicating the controversy. Therefore, certification is improper under Rule 23(b)(3).

IV. CONCLUSION

In light of the foregoing, the Court DENIES Plaintiffs' motion for class certification, Dkt. No. 209. The Court also DENIES Defendants' motion for a stay as moot, Dkt. No. 208.

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The Court sets a case management conference for Tuesday, September 6, 2016 at 2:00 p.m. The parties should be prepared to discuss case scheduling at the hearing.

IT IS SO ORDERED.

Dated: 8/22/2016

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California