APPENDIX A

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

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]

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[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. Morrison*, 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]

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

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[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.

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.

APPENDIX B

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 (Filed Aug. 22, 2016)

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 Cor 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

[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.

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 "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

[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.

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 "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.

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:

HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX C

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** (Filed Aug. 30, 2018)

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**.

APPENDIX D

Federal Rule of Civil Procedure 23
Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members 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.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) 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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a

United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX E

47 U.S.C. § 227

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means 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.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(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); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile

machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the

existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid

receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the

database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different

needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending

machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to

knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report

Not later than 6 months after December 22, 2010, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a

forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the

date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone

solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have

jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.