No. _____

In the Supreme Court of the United States

CAREER COUNSELING, INC., individually and as representative of a class of similarly situated persons,
Petitioner,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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July 19, 2024

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QUESTIONS PRESENTED

The Fourth Circuit affirmed the district court's denial of class certification in this action under the Telephone Consumer Protection Act (TCPA) based on two pure legal propositions that have divided the circuit courts: (1) that there is an implied "administrative feasibility" prerequisite for class certification under Rule 23(b)(3), a requirement rejected by six other circuits, *see Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021); and (2) that the TCPA's definition of "telephone facsimile machine" in 47 U.S.C. § 227(a)(3) is limited to "stand-alone" fax machines, a limitation rejected by the Sixth Circuit in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021).

There are two questions presented:

1. Whether there is an implied "administrative feasibility" prerequisite for class certification, as held by the First, Third, and Fourth Circuits, or whether administrative feasibility is merely a factor to be weighed in determining whether class certification is "superior" to the alternatives under Rule 23(b)(3), as held by the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See Cherry*, 986 F.3d at 1302; *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017); *In re Petrobras Sec.*, 862 F.3d 250, 267 (2d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015).

2. Whether the TCPA's definintion of "telephone facsimile machine" is limited to traditional "stand-alone" fax machines, as the Fourth Circuit held in this case, or whether the "plain language" of the definition

"encompasses more than traditional fax machines that automatically print a fax received over a telephone line," as the Sixth Circuit held in *Lyngaas*, 992 F.3d at 426.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Career Counseling, Inc., was a plaintiff in the district court and an appellant/cross-appellee in the court of appeals.

Respondent AmeriFactors Financial Group, LLC was a defendant in the district court and the appellee/cross-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Career Counseling, Inc. discloses the following. There is no parent or publicly held company owning 10% or more of Petitioner's stock.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Career Counseling, Inc. v. AmeriFactors Financial Group, LLC*, No. 3:16-cv-3013-JMC (D.S.C.) (judgment entered Jan. 31, 2022)
- *Career Counseling, Inc. v. AmeriFactors Financial Group, LLC*, No. 22-1119 (4th Cir.) (judgment entered Jan. 22, 2024)
- *Career Counseling, Inc. v. AmeriFactors Financial Group, LLC*, No. 22-1136 (4th Cir.) (judgment entered Jan. 22, 2024)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

The question of whether Rule 23 contains an "implied" prerequisite to class certification that it must be "administratively feasible" to identify class members has reached a boiling point, with three circuits imposing this "heightened" ascertainability requirement, and six circuits rejecting such an "extratextual" requirement and treating administrative feasibility as a factor to be weighed under Rule 23(b)(3) "superiority." The lower courts in this case denied class certification based solely on their conclusion that Career Counseling failed to meet this "threshold" requirement, with neither the district court nor the Fourth Circuit considering whether class certification was "superior" to the alternatives. This case therefore presents an ideal vehicle for this Court to hold that the courts may not graft an "implied" feasibility requirement onto Rule 23 and remand to the district court to determine whether class certification is superior to the alternatives.

The Fourth Circuit's decision also creates a split with the only other circuit court of appeals to decide whether the TCPA's definition of "telephone facsimile machine" should be read narrowly to cover only traditional "stand-alone" fax machines, as the Fourth Circuit held in this case, or whether the statute should be read according to its plain language, which applies broadly to any "equipment" with the relevant "capacity," and is not limited to stand-alone fax machines, as the Sixth Circuit held in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021). That split has resulted in a situation where the TCPA protects consumers from junk faxes in some jurisdictions but not others, and the Court's review is necessary to correct the imbalance.

OPINIONS BELOW

The Fourth Circuit's decision is reported at 91 F.4th 202 (4th Cir. 2024) and reproduced at Pet. App. 1a. The district court's decision denying class certification is unreported and available at 2021 WL 3022677 (D.S.C. July 16, 2021) and reproduced at Pet. App. 24a.

JURISDICTION

The court of appeals entered judgment on January 22, 2024, and denied rehearing on February 20, 2024. On May 6, 2024, this Court extended the time within which to file a petition for a writ of certiorari to July 19, 2024—157 days from the date rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 23 provides in relevant part:

> **(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:
>
> . . .
>
> **(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.
>
> . . . .

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, as amended by the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, is codified at 47 U.S.C. § 227(a)(3) and provides in relevant part:

> 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.

STATEMENT

I. Factual background

A. The Telephone Consumer Protection Act prohibits the sending of unsolicited advertisements via fax.

Congress passed the TCPA in response to the public's "outrage[] over the proliferation of intrusive, nuisance calls." 47 U.S.C. § 227 note.[1] As amended by the Junk Fax Prevention Act, Pub. L. No. 109-21, 119 Stat. 359, the law targets "a number of problems associated with junk faxes." *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015). Junk faxes often force the recipient, frequently small businesses, to incur significant costs in the form of "paper and ink" and "tied up" fax lines, *id.*, while also causing "interference, interruptions, and expense" resulting from junk faxes, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14134 ¶ 201 (FCC July 3, 2003) ("2003 Commission Order") (quoting H.R. Rep. No. 102-317 at 25 (1991)).

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[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

For these reasons, Congress made it unlawful "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). And it broadly defined the term "telephone facsimile machine" to include any "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." *Id.* § 227(a)(3).

In the years since the TCPA was amended to prohibit using fax machines to send unsolicited advertisements, marketers shifted much of their advertising campaigns online. But as both the FCC and courts have long explained, the TCPA's bar on unsolicited faxes extends to cover faxes sent from and to "computerized" fax machines, which qualify as a "telephone facsimile machine" under the statute. 2003 Commission Order ¶ 143; *see also In re WestFax, Inc. Petition for Consideration & Clarification*, 30 FCC Rcd. 8620, 2015 WL 5120880, at *2 ¶ 9 (CGAB Aug. 28, 2015) ("WestFax Bureau Ruling") (subordinate Bureau of the FCC ruling that "[t]he definition of 'telephone facsimile machine' sweeps in the fax server and modem, along with the computer that receives the efax because together they by necessity have the capacity to 'transcribe text or images (or both) from an electronic received over a telephone line onto paper'").

That is because the TCPA "broadly applies to any equipment that has the *capacity* to send or receive text or images," which "ensure[s] that the prohibition on

unsolicited faxing" cannot be easily circumvented as technology changes. 2003 Commission Order ¶ 144 (emphasis added) (noting that "Congress could not have intended to allow easy circumvention of its prohibition when faxes are . . . transmitted to personal computers and fax servers, rather than traditional stand-alone facsimile machines"); *see also id.* ¶ 145 (noting that unsolicited faxes sent to a recipient's "inbox" still risk "shift[ing] the advertising cost of paper and toner to the recipient" and "may also tie up lines and printers so that the recipients' requested faxes are not timely received"). The Sixth Circuit relied on the text of statute as well as these FCC precedents in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021), holding that the TCPA's definition of "telephone facsimile machine" "encompasses more than traditional fax machines" and includes any "equipment that has the *capacity* to transcribe text or images from or onto paper—as long as the electronic signal is transmitted or received over a telephone line."

B. AFGL sends unsolicited advertisements via fax in violation of the TCPA.

In June 2016, AFGL hired a company called AdMax to send a fax advertising AFGL's financing services to thousands of businesses using a fax broadcaster called WestFax. (A518). AFGL never sought "prior express invitation or permission" from the targets of the fax because the decision makers "weren't under the impression that approval was needed." (Dkt. 197-4, Speiser Dep. at 39:17–18).

In discovery, AdMax produced the WestFax "fax logs" showing the successful and unsuccessful fax transmissions. Career Counseling's expert witness

analyzed the logs and concluded that the Fax was "fully received error-free" by 58,944 unique fax numbers. (A189–90, Biggerstaff Report ¶¶ 15, 16). AFGL's expert testified he had no reason to doubt the accuracy of Biggerstaff's analysis of the fax logs and does not disagree with Biggerstaff's conclusion that the Fax was received by 58,944 unique fax numbers. (Dkt. 197-11, Sponsler Dep. at 97:22-98:6).

II. Procedural background

A. Having received one of the unlawful faxes on June 28, 2016, Career Counseling sued AFGL on behalf of itself and a proposed class for sending unsolicited fax advertisements in violation of the TCPA, 47 U.S.C. § 227(b)(1)(C). Pet. App. 29a. After the suit was filed, AFGL filed a petition with the FCC seeking a ruling that users of "online fax services" were not covered by the TCPA. Pet. App. 30a. The "principal" purpose of the FCC petition (according to the petition) was to "confirm that the statute requires an individualized determination as to how recipients actually received unsolicited fax advertisements" to help AFGL defeat class certification in this action. (A061).

B. On December 9, 2019, three years into the litigation—the FCC's Consumer & Governmental Affairs Bureau issued a declaratory ruling granting AFGL's petition and interpreting the text of the TCPA provision at issue here. *In re AmeriFactors Fin. Grp., LLC*, 34 FCC Rcd. 11950, 2019 WL 6712128 (CGAB Dec. 9, 2019). In this so-called AmeriFactors Bureau Ruling, the Bureau construed the TCPA to exclude an "online fax service" from the definition of "telephone facsimile machine." *Id.* ¶ 2. In the Bureau's view, an "online fax service that effectively receives faxes sent as email

over the Internet" is "not itself equipment which has the capacity to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper" and so "falls outside the scope of the statutory prohibition." *Id.* ¶ 3. The Bureau further reasoned that, because an online fax service "cannot itself print a fax," it did not implicate the specific harms Congress addressed in the TCPA, namely "advertiser cost-shifting." *Id.* ¶ 11.

Career Counseling timely filed an application for review of the AmeriFactors Bureau Ruling with the full FCC on January 8, 2020. (A106). More than four years later, the FCC has yet to act on it.

C. On March 16, 2021, Career Counseling moved to certify a class of "[a]ll persons or entities who were successfully sent a fax, on or about June 24 and 28, 2016, stating: 'AmeriFactors—Funding Is Our Business,' and 'AmeriFactors is ready to help your company with your financing needs.'" (A458; Dkt. 197, Pl.'s Mot. Class Certification at 1). With respect to class members who may have used "online fax services" (if any), Career Counseling argued that the district court was not bound by the AmeriFactors Bureau Ruling and should instead follow the 2003 Commission Order and the WestFax Bureau Ruling on the same topic. (Dkt. 197-1 at 21–24).

Career Counseling also argued that the Sixth Circuit correctly held in *Lyngaas*, 992 F.3d at 425–27, that the unambiguous definition of "telephone facsimile machine" in 47 U.S.C. § 227(a)(3)—as "reinforced" by the 2003 Commission Order and the WestFax Bureau Ruling—is not limited to users of stand-alone fax

machines and covers users of "online fax services." (Dkt. 200, Pl.'s Notice of Supp. Authority at 1).

In the alternative, to the extent the district court found it necessary to distinguish between faxes received on a "stand-alone" fax machine and faxes received via an "online fax service," Career Counseling proposed that the district court certify a class of all persons or entities who received the Fax on a "stand-alone" fax machine. (Dkt. 197 at 2). Career Counseling explained that its counsel had completed a three-step subpoena process to identify the telephone carrier for each of the fax numbers on the fax logs and subpoenaed the carriers asking them to state whether the carrier provided online fax service to those numbers when the faxes were sent in June 2016. (A467). As of the close of briefing on Career Counseling's motion for class certification, carriers had responded that they did not provide online fax services for 20,989 of the fax numbers, and provided online fax service for only 206 class members. (*Id.*)

On July 16, 2021, the district court entered its Order denying class certification. Pet. App. 24a. The district court found that Career Counseling satisfied all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *Id.* at 48a-49a. The district court did not, however, proceed to decide whether Career Counseling satisfied Rule 23(b)(3). Instead, the district court denied class certification based solely on its conclusion that Career Counseling failed to satisfy an implied, unwritten "administrative feasibility" requirement for class certification imposed by *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). *Id.* at 58a.

The district court later granted summary judgment for Career Counseling individually, finding there was no genuine issue of material fact that AFGL was the "sender" of the fax and that AFGL did not obtain Career Counseling's "prior express invitation or permission" to send it. Pet. App. 78a.

D. On appeal from the denial of class certification, the Fourth Circuit observed that the district court found Career Counseling "complied with the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation," and that "the district court did not reach the issue of whether Career Counseling has met the Rule 23(b)(3) requirements of predominance and superiority." Pet. App. 7a. Like the district court, the Fourth Circuit did not consider whether Rule 23(b)(3) was satisfied, affirming solely on the basis that the "implied" ascertainability requirement was not satisfied. Pet. App. 18a, n.6.

Career Counseling petitioned the Fourth Circuit for rehearing en banc to either (1) jettison the heightened "administrative feasibility" requirement or (2) hold that the plain language of the TCPA is not limited to stand-alone fax machines. The Fourth Circuit denied the petition for rehearing on February 20, 2024. Pet. App. 93a.

REASONS FOR GRANTING THE PETITION

I. The Court should resolve the circuit split over how to treat the question of "administrative feasibility" in damages class actions.

A. The circuit courts are deeply divided over class "ascertainability" and "administrative feasibility."

Courts have long recognized that class certification

requires a clearly defined class based on "objective criteria," which prevents vague or subjective classes (*e.g.*, persons "annoyed" by a policy), as well as classes defined entirely by success on the merits, so-called fail-safe classes (*e.g.*, persons who can prove they were defrauded). *See, e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015); William Rubenstein, *et al.*, *Newberg on Class Actions* § 3.3 (5th ed. 2013) ("All courts essentially focus on the question of whether the class can be ascertained by objective criteria."). This traditional "ascertainability" requirement is grounded in Rule 23(c)(1)(B), which requires an order certifying a class "must define the class." A clear and objective definition enables the courts to identify who is bound by a judgment, as Rule 23(c)(3)(A) requires, and thus to enforce the res-judicata effect of a final judgment against the class members as well as the defendants. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130 n.9 (9th Cir. 2017); *Mullins*, 795 F.3d at 661.

Where the courts radically diverge, however, is the question of whether class "ascertainability" carries with it an implied requirement that the party seeking class certification prove that it is "administratively feasible" to identify class members. The Fourth Circuit applied such a stand-alone "threshold" requirement in this case based on *EQT Prod.*, 764 F.3d at 358. The First Circuit and Third Circuit continue to impose an "administrative feasibility" requirement, as well. *See Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021) (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015)).

But six other circuit courts have rejected this "extratextual," judge-made requirement. *Cherry*, 986

F.3d at 1302; *see also Briseno*, 844 F.3d at 1133; *In re Petrobras Sec.*, 862 F.3d 250, 267 (2d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins*, 795 F.3d at 662. These circuits hold that class "ascertainability" concerns only whether a class is defined by "objective criteria" and that "administrative feasibility," rather than being a threshold requirement, is already covered by the text of Rule 23(b)(3)(D), which requires the district court to consider the "likely difficulties in managing a class action" as one non-dispositive factor to be weighed in deciding whether class certification is "superior" to the alternatives. *See, e.g.*, *Cherry*, 986 F.3d at 1304; *Mullins*, 795 F.3d at 663.

B. The circuit split over ascertainability has led to disparate outcomes in TCPA junk-fax cases.

The question of whether "administrative inconvenience" is a threshold requirement or merely a consideration to be weighed under Rule 23(b)(3) superiority makes a real-world "practical difference." *Mullins*, 795 F.3d at 663. The circuit split on this question has led to disparate outcomes specifically in TCPA "junk-fax" cases like this one, depending on the jurisdiction in which the case is filed.

For example, in *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-CV-41-JLB-MRM, 2021 WL 6105590, at *11 (M.D. Fla. Dec. 23, 2021), the district court applied the "traditional" ascertainability standard under the Eleventh Circuit's decision in *Cherry* and certified a Stand-Alone Fax Machine TCPA class, finding that the class was "ascertainable" because it was defined by objective criteria.

In accordance with *Cherry*, the *Scoma* district court then separately considered the administrative feasibility of identifying class members as a factor in the Rule 23(b)(3) superiority analysis, finding that the plaintiff's proposed method of subpoenaing the phone carriers for each fax number to weed out users of "online fax services" provided a "manageable" way to identify class members. *Id.* at *13. The district court reasoned that "[a]t the very least, the proposed process is 'a starting point from which' Plaintiffs can use other methods if necessary, such as 'self-identifying affidavits and subpoenas.'" *Id.* at *11 (quoting *Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV-Goodman, 2018 WL 3145807, at *13 (S.D. Fla. June 26, 2018)).[2]

In contrast, by addressing administrative feasibility "in a vacuum," *Mullins*, 795 F.3d at 663, the district court in this case reached the opposite conclusion, finding that Career Counseling's proposed method for identifying recipients who were not using an "online fax service" in 2016 failed a "threshold" requirement that Career Counseling show these recipients were "necessarily" using stand-alone fax machines. Pet. App. 33a. The circuit split over how to treat administrative feasibility has outcome-determinative consequences in cases just like this one, and the Court's review is essential to resolve that split.

C. The "extratextual" administrative-feasibility requirement imposed by the Fourth Circuit is wrong.

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[2] The *Scoma* district court expressly rejected the district court's analysis in this case on the basis that it applied the Fourth Circuit's heightened "administrative feasibility" test. *Id.* at *11, n.12.

This Court has instructed that Rule 23 "sets the requirements [the courts] are bound to enforce" when considering class certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The text of the rule "limits judicial inventiveness," and "[c]ourts are not free to amend a rule outside the process Congress ordered." *Id.*; *see also Cherry*, 986 F.3d at 1303 (holding the courts "lack discretion to add requirements to the Rule").

Rule 23(a), titled "Prerequisites," does not mention "administrative feasibility." The Rule lists "four threshold requirements applicable to all class actions." *Amchem*, 521 U.S. at 613. The four threshold requirements—numerosity, commonality, typicality, and adequacy of representation—are exclusive. Under the doctrine *expressio unius est exclusio alterius*, the enumeration of four "prerequisites" implies the exclusion of any other prerequisites, such as "administrative feasibility." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius* to Federal Rules of Civil Procedure); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (applying *expressio unius* to Rule 23 in class action). As the Ninth and Eleventh Circuits have explained, because administrative feasibility is not listed among Rule 23(a)'s list of exclusive prerequisites, it cannot be a prerequisite to class certification. *Cherry*, 986 F.3d at 1303; *Briseno*, 844 F.3d at 1125–26.

Likewise, an administrative-feasibility requirement cannot be located in Rule 23(b)(3). "Nothing in Rule 23 mentions or implies this heightened [ascertainability] requirement under Rule 23(b)(3), which [would have] the effect of skewing the balance that

district courts must strike when deciding whether to certify classes." *Mullins*, 795 F.3d at 658. Instead, the administrative feasibility of identifying class members is one factor subsumed within the requirement that a Rule 23(b)(3) class action be "superior" to the alternatives, considering, among other things, the relative fairness and efficiency of class proceedings in light of a number of relevant considerations, some examples of which are set forth in the Rule. *See* Fed. R. Civ. P. 23(b)(3)(A)–(D).

A court's consideration of these factors—which neither the district court nor the Fourth Circuit considered in this case—entails a flexible balancing of sometimes competing considerations, including the "likely difficulties in managing a class action" under Rule 23(b)(3)(D), and not a rigid elevation of a single consideration above all others. *Cherry*, 986 F.3d 1303–04; *Mullins*, 795 F.3d at 658; *In re Petrobras Sec.*, 862 F.3d at 268. A class that is defined based on objective criteria, that satisfies Rule 23(a), and that satisfies Rule 23(b)(3)'s additional requirements that common issues predominate and that class resolution is superior, is entitled to be certified. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). The federal courts may not erect artificial barriers to class certification, such as a threshold administrative-feasibility requirement. *Id.*

An administrative-feasibility prerequisite is also contrary to the policies underlying Rule 23. When a company exposes many people to the same unlawful practice, a class action is often the only effective way to redress the wrongdoing. As the Court has observed, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her

rights." *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "The policy at the very core of the class action mechanism is to overcome [this] problem." *Id.* "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). In such cases, class actions offer the only means for achieving individual redress and deterrence of wrongful conduct.

In sum, there is no administrative-feasibility requirement in Rule 23, and the Court should clarify that the lower courts may not engraft this artificial requirement onto the rule. *See Cherry*, 986 F.3d at 1302; *Briseno*, 844 F.3d at 1133; *In re Petrobras Sec.*, 862 F.3d at 267; *Sandusky Wellness Ctr.*, 821 F.3d at 996; *Rikos*, 799 F.3d at 525; *Mullins*, 795 F.3d at 662.

II. The Court should resolve the circuit split regarding the definition of "telephone facsimile machine."

A. The Fourth and Sixth Circuits are split on whether the statutory definition is limited to "stand-alone" fax machines.

The Fourth Circuit held in this case that the "plain statutory language" of the TCPA's definition of "telephone facsimile machine" in 47 U.S.C. § 227(a)(3) is limited to traditional "stand-alone" fax machines and excludes users of "online fax services." Pet. App. 11a. The Sixth Circuit held in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021), that "the plain language of the TCPA . . . makes clear that a 'telephone facsimile machine' encompasses more than traditional fax machines that automatically print a fax received over

a telephone line" and includes users of "online fax services." 992 F.3d at 425–27.

The split between these authorities could not be clearer, and it has created a state of affairs where a TCPA class defined as "all persons" who were successfully sent a fax may be certified in the Sixth Circuit,[3] while it is not certified in the Fourth Circuit.[4]

The Fourth Circuit attempted to sidestep this inter-circuit conflict in a footnote, stating that *Lyngaas* "is not helpful" to Career Counseling because its discussion is limited to "efaxes" and "it defines an 'efax' as something different from an online fax service and specifies that an efax 'is sent over a telephone line'

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[3] The certified class in *Lyngaas* was defined as "All persons who were successfully sent one or more facsimiles in March 2016 offering the Curaprox '5460 Ultra Soft Toothbrush' for '.98 per/brush' to 'dental professionals only.'" *Lyngaas v. Curaden AG*, No. 17-cv-10910, 2019 WL 2231217, at *13 (E.D. Mich. May 23, 2019).

[4] In *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, 2023 WL 7015279, at *1 (9th Cir. Oct. 25, 2023) (unpublished), the Ninth Circuit ruled that it was required by the Hobbs Act, 28 U.S.C. § 2342(1) to follow the AmeriFactors Bureau Ruling's conclusion that faxes received via "online fax service" are not covered by the TCPA. The Ninth Circuit held that neither it nor the district court had jurisdiction to "disagree[]" with the Bureau Ruling under the Hobbs Act. *Id.* at *2. Unlike the Fourth Circuit in this case and the Sixth Circuit in *Lyngaas*, the Ninth Circuit did not consider whether the "plain language" of the statute is limited to stand-alone fax machines or whether it covers faxes received via "online fax service." *Id.* The Ninth Circuit's decision is the subject of a petition for writ of certiorari in No. 23-1226.

rather than 'as an email over the Internet.'" Pet. App. 14a, n.5. This rationale fails in two ways.

First, "efax" and "online fax service" mean the same thing. Regardless of the nomenclature, both terms describe a scenario in which a fax is sent to a "computerized fax server" maintained by the online fax service and then forwarded by email to the end-user's "inbox." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶¶ 199 (July 3, 2003) ("2003 Commission Order"). The FCC considered that exact scenario in a notice-and-comment rulemaking proceeding leading to the 2003 Commission Order and concluded that "faxes sent to . . . computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes." (*Id.* ¶ 200). The Sixth Circuit held in *Lyngaas* that the 2003 Commission Order "reinforced" its reading of the statute that users of "online fax services" are not excluded from the TCPA's coverage. 992 F.3d at 426.

Second, contrary to the Fourth Circuit's reasoning, *Lyngaas* did not limit its discussion to "efaxes." It expressly considered whether users of "online fax services"—as that term is defined in the AmeriFactors Bureau Ruling—were required to be excluded from the class definition. 992 F.3d at 427. The Sixth Circuit concluded that users of "online fax services" were properly included in the class definition because they are covered under the "plain language" of the TCPA. *Id.*; *see also Craftwood II, Inc. v. Generac Power Sys., Inc.*, 63 F.4th 1121, 1123 (7th Cir. 2023) (holding that today "many (or perhaps most) faxes go directly to an email address like other unwanted junk emails," but the TCPA "still protects unwilling recipients from unsolicited faxes in the same way it always has, by

granting statutory damages of $500 for each violation of the Act . . .").

In sum, there is a clear split between the Fourth and Sixth Circuits on the meaning of "telephone facsimile machine," and the Court's review is warranted to resolve the conflict.

B. The Fourth Circuit's narrow interpretation artificially limits the TCPA's protections to consumers who use "stand-alone" fax machines.

The TCPA defines "telephone facsimile machine" as "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." 47 U.S.C. § 227(a)(3). In *Lyngaas*, 992 F.3d at 425, the Sixth Circuit held this language was unambiguous and affirmed certification of a TCPA class of *all* fax recipients, rejecting the argument that class certification was inappropriate because the plaintiff "failed to establish which proposed class members received faxes on a traditional fax machine versus another device, such as a computer."

The Sixth Circuit held that the "plain language" of the statutory definition of "'telephone facsimile machine' . . . encompasses more than a traditional fax machine" and "does not require the actual printing of the advertisement, which dispels the defendants' argument that Congress was concerned only with the burdensome ink-and-paper costs of fax advertising." *Id.* at 426. The Sixth Circuit held its interpretation of the statute was "reinforced" by the FCC's interpretations stating that the TCPA covers faxes received by the

end-user via email on a computer in the 2003 Commission Order and the WestFax Bureau Ruling. *Id.* at 426–27 (citing 2003 Commission Order ¶¶ 200–01; WestFax Bureau Ruling ¶ 9). *See also Kostmayer Constr., LLC v. Port Pipe & Tube, Inc.*, No. CV 2:16-1012, 2017 WL 5079181, at *7 (W.D. La. Nov. 1, 2017) ("The statutory language requires only that the receiving device have the 'capacity' to print the fax, not that the device 'automatically' print the fax."); *accord Douglas Phillip Brust, D.C., P.C. v. Opensided MRI of St. Louis LLC*, 343 F.R.D. 581, 589 (E.D. Mo. 2023); *Urgent One Med. Care, P.C. v. Co-Options, Inc.*, No. 21-cv-4180, 2022 WL 16755154 (E.D.N.Y. June 1, 2022), *adopted by* 2022 WL 4596754, at *7 (E.D.N.Y. Sept. 30, 2022); *Ambassador Animal Hosp., Ltd. v. Hill's Pet Nutrition, Inc.*, No. 20-cv-3326, 2021 WL 3043422 (N.D. Ill. Feb. 17, 2021); *Levine Hat Co. v. Innate Intelligence, LLC*, 2022 WL 1044880, 2022 WL 1044880, at *2 (E.D. Mo. Apr. 7, 2022); *Mussat v. IQVIA Inc.*, No. 4:16-cv-01132, 2020 WL 5994468, at *3 (N.D. Ill. Oct. 9, 2020).

The Fourth Circuit's ruling in this case, in contrast, "flies in the face of years of precedent" established by the FCC "that the TCPA covers faxes sent to computers in addition to traditional fax machines." *Ambassador Animal Hosp.,* 2021 WL 3043422, at *1 (citing *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013); 2003 Commission Order ¶¶ 199–200) ("We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes.")).

Moreover, even if one assumes that Congress was *solely* concerned with stand-alone fax machines in 1991 and did not anticipate the development of online fax services, "the limits of the drafters' imagination supply no reason to ignore the law's demands," and "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020). What ultimately matters is not any comments of a member of Congress, but how the Act was written. And the Act prohibits the conduct of sending fax advertisements in the absence of "prior express invitation or permission" or an established business relationship (plus compliant opt-out notice).

The TCPA is not concerned with how the recipient receives the fax. It focuses solely on what the fax sender is prohibited from doing. *See* 47 U.S.C. § 227(b)(1)(C). Even the technical requirements of the Act in § 227(d) prescribe what the sender must include in a fax. The sole focus of the statute is on the fax sender, without regard to the recipient. The TCPA does not even "require proof of receipt." *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1253 (11th Cir. 2015) (quoting *City Select Auto Sales, Inc. v. David Randall Assocs., Inc.* 296 F.R.D. 299, 309 (D.N.J. 2013) ("whether Plaintiff actually received the facsimile is irrelevant to liability under the TCPA"); *Bridgeview Health Care Ctr., Ltd. v. Clark*, No. 09-cv-5601, 2013 WL 1154206, at *3 (N.D. Ill. Mar. 19, 2013) ("Neither Congress nor the [FCC], which is tasked with issuing regulations implementing the TCPA, require proof of receipt to establish a

private cause of action.") (citing *A Fast Sign Co. v. Am. Home Servs., Inc.*, 734 S.E.2d 31, 33 (2012)).

In sum, the Court should grant review, reverse the Fourth Circuit's ruling in this case, and hold that the Sixth Circuit was correct that the statutory definition of "telephone facsimile machine" is not limited to stand-alone fax machines and does not require exclusion of users of "online fax services" from a certified TCPA class.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 19, 2024

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JANUARY 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1119

CAREER COUNSELING, INC., D/B/A SNELLING STAFFING SERVICES, A SOUTH CAROLINA CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY-SITUATED PERSONS,

Plaintiff-Appellant,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,

Defendant-Appellee,

and

JOHN DOES 1-5,

Defendants.

No. 22-1136

CAREER COUNSELING, INC., D/B/A SNELLING STAFFING SERVICES, A SOUTH CAROLINA CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY-SITUATED PERSONS,

Plaintiff-Appellee,

v.

Appendix A

AMERIFACTORS FINANCIAL GROUP, LLC,

Defendant-Appellant,

and

JOHN DOES 1-5,

Defendants.

Appeals from the United States District Court for the District of South Carolina, at Columbia. J. Michelle Childs, District Judge. (3:16-cv-03013-JMC).

Argued December 9, 2022 Decided January 22, 2024

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

KING, Circuit Judge:

In this putative class action initiated in the District of South Carolina, it is alleged that defendant AmeriFactors Financial Group, LLC, sent an unsolicited advertisement by fax to plaintiff Career Counseling, Inc., and thousands of other recipients, in contravention of the Telephone Consumer Protection Act of 1991 (the "TCPA"), as amended by the Junk Fax Prevention Act of 2005. By its appeal (No. 22-1119), Career Counseling contests the district court's Order and Opinion denying class certification. *See Career Counseling, Inc. v. Amerifactors Fin. Grp., LLC*, No. 3:16-cv-03013, 2021 U.S. Dist. LEXIS 132869 (D.S.C. July 16, 2021), ECF No. 229 (the "Class Certification Decision").

And by the cross-appeal (No. 22-1136), AmeriFactors challenges the court's subsequent Order and Opinion awarding summary judgment to Career Counseling on its individual TCPA claim. *See Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, No. 3:16-cv-03013, 2022 U.S. Dist. LEXIS 16818 (D.S.C. Jan. 31, 2022), ECF No. 244 (the "Summary Judgment Decision"). As explained herein, we affirm both the denial of class certification and the award of summary judgment.

I.

The operative First Amended Class Action Complaint of November 2017 alleges a single TCPA claim premised on Career Counseling's receipt in June 2016 of an uninvited fax from AmeriFactors advertising its commercial goods and services. *See Career Counseling, Inc. v. Amerifactors Fin. Grp., LLC*, No. 3:16-cv-03013 (D.S.C. Nov. 28, 2021), ECF No. 70 (the "Complaint").[1] Relevant here, the TCPA generally makes it unlawful "to send, to a telephone facsimile machine, an unsolicited advertisement." *See* 47 U.S.C. § 227(b)(1)(C).

1. The record reflects that Career Counseling is a South Carolina corporation that does business as Snelling Staffing Services, an employment staffing agency that acts as a middleman between employers and prospective workers. AmeriFactors, a Florida limited liability company, is in the business of "factoring," or purchasing another company's accounts receivable of unpaid invoices for a discounted price with the intention of collecting the full value of the unpaid invoices at a later date. The fax sent to Career Counseling in June 2016 underpinning the Complaint was headlined "AmeriFactors — Funding Business Is Our Business" and announced that "AmeriFactors is ready to help your company with your financing needs." *See* Complaint Ex. A, at 2.

According to the Complaint, AmeriFactors "sent facsimile transmissions of unsolicited advertisements to [Career Counseling] and the Class in violation of the [TCPA], including, but not limited to, the [fax sent to Career Counseling in June 2016]." *See* Complaint ¶ 2. Career Counseling ultimately proposed a class comprised of the nearly 59,000 other persons and entities who were successfully sent the same June 2016 fax that Career Counseling received.

As more fully discussed below, by its Class Certification Decision of July 2021, the district court denied Career Counseling's request for class certification. Thereafter, by its Summary Judgment Decision of January 2022, the court awarded summary judgment to Career Counseling on its individual TCPA claim against AmeriFactors. That award includes $500 in statutory damages. *See* 47 U.S.C. § 227(b)(3)(B) (providing for recovery of "actual monetary loss from [a TCPA] violation, or . . . $500 in damages for each such violation, whichever is greater").

Following the district court's entry of the judgment, the parties timely noted their respective appeals. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We first address Career Counseling's challenge to the district court's Class Certification Decision of July 2021, denying Career Counseling's request for class certification pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In so doing, we review

the Class Certification Decision for abuse of discretion. *See Brown v. Nucor Corp.*, 576 F.3d 149, 152 (4th Cir. 2009). A district court abuses its discretion in granting or denying class certification "when it materially misapplies the requirements of Rule 23." *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). More generally, a court also abuses its discretion when its decision rests on an error of law or a clearly erroneous finding of fact. *See In re Grand Jury 2021 Subpoenas*, 87 F.4th 229, 250 (4th Cir. 2023); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir. 2002).

A.

As we explained in our 2014 decision in *EQT Production*, "Rule 23(a) requires that the prospective class comply with four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *See* 764 F.3d at 357.[2] Additionally, "the class action must fall within

2. In its entirety, under the headings "Prerequisites" for "Class Actions," Rule 23(a) provides the following:

> 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

one of the three categories enumerated in Rule 23(b)," with certification being appropriate under Rule 23(b)(3) when "(1) common questions of law or fact . . . predominate over any questions affecting only individual class members; and (2) proceeding as a class [is] superior to other available methods of litigation." *Id.* (internal quotation marks omitted). In other words, Rule 23(b)(3) requires both "predominance" and "superiority." *Id.* at 365.

Relying on precedent, we clarified in our *EQT Production* decision that Rule 23 also "contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *See* 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). Under that requirement — which is commonly referred to as "ascertainability" — "[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.* So, "if class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* (alteration and internal quotation marks omitted).

The party seeking class certification must present evidence and demonstrate compliance with Rule 23. *See EQT Prod.*, 764 F.3d at 357-58. Concomitantly, "the district court has an independent obligation to perform a 'rigorous analysis' to ensure that all of the prerequisites

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(4) the representative parties will fairly and adequately protect the interests of the class.

See Fed. R. Civ. P. 23(a).

have been satisfied." *Id.* at 358 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)).

B.

In denying class certification here, the district court determined that — although Career Counseling has complied with the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation — it has failed to satisfy Rule 23's implicit further requirement of ascertainability. *See* Class Certification Decision 18-24.[3] That determination derived from the uncontroverted factual premise that each of the nearly 59,000 recipients of the June 2016 AmeriFactors fax was using either a "stand-alone fax machine" or an "online fax service," as well as from the court's legal conclusion that the TCPA prohibits unsolicited advertisements sent to stand-alone fax machines, but does not reach unsolicited advertisements sent to online fax services. *Id.* at 14-18. Specifically, the court concluded that stand-alone fax machines — but not online fax services — qualify as "telephone facsimile machine[s]" under the TCPA. *See* 47 U.S.C. § 227(b)(1)(C) (making it unlawful "to send, *to a telephone facsimile machine*, an unsolicited advertisement" (emphasis added)). And that conclusion rendered it necessary to be able to identify which of the

3. Having concluded that Career Counseling has failed to satisfy the implicit ascertainability requirement, the district court did not reach the issue of whether Career Counseling has met the Rule 23(b)(3) requirements of predominance and superiority. *See* Class Certification Decision 24.

fax recipients were using stand-alone fax machines and which were using online fax services. Because the court was not convinced that the stand-alone fax machine users are readily identifiable, it decided that the ascertainability requirement has not been satisfied.

For its interpretation of the TCPA, the district court relied on a December 2019 declaratory ruling of the Federal Communications Commission (the "FCC") that "an online fax service . . . is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition [on sending unsolicited advertisements by fax]." *See AmeriFactors Fin. Grp., LLC*, 34 F.C.C.R. 11950, 11950-51 (2019) (the "*AmeriFactors* FCC Ruling"). The *AmeriFactors* FCC Ruling was sought by defendant AmeriFactors for purposes of this very litigation, and it was issued by the Chief of the FCC's Consumer and Governmental Affairs Bureau.

As explained in the Class Certification Decision, the district court deemed itself without jurisdiction to review the *AmeriFactors* FCC Ruling and bound to defer to it pursuant to the Administrative Orders Review Act, or Hobbs Act. *See* 28 U.S.C. § 2342(1) (specifying, in pertinent part, that "[t]he court of appeals . . . has exclusive jurisdiction . . . to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47"); *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055-56, 204 L. Ed. 2d 433 (2019) (outlining factors to be considered when deciding whether Hobbs Act obliges district court to follow particular FCC order). That

is, upon assessing the relevant factors, the court concluded that it was "required to find that the [*AmeriFactors* FCC Ruling] is entitled to Hobbs Act deference." *See* Class Certification Decision 18.

Next, in conducting its ascertainability analysis and resolving that it could not readily identify the fax recipients eligible for class membership under the *AmeriFactors* FCC Ruling — i.e., those recipients who were using stand-alone fax machines rather than online fax services — the district court rejected as "deficient" Career Counseling's proffered method of identifying the stand-alone fax machine users. *See* Class Certification Decision 23. Moreover, the court concluded "that it would need to make an individualized inquiry of each [fax recipient] to determine if [that recipient was a stand-alone fax machine user]." *Id.* As such, the court ruled that the class "is not ascertainable" and that "class certification is inappropriate." *Id.* at 23-24.

C.

By its appeal, Career Counseling challenges the district court's Class Certification Decision on multiple fronts. We do not, however, accept any of its arguments as meritorious.

1.

As a threshold matter, Career Counseling urges us to abandon our precedents recognizing that Rule 23 contains an implicit ascertainability requirement. In other words,

Career Counseling would have us rule that the district court committed legal error in denying class certification for failure to satisfy the ascertainability requirement, because — notwithstanding our precedents holding to the contrary — no such requirement actually exists.

Of course, as a three-judge panel of this Court, we are simply unable to rule as Career Counseling proposes. That is because our Court adheres to "the basic principle that one panel cannot overrule a decision issued by another panel." *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc). Indeed, other panels of this Court have continued to acknowledge and enforce the ascertainability requirement. *See, e.g., Peters v. Aetna Inc.*, 2 F.4th 199, 241-43 (4th Cir. 2021); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654-55, 658 (4th Cir. 2019). And we now do the same.[4]

2.

Accepting that there is an ascertainability requirement, Career Counseling argues that the district court committed legal error in according Hobbs Act deference to the *AmeriFactors* FCC Ruling that an online fax service does not qualify as a "telephone facsimile machine" under the TCPA. Career Counseling further contends that the

4. In recognition of the controlling principle that a three-judge panel of this Court cannot overrule a Circuit precedent, Career Counseling sought an initial en banc review of its appeal. But our Court denied that request. *See Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, No. 22-1119 (4th Cir. June 1, 2022), ECF No. 16 (Order denying initial en banc review).

AmeriFactors FCC Ruling is no more than an interpretive rule and thus is not entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020) (addressing an FCC rule interpreting the meaning of the TCPA term "unsolicited advertisement" and declining to accord that interpretative rule *Chevron* deference because it "doesn't carry the force and effect of law"). Although Career Counseling acknowledges that the *AmeriFactors* FCC Ruling might be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), Career Counseling asserts that the *AmeriFactors* FCC Ruling fails on its merits to qualify for such deference. *See Carlton & Harris*, 982 F.3d at 264 (explaining "that an interpretive rule is entitled to [*Skidmore* deference] only to the extent it has the power to persuade" (internal quotation marks omitted)). Additionally, Career Counseling maintains that — even if the *AmeriFactors* FCC Ruling is somehow entitled to Hobbs Act, *Chevron*, or *Skidmore* deference — that ruling (issued in December 2019) cannot be applied retroactively in these proceedings (assessing the legality of the underlying June 2016 AmeriFactors fax). According to Career Counseling, the district court therefore incorrectly limited class membership to stand-alone fax machine users and erroneously required Career Counseling to show the ascertainability of those particular fax recipients.

Put simply, we need not assess or determine whether the district court erred in according Hobbs Act deference

to the *AmeriFactors* FCC Ruling, whether the ruling is otherwise entitled to *Chevron* or *Skidmore* deference, or whether the ruling can be applied retroactively. Instead, we are satisfied to rule — de novo — that pursuant to its plain statutory language, the TCPA prohibits the sending of unsolicited advertisements to what the district court labelled as "stand-alone fax machines," but not to what the court accepted to be "online fax services." And we therefore conclude that the court properly limited class membership to stand-alone fax machine users and required Career Counseling to demonstrate their ascertainability.

Again, the TCPA prohibits "send[ing], to a telephone facsimile machine, an unsolicited advertisement." *See* 47 U.S.C. § 227(b)(1)(C). More fully, the TCPA renders it unlawful "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." *Id.* And the TCPA defines a "telephone facsimile machine" as

> 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.

Id. § 227(a)(3). Thus, to fall within the § 227(b)(1)(C) prohibition, a fax can be sent from a "telephone facsimile machine" (as defined in § 227(a)(3)), or from a "computer," or from some "other device." But that fax can be received

in only one way: on a "telephone facsimile machine" (also as defined in § 227(a)(3)).

Meanwhile, the district court labelled as a "stand-alone fax machine" what is well understood to be a "traditional fax machine." *See* Class Certification Decision 11-12. As for an "online fax service," the court deferred to the *AmeriFactors* FCC Ruling and thereby accepted that

> [a]n online fax service is a cloud-based service consisting of a fax server or similar device that is used to send or receive documents, images and/or electronic files in digital format over telecommunications facilities that allows users to access faxes the same way that they do email: by logging into a server over the Internet or by receiving a pdf attachment as an email.

See AmeriFactors, 34 F.C.C.R. at 11950 (alteration and internal quotation marks omitted). More simply stated, "online fax services hold inbound faxes in digital form on a cloud-based server, where the user accesses the document via the online portal or via an email attachment." *Id.* at 11953. When faxes are sent to such online fax services, the recipients "can manage those messages the same way they manage email by blocking senders or deleting incoming messages without printing them." *Id.* That is, the recipients have "the option to view, delete, or print [the faxes] as desired." *Id.* Importantly, "an online fax service cannot itself print a fax — the user of an online fax service must connect his or her own equipment in order to do so." *Id.* Moreover, online fax "services can handle multiple simultaneous incoming transmissions," such that "receipt

of any one fax does not render the service unavailable for others." *Id.*

It is clear to us that — whereas a stand-alone fax machine is the quintessential "equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper," *see* 47 U.S.C. § 227(a)(3)(B) — an online fax service is not such equipment and thus cannot be said to qualify as a "telephone facsimile machine" under the TCPA. That is because an online fax service neither receives an electronic signal "over a regular telephone line" nor has the capacity to transcribe text or images "onto paper." Rather, online fax services receive faxes over the Internet and cannot themselves print any faxes. *Accord AmeriFactors*, 34 F.C.C.R. at 11953-54 (similarly recognizing that "online fax services differ in critical ways from the traditional faxes sent to telephone facsimile machines Congress addressed in the TCPA").[5]

5. In arguing that an online fax service qualifies as a "telephone facsimile machine" under the TCPA, Career Counseling invokes as persuasive authority the Sixth Circuit's decision in *Lyngaas v. AG*, 992 F.3d 412 (6th Cir. 2021). The question in *Lyngaas* was whether "a TCPA claim is not actionable if the unsolicited advertisement is received by any device (such as a computer through an 'efax') other than a traditional fax machine." *See* 992 F.3d at 425. The court concluded that a device other than a traditional fax machine may qualify as a "telephone facsimile machine" under the TCPA, including a computer receiving an efax. *Id.* at 425-27. *Lyngaas* is not helpful to Career Counseling, however, in that it defines an "efax" as something different from an online fax service and specifies that an efax "is sent over a telephone line" rather than "as an email over the Internet." *Id.* at 427 (emphasis and internal quotation marks omitted).

To be sure, an online fax service may qualify as a "computer" or some "other device" within the meaning of the TCPA. With respect to a "computer" or "other device," however, the 47 U.S.C. § 227(b)(1)(C) prohibition applies only to faxes sent *from* a "computer" or "other device" — and not to faxes sent *to* a "computer" or "other device" — as a result of the meaningful variances in § 227(b)(1)(C)'s language. *See Rush v. Kijakazi*, 65 F.4th 114, 120 (4th Cir. 2023) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983), for the proposition that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Notably, although we rely solely on the plain statutory language for our conclusion that an online fax service does not qualify as a "telephone facsimile machine" under the TCPA, this interpretation is consistent with the 1991 Report of the House Committee on Energy and Commerce recommending the TCPA's enactment. *See* H.R. Rep. No. 102-317 (1991). In relevant part, after explaining that the "[f]acsimile machines [of the time were] designed to accept, process, and print all messages which arrive over their dedicated lines," the Report specified "two reasons" why the sending of unsolicited advertisements by fax was "problematic": (1) "it shifts some of the costs of advertising [including ink and paper costs] from the sender to the recipient"; and (2) "it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax."

Id. at 10. While those problems continue to exist with stand-alone fax machines, they do not exist with online fax services, as the recipient can choose whether the print a particular fax and there can be multiple incoming transmissions at once.

At bottom, we agree with the district court — albeit based on the plain statutory language, rather than any sort of deference to the *AmeriFactors* FCC Ruling — that an online fax service does not qualify as a "telephone facsimile machine" under the TCPA. Consequently, we further agree with the court that class membership must be limited to stand-alone fax machine users and that Career Counseling must be able to demonstrate their ascertainability.

3.

Finally, accepting that there is an ascertainability requirement and that class membership is properly limited to stand-alone fax machine users, Career Counseling contends that the district court erred in rejecting as "deficient" Career Counseling's method of identifying the stand-alone fax machine users and in deeming the class to be "not ascertainable." *See* Class Certification Decision 23. We do not, however, perceive any abuse of the court's discretion.

As detailed in the Class Certification Decision, to identify which of the nearly 59,000 recipients of the June 2016 AmeriFactors fax were using stand-alone fax machines and which were using online fax services, Career Counseling sent a subpoena to the telephone

carrier associated with each recipient's fax number. *See* Class Certification Decision 19. The subpoena asked, inter alia, whether the carrier provided an online fax service in connection with the particular number. *Id.* at 19 & n.10. According to Career Counseling, as of mid-March 2021, it had received responses indicating that more than 20,000 of the recipients were not — and only 206 of the recipients were — provided online fax services by the subpoenaed carriers. *Id.* at 19. From there, Career Counseling asserted that the more than 20,000 recipients without online fax services from the subpoenaed carriers "thus received the [June 2016 AmeriFactors fax] on a stand[-]alone fax machine." *Id.* at 20 (second alteration in original) (internal quotation marks omitted). As Career Counseling would have it, a class consisting of more than 20,000 stand-alone fax machine users is therefore ascertainable. *Id.*

Significantly, however, AmeriFactors proffered its own evidence showing that the recipients were not necessarily using stand-alone fax machines just because they were not using online fax services from the subpoenaed carriers. *See* Class Certification Decision 22. Rather, under AmeriFactors's evidence, the recipients may have been using online fax services provided by someone else. *Id.* For example, a declaration of an employee of Charter Communications Operating, Inc., stated with respect to each of the nearly 1,300 recipients with Charter-associated fax numbers that there was no way for Charter to determine whether the recipient was using "another provider's online fax service product" or "a stand-alone fax machine." *Id.* (internal quotation marks omitted).

Upon "considering the totality of evidence presented by the parties," the district court ruled that Career Counseling failed to present sufficient evidence that the more than 20,000 recipients without online fax services from the subpoenaed carriers were instead using stand-alone fax machines. *See* Class Certification Decision 23. As such, the court recognized that it would be left to make an individualized inquiry as to whether each recipient was using a stand-alone fax machine at the relevant time, rendering the class of stand-alone fax machine users "not ascertainable" and class certification "inappropriate." *Id.* at 23-24.

On appeal, Career Counseling contends that the district court should have accepted its method of identifying the stand-alone fax machine users, in that — although there is evidence that those recipients could have instead been using online fax services provided by someone other than the subpoenaed carriers — there is no evidence that any recipient was actually doing so. The existing evidence alone, however, refutes the premise of Career Counseling's identification method: that recipients who were not using online fax services from the subpoenaed carriers were necessarily using stand-alone fax machines. As such, we cannot say that the district court abused its discretion in ruling that Career Counseling failed to meet its burden of demonstrating the ascertainability of the class. And we thus are satisfied to affirm the court's denial of Career Counseling's request for class certification.[6]

6. In these circumstances, we need not consider alternative bases for affirmance raised by AmeriFactors on appeal, including that Career Counseling has not complied with the Rule 23(a) prerequisite of adequacy of representation and has not met the Rule 23(b)(3) requirements of predominance and superiority.

III.

Next, we address AmeriFactors's cross-appeal challenge to the district court's Summary Judgment Decision of January 2022, awarding summary judgment to Career Counseling on its individual TCPA claim. We review the Summary Judgment Decision de novo, viewing the facts in the light most favorable to AmeriFactors, as the non-moving party. *See Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 228 (4th Cir. 2022). Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Career Counseling's TCPA claim requires a showing that AmeriFactors "sen[t], to a telephone facsimile machine, an unsolicited advertisement." *See* 47 U.S.C. § 227(b)(1)(C). There has been no dispute that the June 2016 AmeriFactors fax was sent to a "telephone facsimile machine," as the evidence is that Career Counseling was using a stand-alone fax machine at the relevant time. *See* Summary Judgment Decision 4 & n.5, 10-11. There also has been no dispute that the fax was "unsolicited," *see id.* at 10-11, meaning "transmitted to any person without that person's prior express invitation or permission, in writing or otherwise," *see* 47 U.S.C. § 227(a)(5). Although AmeriFactors unsuccessfully argued in the district court that the fax does not constitute an "advertisement," *see* Summary Judgment Decision 11-14 — i.e., "any material advertising the commercial availability or quality of any property, goods, or services," *see* 47 U.S.C. § 227(a)(5) — it has abandoned that contention on appeal. *Cf. Carlton*

& Harris Chiropractic, Inc. v. PDR Network, LLC, 80 F.4th 466, 470-72 (4th Cir. 2023) (continuing litigation over whether fax constituted "advertisement" within meaning of TCPA).

What AmeriFactors argued in the district court that it continues to assert in this Court is that there is a genuine dispute of material fact as to whether it is liable as the "sender" of the fax. *See* Summary Judgment Decision 14-20. AmeriFactors relies for its argument on a declaratory ruling of the FCC that was issued by the Chief of the Consumer and Governmental Affairs Bureau in September 2020 in response to a petition filed by a non-party to these proceedings. *See Akin Gump Strauss Hauer & Feld LLP*, 35 F.C.C.R. 10424 (2020) (the "*Akin Gump* FCC Ruling"). The *Akin Gump* FCC Ruling explained that, by way of its rules, the FCC "define[s] the term 'sender' of a fax advertisement as 'the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.'" *Id.* at 10424 (quoting rule found at 47 C.F.R. § 64.1200(f)(11) as of January 8, 2024).

The *Akin Gump* FCC Ruling, however, sought to clarify liability in situations in which the "advertiser" utilized the services of a "fax broadcaster" to send a TCPA-violating fax advertisement on the advertiser's behalf. *See Akin Gump*, 35 F.C.C.R. at 10425. According to the *Akin Gump* FCC Ruling, "a fax broadcaster may be exclusively liable for TCPA violations where it engages in deception or fraud against the advertiser, such as

securing an advertiser's business by falsely representing that the broadcaster has consumer consent for certain faxes." *Id.* at 10426. That is, "the fax broadcaster, not the advertiser, is the sole 'sender' of a fax for the purposes of the TCPA when it engages in conduct such as fraud or deception against an advertiser if such conduct leaves the advertiser unable to control the fax campaign or prevent TCPA violations." *Id.* at 10427.

Invoking the *Akin Gump* FCC Ruling, AmeriFactors asserts that — although it was the advertiser in the June 2016 fax received by Career Counseling — it is not liable as the fax's "sender" because it was defrauded and deceived by a fax broadcaster it employed to disseminate the fax on its behalf. As proof of the fraud and deception it alleges, AmeriFactors points to the following evidence: that the June 2016 fax was AmeriFactors's first and only fax advertisement; that AmeriFactors engaged a company called AdMax as the fax broadcaster and relied upon AdMax's advice and expertise; that AdMax prepared the list of fax recipients, including Career Counseling; that AdMax knew that the TCPA prohibits sending unsolicited fax advertisements but failed to advise AmeriFactors of the illegality of the June 2016 fax; and that AdMax merely advised AmeriFactors to include language in the fax alerting the recipient how to opt out of receiving future faxes, leading AmeriFactors to believe that was all it needed to do to comply with the law. AmeriFactors maintains that the foregoing evidence demonstrates that AdMax made material misrepresentations that, pursuant to the *Akin Gump* FCC Ruling, relieve AmeriFactors of "sender" liability.

In response, Career Counseling contests both the applicability of the *Akin Gump* FCC Ruling and the sufficiency of AmeriFactors's proof of fraud and deception. Career Counseling highlights the lack of any evidence that AdMax affirmatively and falsely represented to AmeriFactors that the June 2016 fax was legal. Indeed, the record reflects that AmeriFactors never questioned AdMax about the general legality of sending the fax or AdMax's recommendation to include the opt-out language. Rather, AmeriFactors simply discussed with AdMax the services it would provide and the cost for those services, and then AmeriFactors instructed AdMax to disseminate the fax to the recipients on the AdMax-prepared list.

By its Summary Judgment Decision, the district court recognized the applicability of the *Akin Gump* FCC Ruling but rejected AmeriFactors's evidence as insufficient to "create an issue of material fact regarding whether [AdMax] made false statements of material fact." *See* Summary Judgment Decision 17-18. Specifically, the court concluded that AmeriFactors's evidence "does not establish how any statement made by [AdMax] was materially false." *Id.* at 18.

Assuming that the *Akin Gump* FCC Ruling is applicable — without unnecessarily assessing and deciding that question — we agree with the district court that there is insufficient evidence of any fraud and deception to place AmeriFactors's "sender" liability in dispute. AmeriFactors thus being liable for sending the June 2016 fax, we affirm the court's award of summary judgment to Career Counseling.

IV.

Pursuant to the foregoing, we affirm the district court's denial of Career Counseling's request for class certification, as well as the court's award of summary judgment to Career Counseling on its individual TCPA claim against AmeriFactors.

AFFIRMED

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION, FILED JULY 16, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

Civil Action No.: 3:16-cv-03013-JMC

CAREER COUNSELING, INC. D/B/A SNELLING STAFFING SERVICES, A SOUTH CAROLINA CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS,

Plaintiff,

v.

AMERIFACTORS FINANCIAL GROUP, LLC, AND JOHN DOES 1-5,

Defendants.

July 16, 2021, Decided; July 16, 2021, Filed

ORDER AND OPINION

Plaintiff Career Counseling, Inc. d/b/a Snelling Staffing Services, on behalf of itself and all others similarly situated, filed the instant putative class action seeking damages and injunctive relief from Defendants

Amerifactors Financial Group, LLC ("AFGL") and John Does 1-5 (collectively "Defendants") for alleged violations of the Telephone Consumer Protection Act ("TCPA") of 1991, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, and the regulations promulgated under the TCPA by the United States Federal Communications Commission ("FCC"). (ECF No. 70.)

This matter is before the court on Career Counseling's Motion for Class Certification, Motion to Appoint Class Counsel, and Motion to Appoint Class Representative pursuant to Rule 23 of the Federal Rules of Civil Procedure (ECF No. 197). Specifically, Career Counseling "requests that the [c]ourt certify [it]s proposed Class A, or, in the alternative, Class B, pursuant to Rule 23(a) and Rule 23(b)(3), appoint [Career Counseling] the class representative, and appoint [it]s counsel as class counsel pursuant to Rule 23(g)." (ECF No. 197 at 3.) AFGL opposes the Motions arguing that Career Counseling "fails to meet its burden to establish predominance or that its proposed class is ascertainable, as required under both Rule 23 and Fourth Circuit law" and "cannot demonstrate that it is an adequate or typical class representative, or that its proposed class counsel can meet their duty to the proposed class." (ECF No. 206 at 9, 10.) For the reasons set forth below, the court **DENIES** Career Counseling's Motion for Class Certification, and **DENIES AS MOOT** its Motion to Appoint Class Counsel and Motion to Appoint Class Representative. (ECF No. 197.)

Appendix B

I. RELEVANT BACKGROUND TO PENDING MOTIONS

A. The TCPA and the JFPA

The TCPA prohibits the faxing of unsolicited advertisements without "prior express invitation or permission" from the recipient. S. Rep. No. 102-178, at 12. Congress' primary purpose in passing the TCPA was to protect the privacy interests of residential telephone subscribers and the public from bearing the cost of unwanted advertising. *Id.* at 1; S. Rep. No. 109-76, at 3. Congress was expressly concerned because "[j]unk faxes create costs for consumers (paper and toner) and disrupt their fax operations." GAO@100, *Telecommunications: Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement*, https://www.gao.gov/products/gao-06-425 (last visited July 15, 2021).

In 1992, the FCC released its interpretation of the TCPA, which established an exception for unsolicited advertisement faxes ("junk faxes") between parties with an established business relationship ("EBR"). S. Rep. No. 109-76, at 2. The FCC relied on this interpretation until 2003, when it reevaluated and created a stricter standard for junk faxes. *Id.* at 3. Under this new standard, junk faxes could only be sent with prior express permission in the form of written consent from the receiver, and an EBR (which initially had no specified limit) could only be relied upon by the sender for eighteen (18) months after a purchase and three (3) months after an initial inquiry. *Id.* at 4-5.

After this change, many petitions from businesses requested that the FCC return to its previous interpretation of the TCPA, citing efficiency purposes and the enormous cost of compliance with the new interpretation. *Id.* at 4. This caused the FCC to order a stay on these new rules until 2005. *Id.*

In response, Congress passed the JFPA in 2005, codifying the EBR exception to the ban on unsolicited advertising faxes, allowing those with a business relationship to bypass the written consent rule. S. Rep. No. 109-76, at 1. The JFPA also requires that senders of junk faxes provide notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements.[1] *Id.*

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1. Testimony in the JFPA legislative history outlined concerns about the prior written consent requirement from the FCC. For example, National Association of Realtors Broker Dave Feeken testified that not only would a written consent requirement be costly and time-consuming for businesses, but it would also go against the legislative intent of the TCPA, as both the House and the Senate considered and rejected an express written consent requirement for calls and faxes. *Junk Fax Bill: Hearing on S. 714 Before Comm. on S. Commerce, Sci., & Tourism*, 109th Cong. (2005) (Test. of Dave Feeken, 2005 WL 853591 (Apr. 13, 2005)). News-Register Publishing Company President Jon E. Bladine pointed out that the signed consent leaves open the threat of litigation for every small business. *Id.* (Test. of Jon Bladine, 2005 WL 853593 (Apr. 13, 2005).) Bladine explained that fax numbers change, sometimes people misfile forms, and miscommunications between companies happen. *Id.* Not only that, but companies could use a fax in bad faith to sue another company, hoping they do not have the requisite consent form. *Id.* "[I]f we've messed up that time," he asks, "will we pay, even though we know – and the

As a result of the foregoing, the JFPA expressly prohibits the faxing of unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C). The JFPA 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." 47 U.S.C. § 227(a)(5). The JFPA creates a private right of action for a person or entity to sue a fax sender that sends an unsolicited advertisement and allows recovery of either actual monetary loss or $500.00 in damages, whichever is greater, for each violation. *Id.* at § 227(b)(3).

B. The Parties

Career Counseling is an employment staffing agency, which acts as a middleman between employers and prospective workers. (ECF No. 197-7 at 4/27:6-13.[2]) AFGL is an accounts receivable financing firm that engages in factoring. (ECF No. 206-2 at 74/4:17-19.) Factoring is a process in which AFGL purchases a business's accounts receivable of unpaid invoices for a discounted price with the intention of collecting the full value of the unpaid invoices at a later date. (ECF No. 206-2 at 74/4:17-23; ECF

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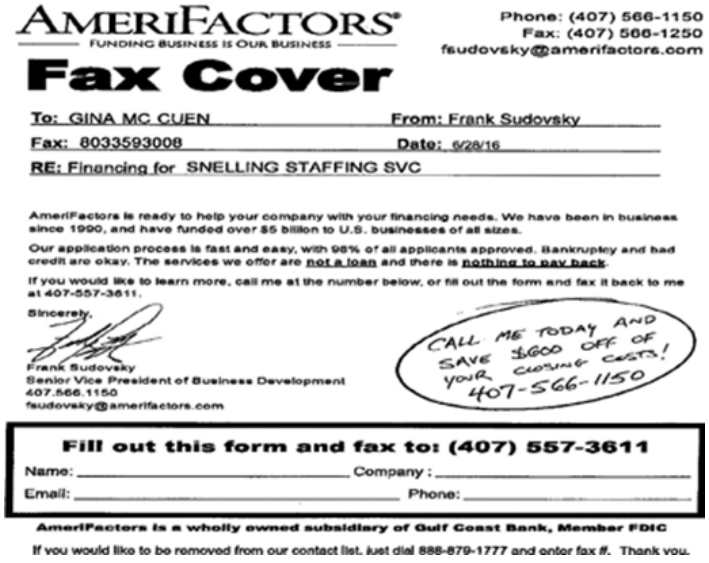
recipient in all honesty knows – the issue isn't about the fax at all?" *Id.*

2. The parties filed on the electronic docket condensed transcripts with 4 pages of testimony on each page. For citation purposes, the number before the slash is the ECF page number and the number after the slash is the transcript page number.

No. 197-4 at 4/6:12-7:4.) In June of 2016, AFGL became interested in marketing by fax and, as a result, contracted with AdMax, a fax marketer. (ECF No. 197-4 at 4/7:5-25.)

On or about June 28, 2016, Career Counseling received the following unsolicited fax:



AMERIFACTORS®
FUNDING BUSINESS IS OUR BUSINESS

Phone: (407) 566-1150
Fax: (407) 566-1250
fsudovsky@amerifactors.com

Fax Cover

To: GINA MC CUEN — From: Frank Sudovsky
Fax: 8033593008 — Date: 6/28/16
RE: Financing for SNELLING STAFFING SVC

AmeriFactors is ready to help your company with your financing needs. We have been in business since 1990, and have funded over $5 billion to U.S. businesses of all sizes.

Our application process is fast and easy, with 98% of all applicants approved. Bankruptcy and bad credit are okay. The services we offer are not a loan and there is nothing to pay back.

If you would like to learn more, call me at the number below, or fill out the form and fax it back to me at 407-557-3611.

Sincerely,

Frank Sudovsky
Senior Vice President of Business Development
407.566.1150
fsudovsky@amerifactors.com

CALL ME TODAY AND SAVE $600 OFF OF YOUR CLOSING COSTS! 407-566-1150

Fill out this form and fax to: (407) 557-3611

Name: _____ Company : _____
Email: _____ Phone: _____

AmeriFactors is a wholly owned subsidiary of Gulf Coast Bank, Member FDIC

If you would like to be removed from our contact list, just dial 888-879-1777 and enter fax #. Thank you.

(ECF Nos. 70 at 3 ¶ 13, 70-1 at 2.) Career Counseling asserts that similar unsolicited faxes were sent by or on behalf of AFGL to 58,945 other recipients. (*E.g.*, ECF No. 197-13 at 15 ¶¶ 43, 44.)

On September 2, 2016, Career Counseling filed a putative Class Action Complaint in this court alleging violation of the TCPA. (ECF No. 1 at 8 ¶ 27-13 ¶ 36.) On October 28, 2016, AFGL filed a Motion to Dismiss.

(ECF No. 29.) After the parties responded and replied to the Motion to Dismiss (ECF Nos. 43, 47), the court entered an Order that granted AFGL's Motion to Dismiss pursuant to Rule 12(b)(1) and dismissed the Class Action Complaint without prejudice. (ECF No. 61 at 10.) After receiving leave from the court (*see* ECF No. 67), Career Counseling filed a First Amended Class Action Complaint on November 28, 2017, alleging revised class claims for violation of the TCPA. (*See* ECF No. 70.) AFGL then filed a Motion to Dismiss (ECF No. 72) on December 21, 2017, and a Motion to Stay Litigation Pending Resolution of Petition Before the FCC (ECF No. 76) on February 2, 2018.[3] On September 28, 2018, the court granted the stay, but denied the Motion to Dismiss with leave to refile. (ECF No. 88.) The court subsequently extended the stay twice. (ECF Nos. 92, 96.)

In response to the petition by AFGL asking the FCC "to clarify that faxes sent to 'online fax services' are not faxes sent to 'telephone facsimile machines,'" the Consumer and Government Affairs Bureau[4] ("CGAB")

3. AFGL hoped to stay the matter until (1) the court ruled on the pending Motion to Dismiss and (2) the FCC took final agency action on AFGL's pending petition for declaratory relief. (ECF No. 76 at 1.)

4. "The Consumer and Governmental Affairs Bureau develops and implements the FCC's consumer policies and serves as the agency's connection to the American consumer." *FCC*, https://www.fcc.gov/consumer-governmental-affairs (last visited June 25, 2021). The Consumer and Governmental Affairs Bureau "serve[s] as the public face of the commission through outreach and education, as well as through our consumer center, which is

issued a declaratory ruling on December 9, 2019, finding that an online fax service that receives faxes "sent as email over the Internet" is not protected by the TCPA. *See Amerifactors Fin. Grp., LLC*, CG Docket Nos. 02-278, 05-338, DA 19-1247, 2019 WL 6712128 (CGAB Dec. 9, 2019) (Pet. for Expedited Declaratory Ruling). Specifically, the CGAB found in relevant part:

> By this declaratory ruling, we make clear that an online fax service that effectively receives faxes 'sent as an email over the internet' and is not itself 'equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper' is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition.

Amerifactors Fin. Grp., LLC, 30 FCC Rcd 8598, 2019 WL 6712128, at *1.

The court lifted the stay on January 8, 2020, but stayed the case again on April 16, 2020, after being informed by AFGL that it had sent a Notice of Constitutional Challenge (ECF No. 120) to the Attorney General of the United States pursuant to Rule 5.1(a) of the Federal Rules of Civil Procedure drawing into question the constitutionality of the TCPA, as amended by the JFPA. On May 18, 2020, the Government filed a response to AFGL's Notice of

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responsible for responding to consumer inquiries and complaints." *Id.* at https://www.fcc.gov/general/consumer-and-governmental-affairs-bureau (last visited June 25, 2021).

Constitutional Challenge asserting that "intervention [wa]s premature prior to Defendants' filing[] a motion to dismiss on constitutional grounds." (ECF No. 126 at 2.)

On July 15, 2020, AFGL filed a Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (ECF No. 137.) After considering the parties extensive briefing (*see* ECF Nos. 139, 147, 164, 165, 166, 169, 170), the court denied AFGL's Motion to Dismiss on December 22, 2020. (ECF No. 171.) Thereafter, AFGL answered the Amended Complaint and the parties engaged in extensive discovery regarding the extent to which the facsimile at issue was sent to the putative class.

On March 16, 2021, Career Counseling filed the instant Rule 23 Motions. (ECF No. 197.) On April 15, 2021, AFGL filed a Memorandum of Law in Opposition to Motion for Class Certification, to which Career Counseling filed a Reply in Support of Its Motion for Class Certification on April 30, 2021. (ECF Nos. 206, 211.) The court heard argument from the parties as to their respective positions at a hearing on May 19, 2021. (ECF No. 217.)

II. JURISDICTION

This court has jurisdiction over Career Counseling's claim alleging violation of the TCPA via 28 U.S.C. § 1331, as it arises under the laws of the United States, and also via 47 U.S.C. § 227(b)(3), which empowers actions under the TCPA "in an appropriate court of th[e] State. . . ." *Id. See also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 386-87, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) ("Nothing

in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal-question jurisdiction U.S. district courts ordinarily have under 28 U.S.C. § 1331.").

III. LEGAL STANDARD

A. Class Certification

Rule 23(a) provides that certification is only proper 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). In addition to the foregoing requirements, the United States Court of Appeals for the Fourth Circuit has held that a class cannot be certified if the class members are not identifiable or ascertainable, stating " . . . Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)); *see also Krakauer v. Dish Network, LLC*, 925 F.3d 643, 655 (4th Cir. 2019) ("Under this principle, sometimes called 'ascertainability,' 'a class cannot be certified unless a court can readily identify the class members in reference to objective criteria.'" (quoting *EQT Prod. Co.*, 764 F.3d at 358)).

Once the Rule 23(a) prerequisites are met, the proposed class must still satisfy one (1) of three (3) additional requirements for certification under Rule 23(b). *See EQT Prod. Co.*, 764 F.3d at 357 (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003)). Career Counseling seeks certification under Rule 23(b)(3); therefore, it must show that "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 of fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b) (emphasis added). "The predominance requirement is similar to but 'more stringent' than the commonality requirement of Rule 23(a)." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (citing *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001)).

A party must produce enough evidence to demonstrate that class certification is in fact warranted. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). If one of the requirements necessary for class certification is not met, the effort to certify a class must fail. *See Clark v. Experian Information Solutions, Inc.*, 2001 U.S. Dist. LEXIS 20024, 2001 WL 1946329, at *4 (D.S.C. March 19, 2001) (citing *Harriston v. Chicago Tribune Co.*, 992 F.2d 697 (7th Cir. 1993)). The court must go beyond the pleadings, take a "'close look' at relevant matters," conduct "a 'rigorous analysis' of such matters," and make "'findings' that the requirements of Rule 23 have been satisfied." *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (internal and external

citations omitted). While the court should not "include consideration of whether the proposed class is likely to prevail ultimately on the merits," *id.* at 366 (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)), "sometimes it may be necessary for the district court to probe behind the pleadings before coming to rest on the certification question." *Id.* (*citing Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

B. Appointment of Class Representative

"[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)). To accomplish this task, the court should appoint as class representative the person or persons who are "most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i). *See also* Fed. R. Civ. P. 23(a)(4) (class representative must be one who can "fairly and adequately protect the interests of the class").

C. Appointment of Class Counsel

Rule 23 provides that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). "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.

Fed. R. Civ. P. 23(g)(1). Additionally, "[c]lass counsel must fairly and adequately represent the interests of the class." *Id.* at 23(g)(4).

IV. ANALYSIS

A. The Parties' Arguments

1. Motion for Class Certification

Pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, Career Counseling moves the court to certify the following proposed class:

Appendix B

> All persons or entities who were successfully sent a fax, on or about June 24 and 28, 2016, stating: "AmeriFactors—Funding Is Our Business," and "AmeriFactors is ready to help your company with your financing needs."

(ECF No. 197 at 1.) In the alternative, "if the [c]ourt finds it necessary to distinguish between faxes received on a 'stand-alone' fax machine versus faxes received via an 'online fax service,'" Career Counseling moves for certification of a class defined as follows:

> All persons or entities who were successfully sent a fax to their stand-alone fax machine, on or about June 24 and 28, 2016, stating: "Amerifactors—Funding Is Our Business," and "Amerifactors is ready to help your company with your financing needs."

(*Id.* at 2.)

In support of its Motion, Career Counseling asserts that it satisfies Rule 23(a)'s criteria because (1) fax logs demonstrate that AFGL successfully sent faxes; (2) there are six (6) questions that are common to all class member's claims[5]; (3) its claims are identical and based

5. Career Counseling specified that the six (6) questions are as follows: "whether the fax is an advertisement, whether AFGL is the sender, whether AFGL can prove its affirmative defenses of 'prior express invitation or permission' or 'established business relationship,' whether the fax was sent from a telephone facsimile machine, computer, or other device, to telephone facsimile

on the same legal theory as the other class members; and (4) it is an adequate class representative because it "has done everything it believes necessary to protect the class" and "[t]here has been no showing of either an actual or potential conflict between Plaintiff and the members of the proposed Classes." (ECF No. 197-1 at 18-20.) Career Counseling further asserts that this case satisfies one (1) of Rule 23(b)'s categories because common questions regarding AFGL's transmission of an unsolicited fax advertisement predominate over any individual issues and caselaw clearly supports that proposition that a class action is "a superior method of adjudicating mass TCPA violations." (*Id.* at 22 (citing *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) ("[C]lass certification is normal" in TCPA cases "because the main questions, such as whether a given fax is an advertisement, are common to all recipients.")).) In this regard, Career Counseling asserts that "class members have little economic incentive to sue individually, given that each class member would be limited to $500 to $1,500 per fax, and the TCPA does not provide for shifting of attorney fees." (*Id.* at 23.)

AFGL argues that class treatment is inappropriate because in order "[t]o determine whether each Fax recipient received the Fax on a 'telephone facsimile machine,' as required by the TCPA," the court will "have to conduct an individualized inquiry into the type

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machines, whether the *Amerifactors* and *Ryerson* Orders are entitled to *Skidmore* deference, and whether those Orders can be applied retroactively, can all be resolved at once with common evidence." (ECF No. 197-1 at 19.)

of equipment on which the recipient received the Fax." (ECF No. 206 at 41.) AFGL asserts that fax logs do not "show which faxes were sent to an online or email-based facsimile service versus which faxes were sent to a traditional fax machine." (*Id.* (citing ECF No. 206-2 at 117 ¶ 53).) AFGL argues this inquiry "will overwhelm any other purportedly common issues." (*Id.* at 42.) Moreover, "individualized inquiries are required to determine the manner in which a recipient received the Fax." (*Id.* at 45.)

In addition to the foregoing, AFGL argues that Career Counseling's Motion for Certification should be denied because the court lacks both general jurisdiction and/or personal jurisdiction over AFGL because it is a non-resident of South Carolina and there is no connection between the putative class members' claims and forum. (*Id.* at 47.)

2. Motion to Appoint Class Representative

Career Counseling contends that it "should be appointed class representative, as it has no conflicts and will actively and adequately prosecute this action." (ECF No. 197 at 2.)

AFGL opposes the appointment of Career Counseling as class representative. AFGL argues that Career Counseling is an inadequate representative because its actions during discovery demonstrate that it lacks knowledge about the case and is a pawn for its counsel. (*See* ECF No. 206 at 21-24.) To this point, AFGL asserts that Career Counseling's "corporate representative repeatedly

referred to legal counsel in response to questions about the most basic aspects of this litigation, including the discovery investigation, settlement negotiations and its obligations as class representative." (*Id.* at 24 (citing, *e.g.*, *Physicians Healthsource Inc. v. Allscripts Health Sols. Inc.*, 254 F. Supp. 3d 1007, 1023 (N.D. Ill. 2017) ("A plaintiff who seeks to be the class representative cannot simply shift its duties to class counsel.")).) AFGL further asserts that Career Counseling's appointment to class representative could negatively affect any class recovery because Career Counseling "is a repeat TCPA plaintiff and has trolled for TCPA violations in the fax context – admitting that it provided at least 100 faxes to its counsel for review" while not attempting "to opt out of receiving any further faxes." (*Id.* at 25.) Finally, AFGL argues that Career Counseling should not be appointed class representative because its claims are "not typical because it received the Fax on a traditional fax machine, unlike numerous other class members." (*Id.* at 26.)

3. Motion to Appoint Class Counsel

Career Counseling asserts that "the law firms of McGowan, Hood & Felder, and Anderson + Wanca, are highly experienced in class-action litigation and, in particular, TCPA class-action litigation, and should be appointed class counsel under Rule 23(g)." (ECF No. 197 at 2.)

AFGL opposes the appointment of Career Counseling's attorneys as class counsel. More specifically, AFGL argues that the law firm of Anderson and Wanca is

inadequate under Rule 23(g) because it has previously been found to have engaged in ethical impropriety by recording telephone conversations in violation of state law. (ECF No. 206 at 20, 27 (citing ECF No. 206-3).) AFGL next asserts that Anderson and Wanca has a conflict with one (1) putative class member, American HomePatient, Inc. ("AHI"), because the firm has brought a TCPA claim against AHI in another case. (*Id.* at 20 (citing *Presswood, D.C., P.C. v. Am. HomePatient, Inc.*, No. 4:17-cv-01977-SNLJ, ECF No. 1-1 (E.D. Mo. July 14, 2017)).) Finally, AFGL argues that Career Counseling's attorneys throughout the litigation of this matter have demonstrated an inability to efficiently handle class-based discovery. (*Id.* at 28.)

4. Relevance of the CGAB's Ruling

The parties expressly disagree regarding the relevance of the CGAB's declaratory ruling. Career Counseling appears to contend that the court's December 22, 2020 Order makes the declaratory ruling inapposite. (*See* ECF No. 197-1 at 25.) However, even if this is not the case, Career Counseling asserts that the CGAB's declaratory ruling is an interpretive ruling and under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), and Fourth Circuit law is "entitled to respect only to the extent it has the power to persuade." (*Id.* at 27 (quoting *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020)).) Ultimately, Career Counseling asserts that the CGAB's declaratory ruling has "no power to persuade and [is] entitled to no deference." (*Id.*)

AFGL counters arguing that the court is bound to defer to the CGAB's ruling pursuant to the Hobbs Act, 28 U.S.C. § 2342, and, alternatively, should accept the ruling and defer to it as required by *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). (ECF No. 206 at 30.) However, even if the court agrees with Career Counseling that the declaratory ruling is only entitled to *Skidmore* deference, AFGL argues that the CGAB's ruling is persuasive because it (1) came from the expert at interpreting the TCPA, (2) gives appropriate meaning to the TCPA's statutory language, and (3) "is consistent with both prior and later pronouncements." (*Id.* at 35.)

B. The Court's Review

1. Relevance of the CGAB's Ruling

On December 9, 2019, the CGAB issued a declaratory ruling effectively finding that faxes sent to 'online fax services' are not faxes sent to 'telephone facsimile machines.'" *See Amerifactors Fin. Grp.*, 30 FCC Rcd 8598, 2019 WL 6712128. The court observes that the parties' instant class certification dispute requires it to first consider whether the CGAB's ruling is entitled to Hobbs Act deference.[6] To this point, "[i]f the Hobbs Act

6. The Hobbs Act states that the court of appeals has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission" made reviewable by 47 U.S.C. § 402(a). *See* 28 U.S.C. § 2342. 47 U.S.C. § 402(a) explains that any "proceeding to enjoin, set aside, annul, or suspend any

applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations." *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015). The Hobbs Act is applicable if a ruling is (1) of the FCC, (2) final, and (3) legislative instead of interpretive. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055-56, 204 L. Ed. 2d 433 (2019) (citing 28 U.S.C. § 2342(1)).

As to the first element, the court finds that the CGAB's ruling is of the FCC. The CGAB is a bureau that "acts for the [Federal Communications] Commission under delegated authority" in matters of "adjudication and rulemaking." 47 C.F.R. § 0.141. The Fourth Circuit has clarified that "[w]hen a federal agency delegates its decision-making authority to a subdivision and Congress has expressly permitted such delegation by statute, the decision of the subdivision is entitled to the same degree of deference as if it were made by the agency itself." *MCImetro Access Transmission Servs. Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 880 (4th Cir. 2003). The appropriate authority has been delegated to the CGAB

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order of the Commission" may be brought under the manner prescribed in 28 U.S.C. § 158 except for those listed in 28 U.S.C. § 402(b). 28 U.S.C. § 402(b) further lays out a list of exceptions to this rule whereby decisions from the Commission may be appealed directly to the Court of Appeals for the District of Columbia, but none of those exceptions apply in this case. Therefore, the district courts are required to comply with such orders unless the order is reversed by the FCC or otherwise adjudicated by the court of appeals.

both by the FCC and by Congress in statute. *See* 47 C.F.R. § 0.141. Therefore, the CGAB acts as a delegated authority under the FCC, and any order from the CGAB should be treated as if it were from the FCC.

Next, the court observes that the CGAB's ruling is legislative, instead of interpretive. A legislative order is issued "by an agency pursuant to statutory authority" and has "force and effect of law" behind it. *PDR Network*, 139 S. Ct. at 2055. An interpretive ruling, on the other hand, does not have the force and effect of law as it merely "advis[es] the public of the agency's construction of the statutes and rules which it administers." *Id.* To become a legislative rule with the full force and effect of law, a rule must also go through the three step "notice-and-comment rulemaking" process under the Administrative Procedure Act, 5 U.S.C. § 553. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015). This process requires the agency making the legislative rule to (1) issue a "[g]eneral notice of proposed rule making," (2) give interested parties the opportunity to participate in the rule making by submitting written data and arguments, and (3) include "a concise general statement of [its] basis and purpose" in the text of the final rule. *Id.* at 96.

The FCC has statutory authority to "promulgate binding legal rules" to carry out the Communications Act of 1934 (which includes the TCPA). *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2006). That authority was delegated to the CGAB by

the FCC and Congress. As for three (3) step notice and comment rulemaking procedure, there does not seem to be disagreement between the parties on steps two (2) and three (3). To fulfill step two, the CGAB issued a public notice seeking comment on the AFGL's petition for declaratory ruling under the TCPA. (*See* ECF No. 98-1 at 7.) Several entities and individuals filed their comments about the AFGL's petition, including Career Counseling, its proposed expert witness, and three (3) others opposing AFGL's petition. *Id.* (*See* ECF No. 206 at 23.) To fulfill step three (3), the CGAB wrote an introduction to the declaratory ruling, outlining their purposes of answering AFGL's petition and clarifying the language of the TCPA. (*See* ECF No. 98-1 at 1-3.)

The parties, however, disagree on whether the CGAB issued a general notice of proposed rulemaking to fulfill step one (1). Career Counseling argues that the CGAB's public notice for comment on the AFGL's petition "does not even come close to meeting the APA requirements" and that "no rule was ever published in the Federal Register or codified in the FCC's regulations." (ECF No. 211 at 17.) While the Administrative Procedure Act, 5 U.S.C. § 553, generally requires a notice of proposed rulemaking be published in the Federal Register, it makes an exception when "persons subject [to the proposed rule] . . . are either personally served or otherwise have actual notice thereof in accordance with law." *See id.* This "actual notice" must include (1) the time, place, and nature of public rule making proceedings, (2) reference to the legal authority under which the rule is proposed, and (3) the terms of the proposed rule or a description of the subjects

and issues involved. *Id.* The public notice issued by the CGAB includes all of these requirements. *See Consumer and Governmental Affairs Bureau Seeks Comment on Amerifactors Fin. Grp., LLC Petition for Expedited Declaratory Ruling Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 5667 (2017). Therefore, the public notice did not need to be published in the Federal Register to meet the APA requirements. *See* 5 U.S.C. § 553. Additionally, Career Counseling filed a comment against AFGL's petition in response to the public notice, meaning that Career Counseling did have knowledge of the proceedings and a chance to submit their opinion for consideration. (ECF No. 98-1 at 7.) This means that the CGAB did fulfill step one (1) of the notice and comment process, adequately giving public notice to all parties. Therefore, because the CGAB's declaratory ruling was issued by "an agency pursuant to statutory authority" and has "force and effect of law" from completing the three (3) step notice and comment rulemaking process, the ruling is legislative and not interpretive.[7] *PDR Network*, 139 S. Ct. at 2055.[8]

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7. Career Counseling's arguments about deference under *Skidmore* assume that the CGAB's ruling is interpretive and not legislative. (*See* ECF 197-1 at 19-20). As the court finds that the ruling is legislative, this analysis does not apply.

8. Career Counseling points out that the United States Supreme Court ruled in *PDR Network* that a different FCC ruling was interpretive instead of legislative. However, in that case, both parties conceded that the rule was interpretive, negating the need for extensive analysis. Additionally, the Supreme Court in *PDR Network* relied heavily on the absence of a notice and comment

Lastly, the court finds that the CGAB's declaratory ruling is final. Under 47 C.F.R. § 1.102(1), non-hearing or interlocutory actions "taken pursuant to delegated authority" will be "effective upon release of the document containing the full text of such action" unless the designating authority orders otherwise. *Id.* Career Counseling has filed a petition for reconsideration of the CGAB's declaratory ruling (*see* ECF No. 139-2), and the FCC has the discretion to "stay the effect of its action pending disposition of the petition for reconsideration." 47 C.F.R. § 1.102(2). Even though the FCC has the authority to stay the CGAB's ruling, it has not yet done so and neither has Career Counseling specifically requested a stay on the ruling while the appeal is being processed. Therefore, it stands to reason that under 47 C.F.R. § 1.102(1), the CGAB's ruling is in effect until the FCC says otherwise in response to an appeal.[9]

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period, whereas the rule in question in this case followed a much different process and did have a notice and comment period initiated by a public notice for comment on the issue. Therefore, the ruling that the relevant sections of the FCC rule was interpretive in *PDR Network* does not contradict the legislative status of the CGAB's ruling in this case.

9. Career Counseling argues that because a bureau decision must be appealed to the FCC before it can be appealed in the courts, citing 47 U.S.C. § 155(c)(7), and that this is a condition precedent for judicial review under the Hobbs Act, the order is not final. (*See* ECF No. 211 at 17.) However, there is no legal precedent to suggest this concern outweighs the clearly defined statutory process. *See* 47 U.S.C. § 155.

As a result of the foregoing, the court is required to find that the CGAB's declaratory ruling is entitled to Hobbs Act deference. If there is a putative class in this case, it will not have class members who received a fax from AFGL by means of an online fax service.

2. Motion for Class Certification

a. Federal Rule of Civil Procedure 23(a)

Upon consideration, the court is persuaded that Career Counseling satisfies Rule 23(a)'s enumerated requirements of "numerosity," "commonality," "typicality," and "adequacy." *See* Fed. R. Civ. P. 23(a). More specifically, the court observes that numerosity is satisfied because there are an estimated 20,989 members in the alternative Class B, who allegedly received faxes to their stand-alone fax machines in violation of the TCPA, as amended by the JFPA. (ECF No. 197-10 at 5 ¶ 13.) Plainly, such a large number makes joinder impracticable.

Second, commonality is satisfied because this factor of Rule 23(a) "requires the plaintiff to demonstrate that the putative class members 'have suffered the same injury.'" *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 417 (E.D. Va. 2016) (citation omitted). The court is persuaded that Career Counseling's general claim regarding its receipt of an unsolicited fax to a stand-alone fax machine is not different from the claims of the absent class members.

Third, typicality, which is similar to commonality, is satisfied here because Career Counseling and the putative

class have an interest in prevailing in similar legal claims. *Nolan v. Reliant Equity Partners, LLC*, 08-cv-062, 2009 U.S. Dist. LEXIS 69765, 2009 WL 2461008, at *3 (N.D. W. Va. Aug. 10, 2009). All class members, including Career Counseling, must eventually establish that they received unsolicited faxes from AFGL to a stand-alone fax machine.

Fourth, adequacy of representation is satisfied here. Despite AFGL's protestations to the contrary, Career Counseling appears to be capable of fairly and adequately representing the interests of the putative class members who received a fax to a stand-alone fax machine.

However, implicit within Rule 23 is the "requirement that the members of a proposed class be 'readily identifiable.'" *Krakauer*, 925 F.3d at 655 (quoting *EQT Prod. Co.*, 764 F.3d at 358). In other words, members of a class must be ascertainable. This does not mean every member of the class needs to be identified at the time of certification; rather, that there must be a "administratively feasible [way] for the court to determine whether a particular individual is a member" at some point. *Id.* at 658. The burden is on the plaintiff as the party moving to certify the class.

In this case, Career Counseling must prove that a class of all persons or entities who were successfully sent the fax in question to a stand-alone fax machine is ascertainable. (ECF No. 197-1 at 1.) To accomplish this task, Career Counseling started with the 58,944 numbers to which the fax in question was sent. (*Id* at 5.) From there, Career Counseling issued subpoenas to Local Number

Portability Administrator of the Number Portability Administrative Center to identify all phone carriers for all phone numbers on the list. (ECF No. 197-10 at 1.) Next, they used the responses to subpoena each identified phone carrier to determine whether the subscriber of each phone number was utilizing "online fax services" on the date of the faxing.[10] (*Id.*) Based on the replies to their subpoenas, Career Counseling asserts the following:

1. As of March 16, 2021, 20,989 numbers on the original list of numbers that were sent a fax were not provided an online fax service from their phone carrier (*id.* at 4); and

2. As of March 16, 2021, 206 numbers on the original list of numbers that were sent a fax were provided an online fax service from their phone carrier. (*Id.*)

In this regard, Career Counseling argues that at least 20,000 numbers were not using an online fax service from their phone carrier at the time the faxes were sent "and thus received the Fax on a stand[-]alone fax machine." (ECF No. 211 at 22.) Therefore, according to Career Counseling, the alternative Class B of at least 20,989 members is ascertainable.

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10. The phone carrier subpoenas asked two questions of the phone carriers about each number. First, did the carrier provide an online fax service to that telephone number. Second, can the carrier provide the names and addresses for each number. (*See* ECF No. 197-10.)

Appendix B

In *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 471 (6th Cir. 2017), the Sixth Circuit opined that "where fax logs[11] have existed listing each successful recipient by fax number, . . . such a 'record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement.'" *Id.* (quoting *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014)). Referencing *Sandusky* and its progeny, Career Counseling asserts that its proposed Class B is ascertainable because it presented fax logs in support of its Motion for Class Certification containing "the list of the names, addresses, and fax numbers" to the "stand-alone fax machine recipients."[12] (ECF No. 197-1 at 24-25.) The following are exemplars of the fax logs relied on by Career Counseling:

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11. For a document to operate as a fax log, it should provide "the date, time, number of pages, destination fax number, and whether the transmission was successful." FaxAuthority, *What is a Fax Log*?, https://faxauthority.com/glossary/fax-log/ (last visited July 13, 2021).

12. There does not appear to be an on point Fourth Circuit opinion as to this issue. This court is not convinced that the Fourth Circuit would agree with the Sixth Circuit's position that a fax log fulfills the ascertainability requirement. Ascertainability in the Sixth Circuit is an implied requirement for Rule 23(b)(3) classes (*see Sandusky*, 863 F.3d at 466) while ascertainability in the Fourth Circuit is a threshold requirement of all Rule 23 classes. *See EQT Prod. Co.*, 764 F.3d 347 at 358. To this point, the Fifth Circuit has found that even with a fax log, the individual inquiry into each recipient on the list made class certification inappropriate. *See Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008).

Job Sequence	Job Name	Date (UTC)	Fax Number	Pages Sent Customer	Result
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157396744	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157396862	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157230853	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157231515	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157232160	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157210751	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157211101	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157219377	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157028535	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157030139	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2156998862	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157075141	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157082427	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157129099	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157237700	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157238859	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157250287	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157233571	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157390990	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157393428	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157399515	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157415887	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157284227	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157322354	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157443456	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157443787	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157445717	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157475720	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157482768	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157503010	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016 .	2157430105	1	Sent

BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157327479	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157353407	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157515735	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157519388	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157437066	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157572575	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157855645	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157855847	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157856030	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157856151	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157856545	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157856644	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157577024	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157638118	1	Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	.	2157638218	1	Sent

EXHIBIT 1
Sorted by Fax Number

	Fax Number	Faxes		Fax Number	Faxes		Fax Number	Faxes		Fax Number	Faxes		Fax Number	Faxes		Fax Number	Faxes
1.	201-217-0082	1	**72.**	201-440-1108	1	**143.**	201-623-0992	1	**214.**	201-896-2795	1	**285.**	202-315-3292	1	**356.**	203-226-9818	1
2.	201-217-4625	1	**73.**	201-440-1455	1	**144.**	201-641-6413	1	**215.**	201-902-9926	1	**286.**	202-315-3655	1	**357.**	203-230-0453	1
3.	201-221-8641	1	**74.**	201-440-4956	1	**145.**	201-641-8088	1	**216.**	201-909-0976	1	**287.**	202-331-9348	1	**358.**	203-230-8122	1
4.	201-223-4607	1	**75.**	201-444-7140	1	**146.**	201-651-1320	1	**217.**	201-909-8521	1	**288.**	202-337-5880	1	**359.**	203-230-9971	1
5.	201-225-7311	1	**76.**	201-444-6148	1	**147.**	201-656-9964	1	**218.**	201-930-0099	1	**289.**	202-342-6500	1	**360.**	203-234-7126	1
6.	201-225-7312	1	**77.**	201-444-6685	1	**148.**	201-659-7970	1	**219.**	201-930-1883	1	**290.**	202-362-9375	1	**361.**	203-234-8090	1
7.	201-246-9290	1	**78.**	201-444-9732	1	**149.**	201-662-0912	1	**220.**	201-931-1800	1	**291.**	202-387-3292	1	**362.**	203-235-0244	1
8.	201-251-1221	1	**79.**	201-445-2810	1	**150.**	201-662-1967	1	**221.**	201-933-0484	1	**292.**	202-387-7669	1	**363.**	203-235-1496	1
9.	201-257-8955	1	**80.**	201-445-8575	1	**151.**	201-666-4661	1	**222.**	201-933-0968	1	**293.**	202-393-4517	1	**364.**	203-235-5625	1
10.	201-261-3040	1	**81.**	201-445-8958	1	**152.**	201-670-7789	1	**223.**	201-933-8990	1	**294.**	202-393-4836	1	**365.**	203-237-5391	1
11.	201-261-7339	1	**82.**	201-445-9811	1	**153.**	201-670-8707	1	**224.**	201-933-9574	1	**295.**	202-393-5541	1	**366.**	203-238-0738	1
12.	201-262-2550	1	**83.**	201-447-1750	1	**154.**	201-692-0179	1	**225.**	201-934-6488	1	**296.**	202-398-8595	1	**367.**	203-238-1314	1
13.	201-262-3543	1	**84.**	201-447-6932	1	**155.**	201-712-7019	1	**226.**	201-934-8266	1	**297.**	202-408-1030	1	**368.**	203-238-2444	1

14.	201-262-7640	1	**85.**	201-451-5697	1	**156.**	201-714-9550	1	**227.**	201-935-5223	1	**298.**	202-429-2852	1	**369.**	203-239-1192	1
15.	201-265-4853	1	**86.**	201-451-5712	1	**157.**	201-722-9630	1	**228.**	201-935-5333	1	**299.**	202-429-8717	1	**370.**	203-239-1363	1
16.	201-272-1730	1	**87.**	201-451-7168	1	**158.**	201-767-0435	1	**229.**	201-935-5961	1	**300.**	202-434-8033	1	**371.**	203-239-4454	1
17.	201-288-3026	1	**88.**	201-457-1811	1	**159.**	201-767-3608	1	**230.**	201-939-0799	1	**301.**	202-452-0910	1	**372.**	203-239-5235	1
18.	201-288-5542	1	**89.**	201-460-1554	1	**160.**	201-767-6804	1	**231.**	201-939-1061	1	**302.**	202-457-8095	1	**373.**	203-239-7569	1
19.	201-288-7664	1	**90.**	201-460-3509	1	**161.**	201-767-9688	1	**232.**	201-939-1934	1	**303.**	202-463-0157	1	**374.**	203-239-9612	1
20.	201-288-7887	1	**91.**	201-460-7866	1	**162.**	201-768-0494	1	**233.**	201-939-4180	1	**304.**	202-463-0350	1	**375.**	203-245-4813	1
21.	201-301-9169	1	**92.**	201-462-4715	1	**163.**	201-768-6999	1	**234.**	201-939-4503	1	**305.**	202-463-8113	1	**376.**	203-245-9704	1
22.	201-302-9350	1	**93.**	201-469-0555	1	**164.**	201-768-7531	1	**235.**	201-939-4903	1	**306.**	202-466-5630	1	**377.**	203-248-3182	1
23.	201-307-0111	1	**94.**	201-475-3526	1	**165.**	201-784-1116	1	**236.**	201-939-8038	1	**307.**	202-466-6167	1	**378.**	203-248-6580	1
24.	201-307-0878	1	**95.**	201-475-9304	1	**166.**	201-784-9710	1	**237.**	201-939-8276	1	**308.**	202-479-0019	1	**379.**	203-248-7045	1
25.	201-313-0751	1	**96.**	201-478-5650	1	**167.**	201-791-4995	1	**238.**	201-941-8253	1	**309.**	202-483-7549	1	**380.**	203-250-6066	1
26.	201-313-5671	1	**97.**	201-487-0330	1	**168.**	201-791-8171	1	**239.**	201-941-8552	1	**310.**	202-488-1122	1	**381.**	203-250-6836	1
27.	201-313-7233	1	**98.**	201-487-0371	1	**169.**	201-794-2338	1	**240.**	201-941-8681	1	**311.**	202-526-0370	1	**382.**	203-250-7199	1
28.	201-327-1129	1	**99.**	201-487-2481	1	**170.**	201-794-5165	1	**241.**	201-941-9399	1	**312.**	202-529-2996	1	**383.**	203-250-8503	1
29.	201-327-7824	1	**100.**	201-487-3138	1	**171.**	201-794-7034	1	**242.**	201-943-4234	1	**313.**	202-541-9861	1	**384.**	203-255-9114	1
30.	201-329-6272	1	**101.**	201-487-3424	1	**172.**	201-794-8341	1	**243.**	201-943-8532	1	**314.**	202-543-0877	1	**385.**	203-255-9633	1
31.	201-329-7272	1	**102.**	201-487-3926	1	**173.**	201-795-0107	1	**244.**	201-944-5022	1	**315.**	202-543-2990	1	**386.**	203-256-9845	1
32.	201-330-0272	1	**103.**	201-487-5120	1	**174.**	201-797-2459	1	**245.**	201-945-4111	1	**316.**	202-315-3292	1	**387.**	203-261-3017	1
33.	201-333-0876	1	**104.**	201-487-5852	1	**175.**	201-797-2711	1	**246.**	201-947-6626	1	**317.**	202-589-1119	1	**388.**	203-261-8331	1
34.	201-333-5176	1	**105.**	201-487-6332	1	**176.**	201-797-3899	1	**247.**	201-947-7060	1	**318.**	202-626-4950	1	**389.**	203-262-1258	1
35.	201-333-8455	1	**106.**	201-487-9060	1	**177.**	201-797-9145	1	**248.**	201-955-2332	1	**319.**	202-628-6696	1	**390.**	203-262-1921	1
36.	201-337-3156	1	**107.**	201-488-0983	1	**178.**	201-798-8781	1	**249.**	201-955-3735	1	**320.**	202-628-7773	1	**391.**	203-262-6715	1
37.	201-337-3680	1	**108.**	201-488-1427	1	**179.**	201-802-0921	1	**250.**	201-955-9007	1	**321.**	202-639-8222	1	**392.**	203-263-5351	1
38.	201-337-5385	1	**109.**	201-488-4927	1	**180.**	201-804-7683	1	**251.**	201-962-8353	1	**322.**	202-639-9630	1	**393.**	203-264-6777	1
39.	201-337-5868	1	**110.**	201-489-3478	1	**181.**	201-804-8717	1	**252.**	201-967-7832	1	**323.**	202-659-1354	1	**394.**	203-265-0255	1
40.	201-342-0052	1	**111.**	201-503-0766	1	**182.**	201-818-1877	1	**253.**	201-967-9444	1	**324.**	202-659-2028	1	**395.**	203-265-2120	1
41.	201-342-1569	1	**112.**	201-505-4800	1	**183.**	201-823-0345	1	**254.**	201-968-0597	1	**325.**	202-659-8983	1	**396.**	203-265-3819	1
42.	201-342-3334	1	**113.**	201-507-8363	1	**184.**	201-823-1156	1	**255.**	201-968-9590	1	**326.**	202-667-8833	1	**397.**	203-265-4874	1
43.	201-342-3568	1	**114.**	201-512-3962	1	**185.**	201-825-3470	1	**256.**	201-968-9681	1	**327.**	202-722-1670	1	**398.**	203-265-5630	1
44.	201-342-8548	1	**115.**	201-518-2920	1	**186.**	201-825-8717	1	**257.**	201-974-3850	1	**328.**	202-722-2480	1	**399.**	203-265-7715	1
45.	201-342-8618	1	**116.**	201-529-0252	1	**187.**	201-825-8878	1	**258.**	201-986-1210	1	**329.**	202-722-4584	1	**400.**	203-265-9371	1
46.	201-343-3027	1	**117.**	201-536-1200	1	**188.**	201-843-1544	1	**259.**	201-995-8605	1	**330.**	202-726-1758	1	**401.**	203-266-6140	1

47.	201-343-5207	1	**118.**	201-549-1055	1	**189.**	201-843-2505	1	**260.**	201-996-8884	1	**331.**	202-747-6534	1	**402.**	203-267-4606	1
48.	201-343-9490	1	**119.**	201-560-0944	1	**190.**	201-843-8572	1	**261.**	201-997-2240	1	**332.**	202-756-7323	1	**403.**	203-267-5000	1
49.	201-348-4457	1	**120.**	201-562-1480	1	**191.**	201-843-8935	1	**262.**	201-997-6556	1	**333.**	202-774-1398	1	**404.**	203-267-6435	1
50.	201-363-6550	1	**121.**	201-567-51418	1	**192.**	201-845-3993	1	**263.**	201-997-9624	1	**334.**	202-775-0494	1	**405.**	203-268-1624	1
51.	201-368-1071	1	**122.**	201-567-7470	1	**193.**	201-847-1394	1	**264.**	201-998-5650	1	**335.**	202-783-3951	1	**406.**	203-268-3169	1
52.	201-384-6930	1	**123.**	201-567-9078	1	**194.**	201-847-5305	1	**265.**	202-223-1068	1	**336.**	202-783-6631	1	**407.**	203-268-7958	1
53.	201-391-3565	1	**124.**	201-567-9151	1	**195.**	201-847-6475	1	**266.**	202-223-1787	1	**337.**	202-785-1057	1	**408.**	203-268-9961	1
54.	201-391-4189	1	**125.**	201-568-1312	1	**196.**	201-848-8479	1	**267.**	202-223-3331	1	**338.**	202-785-7343	1	**409.**	203-269-0687	1
55.	201-398-9739	1	**126.**	201-568-2693	1	**197.**	201-861-7811	1	**268.**	202-223-5343	1	**339.**	202-789-7740	1	**410.**	203-269-2247	1
56.	201-405-0388	1	**127.**	201-568-7962	1	**198.**	201-863-7890	1	**269.**	202-223-6730	1	**340.**	202-797-9705	1	**411.**	203-269-3402	1
57.	201-405-1179	1	**128.**	201-569-1696	1	**199.**	201-863-8585	1	**270.**	202-244-3277	1	**341.**	202-822-8127	1	**412.**	203-269-3618	1
58.	201-418-9121	1	**129.**	201-569-2956	1	**200.**	201-864-2946	1	**271.**	202-244-7875	1	**342.**	202-822-8315	1	**413.**	203-269-4469	1
59.	201-420-5130	1	**130.**	201-569-5340	1	**201.**	201-865-0929	1	**272.**	202-265-0588	1	**343.**	202-829-3350	1	**414.**	203-269-4545	1
60.	201-420-6771	1	**131.**	201-573-1109	1	**202.**	201-865-5567	1	**273.**	202-289-1144	1	**344.**	202-829-9263	1	**415.**	203-269-6075	1
61.	201-432-4373	1	**132.**	201-576-0165	1	**203.**	201-865-6878	1	**274.**	202-289-1574	1	**345.**	202-833-1591	1	**416.**	203-270-4070	1
62.	201-432-6227	1	**133.**	201-585-1180	1	**204.**	201-866-0386	1	**275.**	202-289-4945	1	**346.**	202-833-6105	1	**417.**	203-270-6935	1
63.	201-432-9701	1	**134.**	201-585-9633	1	**205.**	201-866-8282	1	**276.**	202-289-7499	1	**347.**	202-833-9478	1	**418.**	203-270-9619	1
64.	201-433-7453	1	**135.**	201-592-9196	1	**206.**	201-868-3449	1	**277.**	202-291-4715	1	**348.**	202-842-0182	1	**419.**	203-271-3989	1
65.	201-437-2926	1	**136.**	201-599-1947	1	**207.**	201-871-6895	1	**278.**	202-291-5259	1	**349.**	202-861-4209	1	**420.**	203-272-1896	1
66.	201-438-1326	1	**137.**	201-604-1131	1	**208.**	201-880-0745	1	**279.**	202-293-1095	1	**350.**	202-877-6590	1	**421.**	203-272-2278	1
67.	201-438-1615	1	**138.**	201-608-4556	1	**209.**	201-883-1333	1	**280.**	202-293-3480	1	**351.**	202-955-6363	1	**422.**	203-272-3151	1
68.	201-438-1905	1	**139.**	201-612-1323	1	**210.**	201-883-1822	1	**281.**	202-296-2888	1	**352.**	202-947-6262	1	**423.**	203-272-4389	1
69.	201-438-2618	1	**140.**	201-612-8795	1	**211.**	201-886-2010	1	**282.**	202-296-5233	1	**353.**	202-986-4030	1	**424.**	203-272-5671	1
70.	201-438-5380	1	**141.**	201-621-9548	1	**212.**	201-891-4407	1	**283.**	202-296-6369	1	**354.**	202-207-9780	1	**425.**	203-281-4437	1
71.	201-439-1145	1	**142.**	201-440-4798	1	**213.**	201-894-0213	1	**284.**	202-296-7558	1	**355.**	202-226-7333	1	**426.**	203-281-6372	1

(*See* ECF No. 199.) Career Counseling argues that these fax logs are objective data of successful, completed fax transmissions thereby satisfying the ascertainability element for class certification. (ECF No. 197-1 at 25.)

In contrast to the aforementioned, AFGL presents several Declarations to demonstrate that Career Counseling's proposed Class B does not satisfy the ascertainability requirement. In the first such Declaration, attorney Whitney M. Smith asserts there are 4,000 numbers in Class B that are associated with Verizon as the telephone carrier and Verizon "does not have information available to allow it to determine whether the customer associated with the telephone numbers used the number with a fax . . . service." (ECF No. 206-1 at 3 ¶ 10.) In the Second Declaration of Tammy Deloach, a paralegal at Charter Communications Operating, Inc. observes that 1,291 of the phone numbers in the fax log belong to subscribers of Charter and it "is unable to determine whether a VOIP number assigned to a customer account is utilized for voice calls or fax transmissions. . . . cannot determine whether a VOIP subscriber used another provider's online fax service product. . . . [and] does not have a mechanism by which it can identify how a subscriber is using its voice service, including whether a subscriber procured online fax service from a third party or was using a stand-alone fax machine or any other technology to receive faxes." (ECF No. 225-1 at 2-3 ¶ 9.) Finally, in the Declaration of Lisa Likely, the Director for AT&T Corp. states that 12,874 of the numbers on the fax log belong to AT&T subscribers and AT&T cannot identify whether the subscriber used "a stand-alone fax machine or any

other technology to receive faxes" or "confirm whether a subscriber received . . . a fax or used a fax machine." (ECF No. 226-1 at 3 ¶¶ 14, 15.)

To certify Career Counseling's proposed Class B, the court must find that the ascertainability requirement is established by a preponderance of the evidence. *E.g.*, *E&G, Inc. v. Mount Vernon Mills, Inc.*, C/A No. 6:17-cv-318-TMC, 2019 U.S. Dist. LEXIS 148890, 2019 WL 4034951, at *3 (D.S.C. Aug. 22, 2019) ("A plaintiff bears the burden of showing by a preponderance of the evidence that class certification is appropriate under Rule 23." (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011))). More specifically, the fax logs must convey that the fax was successfully received by the recipient. *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 2016 U.S. Dist. LEXIS 1864, 2016 WL 75535, at * (N.D. Ohio Jan. 7, 2016) ("[O]nly persons to whom faxes were 'successfully sent' are proper claimants under the TCPA." (citing *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 632-34 (6th Cir. 2015); *Am. Copper*, 757 F.3d at 545))).

In the Fourth Circuit, class certification is inappropriate when "class members are impossible to identify without extensive and individualized fact-finding" as it needs to be administratively feasible for the court to determine which individuals are members of the class. *EQT Prod. Co.*, 764 F.3d at 358. In considering the totality of evidence presented by the parties, the court is not persuaded that a predominance of the evidence supports finding that a fax designated as successfully

sent on Career Counseling's fax logs reached a stand-alone fax machine.[13] More specifically, if the purpose of TCPA/JFPA is to address a consumer's loss of paper and toner, the aforementioned fax logs are deficient because they do not show that a device using toner and paper received the successfully sent fax. The court finds that it would need to make an individualized inquiry of each class member to determine if the fax number identified in the fax log actually was linked to a stand-alone fax machine on June 28, 2016. Because such individualized inquiries are necessary to ascertain the class, Class B is not ascertainable, and class certification is inappropriate. Accordingly, the court finds that Career Counseling cannot satisfy all of the requirements of Rule 23(a).

B. Federal Rule of Civil Procedure 23(b)(3)

Because Career Counseling cannot satisfy all of Rule 23(a)'s requirements, consideration of whether it meets Rule 23(b)'s requirements of predominance and superiority is futile.

3. Motion to Appoint Career Counseling Class Representative

Because the court did not certify a putative class, Career Counseling's pending Motion to Appoint It Class Counsel is now moot.

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13. The Sixth Circuit also explained in *Lyngaas* that fax logs which showed receipt of the fax were enough to meet the ascertainability requirement because the court could determine which individuals received the fax. *Lyngaas v. Ag*, 992 F.3d 412, 430 (6th Cir. 2021).

4. Motion to Appoint Class Counsel

As a result of its decision to deny the Motion for Class Certification, the court finds the Career Counseling's Motion to Appoint Class Counsel is moot.

V. CONCLUSION

Upon careful consideration of the entire record and the parties' arguments, the court hereby **DENIES** Plaintiff Career Counseling, Inc.'s Motion for Class Certification (ECF No. 197). Further, the court **DENIES AS MOOT** Career Counseling, Inc.'s Motion to Appoint Class Counsel and Motion to Appoint Class Representative. (*Id.*)

IT IS SO ORDERED.

/s/ J. Michelle Childs
United States District Judge

July 16, 2021
Columbia, South Carolina

APPENDIX C — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION, FILED JANUARY 31, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

Civil Action No.: 3:16-cv-03013-JMC

CAREER COUNSELING, INC. D/B/A SNELLING STAFFING SERVICES, A SOUTH CAROLINA CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS,

Plaintiff,

v.

AMERIFACTORS FINANCIAL GROUP, LLC, AND JOHN DOES 1-5,

Defendants.

January 31, 2022, Decided;
January 31, 2022, Filed

ORDER AND OPINION

Plaintiff Career Counseling, Inc. d/b/a Snelling Staffing Services, on behalf of itself and all others similarly situated, filed the instant putative class action seeking damages and injunctive relief from Defendants AmeriFactors Financial Group, LLC and John Does 1-5 (collectively "Defendants") for alleged violations of the Telephone Consumer Protection Act

("TCPA") of 1991, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, and the regulations promulgated under the TCPA by the United States Federal Communications Commission ("FCC"). (ECF No. 70.)

This matter is before the court on Career Counseling's Motion for Summary Judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure (ECF No. 233). Specifically, Career Counseling asserts that "there is no genuine issue of material fact that (1) the Fax [at issue] is an 'advertisement' under 47 U.S.C. § 227(a)(5); (2) Defendant [AmeriFactors] is the 'sender' of the Fax under 47 C.F.R. § 64.1200(f)(11); and (3) the Fax was sent to a 'telephone facsimile machine' using a 'telephone facsimile machine, computer, or other device,' in violation of 47 U.S.C. § 227(b)(1)(C)." (ECF No. 233 at 1-2.) AmeriFactors opposes the Motion arguing that it "should be denied because the record here demonstrates that factual issues remain with respect to Plaintiff's TCPA claim, including whether (i) the Fax is even covered by the TCPA as an advertisement, (ii) AmeriFactors is the 'sender' of the Fax, and (iii) Plaintiff's claim is barred by equitable defenses." (ECF No. 237 at 5.) For the reasons set forth below, the court **GRANTS** Career Counseling's Motion for Summary Judgment. (ECF No. 233.)

I. RELEVANT BACKGROUND TO PENDING MOTION

A. The TCPA and the JFPA

The TCPA prohibits the faxing of unsolicited advertisements without "prior express invitation or permission" from the recipient. S. Rep. No. 102-178, at

12. Congress' primary purpose in passing the TCPA was to protect the privacy interests of residential telephone subscribers and the public from bearing the cost of unwanted advertising. *Id.* at 1; S. Rep. No. 109-76, at 3. Congress was expressly concerned because "[j]unk faxes create costs for consumers (paper and toner) and disrupt their fax operations." GAO@100, *Telecommunications: Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement*, https://www.gao.gov/products/gao-06-425 (last visited July 15, 2021).

In 1992, the FCC released its interpretation of the TCPA, which established an exception for unsolicited advertisement faxes ("junk faxes") between parties with an established business relationship ("EBR"). S. Rep. No. 109-76, at 2. The FCC relied on this interpretation until 2003, when it reevaluated and created a stricter standard for junk faxes. *Id.* at 3. Under this new standard, junk faxes could only be sent with prior express permission in the form of written consent from the receiver, and an EBR (which initially had no specified limit) could only be relied upon by the sender for eighteen (18) months after a purchase and three (3) months after an initial inquiry. *Id.* at 4-5.

After this change, many petitions from businesses requested that the FCC return to its previous interpretation of the TCPA, citing efficiency purposes and the enormous cost of compliance with the new interpretation. *Id.* at 4. This caused the FCC to order a stay on these new rules until 2005. *Id.*

In response, Congress passed the JFPA in 2005, codifying the EBR exception to the ban on unsolicited

advertising faxes, allowing those with a business relationship to bypass the written consent rule. S. Rep. No. 109-76, at 1. The JFPA also requires that senders of junk faxes provide notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements.[1] *Id.*

As a result of the foregoing, the JFPA expressly prohibits the faxing of unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C). The JFPA 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." 47 U.S.C. § 227(a)(5). The JFPA creates a private right of action for a person or entity to sue a fax sender that sends an unsolicited advertisement and allows recovery of either

1. Testimony in the JFPA legislative history outlined concerns about the prior written consent requirement from the FCC. For example, National Association of Realtors Broker Dave Feeken testified that not only would a written consent requirement be costly and time-consuming for businesses, but it would also go against the legislative intent of the TCPA, as both the House and the Senate considered and rejected an express written consent requirement for calls and faxes. *Junk Fax Bill: Hearing on S. 714 Before Comm. on S. Commerce, Sci., & Tourism*, 109th Cong. (2005) (Test. of Dave Feeken, 2005 WL 853591 (Apr. 13, 2005)). News-Register Publishing Company President Jon E. Bladine pointed out that the signed consent leaves open the threat of litigation for every small business. *Id.* (Test. of Jon Bladine, 2005 WL 853593 (Apr. 13, 2005).) Bladine explained that fax numbers change, sometimes people misfile forms, and miscommunications between companies happen. *Id.* Not only that, but companies could use a fax in bad faith to sue another company, hoping they do not have the requisite consent form. *Id.* "[I]f we've messed up that time," he asks, "will we pay, even though we know — and the recipient in all honesty knows — the issue isn't about the fax at all?" *Id.*

actual monetary loss or $ 500.00 in damages, whichever is greater, for each violation. *Id.* at § 227(b)(3).

B. The Parties

Career Counseling is an employment staffing agency, which acts as a middleman between employers and prospective workers. (ECF No. 197-7 at 4/27:6-13.[2]) AmeriFactors is an accounts receivable financing firm that engages in factoring. (ECF No. 206-2 at 74/4:17-19.) Factoring is a process in which AmeriFactors purchases a business's accounts receivable of unpaid invoices for a discounted price with the intention of collecting the full value of the unpaid invoices at a later date. (ECF No. 206-2 at 74/4:17-23; ECF No. 197-4 at 4/6:12-7:4.) Factoring is beneficial to businesses because it allows them to gain early access to cash prior to the payment of an invoice. (ECF No. 197-4 at 4/6:18-23.)

In June of 2016, AmeriFactors became interested in marketing by fax and, as a result, contracted with AdMax Marketing, a fax marketer. (ECF No. 197-4 at 4/7:5-25.) AmeriFactors' Vice President of Marketing Jeff Speiser worked with AdMax's operator Chad Komniey to identify businesses to target with a fax and the content of the fax AdMax would use. (ECF No. 197-4 at 8/22:1-24:4) According to Speiser, Komniey did not discuss with him the legality of sending advertisements by fax.[3] (*Id.* at 11/34:17-36:6.)

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2. The parties filed condensed transcripts on the electronic docket, with 4 pages of testimony on each page. For citation purposes, the number before the slash is the ECF page number and the number after the slash is the transcript page number.

3. Komniey testified that he did discuss the legality of the fax advertisement with Speiser. (ECF No. 197-5 at 11/39:7-40:15.)

Appendix C

On or about June 28, 2016, Career Counseling received the following unsolicited fax[4] (the "Fax") on its stand-alone fax machine[5] :

AMERIFACTORS®
FUNDING BUSINESS IS OUR BUSINESS

Phone: (407) 536-1150
Fax: (407) 566-1250
fsudovsky@amerifactors.com

Fax Cover

To: GINA MC CUEN — From: Frank Sudovsky

Fax: 8033593008 — Date: 6/28/16

RE: Financing for SNELLING STAFFING SVC

AmeriFactors is ready to help your company with your financing needs. We have been in business since 1999, and have funded over $5 billion to U.S. businesses of all sizes.

Our application process is fast and easy, with 98% of all applicants approved. Bankruptcy and bad credit are okay. The services we offer are not a loan and there is nothing to pay back.

If you would like to learn more, call me at the number below, or fill out the form and fax it back to me at 407-557-3611.

Sincerely,

Frank Sudovsky
Senior Vice President of Business Development
407.566.1150
fsudovsky@amerifactors.com

CALL ME TODAY AND SAVE $600 OFF OF YOUR CLOSING COSTS! 407-566-1150

Fill out this form and fax to: (407) 557-3611

Name: _____ Company: _____

Email: _____ Phone: _____

AmeriFactors is a wholly owned subsidiary of Gulf Coast Bank, Member FDIC

If you would like to be removed from our contact list, call toll free 866-835-1777 and enter ext. 8. Thank you.

(ECF Nos. 70 at 3 ¶ 13, 70-1 at 2, 197-8 at 3 ¶ 6.)

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4. The parties do not dispute that the communication was unsolicited.

5. Elizabeth Trenbeath, the Franchise President of Career Counseling, testified that the fax was received on a stand-alone machine because it "receives paper" and "[t]he fax comes out [as] paper." (ECF No. 211-4 at 11/36:10-16.) Moreover, Trenbeath implied that Career Counseling did not use "electronic faxes or e-faxes." (*Id.* at 36:17-20.)

Appendix C

On September 2, 2016, Career Counseling filed a putative Class Action Complaint in this court alleging violation of the TCPA.[6] (ECF No. 1 at 8 ¶ 27-13 ¶ 36.) On October 28, 2016, AmeriFactors filed a Motion to Dismiss. (ECF No. 29.) After the parties responded and replied to the Motion to Dismiss (ECF Nos. 43, 47), the court entered an Order that granted AmeriFactors' Motion to Dismiss pursuant to Rule 12(b)(1) and dismissed the Class Action Complaint without prejudice. (ECF No. 61 at 10.) After receiving leave from the court (*see* ECF No. 67), Career Counseling filed a First Amended Class Action Complaint on November 28, 2017, alleging revised class claims for violation of the TCPA. (*See* ECF No. 70.) AmeriFactors then filed a Motion to Dismiss (ECF No. 72) on December 21, 2017, and a Motion to Stay Litigation Pending Resolution of Petition Before the FCC (ECF No. 76) on February 2, 2018.[7] On September 28, 2018, the court granted the stay, but denied the Motion to Dismiss with leave to refile. (ECF No. 88.) The court subsequently extended the stay twice. (ECF Nos. 92, 96.)

In response to the petition by AmeriFactors asking the FCC "to clarify that faxes sent to 'online fax services' are not faxes sent to 'telephone facsimile machines,'" the Consumer and Government Affairs Bureau[8] ("CGAB")

6. Career Counseling asserted that similar unsolicited faxes were sent by or on behalf of AmeriFactors to 58,945 other recipients. (*E.g.*, ECF No. 197-13 at 15 ¶¶ 43, 44.)

7. AmeriFactors hoped to stay the matter until (1) the court ruled on the pending Motion to Dismiss and (2) the FCC took final agency action on AmeriFactors' pending petition for declaratory relief. (ECF No. 76 at 1.)

8. "The Consumer and Governmental Affairs Bureau develops and implements the FCC's consumer policies and serves as the

issued a declaratory ruling on December 9, 2019, finding that an online fax service that receives faxes "sent as email over the Internet" is not protected by the TCPA. *See AmeriFactors Fin. Grp., LLC*, CG Docket Nos. 02-278, 05-338, DA 19-1247, 34 FCC Rcd 11950, 2019 WL 6712128 (CGAB Dec. 9, 2019) (Pet. for Expedited Declaratory Ruling). Specifically, the CGAB found in relevant part:

> By this declaratory ruling, we make clear that an online fax service that effectively receives faxes 'sent as an email over the internet' and is not itself 'equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper' is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition.

AmeriFactors Fin. Grp., LLC, 34 FCC Rcd 11950, 2019 WL 6712128, at *1.

The court lifted the stay on January 8, 2020, but stayed the case again on April 16, 2020, after being informed by AmeriFactors that it had sent a Notice of Constitutional Challenge (ECF No. 120) to the Attorney

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agency's connection to the American consumer." *FCC*, https://www.fcc.gov/consumer-governmental-affairs (last visited June 25, 2021). The Consumer and Governmental Affairs Bureau "serve[s] as the public face of the commission through outreach and education, as well as through our consumer center, which is responsible for responding to consumer inquiries and complaints." *Id.* at https://www.fcc.gov/general/consumer-and-governmental-affairs-bureau (last visited June 25, 2021).

General of the United States pursuant to Rule 5.1(a) of the Federal Rules of Civil Procedure drawing into question the constitutionality of the TCPA, as amended by the JFPA. On May 18, 2020, the Government filed a response to AmeriFactors' Notice of Constitutional Challenge asserting that "intervention [wa]s premature prior to Defendants' filing[] a motion to dismiss on constitutional grounds." (ECF No. 126 at 2.)

On July 15, 2020, AmeriFactors filed a Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (ECF No. 137.) While AmeriFactors' Motion to Dismiss was pending, the CGAB on September 21, 2020, adopted and released a declaratory ruling on a petition filed by the law firm Akin Gump Strauss Hauer & Feld LLP (the "*Akin Gump* Ruling"), which held as follows:

> In this Declaratory Ruling, we clarify, consistent with Commission rules and precedent, that a fax broadcaster may be exclusively liable for TCPA violations where it engages in deception or fraud against the advertiser, such as securing an advertiser's business by falsely representing that the broadcaster has consumer consent for certain faxes. Specifically, where the fax broadcaster engages in such conduct, it is the "sender" of the fax because it is acting contrary to the advertiser's interests, and thus not "on behalf of" the advertiser.

. . .

> [W]e clarify that the fax broadcaster, not the advertiser, is the sole "sender" of a fax for the purposes of the TCPA when it engages in conduct such as fraud or deception against an advertiser if such conduct leaves the advertiser unable to control the fax campaign or prevent TCPA violations (including cases in which such fraud or deception violates a fax broadcaster's contractual commitments). The Commission has made clear that the "sender" of a fax advertisement in most cases is the advertiser, but not in all cases.

. . .

> We thus reiterate that where the fax broadcaster's deception or fraud leaves the advertiser unaware of and unable to prevent the unlawful faxes, sole liability for violations should rest with the fax broadcaster because the unauthorized faxes cannot reasonably be considered to be "on behalf of" the advertiser. Where the fax broadcaster's misconduct effectively defeats any measures the advertiser took or could have taken to comply with the law, the faxes cannot be considered sent "on [the advertiser's] behalf" as contemplated by our rules. And that decision is consistent with the federal common law of agency to the extent that it applies here. Under such agency principles, a seller of goods or services may not be vicariously liable for the misconduct of

> its alleged agent (*i.e.*, a fax broadcaster) where the fax broadcaster's fraudulent or deceptive conduct makes clear that the seller did not expressly or implicitly authorize it to commit the acts that violated the TCPA.

In the Matter of Akin Gump Strauss Hauer & Feld LLP Petition for Expedited Clarification or Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005, Nos. 02-278, 05-338, 35 FCC Rcd 10424, 2020 WL 5747205, at *2-3 (Sept. 21, 2020).

Thereafter, the court considered the parties' extensive briefing (*see* ECF Nos. 139, 147, 164, 165, 166, 169, 170), and denied AmeriFactors' Motion to Dismiss on December 22, 2020. (ECF No. 171.) AmeriFactors answered the Amended Complaint on January 5, 2021, expressly denying that it was "the sender of the subject facsimile message." (ECF No. 173 at 6 ¶ 5.) The parties then proceeded to engage in extensive discovery regarding the extent to which the facsimile at issue was sent to the putative class.

On March 16, 2021, Career Counseling filed a Motion for Class Certification, a Motion to Appoint Class Counsel, and a Motion to Appoint Class Representative pursuant to Rule 23 of the Federal Rules of Civil Procedure (the "Rule 23 Motions"). (ECF No. 197.) On April 15, 2021, AmeriFactors filed a Memorandum of Law in Opposition to Motion for Class Certification, to which Career Counseling filed a Reply in Support of Its Motion for

Class Certification on April 30, 2021. (ECF Nos. 206, 211.) After allowing the parties to present argument on Rule 23 Motions, the court entered an Order on July 16, 2021, denying all three (3) Rule 23 Motions. (ECF No. 229.) Consequently, Career Counseling filed the instant Motion for Summary Judgment on October 28, 2021. (ECF No. 233.)

II. JURISDICTION

This court has jurisdiction over Career Counseling's claim alleging violation of the TCPA via 28 U.S.C. § 1331, as it arises under the laws of the United States, and also via 47 U.S.C. § 227(b)(3), which empowers actions under the TCPA "in an appropriate court of th[e] State . . . ." *Id. See also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 386-87, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012) ("Nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal-question jurisdiction U.S. district courts ordinarily have under 28 U.S.C. § 1331.").

III. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine question of material fact

exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011). In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denial of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249.

IV. ANALYSIS

A. The Parties' Arguments

Career Counseling moves for summary judgment arguing that "there is no genuine issue of material fact as to the elements of [its] claim: (1) the Fax is an 'advertisement' under 47 U.S.C. § 227(a)(5); (2) Defendant [AmeriFactors] is the 'sender' of the Fax under 47 C.F.R. § 64.1200(f)(11), where Defendant is both the person 'on whose behalf' the Fax was sent and the person whose

'goods or services' are advertised; and (3) the Fax was sent to a 'telephone facsimile machine' using a 'telephone facsimile machine, computer, or other device,' in violation of 47 U.S.C. § 227(b)(1)(C)." (ECF No. 233-1 at 5.) Career Counseling further argues that "there is no genuine issue of material fact that Defendant [AmeriFactors] cannot carry its burden of proving as an affirmative defense either (1) that the Fax was sent with Plaintiff's 'prior express invitation or permission' under 47 U.S.C. § 227(a)(5); or (2) that Defendant [AmeriFactors] qualifies for the three-part statutory safe-harbor for faxes sent pursuant to an 'established business relationship,' 47 U.S.C. § 227(b)(1)(C)(i)-(iii)." (ECF No. 233-1 at 5.) Based on the foregoing, Career Counseling asserts that the court "should enter summary judgment for Plaintiff individually so Plaintiff may appeal the denial of class certification." (*Id.*)

AmeriFactors opposes the Motion for Summary Judgment. First, AmeriFactors argues that there is an issue of fact regarding whether the Fax is an advertisement under the TCPA because it was "offering to purchase-not sell" and "there were no representations as to the quality of the product or service at issue—nor could there be, as Plaintiff is the entity in possession of information related to the quality of its receivables." (ECF No. 237 at 11.) Next, citing to the *Akin Gump* Ruling, AmeriFactors argues that there is a question of fact regarding whether it is the sender of the Fax that violated the TCPA because "AdMax (i) misrepresented and omitted material information and (ii) deprived AmeriFactors of its ability to control the transmission of the Fax." (*Id.* at 14 (quoting 35 FCC Rcd 10424, 2020 WL 5747205, at *3 ¶ 11).)

Finally, AmeriFactors asserts that there are questions of fact as to its defenses of unclean hands and waiver because "[a] reasonable juror could conclude that, given Plaintiff's deliberate efforts to seek out TCPA violations, it would be unjust to permit Plaintiff to now seek[] recovery, or alternatively, that Plaintiff waived the right to receive compensation for statutory 'harm' that it essentially invited by failing to make an opt-out request." (*Id.* at 17.)

B. The Court's Review

Under the TCPA, it is unlawful for any person within the United States "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, ..." 47 U.S.C. § 227(b)(1)(C). The TCPA authorizes a private right of action to (1) "enjoin such violation" of the Act, (2) "to recover for actual monetary loss from such a violation, [and/]or to receive $ 500 in damages for each such violation." *Id.* at § 227(b)(3). At this summary judgment stage of the matter, the areas of the parties' dispute as to the TCPA are (1) whether the Fax at issue was an advertisement, (2) whether AmeriFactors was a sender, and (3) whether AmeriFactors' affirmative defenses of waiver and unclean hands are applicable to Career Counseling's TCPA claims. The court discusses each of these issues as follows:

1. Qualification of June 28, 2016 Fax as an Advertisement

"The determination of whether a fax is a 'advertisement' is a question of law for the court to decide." *Exclusively*

Cats Veterinary Hosp., P.C. v. M/A/R/C Research, LLC, 444 F. Supp. 3d 775, 779 (E.D. Mich. 2020) (citing *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 221 (6th Cir. 2015) ("So were these faxes advertisements? It is a question of law our court has never addressed."). *See also Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 890 (6th Cir. 2020) ("Whether a fax constitutes an unsolicited advertisement is a question of law."); *United States v. Williams*, 733 F.3d 448, 452 (2d Cir. 2013) ("Interpretations of statutes are pure questions of law, ..."); *Bruce E. Katz, M.D., P.C. v. Focus Forward LLC*, 532 F. Supp. 3d 170, 175 (S.D.N.Y. 2021) ("Whether a fax is an "advertisement" is a question of law for the court."). *But see New Concept Dental v. Dental Res. Sys., Inc.*, Case No. 17-CV-61411-MARRA, 2020 U.S. Dist. LEXIS 108682, 2020 WL 3303077, at *3 (S.D. Fla. Mar. 17, 2020) ("The sole issue presented by DRS's motion is whether the December 2016 fax constituted an unsolicited 'advertisement' within the meaning of the TCPA. The Court views this as a mixed question of law and fact." (citations omitted)).

Under the TCPA, an "advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(1). "[C]ourts have generally held that, to be an advertisement, a 'fax must promote goods or services to be bought or sold, and it should have profit as an aim.'" *Bais Yaakov of Spring Valley v. ACT, Inc.*, 438 F. Supp. 3d 106, 109 (D. Mass. 2020) (quoting *Sandusky Wellness Ctr.*, 788 F.3d at 222). "[M]essages that do not promote a commercial product or service . . . are not

unsolicited advertisements under the TVPA." *New Concept Dental*, 2020 U.S. Dist. LEXIS 108682, 2020 WL 3303077, at *3 (quoting *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967 (May 3, 2006)). In this regard, "four types of messages do not fall under the purview of the TCPA: (1) informational messages; (2) transactional messages; (3) non-commercial messages from non-profit organizations; and (4) non-advertisement messages with an incidental amount of advertising." *Bais Yaakov*, 438 F. Supp. 3d at 109 (quoting *Physician's Healthsource, Inc. v. Vertex Pharm. Inc.*, 247 F. Supp. 3d 138, 150 (D. Mass. 2017)). "A fax is informational if its 'primary purpose' is to communicate information, rather than to promote a product." *New Concept Dental*, 2020 U.S. Dist. LEXIS 108682, 2020 WL 3303077, at *3 (citing 71 Fed. Reg. at 25973). "Fa[xe]s that are primarily informational do not violate the TCPA." *Id.* (citation omitted). "[M] essages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA's facsimile advertising rules." *Vinny's Landscaping, Inc. v. United Auto Credit Corp.*, 207 F. Supp. 3d 746, 750 (E.D. Mich. 2016) (quoting 71 Fed. Reg. at 25972).

Upon its review, the court observes that the literal language of the Fax at issue informed Career Counseling that AmeriFactors was in the financing business having "funded over $ 5 billion to U.S. businesses of all sizes." (ECF No. 70-1 at 2.) The Fax described AmeriFactors' "application process" as "fast and easy" with a "98%"

approval and provided contact information to start that process. (*Id.*) While, at the same time, the Fax attempted to persuade immediate action by Plaintiff based on the handwritten message that stated by calling 407-566-1150 "today," Plaintiff could save "$ 600[.00] off of your closing costs!" (*Id.*) Moreover, the Fax expressly stated that AmeriFactors was offering factoring "services" that "are not a loan." (*Id.*) That the Fax was promoting services was confirmed by Speiser:

> Q. The services we offer are not a loan and there's nothing to pay back. Is that a true statement?
>
> A. It is.
>
> Q. Okay. So does Exhibit 5 speak to the services of AmeriFactors?
>
> A. In general, yes.

(ECF No. 197-4 at 9/28:22-29:3.)

"*Sandusky* counsels that, in order to be an 'advertisement' under the TCPA, the fax on its face must propose that the sender and the recipient enter into some kind of commercial relationship, whether that be buying or selling a good or a service." *Lyngaas v. J. Reckner Assocs., Inc.*, C/A No. 2:17-CV-12867-TGB, 2018 U.S. Dist. LEXIS 127345, 2018 WL 3634309, at *3 (E.D. Mich. July 31, 2018). In this case, the court finds that the Fax explicitly communicates the availability of AmeriFactors'

financial services to Plaintiff to help it meet its commercial needs. *E.g., KHS Corp. v. Singer Fin. Corp.*, 376 F. Supp. 3d 524, 528 (E.D. Pa. Mar. 26, 2019) ("Financial services are a 'good or service' that can be the subject of a TCPA advertisement.") (citation omitted). Therefore, as a matter of law, the court finds that the Fax is an advertisement. *Id.* ("A fax is an advertisement as long as some portion of the fax advertises the commercial availability of a good or service.").

2. Status of AmeriFactors as a Sender under the TCPA

"Under the TCPA, a 'sender' is 'the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.'" *Physicians Healthsource, Inc. v. Masimo Corp.*, Case No. SACV14-00001JVS(ADSx), 2020 U.S. Dist. LEXIS 165844, 2020 WL 5260650, at *4 (C.D. Cal. July 13, 2020) (quoting 47 C.F.R. § 64.1200(f)(11)). *See also Crescent City Surgical Centre Operating Co., LLC v. Next Bio-Research Servs., LLC*, C/A Case No. 20-2369, 2021 U.S. Dist. LEXIS 93732, 2021 WL 1985166, at *3 (E.D. La. May 17, 2021) ("In 2006, the FCC . . . defined the term 'sender' as 'the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.'" (citing *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*; Junk Fax Prevention Act of 2005, 21 F.C.C. Rcd. 3787, 3822 (2006))). "The FCC's codification of this definition of 'sender' is in accord with

its earlier uncodified interpretation: 'the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule.'" *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015) (quoting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 F.C.C. Rcd. 12391, 12407-08 (¶ 35) (1995)).

In this matter, AmeriFactors has both denied that it was "the sender of the subject facsimile message" and admitted that the Fax was sent by it or someone on its behalf. (*See* ECF Nos. 173 at 6 ¶ 5, 197-17 at 6 ¶ 2.) Because the court does not agree with AmeriFactors that the request that resulted in its admission sought a legal conclusion (*see* 197-17 at 6 ¶ 2 ("You or someone on your behalf sent Exhibit A to the telephone number 803-359-3008.")),[9] the court could easily find based on a

9. Rule 36 allows a proper request for admission to relate to "facts, the application of law to fact, or opinions about either." Fed. R. Civ. P. 36(a)(1)(A). "[T]he mere presence of legal conclusions in a request for admission does not create a proper objection." *Duchesneau v. Cornell Univ.*, C/A No. 08-4856, 2010 U.S. Dist. LEXIS 111546, 2010 WL 4117753, at *3 (E.D. Pa. Oct. 19, 2010) (citation omitted). "A request for admission that applies law to the facts is [] not objectionable." *Id.* (citation omitted). "[A] request for admission that calls for a legal conclusion that is one of the ultimate issues of the case is properly objectionable." *Id.* (citation omitted). *See also Leffler v. Creative Health Servs., Inc.*, C/A No. 16-1443, 2017 U.S. Dist. LEXIS 161719, 2017 WL 4347610, at *5 (E.D. Pa. Sept. 29, 2017) ("Requests that seek legal conclusions are not allowed under Rule 36." (citing 7 James Wm. Moore, et al., *Moore's Federal Practice* § 36.10[6] & 36.10[8] (3d ed. 1997))).

plain reading of the definition of sender found in the Code of Federal Regulations that AmeriFactors' admission establishes it as the sender of the Fax as a matter of law.[10] *See* Fed. R. Civ. P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."). *Cf. Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." (citation omitted)); *Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 803 (3d Cir. 1992) ("We have also held that Rule 36 admissions are conclusive for purposes of the litigation and are sufficient to support summary judgment . . . . If at that point a party is served with a request for admission of a fact that it now knows to be true, it must admit that fact, even if that admission will gut its case and subject it to summary judgment."). However, the court is reluctant to reach such a finding because the result is antithetical to the framework for Rule 36(b), which expressly grants the court discretion to "permit withdrawal or amendment [of the admission] if it would promote the presentation of the merits of the action . . . ." Fed. R. Civ. P. 36(b).

In response to its admission, AmeriFactors argues that because "the *Akin Gump* Ruling was decided after AmeriFactors responded to [Plaintiff's] Requests to Admit, and provided further clarity on the law with

10. AmeriFactors asserts that its admission does not "support[] a conclusion that [it] admitted that it was the 'sender' of the Fax as a legal matter." (ECF No. 237 at 15.)

respect to this issue, the [c]ourt should reject any attempt to construe the response as an admission by AmeriFactors of any legal liability as the 'sender' of the Fax." (ECF No. 237 at 16.) AmeriFactors further argues that application of the *Akin Gump* Ruling results in "questions of fact as to whether AdMax engaged in fraud or made misrepresentations when it sent the Fax that deprived AmeriFactors of its ability to control the Fax transmission, thereby making AdMax the exclusive 'sender' under the law."[11] (ECF No. 237 at 14.) In support of

11. As a side note, the court observes that precedent from the United States Court of Appeals for the Fourth Circuit holds that "defendants must satisfy Rule 9(b) when they plead affirmative defenses sounding in fraud." *Bakery & Confectionary Union & Indus. Int'l Pension Fund v. Just Born II, Inc.*, 888 F.3d 696, 704 (4th Cir. 2018). "The Rule 9(b) standard requires a party to, 'at a minimum, describe 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.' These facts are often 'referred to as the who, what, when, where, and how of the alleged fraud.'" *Bakery & Confectionary*, 888 F.3d at 705 (quoting *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)). In its Answer, AmeriFactors simply raised the affirmative defense that Plaintiff's TCPA claim fails because "AmeriFactors is not the sender of the subject facsimile message." (ECF No. 173 at 6 ¶ 5.) AmeriFactors did not reference in its pleading either the *Akin Gump* Ruling or the alleged fraud committed by AdMax Marketing. AmeriFactors' affirmative defense based on the *Akin Gump* Ruling sounded in fraud and had to be pleaded with particularity required by Rule 9(b), which was not done by AmeriFactors. "Although it is indisputably the general rule that a party's failure to raise an affirmative defense in the appropriate pleading results in waiver, . . . absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir.

these arguments, AmeriFactors specifies that differences in testimony between Speiser and Komniey require credibility determinations that create factual questions as to whether "AdMax made misrepresentations or omitted material facts to AmeriFactors, including securing its business by falsely suggesting that its practices were compliant with all relevant laws." (*Id.* at 15.) In this regard, AmeriFactors asserts that "AdMax held itself out as the expert with respect to fax transmissions and guided AmeriFactors with respect to the legality of the Fax" and it "reasonably relied on AdMax's and Mr. Komniey's representation that they had such expertise and would guide AmeriFactors to satisfy legal requirements." (*Id.* at 14.)

Since CGAB released and adopted the *Akin Gump* Ruling on September 21, 2020, it does not appear that any court has had the opportunity to interpret its effect on a pending TCPA action. Career Counseling argues that the *Akin Gump* Ruling is inapplicable to this case because it neither is a final ruling nor is subject to retroactive application. (ECF No. 238 at 15 (citing 28 U.S.C. § 2342(1);

1999) (internal and external citations omitted) (citing, *e.g., Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) (asserting that an affirmative defense may be raised in response to summary judgment motion)). The court observes that Plaintiff has not asserted prejudice or unfair surprise and the record does not appear to support such finding. *See, e.g., id.* at 613 ("Brinkley had ample opportunity to respond to HRC's summary judgment motion in which it initially raised the 'factor-other-than-sex' defense. As a result, we conclude that Brinkley was not unfairly surprised or prejudiced by HRC's delay in raising its affirmative defense; the district court did not err in considering it.").

Lyngaas v. Curaden AG, 992 F.3d 412, 427 (6th Cir. 2021)).) This argument is not persuasive because the FCC could have stayed the *Akin Gump* Ruling under 47 C.F.R. § 1.102(b), but has not, and the CGAB expressly states that the *Akin Gump* Ruling is a clarification consistent with existing FCC rules and precedent "that a fax broadcaster may be exclusively liable for TCPA violations where it engages in deception or fraud against the advertiser, ..." *Akin Gump*, 35 FCC Rcd 10424, 2020 WL 5747205, at *2 ¶ 9.

Substantively, in its attempt to survive summary judgment, the court observes that AmeriFactors failed to set forth any elements of an affirmative defense relying on the fraud/deception example set forth in the *Akin Gump* Ruling. Upon its review, the court observes that the following elements establish fraud: "(1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Williams v. Quest Diagnostics, Inc.*, 353 F. Supp. 3d 432, 446 (D.S.C. 2018) (quoting *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667, 670 (S.C. App. 2008))).[12]

12. Although fraud is defined in federal common law, claims pursuant to the TCPA do not appear to require the application of federal common law. *See U.S. ex. rel. Badr v. Triple Canopy, Inc.*, 950 F. Supp. 2d 888, 904 (E.D. Va. 2013) ("Under federal common law, fraud requires four elements: '(1) misrepresentation of a material fact; (2) intent to deceive; (3) justifiable reliance on the

Appendix C

In arguing that there was an issue of fact as to its fraud-based affirmative defense, AmeriFactors primarily relies on the testimony of Speiser. (*See* ECF No. 237 at 14-15.) After its review of Speiser's testimony, the court agrees with Career Counseling that the record does not create an issue of material fact regarding whether Komniey made false statements of material fact. More specifically, the entirety of Speiser's relevant testimony does not establish how any statement made by Komniey was materially false as his disclosure was severely lacking:[13]

> Q. Did you speak to anyone other than Mr. Komniey at AdMax?
>
> A. No.

(ECF No. 197-4 at 6/15:16-18.)

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misrepresentation by the deceived party; and (4) injury to the party deceived.'" (quoting *Veridyne Corp. v. United States*, 105 Fed. Cl. 769, 795 (Fed. Cl. 2012))); *Ames-Ennis, Inc. v. Midlothian Ltd. P'ship*, 469 F. Supp. 939, 943 (D. Md. 1979) ("Federal common law is that rather narrow body of decisional law which is applied in instances where state law cannot supply the rule of decision and the federal courts are free to choose the appropriate rule . . . . [T]he courts have found it necessary to apply federal common law in cases of disputes between states, . . . in determining diversity among parties, . . . and where there exists a strong federal policy favoring uniformity of result." (internal and external citations omitted)).

13. The court observes that AmeriFactors did not assert, reference, or imply the existence of fraud by silence, or fraudulent concealment, and the court was not asked to determine the appropriateness of these defenses in a TCPA case.

Q. And did you instruct Mr. Komniey to send an advertisement to that list? MS. SMITH: Objection to form.

A. What do you mean by "advertisement?"

Q. Well, I'll show it to you. If you look at Exhibit 5. Did you instruct Mr. Komniey to send Exhibit 5 to the of list of fax numbers from the SIC codes?

A. Correct. But there was also a disclaimer on the bottom that's not on this version.

(*Id.* at 8/23:8-19.)

Q. And did you have a discussion with Mr. Komniey regarding why opt-out language was needed?

A. No. It's typical on unsubscribe language in an email. I'm equating it to that.

Q. Did you discuss with Mr. Komniey the legality of sending advertisements by fax?

A. No.

(*Id.* at 11/34:12-19.)

Q. Just so I'm clear, you've never had any discussions with Mr. Komniey about the legality of sending advertisements by fax?

A. Correct.

Q. You did have a conversation with him regarding the opt-out language, correct?

A. We did.

(*Id.* at 11/36:3-9.)

Q. Did Mr. Komniey ever tell you that there was a statute --

A. No.

Q. -- regarding the sending of advertisements by fax?

A. No.

Q. Did you ever review the website from AdMax marketing?

A. I believe that I did when I did the Google search.

Q. Did you ever review the frequently asked questions section of the website?

A. I don't know.

(*Id.* at 11/36:25-37:12.)

> Q. Did he tell you that he was going to use a third-party broadcaster to send the faxes?
>
> A. I can't recall.
>
> Q. What was discussed with Mr. Komniey regarding the less than ten conversations?
>
> MS. SMITH: Objection to form. You can answer if you understand.
>
> A. The services that he would provide and the cost for those services.

(*Id.* at 12/38:7-15.)

In light of the foregoing, the court finds that AmeriFactors fails to carry its burden of establishing an issue of fact as to the misrepresentation of material fact element of its affirmative defense for fraud and, therefore, the fraud affirmative defense fails as a matter of law. *See Herndon v. Mass. Gen. Life Ins. Co.*, 28 F. Supp. 2d 379, 382 (W.D. Va. 1998) ("[I]f a defendant seeks to use an affirmative defense as a basis to resist a plaintiff's motion for summary judgment, the defendant must create at least a triable issue of fact as to the existence of each element of the defense." (citations omitted)).

3. Application of AmeriFactors' Affirmative Defenses for Unclean Hands and Waiver

"TCPA claims are statutory tort claims." *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 U.S.

Dist. LEXIS 103385, 2017 WL 2861671, at *9 (E.D. Mo. July 5, 2017) (citing *Branham v. Isi Alarms, Inc.*, No. 12-CV-1012, 2013 U.S. Dist. LEXIS 124933, 2013 WL 4710588, at *6 (E.D.N.Y. Aug. 30, 2013)). However, "[t]he TCPA [also] provides for injunctive relief." *Exclusively Cats Veterinary Hosp., P.C. v. Pharm. Credit Corp.*, No. 13-cv-14376, 2014 U.S. Dist. LEXIS 132440, 2014 WL 4715532, at *4 (E.D. Mich. Sept. 22, 2014) (citing 47 U.S.C. § 227(b)(3)(A)).

In the First Amended Complaint, Career Counseling sought: "(i) injunctive relief enjoining Defendants, their employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with them, from sending unsolicited advertisements in violation of the JFPA; and (ii) an award of statutory damages in the minimum amount of $ 500 for each violation of the JFPA, and to have such damages trebled, as provided by § 227(b)(3) of the Act." In its Answer, AmeriFactors expressly asserted that Career Counseling's claims "are barred by the doctrines of . . . unclean hands and waiver." (ECF No. 173 at 7 ¶ 16.)

Upon consideration of the foregoing, the court observes that waiver and unclean hands are equitable defenses. *E.g., Simms v. Chase Student Loan Servicing, LLC*, No. 4:08CV01480 ERW, 2009 U.S. Dist. LEXIS 28977, 2009 WL 943552, at *1 n.2 (E.D. Mo. Apr. 6, 2009). When Career Counseling filed its First Amended Complaint, it sought injunctive relief, in addition to trebled statutory damages. However, in its Motion for Summary Judgment, Career Counseling only seeks the statutory damages

amount of $ 500.00 and appears to have withdrawn its claims for injunctive relief and treble damages. (*See* ECF No. 238 at 18 n.6 ("Although the TCPA allows the Court to enter injunctive relief, 47 U.S.C. § 227(b)(3), Plaintiff has not sought injunctive relief in this Motion, limiting its request to the automatic $ 500 per violation on Plaintiff's individual claim." (referencing ECF No. 233 at 2 ¶ 6)).) As a result of this withdrawal, the court finds that TCPA law in its current state does not support application of the equitable defenses of waiver and unclean hands to a claim of statutory damages under the TCPA. *See, e.g., Johnson v. Capital One Servs., LLC*, 2019 U.S. Dist. LEXIS 159633, 2019 WL 4536998, at *6 (S.D. Fla. Sept. 19, 2019) ("[I]t is well settled in this Circuit that the TCPA is essentially a strict liability statute that does not require intent except when determining an award of treble damages . . . . Moreover, the applicability of an equitable defense such as unclean hands to a TCPA claim is uncertain." (internal and external citations omitted)). *Cf. Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, Pa.*, 314 F. Supp. 2d 1094, 1103 (D. Kan. 2004) ("The TCPA is essentially a strict liability statute—even if Park erroneously faxed advertisements to recipients with whom it did not have an existing business relationship, Park may be held liable under the TCPA for its actions (albeit without treble damages)."); *Aaron v. Mahl*, 381 S.C. 585, 674 S.E.2d 482, 487 (S.C. 2009) ("The equitable doctrine of unclean hands, however, has no application to an action at law." (citation omitted)).

V. CONCLUSION

Upon careful consideration of the entire record and the parties' arguments, the court hereby **GRANTS** Plaintiff

Appendix C

Career Counseling, Inc.'s Motion for Summary Judgment (ECF No. 233) and **AWARDS** it statutory damages of $ 500.00 for violation of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005.

IT IS SO ORDERED.

/s/ J. Michelle Childs
United States District Judge

January 31, 2022
Columbia, South Carolina

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FILED JANUARY 31, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Civil Action No. 3:16-03013-JMC

CAREER COUNSELING, INC.
D/B/A SNELLING STAFFING SERVICES,
A SOUTH CAROLINA CORPORATION,
INDIVIDUALLY AND AS THE
REPRESENTATIVE OF A CLASS OF
SIMILARLY SITUATED PERSONS,

Plaintiff,

v.

AMERIFACTORS FINANCIAL
GROUP, LLC, JOHN DOES 1-5

Defendants.

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

- ■ other: the Plaintiff is awarded statutory damages of Five Hundred and 00/100 ($500.00) dollars for violation of the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 and this action is dismissed with prejudice.

Appendix D

This action was *(check one):*

- ■ decided by the Honorable J. Michelle Childs, United States District Judge presiding. The Court having granted plaintiff's motion for summary judgment.

Date: January 31, 2022

CLERK OF COURT

s/ Angie Snipes
Signature of Clerk or Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED FEBRUARY 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1119 (L), No. 22-1136

CAREER COUNSELING, INC., D/B/A SNELLING STAFFING SERVICES, A SOUTH CAROLINA CORPORATION, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY-SITUATED PERSONS,

Plaintiff-Appellant ,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,

Defendant-Appellee,

and

JOHN DOES 1-5,

Defendant.

February 20, 2024, Filed

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Appendix E

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge King.

For the Court

/s/ Nwamaka Anowi, Clerk