No. 17-_____

In the
Supreme Court of the United States

SANDUSKY WELLNESS CENTER, LLC,

Petitioner

v.

ASD SPECIALTY HEALTHCARE, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this putative class action under the Telephone Consumer Protection Act of 1991 ("TCPA"), the Sixth Circuit Court of Appeals ruled that (1) it was "bound" by a D.C. Circuit ruling that the FCC exceeded its authority in issuing a regulation requiring opt-out notice on facsimile advertisements sent with "prior express invitation or permission," and (2) that the class could not be certified where Defendant's records do not allow the parties to "identify" each class member with 100% accuracy.

There are two questions presented:

1. Whether the decision of one circuit court of appeals becomes binding on all other circuits if the decision reviews the validity of an agency order under the Hobbs Act, 28 U.S.C. § 2342(1), as the Sixth Circuit held in this case and the Ninth Circuit held in *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008), *or* whether "there is no rule of intercircuit stare decisis," and one circuit's ruling in a Hobbs Act appeal is not binding outside that circuit, as the Seventh Circuit held in *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir.), *rev'd on other grounds*, 511 U.S. 1103 (1994), and the First Circuit held in *Bhd. of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 802 (1st Cir. 1986).

2. Whether an ability to "identify" class members is a prerequisite to class certification—under the rubric of "ascertainability," "predominance," or

"superiority"—as the Sixth Circuit held in this case, *or* whether class-member identification is merely one aspect of "manageability," which should not ordinarily preclude class certification, as the Seventh and Ninth Circuits held in *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663–64 (7th Cir. 2015), and *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127 (9th Cir. 2017).

PARTIES TO THE PROCEEDING

Petitioner is Sandusky Wellness Center, LLC ("Plaintiff"). Respondent is ASD Specialty Healthcare, d/b/a/ Besse Medical AmerisourceBergen Specialty Group ("Defendant").

RULE 29.6 STATEMENT

Petitioner states that it has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017). (Pet. App. 1a). The district court's order is available at *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, No. 3:13 CV 2085, 2016 WL 75535 (N.D. Ohio Jan. 7, 2016).

JURISDICTION

The court of appeals entered its judgment on July 11, 2017. (Pet. App. 1a). The court of appeals denied a petition for rehearing on September 1, 2017. (Pet. App. 42a). Petitioner filed this Petition for a Writ of Certiorari on November 30, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

28 U.S.C. § 2112(a):

. . . . If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the

agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. . . .

. . . .

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. . . .

28 U.S.C. § 2342(1):

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has

exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47; . . . .

47 U.S.C. § 227(b)(1)(C):

(1) Prohibitions

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

. . . .

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient

> voluntarily agreed to make available its facsimile number for public distribution, . . . ; and
>
> (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D) . . . .

47 U.S.C. § 227(b)(2):

The Commission shall prescribe regulations to implement the requirements of this subsection. . . . .

47 U.S.C. § 227(b)(3):

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

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

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

(C) both such actions.

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

47 C.F.R. § 64.1200:

(a) No person or entity may:

. . .

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited

advertisement to a telephone facsimile machine, unless--

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through--

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution . . .

(C) . . . ; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. . . .

. . . .

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

STATEMENT OF THE CASE

A. The District Court Proceedings.

On September 19, 2013, Plaintiff filed this action in the United States District Court for the Northern District of Ohio, alleging that that Defendant sent "unsolicited advertisements" by fax in violation of the TCPA, including a fax advertising the drug "Prolia" on June 16, 2010 (the "Prolia Fax"). (*See* Pet. App. 8a). Plaintiff further alleged that even if Defendant claimed to have an "established business relationship" ("EBR") with fax recipients or to have obtained their "prior express invitation or permission," the Prolia Fax lacks the opt-out notice required by the regulations implementing the TCPA, 47 C.F.R. § 64.1200(a)(4)(iii)–(iv). (*Id.*)[1]

Discovery revealed that Defendant used a "fax broadcaster" called WestFax, Inc. to send the Prolia Fax to 53,502 fax numbers. (Pet. App. 7a). Defendant obtained the list of target fax numbers from a third-party called InfoUSA. (*Id.*) Defendant produced this "Prolia List" in discovery. (*Id.*)

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[1] The Prolia Fax contains an opt-out notice, but it violates § 64.1200(a)(4)(iii) because it is not "clear and conspicuous," and does not (1) provide a telephone number for requests, (2) state that a sender's failure to honor a request within 30 days is unlawful, (3) state that a request must be made using the means identified in the fax, or (4) state that a request must identify the fax number to which it relates. (Pet. App. 47a).

Of the 53,502 attempted transmissions, Defendant successfully sent[2] 40,343 (or 75.4%). (Pet. App. 7a). Defendant produced a WestFax invoice showing the number of successful transmissions. (*Id.*) WestFax also emailed Defendant a detailed fax-transmission log showing each individual transmission by target fax number and whether the transmission was successful. (Pet. App. 8a). But Defendant and WestFax say they destroyed the log before this suit was filed. (*Id.*)

On September 11, 2015, Plaintiff moved to certify a class of persons "successfully sent" the Prolia Fax. On January 7, 2016, the district court denied class certification on two main grounds. (Pet. App. 30a).

First, the district court held the missing transmission logs meant that individualized inquiries to identify "successfully sent" faxes would "predominate" and that the class is not "ascertainable" because there is no "administratively feasible" way to "identify fax recipients," as opposed to those on the target list. (Pet. App. 34a–37a).

Second, the district court held that individual issues of whether each individual class member gave Defendant "prior express invitation or consent" to receive fax advertisements predominated. (Pet. App. 38a–40a). The district court acknowledged that the "regulations prescribed under" the TCPA, 47 C.F.R.

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[2] Even though the Prolia Fax was physically transmitted by WestFax, it was "sent" by Defendant because "sender" means person "on whose behalf" a fax is sent or "whose goods or services are advertised." 47 C.F.R. § 64.1200(f)(10).

§ 64.1200(a)(4)(iv), require faxes sent with "prior express invitation or permission" to contain compliant opt-out notice, which the Prolia Fax lacks, but it held that regulation did not apply to Defendant because the FCC's Consumer & Governmental Affairs Bureau granted Defendant a "retroactive waiver" on August 28, 2015. (*Id.*) Having bypassed the opt-out-notice requirement, the district court held Defendant produced sufficient evidence that a significant number of persons on the InfoUSA list also happened to be "current or former" customers who may have given "prior express permission," and so individual issues of permission predominated. (*Id.*)

On January 21, 2016, Plaintiff filed a petition for interlocutory review with the Sixth Circuit pursuant to Fed. R. Civ. P. 23(f).

B. The Sixth Circuit Proceedings.

On June 30, 2016, the Sixth Circuit granted Plaintiff's petition to appeal the denial of class certification. The Sixth Circuit had jurisdiction under 28 U.S.C. § 1292(e) because Rule 23(f) "provide[s] for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under § 1292.

Following briefing and oral argument in the Sixth Circuit, the D.C. Circuit issued its split decision in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017). In *Bais Yaakov*, the D.C. Circuit reviewed an FCC order dated October 30, 2014, *In re*

Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 29 FCC Rcd. 13998 (rel. Oct. 30, 2014) ("2014 Order"), in which the FCC rejected several petitions challenging its authority to issue § 64.1200(a)(4)(iv) eight years earlier in *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3811 ¶ 46 (rel. Apr. 6, 2006) ("2006 Order"). Multiple parties filed petitions for review of the 2014 Order in the D.C. Circuit, but one petition filed in the Eighth Circuit. (Pet. App. 44a–45a). On November 13, 2014, the MDL Panel "randomly selected" the D.C. Circuit as the venue, and ordered that "pursuant to 28 U.S.C. § 2112(a)(3), the petitions . . . are consolidated in the District of Columbia Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure." (*Id.*)

On March 31, 2017, a divided panel of the D.C. Circuit held that the FCC exceeded its authority in issuing § 64.1200(a)(4)(iv) and requiring opt-out notice on so-called "solicited faxes."[3] *Bais Yaakov*, 852 F.3d at 1082. Despite acknowledging that the statute gives the FCC authority to "implement" the TCPA, the majority held that § 64.1200(a)(4)(iv) failed *Chevron* "step one," reasoning that because the TCPA specifically requires opt-out notices on fax

[3] The term "solicited fax" does not appear in the statute, the regulation, or the FCC order issuing the regulation. *See* 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(a)(4)(iv); 2006 Order, 21 FCC Rcd. at 3811, ¶ 46.

ads sent *without* prior express permission, but says nothing about opt-out notices on fax ads sent *with* prior express permission, "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements," and so the FCC was forbidden to regulate in the "solicited" arena. *Id.*[4]

Judge Pillard dissented, concluding that the FCC had the power to issue § 64.1200(a)(4)(iv) pursuant to its broad authority "to implement" the TCPA and that it was reasonable for the FCC to require fax advertisers to "make clear" to fax recipients how they can revoke their permission. *Id.* at 1083–84 (Pillard, J., dissenting).[5] Judge Pillard concluded that the majority's reasoning was based on an "*expressio unius*" argument, which is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Id.* at 1085.[6]

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[4] Because the majority ruled that the § 64.1200(a)(4)(iv) was invalid, it dismissed the petitions challenging the FCC's "retroactive waivers" as moot. *Id.* at 1083, n.2.

[5] Judge Pillard also opined that the FCC's "waivers" were invalid. *Id.* at 1086 (Pillard, J., dissenting).

[6] Following denial of rehearing in *Bais Yaakov*, the TCPA plaintiffs, several of whom are represented by undersigned counsel, petitioned this Court for certiorari in No. 17-351. On October 31, 2017, the Court ordered the respondents to respond by November 30, 2017, which the Court extended at the FCC's request to January 2, 2018.

On July 11, 2017, the Sixth Circuit issued its decision in this case, holding that the D.C. Circuit's decision in *Bais Yaakov* is "binding" in all federal courts, including the Sixth Circuit, such that § 64.1200(a)(4)(iv) has been "struck down" and "abrogated" nationwide. (Pet. App. 13a–14a). Based on this ruling, the Sixth Circuit affirmed the district court's denial of class certification, reasoning that with the opt-out requirement eliminated, individual inquiries would be required into whether each class member gave express permission. (Pet. App. 15a–16a).[7]

The Sixth Circuit also affirmed the district court's ruling that the inability to "identify" each class member ex ante precluded class certification. (Pet. App. 21a). The Sixth Circuit held that, regardless whether viewed as an issue of "ascertainability," or Rule 23(b)(3) "predominance" or "superiority," this was an appropriate basis to deny class certification. (Pet. App. 22a–23a, 25a–26a).

On July 25, 2017, Plaintiff filed a petition for rehearing en banc, arguing that a decision from the D.C. Circuit cannot "bind" the Sixth Circuit, citing *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir.), *rev'd on other grounds*, 511 U.S. 1103 (1994), where the Seventh Circuit held it was not bound by

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[7] The Sixth Circuit held it was "no longer necessary" to decide whether the "waiver" from the FCC Bureau eliminated Plaintiff's statutory right to sue for violations of the "regulations prescribed under" the TCPA in 47 U.S.C. § 227(b)(3). (Pet. App. 12a).

a D.C. Circuit decision invalidating an agency order in a Hobbs Act proceeding, ruling that "there is no rule of intercircuit stare decisis," and *Bhd. of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 802 (1st Cir. 1986), which held a D.C. Circuit Hobbs Act decision was not binding in the First Circuit. Plaintiff argued that "[c]ircuit courts often disagree on the validity of agency rules," which allows agencies to pursue different results in different circuits, which may lead to circuit splits to be resolved by *this* Court, under the doctrine of agency "nonacquiescence," citing Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

Plaintiff also argued that the Sixth Circuit's ruling regarding "identification" of class members improperly followed the "heightened" standard for "ascertainability" that the Sixth Circuit had rejected in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), and that it misapplied the standards for Rule 23(b)(3) predominance and superiority, where each class member could be given notice and an opportunity to claim their share of any recovery.

On September 1, 2017, the Sixth Circuit denied the petition for rehearing in a one-page order, and amended the opinion to add a footnote expressing its "agreement with the majority in *Bais Yaakov* that, per the clear text of the TCPA, the FCC does not have the authority to regulate solicited faxes." (Pet. App. 43a). Plaintiff timely filed this Petition on November 30, 2017.

REASONS FOR GRANTING THE PETITION

I. The Court should grant review and reverse the Sixth Circuit holding that the D.C. Circuit's decision in *Bais Yaakov* is binding nationwide

A. The Sixth Circuit's decision is erroneous, and it deepens the split between the Sixth and Ninth Circuits, which hold a decision of one circuit court in a Hobbs Act appeal is binding in other circuits, and the First and Seventh Circuits, which hold there is no "intercircuit stare decisis" with respect to agency appeals, and this issue is of exceptional importance in many types of cases, not only TCPA litigation

The Sixth Circuit held the D.C. Circuit's decision in *Bais Yaakov* is "binding" in every federal court "in light of the procedural mechanism Congress has provided for challenging agency rules." (Pet. App. 13a (citing 28 U.S.C. §§ 2112, 2342–43)). The Sixth Circuit reasoned that "[b]y requiring petitioners to first bring a direct challenge before the FCC, the statute allows this expert agency to weigh in on its own rules, and by consolidating petitions into a single circuit court, the statute promotes judicial efficiency and ensures uniformity nationwide." (*Id.* (citing *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010)).

The Sixth Circuit relied on *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008), where the Ninth Circuit held an Eleventh Circuit

decision in a Hobbs Act appeal concerning an FCC Order was binding in the Ninth Circuit.

These decisions are irreconcilable with the Seventh Circuit's decision in *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir.), *rev'd on other grounds*, 511 U.S. 1103 (1994), where the Seventh Circuit held that it was not bound by a D.C. Circuit decision invalidating an order of the Interstate Commerce Commission, now the "Surface Transportation Board." Such orders, like final FCC orders, are subject to the Hobbs Act, and reviewable only by a circuit court in which venue is proper. *See* 28 U.S.C. § 2342(5). The D.C. Circuit decision that the Seventh Circuit held was not binding in *Brizendine* noted that the D.C. Circuit was exercising its "jurisdiction over challenges to Commission proceedings under the Hobbs Act." *Overland Express, Inc. v. ICC*, 996 F.2d 356, 358, n.1 (D.C. Cir. 1993) (citing 28 U.S.C. §§ 2321(a), 2342)). Nevertheless, the Seventh Circuit ruled that "[b]ecause *there is no rule of intercircuit stare decisis*," the D.C. Circuit's decision was not binding in the Seventh Circuit. *Brizendine*, 4 F.3d at 462, n.4 (emphasis added).

Similarly, the Sixth Circuit's decision conflicts with *Bhd. of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 802 (1st Cir. 1986). In that case, the plaintiff labor union argued to the First Circuit that the Interstate Commerce Commission "exceeded its authority in exempting participants in a rail consolidation from the RLA without specifying

any necessity to justify the exemption." As support, the plaintiff cited a decision from the D.C. Circuit in a Hobbs Act appeal brought by the same plaintiff in which the D.C. Circuit held that the ICC cannot grant an exemption order without "specifying a necessity" to justify the exemption. *Id.* (citing *Bhd. of Locomotive Eng'rs v. Interstate Commerce Comm'n*, 761 F.2d 714 (D.C. Cir. 1985)). The First Circuit held that decision was "inapposite" because "[t]he D.C. Circuit issued its ruling on direct review from an ICC order" under the Hobbs Act, and the First Circuit could not disregard an agency order outside of a Hobbs Act proceeding, even if the rationale of the D.C. Circuit's decision—that the ICC must "specif[y] a necessity" for an exemption order—would have applied in the case before it, as well.

In addition to raising an important issue on which there is a circuit split, the Sixth Circuit's decision that it was bound by the D.C. Circuit's decision in *Bais Yaakov* is also erroneous. A decision by one circuit court of appeals is never "binding" on another circuit. Circuit court opinions "'bind' only within a vertical hierarchy." *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994). "[U]ntil the Supreme Court speaks," the federal circuit courts must "arrive at their own determination of the merits of federal questions presented to them." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993).

In the administrative law context in particular, the lack of intercircuit stare decisis enables "intercircuit dialogue" until *this* Court definitively

settles the dispute, under the principle of "intercircuit nonacquiescence." As one often-cited article explains:

> [T]he acceptance of intercircuit nonacquiescence should properly be seen as a corollary to the rejection of intercircuit stare decisis. To make the ruling of the first court of appeals that considers an issue directly binding on all other courts of appeals through the operation of stare decisis is undesirable because it eliminates the possibility of intercircuit dialogue. For the same reason, it is undesirable to make the ruling of the first court of appeals rejecting an agency's policy indirectly binding on other courts by insisting on compliance with that ruling in the agency's internal proceedings, a requirement which would have the practical effect of precluding the agency from litigating the issue again in other courts of appeals.

S. Estreicher & R. L. Reeves, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 741 (1989); *Ruppert v. Bowen*, 871 F.2d 1172, 1177 (2d Cir. 1989) (rejecting argument that Social Security Administration should be required to "apply circuit court decisions nationally").

The issue of whether one circuit court's decision reviewing the validity of an agency order in a Hobbs Act proceeding is binding in other circuits is of great importance, not only in TCPA cases involving the FCC regulations, but in many other contexts, as

well. For example, the Hobbs Act also applies to orders of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission, Surface Transportation Board, and Secretary of Housing and Urban Development. *See* 28 U.S.C. § 2342(2)–(6). This Court should accept review to resolve this circuit split and decide this important question.

Contrary to the Sixth Circuit's decision in this case (Pet. App. 13a), it makes no difference that the petitioners in *Bais Yaakov* filed in the D.C. Circuit and the Eighth Circuit, with the Eighth Circuit petition then being transferred to the D.C. Circuit by the MDL Panel pursuant to 28 U.S.C. § 2112(a). Section 2112(a) is merely a venue provision, assigning multiple appeals from the same agency order to one court. Nothing in the text or the legislative history suggests that Congress intended to make the decision of the assignee circuit court binding precedent outside of that circuit, in contradistinction to the long-settled law on the lack of intercircuit stare decisis. *See* S. Rep. 100-263, 100th Cong. (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198, 3198, 3202, 1987 WL 61562, at **1, 5. This Court has repeatedly held that Congress does not "hide elephants in mouseholes" in this manner. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1612 (2014).

The Sixth Circuit's erroneous conclusion that § 2112(a) creates a new rule of intercircuit stare decisis in consolidated Hobbs Act appeals can be

traced back from the Ninth Circuit's decision in *Peck*, 535 F.3d at 1057, to the Fourth Circuit's decision in *GTE S., Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999), which is where *Peck* picked up the language that the assignee circuit under § 2112(a) is "the sole forum for addressing challenges to the validity of the FCC's rules." The Fourth Circuit based the "sole forum" language on its conclusion that § 2112(a) was designed "to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions," quoting the Third Circuit's decision in *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 766–67 (3d Cir. 1979).

A closer look at *Westinghouse*, however, shows that the "conflicting decisions" the Third Circuit was concerned about were "'conflicting decisions' *as to where venue lies*." 598 F.2d at 767 (emphasis added). At the time *Westinghouse* was decided, § 2112 provided that, where petitions from one agency order are filed in more than one circuit, "the choice of *the appropriate forum* for review of that order is to be made by the court in which a petition was first filed," not the MDL Panel, as is the case today. *Id.* at 766 (emphasis added).

The Fourth Circuit in *GTE South* omitted the "as to where venue lies" portion of the quote from *Westinghouse*, which led the Ninth Circuit to misconstrue it in *Peck* as holding that the assigned circuit is the sole forum *as to the validity of the agency order*, not as to venue, which in turn led to

the Sixth Circuit's mistaken decision in this case. This Court should grant review, overrule this line of cases to the extent they hold there is a rule of intercircuit stare decisis in consolidated Hobbs Act appeals, and hold that nothing in § 2112(a) makes one circuit's decision binding in other circuits.

B. The Sixth Circuit had no jurisdiction to opine on the validity of § 64.1200(a)(4)(iv) outside of a properly instituted Hobbs Act appeal.

In denying rehearing, the Sixth Circuit expressed its "agreement" with the D.C. Circuit's conclusion that "the FCC does not have the authority to regulate solicited faxes" (Pet. App. 43a). This Court should reverse this ruling because it violates the Hobbs Act. Section § 64.1200(a)(4)(iv) was issued in the 2006 Order, 21 FCC Rcd. at 3811, ¶ 46, which is a "final order" of the FCC subject to the Hobbs Act, and neither the Sixth Circuit nor any other federal court has jurisdiction to question its validity outside the Hobbs Act procedures, 28 U.S.C. § 2342(1). Those procedures require that an "aggrieved party" file a direct appeal from agency action naming the agency as respondent. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).

Defendant in this case filed a petition for a "waiver" of § 64.1200(a)(4)(iv) with the FCC on November 20, 2014, which was granted by the Consumer & Governmental Affairs Bureau on August 28, 2015. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,

30 FCC Rcd. 8598, 8613 ¶ 24 & n.2 (CGAB rel. Aug. 28, 2015). Although Defendant in this case did not challenge the validity of § 64.1200(a)(4)(iv) in its petition, several other petitioners did, and the Bureau denied those challenges. *Id.*, 30 FCC Rcd. at 8602, ¶ 2. Defendant did not appeal the portion of the Bureau Order denying the challenges to the validity of the rule, but on September 28, 2015, Plaintiff timely filed an Application for Review from the Bureau "waiver" with the full FCC pursuant to 47 C.F.R. § 1.115, which is a "condition precedent to judicial review" under 47 U.S.C. § 155(c)(7).

Once the FCC issues a final order on Defendant's petition, any "aggrieved party" has a right to appeal that final order under the Hobbs Act to *either* "the judicial circuit in which the petitioner resides or has its principal office," or the D.C. Circuit, 28 U.S.C. § 2343, just as the petitioners in *Bais Yaakov* had the right to appeal the 2014 Order.[8] There has been no such final order yet, and Defendant cannot

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[8] Plaintiff has its principal office in the Sixth Circuit, and its Hobbs Act petition would not be subject to transfer to the D.C. Circuit under § 2112(a). *See Far East Conference v. Fed. Maritime Comm'n*, 337 F.2d 146, 148 n.1 (D.C. Cir. 1964) (although subject matter of orders was "substantially identical," the orders were not "the same order" and therefore appeal could not be transferred from D.C. Circuit to Ninth Circuit pursuant to § 2112(a)); *ACLU v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973) (denying § 2112 request to transfer to circuit where related Hobbs Act proceeding had been completed because "[i]t is not possible to consolidate a pending petition with one involved in litigation which has ended").

challenge the validity of § 64.1200(a)(4)(iv) outside of the Hobbs Act procedures in the Sixth Circuit or any other federal court.

In sum, this Court should grant review in order to resolve the circuit split on this issue, hold that there is no rule of "intercircuit stare decisis" with respect to one circuit's decision in a Hobbs Act appeal, and hold that 28 U.S.C. § 2112(a) does not create such a rule. The Court should hold that § 64.1200(a)(4)(iv) is binding in the Sixth Circuit unless or until the Sixth Circuit or this Court rules that it is invalid in a proper Hobbs Act proceeding. The Sixth Circuit erred in holding that the D.C. Circuit's ruling in *Bais Yaakov* is "binding" outside the D.C. Circuit, and this Court should accept review and reverse.

C. In the alternative, if the D.C. Circuit's decision in *Bais Yaakov* is binding nationwide, this Court should overrule the "expressio unius" reasoning of *Bais Yaakov*, thus precluding the Sixth Circuit from following it.

Even if the Sixth Circuit did not err in holding that the D.C. Circuit's decision in *Bais Yaakov* is binding in all federal courts, the question remains whether the majority in *Bais Yaakov* correctly ruled that the TCPA's silence regarding whether opt-out notice is required on fax ads sent with express permission precluded the FCC from issuing § 64.1200(a)(4)(iv). *Bais Yaakov*, 852 F.3d at 1082. As Judge Pillard's dissenting opinion correctly

explained, that rationale is an "*expressio unius*" argument, which is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Id.* at 1085 (Pillard, J., dissenting).

This question is raised in the pending petition for certiorari filed by the petitioners seeking review of the D.C. Circuit's decision in No. 17-351.[9] Nevertheless, the Court could also overrule the "expressio unius" reasoning employed in *Bais Yaakov* in this case, and reverse the Sixth Circuit on this basis and remand for further proceedings.

II. The Court should grant review and reverse the Sixth Circuit's ruling that difficulty "identifying" class members precludes class certification, which threatens to undermine the effectiveness of class actions.

The Sixth Circuit held that the district court appropriately denied class certification based on an "inability to identify class members," even though (1) Plaintiff possess the "universe" of the targeted 53,502 fax numbers, and (2) it is undisputed that 40,343 of those fax numbers successfully received the Prolia Fax, a 75% success rate, but (3) it cannot

[9] Several of the petitioners in *Bais Yaakov* are represented by undersigned counsel. On October 31, 2017, the Court ordered the respondents to respond to the *Bais Yaakov* petition, and later extended the date for responses at the FCC's request to January 2, 2018.

be determined ex ante which fax numbers successfully received the faxes and which did not, due to the lack of the transmission logs. (Pet. App. 22a). The Sixth Circuit held denial of class certification was appropriate, regardless whether "identification" is viewed as an issue of "ascertainability," "predominance," or "superiority." (Pet. App. 25–26a). This Court should grant review and overrule the Sixth Circuit on all three points.

A. Class-member identification has nothing to do with "ascertainability," to the extent there even is such an implied requirement, and this Court should grant certiorari to resolve the circuit split on this issue between the Third and Sixth Circuits, and the Seventh and Ninth Circuits.

This case presents an opportunity for this Court to clarify whether there is an "ascertainability" requirement for Rule 23(b)(3) classes and, if so, what that standard means. There is a well-developed circuit split on this issue.

The Seventh and Ninth Circuits hold that, to the extent there is an implied "ascertainability" requirement, it is limited to whether the class is "defined clearly and based on objective criteria," and does *not* concern whether "it would be difficult to identify" class members, and does not require a "reliable and administratively feasible way" to identify class members. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *Briseno v.*

ConAgra Foods, Inc., 844 F.3d 1121, 1127 (9th Cir. 2017) The Seventh and Ninth Circuits hold that any difficulty "identifying" class members for purposes of giving notice or distributing any recovery must be weighed under Rule 23(b)(3) "superiority," recognizing "both the costs *and benefits* of the class device," including the deterrent purpose of the underlying substantive law. *Mullins*, 795 F.3d at 663; *Briseno*, 844 F.3d at 1128.

The Third Circuit applies a "heightened" ascertainability standard, requiring the plaintiff to demonstrate an "administratively feasible" way to "identify" class members. *See Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). The Sixth Circuit previously rejected the Third Circuit's heightened standard in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), but the district court in this case essentially endorsed this heightened approach, and the Sixth Circuit affirmed. (Pet. App. 25a–26a).

This Court should grant certiorari in this case to resolve this significant circuit split on class "ascertainability."

B. Class-member identification has nothing to do with Rule 23(b)(3) "predominance" of common issues.

The Sixth Circuit held that "some" courts have considered "difficulties in identifying class members" to be an issue "when deciding whether common questions of law or fact predominate," citing the Seventh Circuit's decision in *Holtzman v. Turza*, 728

F.3d 682, 685 (7th Cir. 2013). (Pet. App. 23a). That is not what happened in *Turza*. In that case, the defendant sent dozens of slightly different faxes over a period of years, and the defendant's predominance challenge was that "individual issues about who received *how many faxes* predominate over the common questions." *Turza*, 728 F.3d at 685. The court held that determining how many faxes were received at each fax number did not require individualized inquiry because the logs answered the question. *Id.* It had nothing to do with identifying class members, and the Seventh Circuit did not consider identification as a predominance issue. *Id.*

In this case, there was one fax, the Prolia Fax, and the common issues—*e.g.*, whether the Prolia Fax is an "advertisement," whether Defendant is a "sender," and whether the fax contains compliant opt-out notice—far outweigh any individual question. The Court should grant review on the "ascertainability" question and, as part of its ruling, clarify that class-member identification has nothing to do with whether common issues "predominate" over individual issues. As discussed below, the Seventh and Ninth Circuits are correct that identification is a factor to be considered under the comparative Rule 23(b)(3) superiority standard.

C. Class-member identification must be balanced under Rule 23(b)(3) "superiority," and should never be a bar to class certification where the underlying statute has the purpose of deterring corporate wrongdoing, where the

> **aggregate recovery can be easily calculated, where individual notice can be given to every class member, allowing them to file claims, and where any unclaimed funds can be distributed via cy pres or fluid recovery.**

Finally, the Court should grant review and reverse the Sixth Circuit's holding that class certification would not be "superior" to the alternatives under Rule 23(b)(3). The Seventh and Ninth Circuits hold that where predominance is met, "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all." *Mullins*, 795 F.3d at 658; *Briseno*, 844 F.3d at 1127 (following *Mullins*, holding that "[w]hen it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good").

The Sixth Circuit held absent class members should not be given an opportunity to prove receipt of the Prolia Fax through affidavits in a claims process because such "self-serving statements" would be "dubious at best." (Pet. App. 21a, 26a). The Seventh and Ninth Circuits have categorically rejected this reasoning, holding that there is only "one type of case in American law where the testimony of one witness is legally insufficient to prove a fact"—treason—and "[t]here is no good reason to extend that rule to consumer class actions." *Mullins*, 795 F.3d at 668–69; *Briseno*, 844

F.3d at 1132 ("Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made.").

Moreover, given that the number of statutory violations in this case is known, "identification of class members" will not affect Defendant's total liability. *Briseno*, 844 F.3d at 1132. Defendant's "aggregate liability" can be calculated by multiplying the number of successful fax transmissions (40,343) by the per-violation statutory damages ($500 to $1,500). As in *Briseno*, an inability to "identify" class members "affects neither the defendant's liability nor the total amount of damages it owes to the class." *Id.*; *Mullins*, 795 F.3d at 670 ("the identity of particular class members does not implicate the defendant's due process interest at all" because "[t]he addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class"); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute damages, the interests affected are not the defendant's but rather those of the silent class members.").

Any class recovery could also be distributed through "fluid recovery" to persons on the target list. *See* William B. Rubenstein, Newberg on Class

Actions § 12:27 (5th ed. 2013) (distinguishing fluid recovery to similarly situated persons from cy pres to charity). Allowing fluid recovery here would "benefit many class members directly," although it might also compensate some who did not successfully receive the faxes. *Id.* Still, the TCPA's deterrent objective would be satisfied, and it would be highly "efficient." *Id.* It is certainly "superior" to the alternative that no one recovers anything and Defendant walks away scot-free, considering "both the costs *and benefits* of the class device." *Mullins*, 795 F.3d at 663.

Even if it is totally "infeasible" to distribute funds to the class, the "superior" solution under Rule 23(b)(3) is to designate a cy pres recipient, not to deny class certification. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013). "In a class action the reason for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds," especially with statutory damages, which have an inherent "deterrent objective." *Id.*; *Six Mexican Workers*, 904 F.2d at 1303–04 (allowing cy pres of class-action statutory damages where class of undocumented workers could not be located).

In sum, the Court should grant review on the "ascertainability" issue, and hold that class-member identification is a "manageability" concern that cannot defeat "superiority" of class certification where the class seeks easily calculated statutory

damages, where the number of violations is known, where class members can be given notice and an opportunity to claim their share of the recovery, and where any unclaimed funds can be distributed by fluid recovery or cy pres distribution.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED JULY 11, 2017'

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3741

SANDUSKY WELLNESS CENTER, LLC,

Petitioner,

v.

ASD SPECIALTY HEALTHCARE, INC.,

Respondent.

Argued November 8, 2016 Decided July 11, 2017

Before: SUHRHEINRICH, SUTTON, and McKEAGUE, Circuit Judges

McKEAGUE, Circuit Judge. In 2010, Defendant ASD Specialty Healthcare, d/b/a/ Besse Medical AmerisourceBergen Specialty Group ("Besse"), a pharmaceutical distributor, sent a one-page fax advertising the drug Prolia to 53,502 physicians. Only 40,343, or 75%, of these faxes were successfully transmitted. Plaintiff Sandusky Wellness Center, a chiropractic clinic that

employed one of these physicians, claims to have received this so-called "junk fax," and— three years later—filed a lawsuit against Besse for the annoyance. Sandusky alleged that Besse violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by sending an unsolicited fax advertisement lacking a proper opt-out notice, and it sought to certify a putative class of all 40,343 Prolia fax recipients. The district court denied Sandusky's motion for class certification, and because that decision was not an abuse of discretion, we affirm.

I

We first provide a brief overview of the Telephone Consumer Protection Act before turning to the facts of this case.

A

In 1991, Congress passed the Telephone Consumer Protection Act (TCPA), *see* Pub. L. No. 102-243, 105 Stat. 2394, which was later amended by the Junk Fax Prevention Act of 2005, *see* Pub. L. No. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227). These legislative efforts were geared towards curbing the inundation of "junk faxes" that businesses were receiving. H.R. Rep. 102–317 at 10 (1991). These faxes were seen as problematic because they forced unwitting recipients to bear the costs of the paper and ink and also monopolized the fax line, preventing businesses from receiving legitimate messages. *Id.*

In response, the TCPA generally banned the sending of any "*unsolicited* advertisement" via fax. 47 U.S.C. §227(b)(1)(C) (emphasis added). A fax is

"unsolicited" if it is sent to persons who have not given their "prior express invitation or permission" to receive it. *Id.* § 227(a)(5). The statute carves out a narrow exception to this general ban by permitting the sending of unsolicited faxes if a sender can show three things: (1) the sender and recipient have "an established business relationship"; (2) the recipient voluntarily made his fax number available either to the sender directly or via "a directory, advertisement, or site on the Internet"; and (3) the fax contained an opt-out notice meeting detailed statutory requirements. *Id.* § 227(b)(1)(C)(i)- (iii). The upshot of this exception is that if an unsolicited fax does not contain a properly worded opt-out notice, the sender will be liable under the statute, regardless of whether the other two criteria are met.

Congress also authorized the Federal Communications Commission (FCC) to "prescribe regulations to implement the requirements of [the TCPA]." *Id.* § 227(b)(2). In 2006, the FCC promulgated a rule requiring opt-out notices on *solicited* faxes, i.e., those faxes sent to recipients who had given their "prior express invitation or permission" to receive it. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,971–72 (May 3, 2006) (now codified at 47 C.F.R. § 64.1200(a)(4)(iv)) (the "Solicited Fax Rule"). After the passage of the Solicited Fax Rule, both unsolicited and solicited faxes were

required to include opt-out notices that, among other things, were "clear and conspicuous," informed recipients that a sender was required to comply with an opt-out request "within the shortest reasonable time," and included a telephone number recipients could call to exercise their opt-out rights. *See* 47 U.S.C. § 227(b)(2)(D)(i)- (vi).

To ensure fax senders complied with the TCPA, Congress provided for a private right of action that allowed individuals and entities to sue for injunctive and monetary relief based on any violation "of [the statute] or the regulations prescribed [there]under." *Id.* § 227(b)(3). Specifically, fax senders faced a $500 fine for each fax sent that violated the TCPA or any FCC rule—a fine that could be increased to $1,500 per fax for willful violations. *Id.*

The import of the TCPA's damage scheme combined with the FCC's Solicited Fax Rule meant vast exposure to liability for businesses that used fax machines to advertise. For example, even individuals who agreed to receive faxes could nevertheless turn around and sue senders for $500 per fax if, in their view, an opt-out notice was not sufficiently "clear and conspicuous." For businesses that sent faxes on a mass scale, this liability quickly added up. *See, e.g., Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013) (recognizing that the Solicited Fax Rule's opt-out notice requirement subjected Walburg to "a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express

consent"). Here, for example, Sandusky proposed a class size of 40,343 individuals and entities. With a minimum of $500 potentially owed to each class member, Besse could be on the hook for over $20 million.

Concerned by this specter of crushing liability, businesses (and courts) began to question whether the FCC possessed the authority to promulgate the Solicited Fax Rule given that the text of the TCPA appeared to reach only unsolicited faxes. *See, e.g., id.* (finding it "questionable whether the regulation at issue . . . properly could have been promulgated under the statutory section that authorized a private cause of action"). Many fax senders petitioned the FCC for a declaratory ruling asking the agency to acknowledge its lack of statutory authority, *see* Anda Petition for Declaratory Ruling, CG Docket No. 05-338 (Nov. 30, 2010).

But in 2014, the FCC issued an order denying the petitioners' request, standing by the Solicited Fax Rule. *See* Order, *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirements for Faxes Sent with the Recipient's Prior Express Permission*, 29 F.C.C.R. 13,998, 13,998, 14,005 (2014) ("2014 Order"). In the same order, the FCC granted retroactive waivers of liability to the petitioners, exempting them from compliance with the Rule during a certain timeframe due to confusion over its applicability. *Id.* at 13,998. Furthermore, the FCC encouraged other fax senders to "seek waivers such as those

granted in this [2014] Order." *Id.* Besse heeded this advice, and in August 2015, the FCC granted it, along with 100 others, a similar liability waiver. Order, *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Appendix A Regarding the Commission's Opt-Out Requirements for Faxes Sent with the Recipient's Prior Express Permission*, 30 F.C.C.R. 8598 (2015) ("2015 Order").

After the 2014 Order was issued, several fax senders filed petitions for review of the agency's decision in multiple circuit courts. *Bais Yaakov* Docket, Notice of Multi-Circuit Petitions for Review filed on 11/13/14; Attachment A. The United States Judicial Panel on Multidistrict Litigation consolidated the petitions in the District of Columbia Circuit. *Bais Yaakov* Docket, Consolidation Order filed on 11/14/14. In March 2017, a split panel of the D.C. Circuit struck down the Solicited Fax Rule, holding it "unlawful to the extent that it requires opt- out notices on solicited faxes." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017). Applying the *Chevron* framework, the majority found that the clear text of the TCPA reached only *unsolicited* fax advertisements and that the FCC was thus without the authority to promulgate a rule governing *solicited* faxes. *See id.* at 1082 (citing *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 & n.9 (1984)) ("Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax

advertisements."). Because the majority struck down the Solicited Fax Rule, the question of the FCC's authority to issue retroactive waivers—which was also challenged—became moot. *Id.* at 1083 n.2. The D.C. Circuit's invalidation of the Solicited Fax Rule occurred after the district court denied Sandusky's motion for class certification in this case.

B

Besse is a distributor of pharmaceuticals and medical products. In 2007, it purchased a list of physician contact information from InfoUSA, a third-party data provider. Some of the physicians on that list, Besse later learned, happened to be current or former customers. Besse condensed the InfoUSA List down to 53,502 names, creating the Prolia List, which it planned to use to send a fax advertising the drug. On June 16, 2010, WestFax, a fax broadcaster, transmitted the Prolia fax on Besse's behalf. The one-page fax stated that "Besse Medical is proud to offer Prolia" and touted "FREE Overnight Shipping on all PROLIA orders!" *See* R. 1-1, Prolia Fax at 1, PID 15. The ad also contained a blank order form, a fax number where completed orders could be sent, and a fine-print opt-out notice. *Id.*

Although the fax was supposed to reach all 53,502 numbers on the Prolia List, WestFax's invoice records confirm that only 40,343, or 75% of the faxes, were transmitted successfully. While this total number of actual Prolia fax recipients is known, the identity of each is not. Typically after a

fax blast, a fax broadcaster will retain fax logs, listing by fax number each intended recipient and whether that recipient received a successful transmission of the fax. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684–85 (7th Cir. 2013). Here, however, the fax logs no longer exist. Sandusky did not sue Besse until three years after receiving the Prolia fax and by that time, neither Westfax nor Besse—who has an 18-month document retention policy— possessed a copy of the logs by which recipients could be identified.

Notwithstanding this roadblock, Sandusky Wellness Center claims it received the Prolia fax. In 2013, it filed suit against Besse, claiming Besse violated the TCPA by sending an unsolicited fax with a non-compliant opt-out notice. Following discovery, Sandusky sought certification of a putative class comprising all 40,343 persons who also allegedly received the fax. In Sandusky's view, Besse was liable to this whole lot, with no need to distinguish between which faxes were unsolicited and which were solicited: the statute itself provided redress for the former, and the Solicited Fax Rule covered the latter.

The district court, however, denied Sandusky's motion for class certification. *See generally* R. 108, Memorandum Op. at 1–9, PID 24703–11. It held that Sandusky's proposed class failed to satisfy Rule 23(b)(3) because two individualized issues—class member identity and consent—were central to the lawsuit and thus prevented "questions of law or fact common to class members [from] predominat[ing]." Fed. R. Civ. P.

23(b)(3); R. 108, Memorandum Op. at 3–4, PID 24705–06. As to class member identity, the district court concluded that, in the absence of fax logs, no classwide means existed by which to identify the 75% of individuals who received the Prolia fax, and thus were proper TCPA claimants, from the other 25%, who lacked standing to sue. R. 108, Memorandum Op. at 4, PID 24706. Without fax logs, the district court determined that "each potential class member would have to submit an affidavit certifying receipt of the Prolia fax." *Id.* at 6, PID 24708. Since the district court foresaw this becoming a highly individualized process, this counseled against class certification.

As to consent, the district court concluded that those fax recipients who had solicited the Prolia fax—i.e., consented to receiving it—did not have a valid claim against Besse since the FCC had granted Besse a retroactive waiver from complying with the Solicited Fax Rule. *Id.* at 7–8. The district court noted that Besse had produced considerable evidence indicating that at least some intended Prolia fax recipients had indeed solicited the fax. Thus, weeding out the solicited from the unsolicited fax recipients to discern proper class membership "would require manually cross-checking 450,000 potential consent forms [that established a fax was solicited] against the 53,502 potential class members," another individualized inquiry that made class certification improper. *See id.* at 6–8, PID 24708–10.

As an alternative to denying Sandusky's motion on Rule 23(b)(3) predominance grounds, the

district court also found that Sandusky's proposed class definition did not meet the implicit ascertainability requirement since identifying class members in the absence of fax logs was not "administratively feasible." *Id.* at 4–6, PID 24706–08. This appeal followed.

II

As explained more fully below, we find no abuse of discretion in the district court's denial of class certification. First, the district court was correct to conclude that individualized questions of consent prevent common questions from predominating under Rule 23(b)(3). Although the district court credited the FCC's retroactive waiver for the need to distinguish between solicited and unsolicited Prolia faxes, the D.C.'s Circuit's intervening decision in *Bais Yaakov*, which invalidated the Solicited Fax Rule, provides alternative grounds for this differentiation. Second, the district court's recognition of the difficulty in identifying class members without fax logs and with sole reliance on individual affidavits was equally sufficient to preclude certification, regardless of whether this concern is properly articulated as part of ascertainability, Rule 23(b)(3) predominance, or Rule 23(b)(3) superiority.

A

We review the district court's denial of class certification for an abuse of discretion. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of

fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012). In the class action context, a district court is given "substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation." *Rikos*, 799 F.3d at 504 (quoting *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007)). Therefore, our review is "very limited," and we will reverse "only if a strong showing is made that the district court clearly abused its discretion." *Young*, 693 F.3d at 536.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To merit certification, a putative class must satisfy the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequate representation—plus fit within one of the three types of classes listed in Rule 23(b). *Young*, 693 F.3d at 537. Rule 23(b)(3) classes—the kind at issue here—must meet predominance and superiority requirements, that is, "questions of law or fact common to class members [must] predominate over any questions affecting only individual members" and class treatment must be "superior to other available methods." Fed. R. Civ. P. 23(b)(3). In addition, Rule 23(b)(3) classes must

also meet an implied ascertainability requirement. *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016). It is the party seeking class certification—here, Sandusky—that bears the burden of "affirmatively demonstrat[ing]" compliance with Rule 23. *Wal-Mart*, 564 U.S. at 350.

B

The district court determined that questions of consent presented an individualized issue. *See* R. 108, Memorandum Op. at 6–9, PID 24708–11. Acknowledging that the FCC had retroactively waived Besse's liability for failure to comply with the Solicited Fax Rule, it concluded that Besse had a valid defense as to the solicited Prolia fax recipients—they were not proper class claimants. *See id.* at 7, PID 24709. Identifying these individuals, however, entailed combing through hundreds of thousands of customer forms that Besse had produced as evidence of consent, a recipient-by-recipient inquiry that was prohibitive of class certification. *Id.* at 8, PID 24710.

1

While the district court assumed the FCC's retroactive waiver exempted Besse from liability for sending solicited Prolia faxes, the intervening D.C. Circuit decision striking down the Solicited Fax Rule means reliance on this waiver is no longer necessary. Instead, the invalidation of the Rule altogether confirms the district court's conclusion that Besse cannot be liable to any individuals who solicited the Prolia fax. *See Bais Yaakov*, 852

F.3d at 1083 (holding the Solicited Fax Rule "unlawful to the extent that it requires opt-out notices on solicited faxes").

Once the Multidistrict Litigation Panel assigned petitions challenging the Solicited Fax Rule to the D.C. Circuit, that court became "the sole forum for addressing . . . the validity of the FCC's rule[]." *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (quoting *MCI Telecomms. Corp. v. U.S. West Comms.*, 204 F.3d 1262, 1267 (9th Cir. 2000)). And consequently, its decision striking down the Solicited Fax Rule became "binding outside of the [D.C. Circuit]." *Id.* This result makes sense in light of the procedural mechanism Congress has provided for challenging agency rules. *See* 28 U.S.C. §§ 2112, 2342–43. By requiring petitioners to first bring a direct challenge before the FCC, the statute allows this expert agency to weigh in on its own rules, and by consolidating petitions into a single circuit court, the statute promotes judicial efficiency and ensures uniformity nationwide. *See CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010). Thus, since the Solicited Fax Rule is no longer valid, the district court would reach the same conclusion as it did initially: that questions of consent present individualized issues counseling against class certification.

Sandusky contends that the district court is not bound by *Bais Yaakov*. Its argument is as follows: The D.C. Circuit struck down *only* the FCC's 2014 Order validating the Solicited Fax Rule. That order applied *only* to specific

petitioners. Besse did not petition the FCC for relief from the Rule until later, and *its* denial came in the 2015 Order. Thus, according to Sandusky, this court must assume the Solicited Fax Rule's validity until the 2015 Order is separately (and successfully) challenged in a circuit court. *See* App. R. 34, Sandusky Rule 28(j) Letter at 1–2. Sandusky misreads the breadth of the D.C. Circuit decision. That court was clear that the "Solicited Fax Rule is unlawful" and vacated the 2014 Order because it "interpreted and applied [that Rule]." *Bais Yaakov*, 852 F.3d at 1083. Thus, it was the Solicited Fax Rule itself that was struck down, which is itself an "order." *See Leyse v. Clear Channel Braod., Inc.*, 545 F. App'x 444, 455 (6th Cir. 2013) (citing *Columbia Broad. Sys., Inc. v. United* States, 316 U.S. 407 (1942)). Since the 2015 Order likewise "interpreted and applied [the Solicited Fax Rule]," that order is also no longer good law post-*Bais Yaakov*. Moreover, the 2015 Order purported to "follow[] the Commission's 2014 fax opt-out notice order." 2015 Order, 30 F.C.C.R. at 8598. Thus, Sandusky's argument that the district court would be required to turn a blind eye to the D.C. Circuit decision invalidating the Solicited Fax Rule, and instead follow the 2015 Order that relies on an abrogated rule, is without merit.

2

Not only was the district court correct to identify consent as presenting individualized questions, such questions were sufficient to keep common questions from predominating and

preclude certification under Rule 23(b)(3). This rule provides that "questions of law or fact common to class members must predominate over any questions affecting only individual members." In discerning whether a putative class meets the predominance inquiry, courts are to assess "the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and assess whether those questions are "subject to generalized proof, and thus applicable to the class as a whole," *Bridging Cmtys., Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1124 (6th Cir. 2016) (internal citation omitted). "If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 998 (8th Cir. 2016). Plaintiffs need not prove that every element can be established by classwide proof. *Bridging Cmtys.*, 843 F.3d at 1124. But the key is to "identify[] the substantive issues that will control the outcome," in other words, courts should "consider how a trial on the merits would be conducted if a class were certified." *Gene & Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quotation marks omitted).

Here, if Sandusky's 40,343-member class were certified, the district court would be tasked with filtering out those members to whom Besse was not liable—those individuals who solicited the Prolia fax. Regardless of other questions that may be common to the class, identifying which

individuals consented would undoubtedly be the driver of the litigation. *See id.* In other words, "one substantive issue undoubtedly will determine how a trial on the merits will be conducted if the proposed class is certified." *Id.* at 327. "This issue . . . is whether [Besse's] fax advertisements were transmitted without the prior express invitation or permission of each recipient. Thus, the predominant issue of fact is undoubtedly one of *individual* consent." *Id.*

The undertaking is individualized because Besse produced evidence that "several thousand" individuals on the Prolia List of intended fax recipients are "current or former Besse customers." *See* App. R. 18, Decl. of Eric Besse ¶¶ 5, 9, APX 0002–03. This evidence consisted of over 450,000 pages of various forms where customers had provided Besse with their fax numbers. *See, e.g., id.* ¶ 9, Exhs. 1, 7, and 13, APX 0003, 0022, 0034, and 0047. Upon review of a sample of these documents, the district court concluded that many forms would demonstrate that these customers—if their names also appeared on the Prolia List—had given the requisite consent, or "prior express invitation or permission," to receive the fax, and thus would not have valid claims against Besse. R. 108, Memorandum Op. at 8, PID 24710. But identifying these individuals "would require manually cross-checking 450,000 potential consent forms against the 53,502 potential class members." *Id.* Identifying solicited fax recipients through a form-by-form inquiry is sufficiently individualized to preclude class certification.

This court's decision in *Bridging Communities, Inc. v. Top Flite Financial, Inc.* does not require otherwise. In that junk fax case, we held that "the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Cmtys.*, 843 F.3d at 1126. But there, the defendant had simply "raised the possibility" that "individual class members *might* have solicited or consented to receiving the challenged faxes." *Id.* at 1123, 1125 (emphasis added). And, we were "unwilling to allow such speculation and surmise to tip the decisional scales in a class certification ruling." *Id.* at 1125 (internal quotation marks omitted). Here, by contrast, Besse has produced concrete evidence of consent, evinced by hundreds of thousands of customer documents, some of which we know for certain match the names of individuals on the Prolia List. Reviewing these documents, discerning which provide the requisite consent, and then manually cross-checking each individual customer name against the Prolia List—with a match indicating Besse has a valid defense as to that individual—is no hypothetical scenario. Were the class certified, this undertaking would be a tangible reality for the district court, sufficiently distinguishing the facts of this case from the mere "speculation and surmise" that existed in *Bridging Communities*.

Sandusky makes two additional arguments as to why consent evidence should not prevent certification. First, Sandusky argues that there is actually a class-wide absence of consent since

Besse compiled its Prolia List using fax numbers obtained from third-party data provider, InfoUSA. It would have us hold that "if a fax sender is buying a list of fax numbers from a third party, then it cannot have prior express permission as a matter of law." *See* Appellant Br. at 30; *see also Bridging Cmtys.*, 843 F.3d at 1126 (recognizing the possibility that in cases "where . . . a sender 'obtained all of the fax recipients' fax numbers from a single purveyor of such information' there exists a 'class-wide means of establishing the lack of consent based on arguably applicable federal regulations'") (quoting *Gene & Gene LLC*, 541 F.3d at 327–28).

This argument is unavailing. Besse's enlistment of a third party to send the Prolia fax on its behalf does not somehow negate previous consent. Perhaps Besse risked a lack of consent by relying on this data collector initially, but its ability to produce later consent evidence saves Besse from this downfall. The case Sandusky cites in support—a district court case—is inapposite. *See Siding & Insulation Co. v. Combined Ins. Grp. Ltd., Inc.*, No, 1:11 CV 1062, 2012 WL 1425093 (N.D. Ohio 2012). Unlike the voluminous consent evidence in the record before us, in *Siding & Insulation* there was "nothing in the record to support the claim that any of the recipients consented to receiving the fax." *Id.* at *3. Therefore, in that case it may very well have been reasonable for the court to assume a universal lack of consent.

Additionally, no "arguably applicable federal regulation[s]" compel a different conclusion. One regulation that Sandusky cites, 47 C.F.R. § 64.1200(a)(4)(ii)(B), states that if a "sender obtains the facsimile number from [a commercial database], the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution." Presumably Sandusky's argument is that Besse did not verify consent *before* sending the Prolia fax, so it was in violation of this regulation. However, this regulation applies only to the senders of *unsolicited* faxes. 47 C.F.R. § 64.1200(a)(4) (prohibiting "[u]se of a telephone facsimile machine, computer, or other device to send an *unsolicited* advertisement") (emphasis added). Since there is evidence that Besse had already obtained consent from certain individuals on the Prolia List, the faxes sent to those individuals by definition could not have been unsolicited. Besse did not simply cull fax numbers from one purchased database. Although it utilized the InfoUSA list in compiling its list of recipients, many of those recipients had in fact already provided their fax numbers to Besse and consented to receive advertisements. *Cf. Gene & Gene LLC*, 541 F.3d at 329.

Sandusky's second contention, as stated by counsel at oral argument, is that the district court should have certified the class and then created subclasses based on the different types of consent forms produced. According to counsel, he would then proceed subclass-by-subclass and prove that none of the evidence Besse produced actually

amounted to consent under the Act. However, it was not an abuse of discretion for the district court to deny counsel this opportunity. *See* Fed. R. Civ. P. 23(c)(5) (stating that only "[w]hen appropriate, a class may be divided into subclasses"). To even create subclasses would have required the district court to analyze each individual form, and further assumes that the forms could be easily categorized. And after this painstaking sorting process, allowing Sandusky to then litigate the validity of consent as to each subclass would result in the exact "myriad mini-trials" that Rule 23(b)(3) seeks to prevent. *See Gene & Gene, LLC*, 541 F.3d at 329.

Because Besse presented actual evidence of consent to the district court, which required the need for individualized inquiries in order to distinguish between solicited and unsolicited Prolia faxes, the district court did not abuse its discretion in denying class certification on these grounds.

C

In addition to issues surrounding consent, the district court premised its denial of certification on the inability to identify class members. In its view, this difficulty was a problem for Sandusky under both Rule 23(b)(3) predominance and ascertainability. Sandusky's proposed class consisted of "[a]ll persons who were successfully sent [the Prolia fax]." R. 91 at 12; R. 107. But while Besse intended the fax to be sent to all 53,502 individuals and entities on the Prolia List, only 40,343 actually received it. Both parties

agreed that the 25% who did not receive the Prolia fax are not valid class members. In the absence of fax logs listing the status of each attempted transmission, the district court resolved that "each potential class member would have to submit an affidavit certifying receipt of the Prolia fax. Given that the fax was sent in 2010, the recollection of a putative class member that he, she, or it had received a particular unsolicited fax would be somewhat suspect." R. 108, Memorandum Op. at 6, PID 24708. Thus, it concluded that using affidavits to identify class members was yet a second individual issue that prevented common questions from predominating, and reliance on these 7-year-old, self-serving statements was not an "administratively feasible" way to ascertain class membership.[1] *Id.* at 4–5, PID, 24706–07.

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[1]On appeal, Sandusky argues that class members could submit copies of the fax as proof of receipt, as Sandusky has done. However, even after discovery Sandusky produced no evidence that other fax recipients still possessed copies of the Prolia fax. And more importantly, Sandusky did not argue this point below, so we deem it forfeited. *See Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

On appeal, Sandusky argues that difficulties in identifying class members are not relevant to either ascertainability or Rule 23(b)(3) predominance; in its view, this concern should be accounted for under Rule 23(b)(3)'s superiority prong, which requires courts to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Analyzing superiority entails balancing the "the desirability" of class treatment with "the likely difficulties in managing a class action," among other things. *Id.* So although scrutinizing individual affidavits may be burdensome, Sandusky argues that these burdens are outweighed by the benefits of affording its TCPA claim class action treatment, which include furthering the deterrent purposes of the TCPA and ensuring that Besse does not walk away from its alleged wrongdoings scot-free. According to Sandusky, if the district court had conducted this balancing inquiry, rather than relying on predominance or ascertainability, it would have certified Sandusky's proposed class.

We disagree. Even if Sandusky is correct that class member identity is properly analyzed under Rule 23(b)(3) superiority—something we do not decide—it would not have been an abuse of discretion for the district court to conclude that class action treatment was not the superior method for resolving Sandusky's claim. To be sure, courts have been inconsistent in how they have accounted for difficulties in identifying class members, especially within the context of the TCPA. Some consider it when deciding whether

common questions of law or fact predominate. *See, e.g., Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 685 (7th Cir. 2013) (concluding that fax logs listing the fax numbers of each individual who received the fax obviated the "need for recipient-by-recipient adjudication," and consequently, "the district court did not err in concluding that the questions of law or fact common to class members predominate over any questions affecting only individual members") (internal quotation marks omitted).

Other courts frame it as a question of ascertainability. In order to meet Rule 23(b)(3)'s implied ascertainability requirement, a "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young*, 693 F.3d at 537–38 (citing 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed. 1997)). In the context of the TCPA, where fax logs have existed listing each successful recipient by fax number, our circuit has concluded that such a "record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement." *See Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014).

Recently, the Second Circuit affirmed a district court's denial of class certification on ascertainablity grounds under similar circum–stances as present here. *See Leyse v. Lifetime Entm't Servs., Inc.*, No. 16-1133-cv, 2017 WL

659894 (2d Cir. Feb. 15, 2017). In *Leyse*, the plaintiffs brought a putative class action against Lifetime for violating the TCPA by making a series of unlawful, prerecorded telephone calls. *Id.* at *2. They proposed identifying class members through soliciting affidavits from individuals who would testify to receipt of the calls. *Id.* The district court concluded—and the Second Circuit affirmed—that this was not an ascertainable way to identify class members given "(1) no list of the called numbers existed; (2) no such list was likely to emerge; and (3) [] proposed class members could not realistically be expected to recall a brief phone call received six years ago or . . . to retain any concrete documentation of such receipt." *Id.* (internal citations and quotation marks omitted). These ascertainability concerns mirror the ones present here where (1) fax logs no longer exist; (2) they are not likely to emerge; and (3) Prolia fax recipients are not realistically expected to remember receiving a one-page fax sent seven years ago.

And still other courts take a dual-approach, considering both predominance and ascertainability in tandem, much like the district court did here. *See Medtox*, 821 F.3d at 997–98 (finding that "whether a class member received the unsolicited fax" was a common question of fact that predominated when fax logs existed to identify recipients and that "fax logs showing the numbers that received each fax are objective criteria that make the recipient [class member] clearly ascertainable").

Outside the context of the TCPA, two sister circuits have cautioned against an aggressive take on ascertainability, and have instead concluded, as Sandusky advocates, that class member identity concerns should be taken into account under Rule 23(b)(3) superiority. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015) (declining to reverse district court decision finding that a putative class of all purchasers of Instaflex within the relevant time period was clearly ascertainable despite the fact that affidavits alone might be the only means of identifying class members); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017) (rejecting ConAgra's argument that there was no administratively feasible way of identifying putative class of Wesson Oil purchasers who were unlikely to have proof of purchase, and affirming certification of class because it was defined by objective criteria). Moreover, *Mullins* and *Briseno* suggest that utilizing affidavits alone as a mechanism to identify class members need not be a barrier to class certification under Rule 23's implied ascertainability requirement. *Mullins*, 795 F.3d at 658, 672; *Briseno*, 844 F.3d at 1132; *cf. Carrera v. Bayer Corp.*, 727 F.3d 300, 309–12 (3d Cir. 2013) (suggesting that use of affidavits is *insufficient* to satisfy the ascertainability requirement).

As this synopsis indicates, courts have categorized class member identity concerns differently within Rule 23's framework. And the district court's decision to account for it under ascertainability and predominance does find some

support in the case law. However, we see no need to add our own opinion to this debate. For even assuming Sandusky is correct that difficulties in identifying class members should be considered as part of Rule 23(b)(3) superiority, the facts of this case present a situation where the class device is not "superior to other available methods" due to "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Thus, we may affirm the district court on this alternative ground. *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 786 (6th Cir. 2016).

As a general matter, the district court does not know who received the Prolia fax. The fax logs no longer exist. Yet we know that 13,159 individuals on the Prolia List do not have valid claims against Besse. Sandusky has proposed no method for weeding out these individuals, who comprise approximately 25% of all intended recipients. The district court recognized that its own proffered solution—having class members submit individual affidavits testifying to receipt of the Prolia fax—was not feasible, concluding that the reliability of an individual's recollection of having received a seven-year-old, single-page fax would be dubious at best. Furthermore, it is possible that all 53,502 intended recipients might submit affidavits claiming receipt of the Prolia fax and their entitlement to $500 in damages. Finding out which quarter of these individuals were being untruthful would require scrutinizing each affidavit and would undoubtedly be a difficult

undertaking. In fact, it may not even be possible, in which case the district court would be tasked with fashioning some type of reduced equitable relief for all recipients. Practical concerns such as these highlight the difficulties the district court would have in managing Sandusky's proposed class and further underscore the inappropriateness of class certification.

To our knowledge, no circuit court has ever mandated certification of a TCPA class where fax logs did not exist, and we decline to be the first. Sandusky cites exclusively out-of- circuit district court cases as examples of when TCPA classes have been certified despite missing fax logs. *See* Appellant Br. at 13–14. But while the district courts in those cases may have determined, given the specific facts presented, that classwide treatment was manageable, the district court's opposite conclusion in this case was not an abuse of discretion.

The two non-TCPA circuit court cases relied on by Sandusky—*Mullins* and *Briseno*— suggest that a district court may rely on affidavits to identify class members, but they do not mandate that it must do so. Notably, both of those cases *affirmed* lower court decisions certifying a class, where the district court had concluded that it was manageable to rely on affidavits to identify class members. Here, in contrast, the district court came to the opposite conclusion. We think this difference in procedural posture is important

given the "substantial discretion" we afford district courts in choosing whether to certify a class and our subsequent "very limited" review of that decision. *Rikos*, 799 F.3d at 504; *Young*, 693 F.3d at 536. Finally, even *Mullins* contemplates that "[a] plaintiff's failure to address the district court's concerns adequately [with regards to difficult manageability problems] may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3)." *See Mullins*, 795 F.3d at 672. That is exactly the scenario we have here.

While class certification may be "normal" under the TCPA, *see* Appellant Br. at 8 (quoting *Turza*, 728 F.3d at 683), that does not mean it is automatic. While there may be several benefits to affording TCPA cases class treatment—for example, as a way to hold businesses accountable when smaller recovery values provide fewer incentives for solo claims—those benefits do not always outweigh the difficulties of managing a proposed class. Sandusky waited three years after receipt of the one-page Prolia fax to sue Besse for failing to include a properly worded opt-out notice. It did so when fax logs no longer existed to identify each recipient and without a proposed alternative for identifying class members. Perhaps if Sandusky had brought suit earlier, fax logs would have existed, and their absence would not pose an independent barrier to class certification. Or, Sandusky could have filed an individual claim against Besse and presented a copy of the Prolia fax as evidence of receipt. Instead, Sandusky did neither of these things. By choosing to file a class

action when it did, Sandusky shouldered the burden of proving that its proposed class satisfied Rule 23. It simply did not meet that burden here. In sum, we conclude that the difficulty of identifying class members in the absence of fax logs was a separate and valid concern recognized by the district court that precluded class certification.

III

For the foregoing reasons, we **AFFIRM** the district court's denial of class certification.

APPENDIX B – MEMORANDUM OPINION AND ORDER DENYING CLASS CERTIFICATION FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Before the
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OHI0 – WESTERN DIVISION

No. 3:13 CV 2085

IN THE MATTER OF

SANDUSKY WELLNESS CENTER, LLC,

Petitioner,
v.

ASD SPECIALTY HEALTHCARE, INC.,

Respondent.

Before: Judge Jack Zouhary
U.S. District Judge

INTRODUCTION

In June 2010, Plaintiff Sandusky Wellness Center, LLC ("Sandusky"), a chiropractic clinic, received a facsimile advertisement from Defendants

ASD Specialty Healthcare, Inc., d/b/a Besse Medical and AmerisourceBergen Specialty Group, Inc. (collectively "Besse"). Sandusky initiated this putative class action on behalf of itself and other persons similarly situated, alleging Besse violated the Telephone Consumer Protection Act ("TCPA"), as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227, by sending an unsolicited fax advertisement.

The parties have completed extensive discovery, including from expert witnesses (*see* Doc. 61). Pending before this Court is Sandusky's Motion for Class Certification (Doc. 91), which Besse opposes (Doc. 100). This Court held a hearing and heard argument from counsel on the Motion (*see* Docs. 104 & 107). For the following reasons, this Court denies the Motion.

BACKGROUND

Besse is a distributor of pharmaceuticals and medical products. In September 2007, Besse purchased from InfoUSA, a third-party data provider, a list of contact information for physicians who prescribe pharmaceuticals (Besse Decl. (Doc. 103-4) at ¶ 3). Using the InfoUSA list, Besse created a list of 53,502 physicians to fax an advertisement for Prolia, a prescription-only injectable drug used to treat post-menopausal osteoporosis (*id.* at ¶ 4). The fax included information about the drug, details about cost and shipping, and directed interested persons to purchase Prolia from Besse (Doc. 1-1). Besse retained fax broadcaster WestFax to transmit the Prolia fax. On June 16, 2010, WestFax attempted to send the Prolia

fax to the 53,502 numbers on the list (Besse Decl. ¶ 6). Of those, WestFax successfully transmitted 40,343 faxes (or 75.4%) (Doc. 91-7; Biggerstaff Report (Doc. 83-3) at ¶¶ 18, 23, 25).

Sandusky defines the proposed class as (Doc. 91 at 12; Doc. 107):

> All persons who were successfully sent a facsimile on or about June 16, 2010, by or on behalf of Besse Medical and/or AmerisourceBergen Speciality Group regarding "Prolia" and stating: "Besse Medical sends important announcements, recall notices, promotions, etc. via FAX. If you wish to opt-out and no longer receive FAX communications from Besse Medical, please check here ( ) and fax back to 1-800-736-8866, Attn: FAX OPT OUT. Please note that by opting out you will delay receipt of important notices, such as a product recall."

LEGAL STANDARD

A plaintiff must "affirmatively demonstrate" compliance with Federal Civil Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This Court must check that compliance "through rigorous analysis." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012) (internal quotation marks omitted); *see also id.* at 418 n.8 (declining to impose a preponderance-of-the-evidence standard). Plaintiff must "satisfy through evidentiary proof [each of the Rule 23(a) factors and] at least one of the provisions of Rule 23(b)." *Comcast Corp. v.*

Behrend, 133 S. Ct. 1426, 1432 (2013). However, Rule 23 grants "no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194–95 (2013).

To satisfy Rule 23(a), a plaintiff must establish as a threshold matter that: "(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." Sandusky seeks to certify this class under Rule 23(b)(3), which requires a finding that "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d

347, 352–53 (6th Cir. 2011). This Court has "broad discretion" in deciding whether to certify a class within the framework of Rule 23. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). "[A] court is allowed to look beyond the pleadings on a class certification motion to determine what type of evidence will be presented by the parties." *Rodney v. Nw. Airlines, Inc.*, 146 F. App'x 783, 785 (6th Cir. 2005) (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)).

Appendix B

DISCUSSION

Besse does not dispute that the proposed class satisfies the numerosity and typicality prerequisites for class certification. Besse's Opposition is focused on the proposed class being overbroad and Sandusky being unable to demonstrate ascertainability, manageability, or commonality. Specifically, Besse contends individualized issues as to the identity of the intended fax recipients and whether each recipient consented to receiving the fax predominate, making class certification improper.

Sandusky asserts the proposed class satisfies Rule 23(b)(3) because the class is "'defined by objective criteria' of having been sent a specific fax during a specific time frame" (Doc. 91 at 12 (quoting *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 526 (6th Cir. 2015))). However, only persons to whom faxes were "successfully sent" are proper claimants under the TCPA. *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 632–34 (6th Cir. 2015); *see Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014) (affirming certification where class was defined as persons who were "successfully sent a facsimile"). The parties agree the individuals associated with the unsuccessful 13,159 fax transmissions (24.6% of the list) lack standing.

Identifying fax recipients is typically accomplished by examining fax logs that confirm which faxes successfully transmitted and which failed. *See e.g.*, *Ira Holtzman, C.P.A. v. Turza*,

728 F.3d 682, 684–85 (7th Cir. 2013) (affirming certification based on predominance where fax logs identify fax recipients and thus there was "no need for recipient-by-recipient adjudication"). That analysis is not possible here because Besse only retains its emails for up to eighteen months (Doc. 100-6 at 3–4). Any fax logs Besse received from WestFax at the time of the 2010 fax were gone by the time Sandusky initiated this lawsuit in 2013 (Besse Decl. at ¶ 8). Without the fax logs, there is no classwide method by which to identify the 13,159 class members who have no claim.

This Court acknowledges Sandusky's argument that Besse should not escape responsibility for its potential wrongdoing because of its lack of records. But the absence of the fax logs does not alleviate Sandusky's burden of demonstrating that the proposed class meets the Rule 23 requirements. Even though Sandusky can identify the potential universe of fax recipients, class certification is improper because individualized issues predominate as to whom Besse "successfully sent" the Prolia fax. *See City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, 2015 WL 5769951, at *8 (D.N.J. 2015) (finding plaintiff failed to demonstrate class ascertainability where defendant did not retain a record of fax transmissions and there was "no objective way of determining which customers were actually sent" the fax); *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, 2015 WL 1538497, at *4 (N.D. Ill. 2015) (denying class certification where records "show aggregate data of faxes sent and do not show individual fax numbers

. . . just the total number of faxes sent")*; Brey Corp. v. LQ Mgmt. LLC*, 2014 WL 943445, at *1 (D. Md. 2014) (finding "no objective criteria" to establish class membership because there were no fax logs); *cf. City Select Auto Sales, Inc. v. David Randall Assoc., Inc.*, 296 F.R.D. 299, 314–15 (D.N.J. 2013) (certifying class where plaintiff's expert compiled list of the fax numbers that were "successfully sent"); *CE Design Ltd. v. Cy's Crabhouse N., Inc.*, 259

F.R.D. 135, 141 (N.D. Ill. 2009) (granting certification and finding the fax logs were "sufficiently reliable to establish how many faxes were successfully sent" and to identify fax recipients). For the same reasons, Sandusky has not established its class definition is administratively feasible. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538–41 (6th Cir. 2012).

Sandusky resists this conclusion by relying on *Rikos v. Proctor & Gamble Co.*, where the Sixth Circuit certified a class of consumers who purchased a nutritional supplement despite argument from defendant that plaintiffs failed to demonstrate a "reliable and administratively feasible method for *identifying* the class members." 799 F.3d at 524 (emphasis in original). The court reasoned class membership could "be determined with reasonable -- but not perfect -- accuracy," confirmed by "substantial review, likely of internal [defendant] data," and "supplemented through the use of receipts, affidavits, and a special master to review individual claims." *Id.* at 526. Unlike in *Rikos*,Sandusky fails to advance

any theory of generalized proof regarding receipt of the Prolia fax to enable this Court to make even a "reasonable" determination of class membership. Without the fax log, each potential class member would have to submit an affidavit certifying receipt of the Prolia fax. Given that the fax was sent in 2010, the "recollection of a putative class member that he, she, or it had received a particular unsolicited fax would be somewhat suspect." *Brey*, 2014 WL 943445, at *1.

The proposed class definition is also problematic because it focuses on individuals "who were successfully sent" the Prolia fax. However, as this Court addressed in its earlier Order (Doc. 90), the intended fax recipient is not apparent from the face of the document. As to the named Plaintiff, Besse argues it intended to send the Prolia fax to Dr. Juan Penhos, not Sandusky, but the fax did not specify to whom it was intended (Doc. 79 at 16; Besse Dep. (Doc. 79-2) at 30–32). Further complicating the analysis, the list of fax numbers included two entries for Penhos with two different fax numbers -- one at Sandusky and one at his private office (Doc. 83-1). Based on that record, this Court found there is a genuine issue of fact whether the fax was part of a mass advertising "fax blast" intended for Sandusky, or a targeted advertisement directed to Penhos (Doc. 90 at 6). Under the class definition, Penhos or Sandusky, or both, may be class members. And this is not the only instance where the listed fax number may be associated with multiple physicians or entities (*see, e.g.*, Besse Decl. at ¶¶ 17, 30–32, 59). Identifying the intended recipient of the Prolia

fax and whether that recipient consented would require this Court to conduct an individualized inquiry into the unique circumstances of each fax transmission. *See Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, 2014 WL 3846037, at *3–4 (D. Minn. 2014) (denying class certification).

Even if Sandusky could identify each class member with "reasonable accuracy," this Court would still have to determine whether each individual class member provided Besse "prior express invitation or consent" to receive facsimile advertisements. advertisements. *See* 47 U.S.C. § 227(a)(5) (defining "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"). An "unsolicited advertisement" sent by fax violates the TCPA unless the sender can establish three elements: (1) the sender has an established business relationship with the recipient; (2) the sender obtained the recipient's fax number either through a voluntary communication between the two or from a public source on which the recipient voluntarily made the number available; and (3) the fax has an opt-out notice meeting the requirements of the statute. *See* 47 U.S.C. § 227(b)(1).

Sandusky argues consent to the Prolia fax is irrelevant because the fax did not include a proper opt-out notice (Doc. 91 at 12–13). Besse contends consent is always relevant because the TCPA applies only to "unsolicited advertisements" and, regardless, the Prolia fax included a clear opt-out

notice (Doc. 100 at 16–17). Even assuming solicited faxes require opt-out notices and the notice on the Prolia fax was deficient, the Federal Communications Commission ("FCC") granted Besse a retroactive waiver from the notice requirement (Doc. 100-11). Sandusky dismisses the FCC's waiver as applying only in FCC enforcement proceedings and argues that applying the waiver to private litigations violates "separation of powers" (Doc. 91 at 16–18). Other courts have struggled with the applicability of FCC waivers to civil litigation, *see, e.g.*, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2015) ("the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action"), and the question is before the Court of Appeals for the District of Columbia in *Bais Yaakov of Spring Valley, et al., v. FCC et al.*, No. 14-1234.

Sandusky urges that this Court need not decide the effect of the waiver because "whether the FCC can grant a retroactive waiver that would apply in civil litigation between private parties is itself merely another class-wide question that does not preclude class certification" (Doc. 91 at 17 (internal quotation omitted)). While the question as to the applicability of the waiver does not defeat commonality, individual inquiries whether each class member consented to the Prolia fax preclude class certification.

The InfoUSA list included contact information of both prospective clients and "several thousand" current or former Besse

customers, many of whom had consented to receive faxes (Besse Decl. at ¶ 5). Besse has presented evidence that some of the fax advertisements were solicited, but identifying those recipients who consented to receiving faxes is a case-by-case analysis (*see* Lee Dep. (Doc. 100-10) at 18–19). Besse customers consented through a variety of different forms, completed in unique ways at different times. Besse claims that determining which of the proposed class members consented to receiving faxes would require manually cross-checking 450,000 potential consent forms against the 53,502 potential class members (Besse Decl. at ¶¶ 9–11, 14–107). Certification is thus inappropriate because Sandusky has "failed to advance a viable theory of generalized proof to identify those persons, if any, to whom [Besse] may be liable under the TCPA." *Gene and Gene LLC v. BioPay*, 541 F.3d 318, 327–29 (5th Cir. 2008) (denying class certification where issue of consent could not be established via class-wide proof); *cf. Siding & Insulation Co. v. Combined Ins. Grp. Ltd.,* 2012 WL 1425093, at *3 (N.D. Ohio 2012) (finding common issues of consent predominated where the fax sender "produced no evidence that any individual consented to receive the fax advertisement and, therefore, is unable to realistically argue that individual issues relative to consent outweigh commonality").

Appendix B

CONCLUSION

Sandusky moves to certify a TCPA fax class where fax logs are no longer available to identify class members, and where Besse produced evidence that some class members consented to receiving the fax. While each of these issues alone may not preclude class certification, when viewed together they not only predominate, but overwhelm the common questions Sandusky seeks to certify. This seems to be the exact type of case that would devolve into a series of mini-trials, which Rule 23(b)(3) seeks to prevent. For these reasons, Plaintiff's Motion for Class Certification (Doc. 91) is denied.

IT IS SO ORDERED.

/s// *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE January 7, 2016

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED SEPTEMBER 1, 2017

Before the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3741

IN THE MATTER OF

SANDUSKY WELLNESS CENTER, LLC,

Petitioner,

v.

ASD SPECIALTY HEALTHCARE, INC.,

Respondent.

Before: SUHRHEINRICH, SUTTON, and McKEAGUE, Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Appendix C

However, the panel adds the following footnote to the opinion on page 9, after the sentence beginning with "And consequently . . . ."

> [1]We also note our agreement with the majority in *Bais Yaakov* that, per the clear text of the TCPA, the FCC does not have the authority to regulate solicited faxes. Therefore, we think the Solicited Fax Rule was properly invalidated.

On page 12, the following sentence is stricken:

"Besse did not simply cull fax numbers from one purchased database."

ENTERED BY ORDER OF THE COURT

BY: /s/
Deborah S. Hunt
Clerk

APPENDIX D–CONSOLIDATION ORDER OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: FEDERAL COMMUNICATIONS COMMISSION, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, ORDER, FCC 14-164 (RELEASED OCTOBER 30, 2014)

MCP No. 124

(SEE ATTACHED SCHEDULE)

CONSOLIDATION ORDER

The Federal Communications Commission issued an Order dated October 30, 2014. On November 13, 2014, the Panel received, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included petitions for review pending in two circuit courts of appeal as follows: Eighth Circuit Court and District of Columbia Circuit Court.

The Panel has randomly selected the United States Court of Appeals for the District of Columbia Circuit in which to consolidate these petitions for review.

Appendix D

IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 2112(a)(3), the petitions on the attached schedule are consolidated in the District of Columbia Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

FOR THE PANEL:

/s/
Delora Davis, Operations Supervisor –
Random Selector

/s/
Lakiah Hyson, Case Administrator
Witness

Appendix D

IN RE: FEDERAL COMMUNICATIONS COMMISSION, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, ORDER, FCC 14-164 (RELEASED OCTOBER 30, 2014) MCP No. 124

SCHEDULE OF PETITIONS:

CIRCUIT NO.	CASE CAPTION
DC Circuit No. 14-1234	Bais Yaakov of Spring Valley, et al. v. FCC, et al.
DC Circuit No. 14-1235	Sandusky Wellness Center, LLC, et al. v. FCC, et al.
Eighth Circuit No. 14-3497	Douglas Wahlberg v. FCC, et al.

Exhibit "A"

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