

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. A _____

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

v.

MCKESSON CORPORATION and
MCKESSON TECHNOLOGIES, INC.,

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

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March 7, 2024

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. A _____

TRUE HEALTH CHIROPRACTIC, INC.; McLAUGHLIN CHIROPRACTIC ASSOCS., INC.,
INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF SIMILARLY SITUATED
PERSONS,

v.

McKESSON CORPORATION; McKESSON TECHNOLOGIES, INC.

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

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

Applicants McLaughlin Chiropractic Associates, Inc. and True Health
Chiropractic, Inc. (collectively, “Plaintiffs”), respectfully request a 59-day
extension of time, from March 19, 2024, to and including May 17, 2024, within
which to file a petition for a writ of certiorari to review the judgment of the United
States Court of Appeals for the Ninth Circuit in this case.

The Ninth Circuit entered judgment on October 25, 2023. App., *infra*, 1a.
The Ninth Circuit extended the time in which to file a petition for panel rehearing

and rehearing en banc to November 22, 2023. On that date, Plaintiffs timely filed a petition for rehearing and rehearing en banc, which the Ninth Circuit denied on December 20, 2023. App., *infra*, 10a. A petition for a writ of certiorari is currently due on March 19, 2024. This application is being filed more than ten days before that date. *See* Sup. Ct. R. 13.5.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the opinion of the court of appeals, the order denying rehearing and rehearing en banc, and the two relevant opinions of the district court are attached to this application. App., *infra*, 1a–34a.

1. This case is a putative class action arising from a series of “unsolicited advertisements” McKesson sent by facsimile in 2009–2010, which Plaintiffs alleged (and proved, as to their individual claims) violated the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227(b)(1)(C).

2. After a years-long battle over class certification, including a ruling from the Ninth Circuit largely reversing the district court’s initial denial of class certification, *see True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 930 (9th Cir. 2018), *cert. denied* 139 S. Ct. 2743 (2019), the district court ultimately decertified the class based solely on its conclusion that it was jurisdictionally “bound” by the Hobbs Act, 28 U.S.C. § 2342(1), to follow a declaratory ruling issued in December 2019 by the Consumer & Governmental

Affairs Bureau of the Federal Communications Commission in *In re Amerifactors Fin. Group, LLC Pet.*, 2019 WL 6712128 (CGAB Dec. 9, 2019) (“Amerifactors Ruling”), interpreting the statutory term “telephone facsimile machine” in 47 U.S.C. § 227(a)(3). App., *infra*, 22a; *id.* 34a. The district court held the Amerifactors Ruling interpreted the statute to exclude users of “online fax services” and include only users of traditional “stand-alone” fax machines. App., *infra*, 33a. The district court concluded there was no manageable way to separate users of online fax services from users of “stand-alone” fax machines and decertified the class. App., *infra*, 34a.

3. The Ninth Circuit affirmed in all respects, holding that the Hobbs Act categorically requires district courts to accept the FCC’s legal interpretation of the TCPA, regardless of whether that interpretation is correct. App., *infra*, 5a. Neither the district court nor the Ninth Circuit considered whether the Amerifactors Ruling’s interpretation of the statute was correct, whether it was “reasonable” under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or whether it was persuasive under *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944). Instead, the courts below simply held they were bound to follow the Amerifactors Ruling, regardless of the merits, on the basis that “exclusive jurisdiction” to “determine the validity” of that ruling lies in the court of appeals under the Hobbs Act. App., *infra*, 5a; *id.* 22a, n.7 (district court noting “the Court

agrees with the reasoning of Justice Kavanaugh’s concurrence” in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 139 S. Ct. 2051, 2057–67 (2019) (Kavanaugh, J., concurring, joined by Thomas, Alito, Gorsuch, JJ.), that a district court should *not* be required to follow the FCC’s interpretation of the TCPA, but holding the issue was “for a higher court than this one”).

4. Plaintiffs request a 59-day extension of time within which to file a petition for a writ of certiorari seeking review of the Ninth Circuit’s judgment and submit there is good cause for granting this request.

a. This appeal presents the same question of exceptional importance on which this Court granted certiorari, but declined to decide, in *PDR Network*, 139 S. Ct. at 2066: “Whether the Hobbs Act required the district court in this case to accept the FCC’s legal interpretation of the Telephone Consumer Protection Act.” The Ninth Circuit and the Eleventh Circuit have adopted a hardline rule that a district court (and the court of appeals, outside of a proper Hobbs Act proceeding) lacks jurisdiction to disagree with the FCC’s interpretation of the TCPA. *See App., infra*, 7a; *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1106 (11th Cir. 2019) (Pryor, J., concurring, joined by Newsom and Branch, JJ.) (recognizing Eleventh Circuit precedent requires district courts to follow the FCC’s interpretation and urging the full court to overrule those authorities en banc “[i]n the earliest appropriate case”).

The rule adopted by the Ninth and Eleventh Circuits is wrong for the reasons explained in the four-justice concurrence in *PDR Network*, 139 S. Ct. at 2057–67. As that concurrence explains, a court “does not ‘determine the validity’ of an order when the district court agrees or disagrees with the agency interpretation in an enforcement action.” *Id.* at 2063. If the district court in a TCPA enforcement action “disagrees with the agency interpretation, the district court does not issue a declaratory judgment or an injunction against the agency.” *Id.* Rather, the district court simply decides whether the defendant is liable “under the correct interpretation of the statute,” using “the usual principles of statutory interpretation, affording appropriate respect to the agency’s interpretation.” *Id.* at 2064.

Moreover, under the Ninth and Eleventh Circuit’s misinterpretation of the Hobbs Act, once the 60-day period for filing a Hobbs Act appeal from agency action has expired, “*no one* is able to argue in court that the regulation is inconsistent with the statute—no matter how wrong the agency’s interpretation might be.” *Id.* at 2066. The effect of this “extraordinary close-the-courthouse-door outcome” is “to transform the regulation into the equivalent of a statute,” requiring a district court “to afford the agency not mere *Skidmore* deference or *Chevron* deference, but absolute deference. Not *Skidmore* deference or *Chevron* deference, but *PDR* abdication.” *Id.*; *see also* 139 S. Ct. at 2056 (Thomas, J., concurring in the judgment) (arguing the rule “rests on a mistaken—and possibly unconstitutional—

understanding of the relationship between federal statutes and the agency orders interpreting them”).

The additional time Plaintiffs seek to file their petition for a writ of certiorari will allow counsel to investigate further the manner in which the Ninth Circuit’s ruling conflicts with the decisions of this Court and other courts of appeals. *See Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 832–33 (7th Cir. 2023) (“Because we conclude that it conflicts with the statutory text, the [FCC’s interpretation of the TCPA] is not entitled to deference.”) (citing *Utility Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014)).

b. In addition, counsel for Plaintiffs have a number of other obligations during the period for preparation of the petition. Counsel have a Supplemental Reply in Support of Class Certification due March 13 in *Scoma Chiropractic, Inc. v. Mastercard Int’l*, No. 2:16-cv-0041 (M.D. Fla.); a Supplemental Response Brief in Support of Final Settlement Approval due March 21 in *Med. & Chiropractic, Inc. v. Buccaneers Team Ltd.*, No. 8:13-cv-1592 (M.D. Fla.); a hearing on the defendant’s motion to dismiss on April 2 in *Mussi v. Mercury Indem. Co. of Am.*, No. 2022-571-CI (Fla. Cir. Ct.); and oral argument tentatively calendared during the May 7–10 oral argument session in *Fam. Health Phys. Med. v. Pulse8, LLC*, No. 22-1393 (4th Cir.).

Conclusion

For these reasons, Plaintiffs respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including May 17, 2024.

Dated: March 7, 2024

Respectfully submitted,



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No. A _____

True Health Chiropractic, Inc. and McLaughlin Chiropractic Associates, Inc.

v.

McKesson Corporation and McKesson Technologies, Inc.

CERTIFICATE OF SERVICE

I, Glenn L. Hara, hereby certify that I am a member of the Bar of this Court and that I have this 7th day of March, 2024, caused one copy of the Application For An Extension of Time Within Which to File A Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be served on the following counsel by third party carrier and also by electronic mail.

**APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI**

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Executed March 7th, 2024

/s/Glenn L. Hara
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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 25 2023

FOR THE NINTH CIRCUIT

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

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

Plaintiffs-Appellees,

v.

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Defendants-Appellants.

No. 22-15710

D.C. No. 4:13-cv-02219-HSG

MEMORANDUM*

TRUE HEALTH CHIROPRACTIC, INC.,

Plaintiff,

and

MCLAUGHLIN CHIROPRACTIC
ASSOCIATES, INC., individually and as
representatives of a class of similarly situated
persons,

Plaintiff-Appellant,

v.

No. 22-15732

D.C. No. 4:13-cv-02219-HSG

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Defendants-Appellees.

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

Argued and Submitted September 11, 2023
San Francisco, California

Before: BOGGS, ** S.R. THOMAS, and FORREST, Circuit Judges.

In this purported class action arising under the Telephone Consumer Protection Act of 1991 (“TCPA”), as amended by the Junk Fax Prevention Act, McKesson Corporation and McKesson Technologies, Inc. (“McKesson”) appeal the district court’s grant of summary judgment to True Health Chiropractic, Inc., and McLaughlin Chiropractic Associates, Inc., (“Plaintiffs”) on McKesson’s defenses that Plaintiffs consented to receive McKesson’s faxes. On cross-appeal, Plaintiffs challenge the district court’s class decertification and denial of treble damages. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review de novo the district court’s grant of summary judgment to Plaintiffs. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1041 (9th Cir.

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

2017). We review the district court’s decertification order for abuse of discretion. *NEI Contracting & Eng’g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 531 (9th Cir. 2019). Because the TCPA makes the awarding of treble damages a discretionary act, we review for abuse of discretion the district court’s decision not to award treble damages. *See* 47 U.S.C. § 227(b)(3); *cf.* *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) (explaining that, when no constitutional issues are raised, courts of appeals review punitive-damages determinations for abuse of discretion).

We affirm. Because the parties are familiar with the factual and procedural history of the case, we do not recount it here.

1. The district court did not err by granting summary judgment to Plaintiffs on McKesson’s consent defenses. With some exceptions not relevant here, the TCPA forbids sending an advertisement via fax “to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). Because consent “depends on the transactional context in which it is given,” we consider whether, under the “circumstance[s] in which the consumer gave his . . . [fax] number,” he understood that, by giving that number, he had agreed to receive related advertisements. *Van Patten*, 847 F.3d at 1040; *see also In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14129 (2003) (“Express permission to receive a faxed ad requires that the consumer

understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.”).

Neither the registration form nor the end-user license agreements (“EULAs”) established Plaintiffs’ consent to receive faxed advertisements. The registration form merely prompted users to provide their address, email, phone number, and fax number. Nothing about the form would suggest to a reasonable consumer that, upon submitting the form, he or she had agreed to receive faxed advertisements.

Under the terms of the EULA, consumers consent only to the transmission *to* McKesson of “certain computer and software usage information.” To be sure, the EULA states that McKesson collected this information to “assist[] McKesson in offering End User other features and services.” But this language does not demonstrate that the parties contemplated that “features and services” from McKesson would include sending Plaintiffs faxed advertisements. Accordingly, McKesson has failed to show that Plaintiffs consented to receive faxed advertisements.

2. The district court did not abuse its discretion in decertifying the proposed class. The court correctly found that it was bound by the Federal Communication Commission’s *Amerifactors* declaratory ruling, which determined that the TCPA does not apply to faxes received through an online fax service. *See In re Amerifactors Fin. Grp., LLC Pet. for Expedited Declaratory Ruling*, 34 FCC Rcd.

11950, 11950–51 (2019). Under the Hobbs Act, federal courts of appeals have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communication Commission made reviewable” by 47 U.S.C. § 402(a). 28 U.S.C. § 2342(1). Section 402(a) encompasses “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under [the Communications Act of 1934, as amended by the Telecommunications Act of 1996],” except in limited circumstances not relevant here.

Plaintiffs argue that *Amerifactors* is neither an order of the Commission, nor final. We disagree.

First, it does not matter that *Amerifactors* was issued by the Commission’s Consumer and Governmental Affairs Bureau, rather than the full Commission. Congress authorized the Commission to “delegate any of its functions.” 47 U.S.C. § 155(c)(1). Pursuant to this authorization, the Commission has delegated to the Bureau the authority to issue declaratory rulings in “matters pertaining to consumers and governmental affairs.” 47 C.F.R. § 0.141; *see also id.* §§ 0.204, 0.361, 1.2. Orders issued on delegated authority “have the same force and effect” as orders of the full Commission. 47 U.S.C. § 155(c)(3). *Amerifactors* is one such order. *See* 34 FCC Rcd. at 11954.

Second, *Amerifactors* is a “final order” under the Hobbs Act. Orders of the

Commission are final for the purposes of the Hobbs Act “if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.” *US W. Commc’ns Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000) (quoting *Sierra Club v. U.S. Nuclear Regul. Comm’n*, 862 F.2d 222, 225 (9th Cir. 1988)). *Amerifactors* is a product of the Commission’s administrative process. The Commission, through the Bureau, received a petition for a declaratory ruling, sought public comment, and issued *Amerifactors* through its general rulemaking authority to carry out the TCPA. *See* 34 FCC Rcd. at 11950–51, 11954. And the ruling fixes a legal relationship by clarifying that an online fax service is not a “telephone facsimile machine” and “thus falls outside the scope of the [TCPA’s] statutory prohibition.” *Id.* at 11951. Thus, *Amerifactors* is final for purposes of the Hobbs Act.¹

As a final order of the Commission made reviewable by Section 402(a), *Amerifactors* is subject to judicial review as provided by the Hobbs Act. That is, it is reviewable only by the federal courts of appeals. Further, *Amerifactors* applies retroactively to the faxes at issue here. *See Reyes v. Garland*, 11 F.4th 985, 991 (9th Cir. 2021) (explaining that “when an agency’s adjudicatory decisions apply

¹ That there is a pending application for review of *Amerifactors* by the full Commission does not change this analysis. Orders issued on delegated authority are “effective upon release.” 47 C.F.R. § 1.102(b)(1). Unless the full Commission issues a stay pending review, *Amerifactors* remains in effect. *See id.* §§ 1.102(b)(2), 1.115(h)(2).

preexisting rules to new factual circumstances,” its “determinations apply retroactively”); *see also* 5 U.S.C. § 554(e) (characterizing declaratory rulings as adjudications); 47 C.F.R. § 1.2(a). As a result, *Amerifactors* is binding on the district court. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996).

The district court was bound by *Amerifactors* to grant summary judgment to McKesson on any class claims for faxes received through an online fax service. *Amerifactors* makes clear that the TCPA does not apply to such faxes. 34 FCC Rcd. at 11950–51. But in a decision that Plaintiffs do not challenge on appeal, the district court found that Plaintiffs had no viable methodology for distinguishing class members who had received faxes on a stand-alone fax machine and those who had received them through an online fax service. This meant that Plaintiffs could not prevail on their class claims unless the district court disagreed with *Amerifactors*—a step that would violate 28 U.S.C. § 2342. *See Wilson*, 87 F.3d at 400. Accordingly, the district court did not abuse its discretion by dividing the class and decertifying the Stand-Alone Fax Machine class. Nor did it err by granting summary judgment sua sponte to McKesson on the Online Fax Services class, leaving only Plaintiffs’ individual claims for which they could show that they received an unsolicited faxed advertisement on a stand-alone fax machine.

3. The district court did not abuse its discretion by denying treble damages to Plaintiffs on their remaining individual claims. A court may award treble damages

if it finds that a defendant “willfully or knowingly” violated the TCPA. 47 U.S.C. § 227(b)(3). We agree with the Eleventh Circuit that this standard requires more than merely intentional or volitional action. *See Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir. 2015). In other contexts, we have construed “willfully” as requiring awareness that an action constitutes a legal violation and “knowingly” as requiring awareness of the facts that constitute a legal violation. *See, e.g., United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020) (discussing “willfully” and “knowingly” under criminal law); *Peer Int’l Corp. v. Pausa Recs., Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990) (construing “willful” under the Copyright Act). In the context of the Fair Credit Reporting Act, the Supreme Court has held that a willful violation includes “not only knowing violations of a standard, but reckless ones as well.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). Conduct is reckless if it “is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” *Id.* at 69.

Applying this standard here, McKesson did not willfully or knowingly violate the TCPA. Although the Commission in 2008 cited McKesson for sending “one or more unsolicited advertisements to telephone facsimile machines in violation of Section 227(b)(1)(C) of the [TCPA],” it did not explain which of McKesson’s faxes violated the TCPA or why. This warning does not establish that, when it sent the

faxes to Plaintiffs, McKesson knowingly violated the TCPA or ran a risk of violating the TCPA that was substantially greater than the risk associated with a “merely careless” reading of the TCPA. Thus, the district court did not abuse its discretion in concluding that McKesson did not willfully or knowingly violate the TCPA.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

TRUE HEALTH CHIROPRACTIC, INC.;
MCLAUGHLIN CHIROPRACTIC
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Plaintiffs-Appellees,

v.

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Defendants-Appellants.

No. 22-15710

D.C. No. 4:13-cv-02219-HSG
Northern District of California,
Oakland

ORDER

TRUE HEALTH CHIROPRACTIC, INC.,

Plaintiff,

and

MCLAUGHLIN CHIROPRACTIC
ASSOCIATES, INC., individually and as
representatives of a class of similarly situated
persons,

Plaintiff-Appellant,

v.

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES, INC.,

Defendants-Appellees.

No. 22-15732

D.C. No. 4:13-cv-02219-HSG

Before: BOGGS,* S.R. THOMAS, and FORREST, Circuit Judges.

The panel has unanimously voted to deny Plaintiffs' Petition for Panel Rehearing. Judge Boggs and Judge Thomas recommend denying the Petition for Rehearing En Banc and Judge Forrest votes to deny. The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The Petition for Panel Rehearing or Rehearing En Banc is **DENIED**.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC INC, et
al.,

Plaintiffs,

v.

MCKESSON CORPORATION, et al.,

Defendants.

Case No. 13-cv-02219-HSG

**ORDER DENYING MOTION TO
DECERTIFY CLASS**

Re: Dkt. No. 362

Pending before the Court are Plaintiffs’ motion for summary judgment, Dkt. No. 360, Defendants’ motion for partial summary judgment, Dkt. Nos. 363, and Defendants’ motion to decertify class, Dkt. Nos. 362 (“Mot.”), 372 (“Opp”), 379 (“Reply”). For the reasons stated below, the Court **DENIES** Defendants’ motion to decertify and defers ruling on the cross-motions for summary judgment.

I. BACKGROUND

Plaintiff True Health Chiropractic, Inc. filed this putative class action on May 15, 2013, alleging that Defendant McKesson Corporation (“McKesson”) sent “unsolicited advertisements” by facsimile (“fax”) in violation of the Telephone Consumer Protection Act (“TCPA”). See Dkt. No. 1. Plaintiff filed a First Amended Complaint on June 20, 2013, Dkt. No. 7, and a Second Amended Complaint (“SAC”) on July 18, 2014, Dkt. No. 90, which added McLaughlin Chiropractic Associates, Inc. (“McLaughlin”) as a Plaintiff and McKesson Technologies, Inc. (“MTI”) as a Defendant. The operative complaint similarly alleges that Defendants violated the TCPA by sending “unsolicited advertisements” by fax. SAC ¶¶ 1–2. Plaintiffs contend that they neither invited nor gave permission to Defendants to send the faxes, SAC ¶¶ 14–18, but that even assuming the faxes were sent pursuant to a recipient’s express permission or an “established

United States District Court
Northern District of California

1 business relationship,” the required “opt-out notice” was absent, *id.* ¶¶ 33–34.

2 During heavily contested discovery, Defendants were ordered to identify “each type of act
3 that Defendants believe demonstrates a recipient’s express permission to receive faxes (e.g.
4 completing a software registration), (2) explain[] how that act qualifies as express permission, and
5 (3) identif[y] each recipient allegedly giving that type of permission by name and contact
6 information (including, at a minimum, fax and phone number).” Dkt. No. 178 at 12. In response,
7 Defendants identified three groups of consent defenses that it argued relieved it of TCPA liability
8 and produced three exhibits—Exhibits A, B, and C—corresponding to the consent-defense groups.
9 See Dkt. No. 305-1 Ex. A, at 1–2. Fax recipients identified in Exhibit A purportedly gave consent
10 by (1) providing fax numbers when registering a product purchased from a subdivision of
11 McKesson; and (2) entering into software-licensing agreements, or End User License Agreements
12 (“EULA”). *Id.* Fax recipients identified in Exhibit B purportedly gave consent by (1) checking a
13 box during their software registration “that indicated express permission to be sent faxes as a
14 preferred method of communication to receive promotional information;” (2) completing a written
15 consent form “whereby they further provided their express permission to receive faxes;” or (3)
16 confirming on phone calls “that they would like to continue to receive faxes and/or would like to
17 change their communication method preferences.” *Id.* at 2. Fax recipients identified in Exhibit C
18 purportedly gave Defendants consent through individual communications and personal
19 relationships. *Id.*

20 Plaintiffs later moved to certify a single class of all putative class members. Dkt. No. 209.
21 The Court denied certification on the basis that Plaintiffs failed to satisfy Rule 23(b)(3)’s
22 predominance requirement. Dkt. No. 260. Because the Court denied certification for failure to
23 satisfy predominance, its order did not address other requirements for class certification. On
24 appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded. *See True Health*
25 *Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018) (“*True Health*”). The Ninth
26 Circuit ruled that this Court should have considered the certification of subclasses tracking
27 Defendants’ consent-defense groups identified in Exhibits A, B, and C. *Id.* at 930–31. The Ninth
28 Circuit then (1) held that putative class members only in Exhibit A satisfy Rule 23(b)(3)’s

1 predominance requirement; (2) held that putative class members in Exhibit C do not satisfy Rule
2 23(b)(3)'s predominance requirement; and (3) remanded to this Court to determine whether
3 putative class members in Exhibit B satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 933.
4 As to Exhibit B alone, the Ninth Circuit added:

5 Given the somewhat unclear state of the record, and given that the
6 district court has not had an opportunity to address class certification
7 in light of our intervening decision in *Van Patten*, we view these and
8 other issues related to Exhibit B as best addressed in the first instance
9 by the district court on remand.

10 *Id.*; see also *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017). The Ninth
11 Circuit left it to this Court, “in its discretion, to allow supplementation of the record in light of *Van*
12 *Patten* and [its] opinion.” *Id.*

13 Following remand, the Court reopened fact discovery for the limited purpose of
14 supplementing the record in light of *Van Patten*, and only as to putative class members identified
15 in Exhibit B. See Dkt. No. 285; see also Dkt. No. 309 (rejecting Defendants’ attempt to reopen
16 fact discovery wholesale). After supplemental discovery, Plaintiffs submitted a renewed motion
17 for class certification. See Dkt. No. 292. Plaintiffs sought certification limited to the Exhibit A-
18 only Class. *Id.* at 2. And only Plaintiff McLaughlin sought appointment as a class representative.
19 *Id.* at 3.

20 At the hearing on the renewed motion for class certification, the Court advised the parties
21 that it was inclined to permit narrow summary judgment briefing before ruling on that motion.
22 See Dkt. No. 315. Specifically, the Court expressed interest in resolving whether the provision of
23 fax numbers through the Medisoft product registration and EULA—in other words, Exhibit A
24 consent defenses—constituted prior express invitation or permission to receive the disputed faxes,
25 which is a matter of law that all parties agreed would resolve the case as to the named Plaintiff’s
26 claim. *Id.* at 7. The Court then permitted summary judgment briefing on the limited issue of
27 “whether voluntarily providing a fax number on product registration and/or agreeing to the
28 [EULA] constitutes express permission.” Dkt. No. 322.

 On August 31, 2019, the Court denied Defendant’s motion for summary judgment, finding
that Defendants failed to carry their burden to show Plaintiffs gave prior express invitation or

1 permission for faxed advertisements through either the provision of their fax numbers in the
 2 Medisoft product registration form or agreeing to the EULA. Dkt. No. 331. The Court
 3 additionally granted Plaintiffs' renewed motion for class certification, finding that the Exhibit A-
 4 only Class satisfied Rule 23(a)'s and Rule 23(b)(3)'s requirements. *Id.*

5 After the Court set a new case schedule, the parties were required to submit dispositive
 6 motions by March 5, 2020. *See* Dkt. No. 344, 356. Now pending before the Court are
 7 Defendants' motion to decertify class and the parties' cross-motions for partial summary
 8 judgment. *See* Dkt. Nos. 360, 362, 363. At the hearing on the pending motions on May 21, 2020,
 9 the parties disputed whether the Court was bound by an FCC ruling which, if applicable, could
 10 impact several aspects of the case. Accordingly, the Court ordered the parties to submit
 11 supplemental briefs addressing the United States Supreme Court's opinion in *PDR Network, LLC*
 12 *v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019). *See* Dkt. Nos. 384, 385–
 13 388.

14 II. MOTION TO DECERTIFY CLASS

15 A. Legal Standard

16 An order certifying a class “may be altered or amended before final judgment.” Fed. R.
 17 Civ. P. 23(c)(1). “A district court’s order respecting class certification is ‘inherently tentative’
 18 prior to final judgment on the merits.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
 19 633 (9th Cir.1982); *see also* Fed. R. Civ. P. 23(c)(1)(C). “In considering the appropriateness of
 20 decertification, the standard of review is the same as a motion for class certification: whether the
 21 Rule 23 requirements are met.” *Bowerman v. Field Asset Servs., Inc.*, 242 F. Supp. 3d 910, 927
 22 (N.D. Cal. 2017) (citation omitted). The burden of proof remains on the plaintiff. *Id.* (citing
 23 *Marlo v. UPS*, 639 F.3d 942, 947 (9th Cir. 2011)).¹ The manner and degree of evidence required

24
 25 ¹ The Court notes that other district courts in this circuit have found that the party seeking
 26 decertification bears the burden of demonstrating that the elements of Rule 23 have not been
 27 established. *See, e.g., Zakaria v. Gerber Prod. Co.*, No. 15-cv-00200-JAK EX, 2017 WL
 28 9512587, at *16 (C.D. Cal. Aug. 9, 2017), *aff’d*, 755 F. App’x 623 (9th Cir. 2018); *Cole v. CRST,*
Inc., 317 F.R.D. 141, 144 (C.D. Cal. 2016); *Rosales v. El Rancho Farms*, No. 09-cv-00707, 2014
 WL 321159, at *4 (E.D. Cal. Jan. 29, 2014). While the Ninth Circuit has not affirmatively
 articulated the burden of proof for decertification, in *Marlo*, the panel held that the district court,
 in its order decertifying the class, “properly placed the burden on [the plaintiff] to demonstrate that

1 for the plaintiff to meet his burden depends on the stage of the litigation. *Wash. Envtl. Council v.*
 2 *Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citation omitted). As the Ninth Circuit has
 3 acknowledged, “the manner and degree of evidence required at the preliminary class certification
 4 stage is not the same as at the successive stages of the litigation—i.e., at trial.” *Sali v. Corona*
 5 *Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (quotation omitted).

6 **B. Discussion**

7 Defendants argue that class decertification is warranted due to two developments that
 8 purportedly defeat predominance and superiority. Mot. at 11–16, 16–19. First, Defendants argue
 9 that the new consumer survey conducted by Dr. Steven Nowlis shows significant variability in
 10 consumers’ interpretation of the EULA, such that individualized analysis will be required to
 11 determine whether each class member understood the EULA to constitute consent. The Court
 12 readily rejects this argument in light of the Ninth Circuit’s determination that consent as to both
 13 the EULA and the product registration form can be determined by “simply examining” the
 14 documents themselves. *True Health*, 896 F.3d at 932. The Court also ruled on Defendants’
 15 motion for summary judgment based on the EULA defense and found that the EULA does not, as
 16 a matter of law, constitute prior express permission to send the faxes at issue. Dkt. No. 331.
 17 Defendants contend that “the issue of ambiguity in construing the EULA had not arisen” prior to
 18 the Court’s ruling, *see* Reply at 12, but its efforts to present such factual survey data are flatly
 19 inconsistent with both the Ninth Circuit’s holding and this Court’s denial of summary judgment.²

20 Second, Defendants contend that a recent decision by the Consumer and Government
 21 Affairs Bureau (“Bureau”) of the FCC will necessitate individualized inquiries to determine

23 Rule 23’s class-certification requirements had been met.” *Marlo*, 639 F.3d at 947. In any event,
 24 the Court does not find that this distinction would change its analysis.

25 ² Defendants argue that the “Nowlis Surveys, in combination with other evidence of consent, show
 26 that individualized inquiries into consent requires [sic] decertification.” Mot. at 16. Concerning
 27 other evidence, Defendants point to “the additional context that (1) all customers voluntarily
 28 provided fax numbers during the product registration process, and (2) numerous customers gave
 additional consent through their frequent oral or written communications and ongoing
 relationships with their account representatives.” *Id.* at 18. The Court is similarly unconvinced
 that the other evidence of consent in the record, alone or combined with the Nowlis Surveys,
 “clearly show[s] that consent based on the EULA cannot be determined through common proof on
 a class wide basis.” *See id.* at 25.

1 whether class members received the advertisements through online fax services or traditional
 2 analog fax machines. *See In the Matter of Amerifactors Fin. Grp., LLC Petition for Expedited*
 3 *Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk*
 4 *Fax Prot. Act of 2005*, CG Dkt. Nos. 02-278, 05-338, 2019 WL 6712128, ¶ 3 (Dec. 9, 2019)
 5 (“*Amerifactors*”). To assess Defendants’ argument, the Court reviews *Amerifactors* and considers
 6 the relevance of *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051
 7 (2019).

8 **i. *Amerifactors* Declaratory Ruling**

9 In passing the Communications Act, Congress “delegated to the [FCC] the authority to
 10 ‘execute and enforce’ the Communications Act and to ‘prescribe such rules and regulations as may
 11 be necessary in the public interest to carry out the provisions of the Act,” and to “promulgate
 12 binding legal rules.” *See Nat’l Cable & Telecom. Ass’n v. Brand X Internet Services*, 545 U.S.
 13 967, 980 (2005); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 312 (2013) (Breyer, J.,
 14 concurring). Pursuant to that authority, the FCC has provided for the disposition of “declaratory
 15 rulings,” meant to “terminat[e] a controversy or remov[e] uncertainty.” 47 C.F.R. § 1.2(a); *see*
 16 *also* 5 U.S.C. 554(e) (granting authority to agencies to “issue a declaratory order to terminate a
 17 controversy or remove uncertainty.”). The FCC has delegated authority to its constituent bureaus
 18 and offices to docket petitions for declaratory rulings, post notice of and seek comment on them,
 19 and issue final orders disposing of them. 47 C.F.R. § 1.2(b). These orders then become final and
 20 effective “upon release.” 47 CFR § 1.102(b)(1). Parties may apply for review of these decisions,
 21 but the decisions remain in effect unless the FCC, “in its discretion,” issues a stay pending review.
 22 § 1.102(b)(2); § 1.115.

23 In 1991, Congress passed the Telephone Consumer Protection Act (TCPA), granting the
 24 FCC the authority to “prescribe regulations to implement” its requirements. 47 U.S.C.
 25 § 227(b)(2). The TCPA prohibits the “use [of] any telephone facsimile machine, computer, or
 26 other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C.
 27 § 227(b)(1)(C). To establish liability, Plaintiffs must then show that the faxes were received by
 28 Plaintiffs on a “telephone facsimile machine.” *Id.* The TCPA defines “telephone facsimile

1 machine” as “equipment which has the capacity (A) to transcribe text or images, or both, from
 2 paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to
 3 transcribe text or images (or both) from an electronic signal received over a regular telephone line
 4 onto paper.” *Id.* § 227(a)(3).

5 In 2017 a petitioner sought a declaratory ruling clarifying whether faxes received by
 6 “online fax services” are covered under the TCPA. *See Amerifactors*, CG Dkt. Nos. 02-278, 05-
 7 338, 2019 WL 6712128, ¶ 2 (Dec. 9, 2019). The Bureau granted the petition and issued a
 8 declaratory ruling that an “online fax service” is not a “telephone facsimile machine” under the
 9 TCPA. *See generally id.* Specifically, it ruled that “an online fax service that effectively receives
 10 faxes ‘sent as email over the Internet’ and is not itself ‘equipment which has the capacity . . . to
 11 transcribe text or images (or both) from an electronic signal received over a regular telephone line
 12 onto paper’ is not a ‘telephone facsimile machine’ and thus falls outside the scope of the statutory
 13 prohibition.” *Id.* at ¶ 3

14 The Bureau reached its conclusion by examining the plain language of the TCPA and
 15 considering the specific harms Congress sought to address. It first defined an online fax service as
 16 “a cloud-based service consisting of a fax server or similar device that is used to send or receive
 17 documents, images and/or electronic files in digital format over telecommunications facilities that
 18 allows users to access faxes the same way that they do email: by logging into a server over the
 19 Internet or by receiving a pdf attachment [as] an email.” *Id.* at ¶ 2. It likened online fax services
 20 to “faxes sent to a “computer” or “other device,” rather than a “telephone facsimile machine.” *Id.*
 21 at ¶ 13. The Bureau also emphasized that “an online fax service cannot itself print a fax —the
 22 user of an online fax service must connect his or her own equipment in order to do so.”³ *Id.* at
 23 ¶ 11. It further determined that online fax services did not pose the specific harms Congress
 24 addressed in the TCPA, namely “advertiser cost-shifting” from the use of paper and ink and
 25 “occupying the recipient’s fax machine so it is unavailable for other transmissions.” *Id.* at ¶ 11–

26
 27 ³ The Bureau distinguished its discussion of online fax services, which have no capacity to print a
 28 fax, from another declaratory ruling focusing on an “efax” that “was sent to a computer with an
 attached fax modem that had the capacity to print the fax, as required by statute.” *See id.* at ¶ 8,
 15.

1 13.

2 As noted, the parties dispute the role *Amerifactors* should play in this Court’s analysis.
3 Defendants argue that *Amerifactors* is a final order binding upon the Court. Reply at 2. Plaintiffs
4 argue that it is not a binding final order and does not justify decertification of the class. *See* Opp.
5 at 7. More precisely, the parties dispute the applicability of 28 U.S.C. § 2342 (the “Hobbs Act”).
6 The Hobbs Act limits judicial review of FCC “final orders” to the Courts of Appeals, provided
7 that complaints are filed within 60 days of an order’s publication. *See* 28 U.S.C. § 2342(1); 47
8 U.S.C. § 402(a) (“Any proceeding to enjoin, set aside, annul, or suspend any order of the
9 Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in
10 [the Hobbs Act].”). However, parties who were “not a party to the proceedings resulting” in the
11 order may file a petition for reconsideration within the agency itself prior to seeking judicial
12 review. 47 U.S.C. 405(a); 47 C.F.R. § 1.106(m); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 400
13 (9th Cir. 1996). The FCC’s action on that petition, including a decision not to issue an order at all,
14 is then reviewable by the Courts of Appeals as a final order of the FCC. *See Coalition for a*
15 *Healthy California v. F.C.C.*, 87 F.3d 383, 385–86 (9th Cir. 1996).

16 **ii. PDR Network**

17 In 2019 the United States Supreme Court addressed the applicability of the Hobbs Act in
18 private litigation. *See PDR Network*, 139 S. Ct. at 2055. *PDR Network* involved a private action
19 for damages against Petitioners, alleging violations of the TCPA based on “unsolicited” fax
20 advertisements sent to Respondent. *Id.* The district court dismissed the claim, holding that the
21 faxes, which promoted a free e-book, were not “advertisements” under the TCPA, even though the
22 FCC interpreted advertisements to include the promotion of free goods and services. *Id.* at 2054.
23 The Fourth Circuit reversed, concluding that the Hobbs Act barred the district court from
24 diverging from the FCC’s interpretation of the TCPA. *Id.*

25 The Supreme Court granted certiorari, but ultimately did not resolve whether the Hobbs
26 Act requires a district court to follow a particular FCC order interpreting the TCPA. *See generally*
27 *id.* In remanding the case to the Court of Appeals, the majority reasoned that “the extent to which
28 the Order binds the lower court may depend on the resolution of two preliminary sets of questions

1 that were not aired before the Court of Appeals.” *See id.* at 2053, 2055. First, the Court of
 2 Appeals would need to assess the “legal nature” of the relevant FCC order, and whether it was a
 3 “legislative rule which is ‘issued by an agency pursuant to statutory authority’ and has the ‘force
 4 and effect of law,’” or an “interpretive rule,” which lacks the force of law and merely “advise[s]
 5 the public of the agency’s construction of the statutes...which it administers.” *Id.* at 2055.
 6 Second, the Court of Appeals would need to consider whether PDR had “prior” and “adequate”
 7 opportunities to seek judicial review of the FCC order. *Id.* at 2055–56.

8 Notably, the Supreme Court did not determine what conclusions should be reached in
 9 addressing these preliminary questions. *Id.* at 2055–56. In a concurring opinion, Justice
 10 Kavanaugh said that the Court should have concluded that “the Hobbs Act does not bar a
 11 defendant in an enforcement action from arguing that the agency’s interpretation of the statute is
 12 wrong.” *Id.* at 2058–59 (Kavanaugh, J., concurring). Justice Kavanaugh explained that “[i]n an
 13 as-applied enforcement action, the district court should interpret the [TCPA] . . . under the usual
 14 principles of statutory interpretation, affording appropriate respect to the agency’s interpretation.”
 15 *Id.* at 2066 (Kavanaugh, J., concurring).

16 **iii. Analysis**

17 Because *PDR Network* did not resolve the central issue presented here, Ninth Circuit
 18 precedent controls.⁴ And under Ninth Circuit precedent, the Court must treat *Amerifactors* as
 19 authoritative. The Ninth Circuit has held that the Hobbs Act bars district courts from considering
 20 claims that would necessarily require the court to determine the validity of, or to enjoin, set aside
 21 or suspend, a final FCC order. In *Wilson*, a plaintiff in a private enforcement action asked the
 22 court to disregard a recent FCC order issued in a proceeding in which he had not participated that
 23 would render his claims moot. On appeal, the Ninth Circuit affirmed the dismissal, holding that
 24 the district court was divested of jurisdiction by the Hobbs Act and that a “declaratory ruling...is
 25 subject to the exclusive review of the court of appeals,” even as to parties who “are not parties to
 26

27 _____
 28 ⁴ *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (stating that only in cases of “clear
 irreconcilability” can district courts “consider themselves bound by the intervening higher
 authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled”).

1 FCC proceedings.” *Wilson*, 87 F.3d at 389. Because the plaintiff’s claim “raise[d] the same
2 issues and [sought] the same relief in substance as the declaratory ruling,” it necessarily required
3 “judicial review” and fell under the exclusive appellate jurisdiction described by the Hobbs Act.
4 *Id.* at 399.

5 Since *Wilson*, the Ninth Circuit has indicated that district courts do not have jurisdiction to
6 question the validity of FCC final orders, and district courts have recognized this limitation. *See*,
7 *e.g.*, *US W. Commc’ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000), *as amended on*
8 *reh’g* (Sept. 13, 2000) (concluding that even court of appeals could not invalidate FCC final order
9 where no Hobbs Act petition had been filed); *Daniel v. Five Stars Loyalty, Inc.*, No. 15-CV-
10 03546-WHO, 2015 WL 7454260, at *6 n.6 (N.D. Cal. Nov. 24, 2015) (determining in TCPA
11 action that an “FCC final order” is binding under the Hobbs Act “unless it is invalidated by a court
12 of appeals”).

13 Plaintiff contends that *Amerifactors* is an “interpretative rule” and thus is not a final order
14 under the Hobbs Act. Dkt. No. 385 at 3. Even assuming (without deciding) that Plaintiff were
15 correct in this characterization of *Amerifactors*,⁵ Plaintiff acknowledges that the Ninth Circuit has
16 previously considered, and rejected, this argument. *See id.* at 5. In *Hamilton*, the Ninth Circuit
17 held that a potential distinction between “legislative” and “interpretive” rules does not matter
18 insofar as the “finality” and enforceability of an FCC order is concerned. *Hamilton*, 224 F.3d
19 1049, 1055 (9th Cir. 2000).⁶ Instead, to determine the order’s finality, the Ninth Circuit focused
20 on whether the FCC order was merely “tentative” and whether it “determines rights and gives rise

21 _____
22 ⁵ Both parties suggest that *Amerifactors* must be “interpretive” because its purpose is to “interpret”
23 the TCPA. *See* Dkt. No. 385 at 2; Dkt. No. 386 at 8. This analysis wrongly assumes that the act
24 of interpretation makes a rule an “interpretive rule” *per se*, and misses the purpose of
distinguishing “interpretive” from “legislative rules,” which is to determine which rules “carry the
force of law.” *Kisor v. Wilkie*, 139 S.Ct. 2400, 2420 (2019).

25 ⁶ As noted, *PDR Network* observed that the extent an FCC order “binds the lower courts may
depend” on its legal nature, and that an interpretive rule “may not be binding on a district court.”
26 139 S. Ct. at 2055. The Supreme Court highlighted its use of “may,” explaining that it d[id] not
definitively resolve these issues here.” *Id.* The Court thus does not find this ruling to be clearly
27 irreconcilable with presently binding Ninth Circuit law on the question. *See Hamilton*, 224 F.3d at
1055 (“The Hobbs Act itself contains no exception for ‘interpretive’ rules, and case law does not
28 create one.”). It follows that Plaintiffs’ effort to distinguish *Hamilton* because it was not a private
TCPA action and was decided before *PDR Network* must be rejected. *See* Dkt. No. 385 at 5.

1 to legal consequences.” *Id.*

2 Here, the Court finds that *Amerifactors* is a final, binding order for purposes of the Hobbs
 3 Act. The Bureau acted “pursuant to delegated authority” to issue a declaratory ruling and the
 4 ruling became effective “upon release.” *See* 47 C.F.R. § 1.2; 47 CFR § 1.102 (b)(1). The pending
 5 petition for reconsideration before the FCC does not affect the order’s finality as it applies to
 6 Defendants’ potential liability under the TCPA. *See* 47 C.F.R. §1.102 (b)(2); *Comm. to Save*
 7 *WEAM v. Fed. Commc’ns Comm’n*, 808 F.2d 113, 119 (D.C. Cir. 1986) (holding that an
 8 application for FCC review could not preclude an order from taking effect unless the FCC decided
 9 to stay its effectiveness). And because *Amerifactors* establishes that those who received faxes via
 10 an online fax service have different legal rights than those who received faxes on a telephone
 11 facsimile machine, it clearly “determines rights and gives rights to legal consequences.” *See*
 12 *Hamilton*, 224 F.3d at 1055. Moreover, Plaintiffs’ request that the Court diverge from
 13 *Amerifactors*’ fundamental holding, that online fax services do not fall under the TCPA, would
 14 “raise the same issues...as the declaratory ruling” and is thus precluded by Ninth Circuit
 15 precedent. *See Wilson*, 87 F.3d at 399.⁷

16 Accordingly, in light of *Amerifactors*, the Court modifies the class definition to include a
 17 Stand-Alone Fax Machine Class and an Online Fax Services Class:

18 All persons or entities who received faxes from “McKesson” via a
 19 “stand-alone” fax machine from September 2, 2009, to May 11, 2010,
 20 offering “Medisoft,” “Lytec,” “Practice Partner,” or “Revenue
 21 Management Advanced” software or “BillFlash Patient Statement
 22 Service,” where the faxes do not inform the recipient of the right to
 “opt out” of future faxes, and whose fax numbers are listed in Exhibit
 A to McKesson’s Supplemental Response to Interrogatory Regarding

23 ⁷ For what it is worth, the Court agrees with the reasoning of Justice Kavanaugh’s concurrence in
 24 *PDR Network*, because requiring federal courts to treat administrative agencies’ legal
 25 interpretations as invariably binding under these circumstances would appear to pose practical as
 26 well as constitutional problems. *See PDR Network*, 139 S. Ct. at 2061–62 (Kavanaugh, J.,
 27 concurring) (noting that “the default rule is to allow defendants in enforcement actions to argue
 28 that the agency’s interpretation of the statute is wrong, unless Congress expressly provides
 otherwise”). At least three judges of the Eleventh Circuit have urged that court to reconsider its
 precedent, which parallels the Ninth Circuit’s approach, *en banc* and adopt Justice Kavanaugh’s
 reasoning in *PDR Network*. *See Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1106
 (11th Cir. 2019) (Pryor, J., concurring) (positing that “[o]ur precedents’ interpretation of the
 Hobbs Act ignores the statutory context, generates absurd results, and raises serious constitutional
 doubts”). But these questions are obviously for another day, and for a higher court than this one.

1 Prior Express Invitation or Permission, but not in Exhibit B or Exhibit
2 C to McKesson’s Response to Interrogatory Regarding Prior Express
3 Invitation or Permission.

4 All persons or entities who received faxes from “McKesson” via an
5 “online fax service” from September 2, 2009, to May 11, 2010,
6 offering “Medisoft,” “Lytec,” “Practice Partner,” or “Revenue
7 Management Advanced” software or “BillFlash Patient Statement
8 Service,” where the faxes do not inform the recipient of the right to
9 “opt out” of future faxes, and whose fax numbers are listed in Exhibit
10 A to McKesson’s Supplemental Response to Interrogatory Regarding
11 Prior Express Invitation or Permission, but not in Exhibit B or Exhibit
12 C to McKesson’s Response to Interrogatory Regarding Prior Express
13 Invitation or Permission.

14 Defendants argue that “the Court lacks jurisdiction over any claims of the proposed
15 ‘Online Fax Service Class.’” *See* Reply at 5. While the Court is aware of the language in *Wilson*
16 that could be read in isolation to suggest as much, the reality is that in cases similar to this one,
17 including TCPA cases, the Ninth Circuit has not appeared to view *Wilson* as divesting district
18 courts of jurisdiction altogether. In *Fober v. Management and Technology Consultants, LLC*, 886
19 F.3d 789, 795 (9th Cir. 2018), for example, the Ninth Circuit found that the district court correctly
20 granted summary judgment in favor of the defendant on the ground that plaintiff gave “prior
21 express consent” as a matter of law. The court of appeals “presume[d] the validity of the relevant
22 FCC rules and regulations,” *id.* at 792 n.2, and considered those rules and regulations as part of its
23 analysis in affirming the district court’s summary judgment ruling, *id.* at 792–95. Significantly,
24 the Ninth Circuit did not in any way suggest that the district court lacked jurisdiction to consider
25 the case in the first place.

26 Similarly, in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017),
27 the Ninth Circuit affirmed the post-class-certification grant of summary judgment against a TCPA
28 plaintiff on the ground that he gave prior express consent to receive text messages and did not
effectively revoke that consent. The court of appeals confirmed that it “[did] not question, in this
appeal from an order of the district court, the validity of the FCC’s interpretation of ‘prior express
consent,’” instead “read[ing] the 1992 [FCC] Order in a way that harmonizes with the TCPA’s
text and purpose, as well as the FCC’s other orders and rulings.” *Id.* at 1044. Again, nowhere in
its analysis did the *Van Patten* court suggest that the district court should have dismissed the case
for lack of jurisdiction.

1 Consistent with the Ninth Circuit’s approach in *Fober* and *Van Patten*, the Court
 2 acknowledges (as it must under controlling precedent) that *Amerifactors* is authoritative and
 3 establishes that those who received faxes via an online fax service have different legal rights than
 4 those who received faxes via a traditional physical fax machine. Accordingly, in modifying the
 5 class definition, the Court simply adheres to the FCC’s interpretation and enables a process for
 6 identifying those who received faxes via an online fax service. So rather than posing a threshold
 7 “jurisdictional” issue as Defendants assert, the question of whether the Online Fax Service
 8 subclass has a claim under the TCPA is simply a common merits question whose answer will be
 9 the same for all members of that subclass.

10 Defendants further argue that Plaintiffs’ “failure to fully describe . . . a common proof
 11 methodology and to show class-wide liability defeats predominance.” Reply at 7. But the Court
 12 is satisfied with Plaintiffs’ proposed three-step subpoena process to distinguish members of these
 13 subclasses based on Plaintiffs’ counsel’s experience in another TCPA case. *See id.* at 12 (citing
 14 *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 2014 WL 11429029, at *1 (W.D. Mich. Feb.
 15 20, 2014)).

16 Accordingly, the Court **DENIES** Defendants’ motion to decertify the class.

17 **III. CROSS-MOTIONS FOR SUMMARY JUDGMENT**

18 The Court turns next to the cross-motions for summary judgment.

19 **A. Legal Standard**

20 A motion for summary judgment should be granted where there is no genuine issue of
 21 material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56;
 22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The purpose of summary
 23 judgment “is to isolate and dispose of factually unsupported claims or defenses.” *Celotex v.*
 24 *Catrett*, 477 U.S. 317, 323–24 (1986). The moving party has the initial burden of informing the
 25 Court of the basis for the motion and identifying those portions of the pleadings, depositions,
 26 answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable
 27 issue of material fact. *Id.* at 323.

28 If the moving party meets its initial burden, the burden shifts to the non-moving party to

1 present facts showing a genuine issue of material fact for trial. Fed. R. Civ. P. 56; *Celotex*, 477
2 U.S. at 324. The Court must view the evidence in the light most favorable to the nonmovant,
3 drawing all reasonable inferences in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
4 *Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). Summary judgment is not appropriate if the
5 nonmoving party presents evidence from which a reasonable jury could resolve the disputed issue
6 of material fact in the nonmovant’s favor. *Anderson*, 477 U.S. at 248. Nonetheless, “[w]here the
7 record taken as a whole could not lead a rational trier of fact to find for the non-moving party,
8 there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587
9 (1986) (internal quotation marks omitted).

10 **B. Discussion**

11 Plaintiffs argue that they are entitled to summary judgment as to liability under the TCPA
12 because “(1) the faxes are ‘advertisements’; (2) each Defendant is a ‘sender’; (3) the faxes were
13 sent and received using covered ‘equipment’; (4) Defendants’ defense of ‘prior express invitation
14 or permission’ fails as a matter of law; and (5) Defendants’ defense of ‘established business
15 relationship’ fails.” Dkt. No. 360 at 8. Plaintiffs also argue that the Court should impose statutory
16 and treble damages. *Id.* at 20–23. Defendants limit their motion for partial summary judgment to
17 Plaintiffs’ claim for treble damages. Dkt. No. 363 at 4–10.

18 In light of the Court’s modification of the class definition, the Court defers ruling on these
19 motions. Under *Amerifactors*, it appears that the Online Fax Service subclass has no cause of
20 action as a matter of law, and is subject to a grant of summary judgment against it on that basis.
21 As reluctant as it is to further drag out the resolution of this seemingly interminable case, the
22 Court is inclined to provide class members an updated notice explaining that the class has now
23 been divided into subclasses with different legal rights. The updated notice would also provide
24 another opportunity to opt out, which potentially could be significant for members of the Online
25 Fax Service subclass. Each party shall submit simultaneous statements, not to exceed two pages,
26 indicating whether the party objects to or agrees with this proposal. The parties may not relitigate
27 any of the issues decided above: the limited and simple task is for each party to state its position
28 on the question of providing supplemental notice of the creation of subclasses, accepting all of the

1 above issues as decided. The parties' positions on the underlying substantive questions have
2 already been exhaustively preserved for the record, and need not be repeated.

3 **IV. CONCLUSION**

4 The Court **DENIES** Defendants' motion for class decertification and defers ruling on the
5 parties' cross-motions for summary judgment. With respect to the Court's proposal regarding
6 updated notice, the parties are **DIRECTED** to submit their separate statements by January 19,
7 2021.

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9 **IT IS SO ORDERED.**

10 Dated: 12/24/2020

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12 HAYWOOD S. GILLIAM, JR.
13 United States District Judge
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United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC INC, et al.,

Plaintiffs,

v.

MCKESSON CORPORATION, et al.,

Defendants.

Case No. 13-cv-02219-HSG

**ORDER ENTERING SUMMARY
JUDGMENT AGAINST THE ONLINE
FAX SERVICES CLASS**

On March 5, 2020, Defendants moved to decertify in light of a ruling by the Consumer and Government Affairs Bureau of the FCC stating that an “online fax service” is not a “telephone facsimile machine” under the Telephone Consumer Protection Act. *See In the Matter of Amerifactors Fin. Grp., LLC Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prot. Act of 2005*, CG Dkt. Nos. 02-278, 05-338, 2019 WL 6712128, ¶ 3 (Dec. 9, 2019) (“*Amerifactors*”). The Court denied Defendants’ motion to decertify, but modified the class definition to include a Stand-Alone Fax Machine Class and an Online Fax Services Class. Dkt. No. 393 (“*Order*”). The Court later indicated its view that summary judgment should be entered against the Online Fax Services Class as a matter of law based on the analysis in its *Order*. Dkt. No. 400.

The Court “may enter summary judgment sua sponte against a moving party if the losing party has had a ‘full and fair opportunity to ventilate the issues involved in the matter.’” *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982)). The Court allowed Plaintiffs to submit a statement raising any arguments as to why summary judgment against the Online Fax Services Class would be inappropriate without rearguing any issues already decided by the Court’s *Order*. Dkt. No. 400.

United States District Court
Northern District of California

1 Plaintiffs responded indicating they wished to stand on arguments already made in connection
2 with the decertification motion and their motion for summary judgment in favor of the Online Fax
3 Services Class. Dkt. No. 402 at 3. But Plaintiffs contended that the Court “should not decide the
4 merits of a certified Rule 23(b)(3) class’s claims until after notice has been sent and the period to
5 request exclusion from the class (the ‘opt-out’ deadline) has passed.” *Id.*

6 The parties have since provided updated class notice and the opt-out deadline, April 20,
7 2021, has passed, and Plaintiffs’ arguments have been preserved for the record. The Court
8 maintains its view that the Online Fax Services Class has no cause of action as a matter of law
9 under *Amerifactors*. And the Court finds that Plaintiffs have had a “full and fair opportunity to
10 ventilate the issues involved.” *See Gospel Missions*, 328 F.3d at 553. Accordingly, the Court
11 enters summary judgment against the Online Fax Services Class.

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13 **IT IS SO ORDERED.**

14 Dated: August 13, 2021

15 
16 HAYWOOD S. GILLIAM, JR.
17 United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC INC, et
al.,

Plaintiffs,

v.

MCKESSON CORPORATION, et al.,

Defendants.

Case No. 13-cv-02219-HSG
ORDER DECERTIFYING CLASS
Re: Dkt. No. 476

United States District Court
Northern District of California

On September 29, 2021, the Court ordered Plaintiffs to show cause why the class should not be decertified. *See* Dkt. No. 476 (“Order to Show Cause” or “OSC”). In the OSC, the Court told the parties that they should cite any relevant legal authority supporting their respective positions. *Id.* at 7. The Court incorporates the legal standards and analysis set forth in the Order to Show Cause, and adds the analysis below based on the parties’ responses to the OSC.

Plaintiffs filed their Response to the Order to Show Cause on October 4, 2021. *See* Dkt. No. 480 (“Plaintiffs’ Response”). Defendants submitted a Response to Plaintiffs’ Response on October 6, 2021. *See* Dkt. No. 482 (“Defendants’ Response”). On October 8, 2021, the Court heard oral argument regarding the OSC. Dkt. No. 485.

As explained in the Order to Show Cause, an FCC decision issued after the class’s initial certification changed the requirements for TCPA liability. There is now no liability under the TCPA for faxes received via an online fax service. *In the Matter of Amerifactors Fin. Grp., LLC Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prot. Act of 2005*, CG Dkt. Nos. 02-278, 05-338, 2019 WL 6712128, ¶ 3 (Dec. 9, 2019) (“*Amerifactors*”). While Defendants sought decertification of the class after the *Amerifactors* ruling issued, *see* Dkt. No. 362, the Court gave Plaintiffs the opportunity to obtain

1 class-wide proof sufficient to show how class members received the faxes at issue, *see* Dkt. No.
 2 393. Plaintiffs returned with over 100 telephone carrier declarations, which Defendants
 3 supplemented with two additional telephone carrier declarations. *See* Dkt. Nos. 460, 465, 468,
 4 469, 470, 471.¹ Telephone carriers who provided service to over 60% of the class members
 5 affirmatively say they have no way of knowing if the class member received faxes via a stand-
 6 alone fax machine or via an online fax service. Defendants' Response at 4; *see* Dkt. Nos. 460,
 7 465, 468, 469, 470, 471; *see, e.g.*, Dkt. No. 460, Exhibit A Part 5 at 63 ("Comcast has no
 8 mechanism to determine whether its subscribers received faxes on a standalone fax machine or via
 9 online fax service."). Plaintiffs attempt to fill this evidentiary gap with a proffered expert who
 10 opines on general trends in online fax service usage, from which Plaintiffs then make assertions
 11 about the likelihood of particular individual consumer choices.² After reviewing the Plaintiffs'
 12 Offer of Proof, Dkt. No. 455, and the telephone carrier declarations, the Court became concerned
 13 that the class does not satisfy Federal Rule of Civil Procedure Rule 23(b)(3), which requires that
 14 "questions of law or fact common to class members predominate over any questions affecting only
 15 individual members." Fed. R. Civ. P. 23(b)(3); *see* OSC at 1. Plaintiffs have not rebutted the
 16 concerns the Court identified.³

18 ¹ A significant number of Plaintiffs' subpoenas resulted in no reply. In their offer of proof,
 19 Plaintiffs said they issued 246 subpoenas. Dkt. No. 455 at 1. Defendants, in their latest response,
 20 contend that Plaintiffs subpoenaed 231 phone carriers, 110 of which have not responded.
 21 Defendants' Response at 11. According to Defendants, Plaintiffs have no data from telephone
 22 carriers servicing at least 17% of the class members. *See id.*

23 ² According to Plaintiffs' expert, in the "absence of data" it can be assumed that the class member
 24 used a stand-alone fax machine. Even though it has been clear since December 2019 that
 25 *Amerifactors* represented a significant change in the law relevant to this case, Plaintiffs only
 26 disclosed this theory for the first time on September 10, 2021, approximately one month before
 27 trial, in response to the Court's OSC. *See* Dkt. No. 455, Exhibit B at Part IV. Then mere weeks
 28 before trial, Plaintiffs came up with new theories supporting their assertion that class members
 must have used a stand-alone fax machine, contending for the first time, for example, that call
 forwarding was not a realistic option due to quality degradation of the fax. *See* Dkt. No. 480 at 5
 (citing nothing in Plaintiffs' expert's declaration disclosing opinions to which counsel asserted he
 "will testify"). While the Court agrees with Defendants that these theories plainly were not timely
 disclosed under Rule 26, *see* Defendants' Response at 12 n.30, the Court considers them on their
 merits, and finds that they fail to meet Plaintiffs' burden under Rule 23 in any event.

³ While the Ninth Circuit has not affirmatively articulated the burden of proof for decertification,
 in *Marlo v. United Parcel Service, Inc.*, the panel held that the district court, in its order
 decertifying the class, "properly placed the burden on [the plaintiff] to demonstrate that Rule 23's
 class-certification requirements had been met." 639 F.3d 942, 947-48 (9th Cir. 2011). In any
 event, the Court's conclusion would not change based on who holds the burden.

1 First, Plaintiffs’ proposed methodology does not amount to class-wide proof. Instead, it is
 2 essentially an effort to aggregate, through an expert and Plaintiffs’ counsel’s own assumptions,
 3 individualized data based on over a hundred different declarations concerning thousands of
 4 discrete phone numbers to which faxes were sent. The declarations Plaintiffs submit, on their
 5 face, simply do not speak directly to the central question at issue: how can it be shown via class-
 6 wide, common proof that each purported class member received the faxes at issue via a means
 7 other than an “online fax service”? Simply asking whether various phone carriers themselves
 8 provided online fax services does not provide uniform class-wide proof that each class member
 9 received the faxes at issue in the manner necessary to give rise to TCPA liability, as Defendants
 10 note.⁴ Instead, Plaintiffs have only managed to advance “evidence that varies from member to
 11 member.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted)
 12 (“*Tyson*”).

13 Plaintiffs argue that they have proffered class-wide proof because a jury could find by a
 14 preponderance of the evidence that each class member received the faxes on a stand-alone fax
 15 machine. *See* Plaintiffs’ Response at 6. Plaintiffs rely almost entirely on a single case: *Tyson*, a
 16 class action in which plaintiffs alleged they were improperly denied overtime compensation. *See*
 17 Plaintiffs’ Response at 6. However, *Tyson* simply does not support Plaintiffs’ predominance claim
 18 here. *See Tyson* at 459 (“Whether a representative sample may be used to establish classwide
 19 liability will depend on the purpose for which the sample is being introduced and on the
 20 underlying cause of action.”).

21 In *Tyson*, the plaintiffs “sought to introduce a representative sample to fill an evidentiary
 22 gap created by the employer’s failure to keep adequate records.” *Id.* at 456. Without the
 23 representative sample, each individual plaintiff would have had no alternative means to establish
 24 their hours worked. *Id.* at 457. The *Tyson* plaintiffs were similarly situated because they worked
 25 in the same facility, did similar work, and were paid under the same policy. *Id.* at 459. Therefore,
 26

27 ⁴ For example, the class members still could have received the faxes at issue through an online fax
 28 service by using a third party online fax service or call forwarding. *See* Dkt. No. 455, Exhibit B at
 4; Defendants’ Response at 12.

1 the “experience of a subset of employees [could] be probative as to the experiences of all of
 2 them.” *Id.* The Supreme Court allowed the plaintiffs to rely on a representative sample to
 3 establish hours worked because “the sample could have sustained a reasonable jury finding as to
 4 hours worked in each employee’s individual action.” *Tyson* at 455. The Supreme Court
 5 recognized that not all class actions could properly rely on representative samples, comparing the
 6 plaintiffs in *Tyson* with the plaintiffs in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)
 7 (reversing class certification based on plaintiffs’ failure to prove that the class shared common
 8 questions of law or fact). In *Wal-Mart*, “the employees were not similarly situated” and so “none
 9 of them could have prevailed in an individual suit by relying on depositions detailing the ways in
 10 which other employees were discriminated against by their particular store managers.” *Tyson* at
 11 458.

12 *Tyson* does not support the Plaintiffs’ proposed method of so-called class-wide proof. The
 13 Plaintiffs and other class members in this case, unlike the plaintiffs in *Tyson*, have a clear
 14 alternative means to establish TCPA liability: each person can testify as to whether they received
 15 the faxes at issue on a stand-alone fax machine. Moreover, whether one class member received
 16 the faxes at issue on a stand-alone fax machine is not in any way probative of whether any other
 17 individual class member received his or her faxes on a stand-alone fax machine. Despite this,
 18 Plaintiffs propose using over 100 non-standardized telephone carrier declarations and an expert’s
 19 testimony about the rate of use of online fax services to make assumptions about how more than
 20 6,000 individual class members actually received the faxes at issue in this case. *See* Dkt. No. 455
 21 at 1, Exhibit B at Part IV. Far from presenting class-wide proof that would also be acceptable to
 22 prove an individual claim, Plaintiffs seek to transform the *absence* of uniform proof, cobbled
 23 together from a large number of disparate declarations, into a generalization they claim applies to
 24 each class member. But in an individual action, a plaintiff clearly would not be able to prove her
 25 case by saying, “Even though I personally received this fax via an online fax service, most people
 26 didn’t, according to Plaintiffs’ expert in the *True Health* case.”⁵ The issues and evidence in this

27
 28 ⁵ Plaintiffs’ position boils down to the assertion that because most fax recipients in 2009-2010
 purportedly used stand-alone fax machines, every single individual class member must have

1 case are fundamentally different than those in *Tyson*. The idea that Plaintiffs' expert's opinions
 2 about probability can constitute the required class-wide proof is not supported by *Tyson* or any
 3 other authority the Court has found.

4 Second, the individualized question of whether each class member received the faxes at
 5 issue on a stand-alone fax machine predominates over common questions. Plaintiffs argue that the
 6 predominance inquiry does not require that every possible issue in the case be capable of
 7 resolution via class-wide proof. *See* Plaintiffs' Response at 1-5. Plaintiffs miss the point. There
 8 can be no TCPA liability at all if the fax was received via an online fax service. *Amerifactors* at ¶
 9 8. Plaintiffs themselves proposed splitting the class into two subgroups: those that received the
 10 subject faxes "via a 'stand-alone' fax machine" and those that received the subject faxes "via an
 11 'online fax service.'" *See* Dkt. No. 372 at 10. As reflected by the class definitions, how the fax
 12 was received is a threshold requirement for TCPA liability. It is the central issue in this case.
 13 Where, as here, individual inquiries are required to prove a core element of liability, courts have
 14 found that individual questions predominate over common questions. *See Andrews v. Plains All*
 15 *American Pipeline, L.P.*, 777 Fed. Appx. 889, 892 (9th Cir. 2019) ("These individualized inquiries
 16 go to key elements of the class's claims, and the district court abused its discretion by concluding
 17 that this disparity would affect only damage calculations.")⁶; *Sandusky Wellness Ctr., LLC v. ASD*
 18 *Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017) (no predominance where "the
 19 district court would be tasked with filtering out those members to whom [defendant] was not
 20 liable"); *Williams v. Apple, Inc.*, No. 19-CV-04700-LHK, 2021 WL 2186223, at *11 (N.D. Cal.
 21 May 28, 2021) (denying class certification where the plaintiff lacked common proof of "essential
 22 elements" of the claim, including causation and injury); *Hamm v. Mercedes-Benz USA, LLC*, No.

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 24
 25 received the faxes at issue here via a stand-alone fax machine. *See* Plaintiffs' Response at 5
 26 ("Based on this evidence, the jury could reasonably find, by a simple preponderance of the
 27 evidence, that each of these class members did not receive the subject faxes via an online fax
 28 service."). This assertion, which as Defendants note is not supported by any cited empirical
 evidence whatsoever, *see* Defendants' Response at 15-16, is not the sort of evidence that can
 satisfy the "rigorous" and "demanding" analysis required under Rule 23. *Comcast Corp. v.*
Behrend, 569 U.S. 27, 34-35 (2013).

⁶ As an unpublished Ninth Circuit decision, *Andrews* is not precedent, but may be considered for
 its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

1 16-CV-03370, 2021 WL 1238304, at *12 (N.D. Cal. April 2, 2021) (denying class certification
 2 where proof of reliance, a requirement to prevail on a California Consumer Legal Remedies Act
 3 claim, would vary from consumer to consumer, defeating the predominance requirement under
 4 Rule 23(b)(3)). Accordingly, the predominance requirement of Rule 23(b)(3) is not met.

5 For similar reasons, Rule 23(b)(3)'s superiority requirement also is not met. The
 6 superiority requirement tests whether "a class action is superior to other available methods for
 7 fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Where "the
 8 complexities of a class action treatment outweigh the benefits of considering common issues in
 9 one trial, class action treatment is not the 'superior' method of adjudication." *Zinser v. Accufix*
 10 *Research Institute, Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001) (citations omitted). As explained
 11 above, the core fact establishing TCPA liability is only determinable through individualized
 12 inquiries. Given the individual inquiries required to establish the proposed class members' claims,
 13 class action treatment is not the superior method of adjudication.

14 The Court understands the desire of Plaintiffs (and their counsel) to resolve these claims
 15 via a class action lawsuit. However, *Amerifactors* changed the landscape for TCPA litigation, and
 16 under Ninth Circuit precedent, this Court must follow the FCC's interpretation. *See Wilson v.*
 17 *A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996); Dkt. No. 393 at 9-11. In the Court's view,
 18 whether *Amerifactors* in fact controls here is determinative of the viability of this case as a class
 19 action. Plaintiffs can and no doubt will argue on appeal that *Amerifactors* is not binding, and the
 20 Court and the parties will get critical guidance from any ruling by the Ninth Circuit on that issue.

21 After carefully considering the entire record in this case, the Court orders the "Stand-Alone
 22 Fax Machine Class" **DECERTIFIED**.

23 **IT IS SO ORDERED.**

24 Dated: 10/15/2021

25 
 26 HAYWOOD S. GILLIAM, JR.
 27 United States District Judge
 28