

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

MCKESSON CORPORATION;
MCKESSON TECHNOLOGIES,
INC.,

Defendants-Appellants.

No. 22-15710

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

ORDER

TRUE HEALTH
CHIROPRACTIC, INC.,

Plaintiff,

and

No. 22-15732

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

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.

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.

APPENDIX B

**UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

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

Plaintiffs-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

No. 22-15732

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

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.

NOT FOR PUBLICATION

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

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

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. 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,

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

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

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).

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 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

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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.

APPENDIX C

**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

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 3. Plaintiffs returned with over 100 telephone carrier declarations, which Defendants supplemented with two additional telephone carrier declarations. *See* Dkt. Nos. 460, 465, 468, 469, 470, 471.¹ Telephone carriers who provided service to over 60% of the class members affirmatively say they have no way of knowing if the class member received faxes via a standalone fax machine or via an online fax service. Defendants' Response at 4; *see* Dkt. Nos. 460, 465, 468, 469, 470, 471; *see, e.g.*, Dkt. No. 460, Exhibit A Part 5 at 63 ("Comcast has no mechanism to determine whether its subscribers received faxes on a standalone fax machine or

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

via online fax service.”). Plaintiffs attempt to fill this evidentiary gap with a proffered expert who opines on general trends in online fax service usage, from which Plaintiffs then make assertions about the likelihood of particular individual consumer choices.² After reviewing the Plaintiffs’ Offer of Proof, Dkt. No. 455, and the telephone carrier declarations, the Court became concerned that the class does not satisfy Federal Rule of Civil Procedure Rule 23(b)(3), which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3); *see* OSC at 1. Plaintiffs have not rebutted the concerns the Court identified.³

² According to Plaintiffs’ expert, in the “absence of data” it can be assumed that the class member used a stand-alone fax machine. Even though it has been clear since December 2019 that Amerifactors represented a significant change in the law relevant to this case, Plaintiffs only disclosed this theory for the first time on September 10, 2021, approximately one month before trial, in response to the Court’s OSC. *See* Dkt. No. 455, Exhibit B at Part IV. Then mere weeks 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

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

Plaintiffs argue that they have proffered class-wide proof because a jury could find by a preponderance of the evidence that each class member received the faxes on a stand-alone fax machine. *See* Plaintiffs' Response at 6. Plaintiffs rely almost entirely on a single case: *Tyson*, a class action in which plaintiffs alleged they were improperly denied overtime compensation. *See* Plaintiffs'

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.

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

Response at 6. However, *Tyson* simply does not support Plaintiffs' predominance claim here. See *Tyson* at 459 ("Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.").

In *Tyson*, the plaintiffs "sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 456. Without the representative sample, each individual plaintiff would have had no alternative means to establish their hours worked. *Id.* at 457. The *Tyson* plaintiffs were similarly situated because they worked in the same facility, did similar work, and were paid under the same policy. *Id.* at 459. Therefore, the "experience of a subset of employees [could] be probative as to the experiences of all of them." *Id.* The Supreme Court allowed the plaintiffs to rely on a representative sample to establish hours worked because "the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action." *Tyson* at 455. The Supreme Court recognized that not all class actions could properly rely on representative samples, comparing the plaintiffs in *Tyson* with the plaintiffs in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (reversing class certification based on plaintiffs' failure to prove that the class shared common questions of law or fact). In *Wal-Mart*, "the employees were not similarly situated" and so "none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers." *Tyson* at 458.

Tyson does not support the Plaintiffs' proposed method of so-called class-wide proof. The Plaintiffs and

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

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 received the faxes at issue here via a stand-alone fax machine. *See* Plaintiffs' Response at 5 ("Based on this evidence, the jury could reasonably find, by a simple preponderance of the evidence, that each of these class members did not receive the subject faxes via an online fax service."). This assertion, which as Defendants note is not supported by any cited empirical evidence whatsoever, *see* Defendants'

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

Second, the individualized question of whether each class member received the faxes at issue on a stand-alone fax machine predominates over common questions. Plaintiffs argue that the predominance inquiry does not require that every possible issue in the case be capable of resolution via class-wide proof. *See* Plaintiffs' Response at 1-5. Plaintiffs miss the point. There can be no TCPA liability at all if the fax was received via an online fax service. *Amerifactors* at ¶ 8. Plaintiffs themselves proposed splitting the class into two subgroups: those that received the subject faxes "via a 'stand-alone' fax machine" and those that received the subject faxes "via an 'online fax service'." *See* Dkt. No. 372 at 10. As reflected by the class definitions, how the fax was received is a threshold requirement for TCPA liability. It is the central issue in this case. Where, as here, individual inquiries are required to prove a core element of liability, courts have found that individual questions predominate over common questions. *See Andrews v. Plains All American Pipeline, L.P.*, 777 Fed. Appx. 889, 892 (9th Cir. 2019) ("These individualized inquiries go to key elements of the class's claims, and the district court abused its discretion by concluding that this disparity would affect only damage

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).

calculations.”)⁶; *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017) (no predominance where “the district court would be tasked with filtering out those members to whom [defendant] was not liable”); *Williams v. Apple, Inc.*, No. 19-CV-04700-LHK, 2021 WL 2186223, at *11 (N.D. Cal. May 28, 2021) (denying class certification where the plaintiff lacked common proof of “essential elements” of the claim, including causation and injury); *Hamm v. Mercedes-Benz USA, LLC*, No. 16-CV-03370, 2021 WL 1238304, at *12 (N.D. Cal. April 2, 2021) (denying class certification where proof of reliance, a requirement to prevail on a California Consumer Legal Remedies Act claim, would vary from consumer to consumer, defeating the predominance requirement under Rule 23(b)(3)). Accordingly, the predominance requirement of Rule 23(b)(3) is not met.

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

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.

proposed class members' claims, class action treatment is not the superior method of adjudication.

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

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

IT IS SO ORDERED.

Dated: 10/15/2021

/s/ Haywood S. Gilliam, Jr.
HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX D

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

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

-App. 23a-

Accordingly, the Court enters summary judgment against the Online Fax Services Class.

IT IS SO ORDERED.

Dated: August 13, 2021

/s/ Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.

United States District Judge

APPENDIX E

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

During heavily contested discovery, Defendants were ordered to identify “each type of act that Defendants believe demonstrates a recipient’s express permission to receive faxes (e.g. completing a software registration), (2) explain[] how that act qualifies as express permission, and (3) identif[y] each recipient allegedly giving that type of permission by name and contact information (including, at a minimum, fax and phone number).” Dkt. No. 178 at 12. In response, Defendants identified three groups of consent defenses that it argued relieved it of TCPA liability and produced three exhibits—Exhibits A, B, and C—corresponding to the consent-defense groups. *See* Dkt. No. 305-1 Ex. A, at 1–2. Fax recipients identified in Exhibit A purportedly gave consent by (1) providing fax numbers when registering a product purchased from a subdivision of McKesson; and (2) entering into software-licensing agreements, or End User License Agreements (“EULA”). *Id.* Fax recipients identified in Exhibit B purportedly gave consent by (1) checking a box during

their software registration “that indicated express permission to be sent faxes as a preferred method of communication to receive promotional information;” (2) completing a written consent form “whereby they further provided their express permission to receive faxes;” or (3) confirming on phone calls “that they would like to continue to receive faxes and/or would like to change their communication method preferences.” *Id.* at 2. Fax recipients identified in Exhibit C purportedly gave Defendants consent through individual communications and personal relationships. *Id.*

Plaintiffs later moved to certify a single class of all putative class members. Dkt. No. 209. The Court denied certification on the basis that Plaintiffs failed to satisfy Rule 23(b)(3)’s predominance requirement. Dkt. No. 260. Because the Court denied certification for failure to satisfy predominance, its order did not address other requirements for class certification. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded. *See True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018) (“*True Health*”). The Ninth Circuit ruled that this Court should have considered the certification of subclasses tracking Defendants’ consent-defense groups identified in Exhibits A, B, and C. *Id.* at 930–31. The Ninth Circuit then (1) held that putative class members only in Exhibit A satisfy Rule 23(b)(3)’s predominance requirement; (2) held that putative class members in Exhibit C do not satisfy Rule 23(b)(3)’s predominance requirement; and (3) remanded to this Court to determine whether putative class members in Exhibit B satisfy Rule 23(b)(3)’s predominance requirement. *Id.* at 933. As to Exhibit B alone, the Ninth Circuit added:

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

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

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

At the hearing on the renewed motion for class certification, the Court advised the parties that it was inclined to permit narrow summary judgment briefing before ruling on that motion. See Dkt. No. 315. Specifically, the Court expressed interest in resolving whether the provision of fax numbers through the Medisoft product registration and EULA—in other words, Exhibit A consent defenses—constituted prior express invitation or permission to receive the disputed faxes, which is a matter of law that all parties agreed would resolve the case as to the named Plaintiff’s claim.

Id. at 7. The Court then permitted summary judgment briefing on the limited issue of “whether voluntarily providing a fax number on product registration and/or agreeing to the [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 permission for faxed advertisements through either the provision of their fax numbers in the Medisoft product registration form or agreeing to the EULA. Dkt. No. 331. The Court additionally granted Plaintiffs’ renewed motion for class certification, finding that the Exhibit A-only Class satisfied Rule 23(a)’s and Rule 23(b)(3)’s requirements. *Id.*

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

II. MOTION TO DECERTIFY CLASS

A. Legal Standard

An order certifying a class “may be altered or amended before final judgment.” Fed. R. Civ. P. 23(c)(1). “A district court’s order respecting class certification is ‘inherently tentative’ prior to final judgment on the merits.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 633 (9th Cir.1982); *see also* Fed. R. Civ. P. 23(c)(1)(C). “In considering the appropriateness of decertification, the standard of review is the same as a motion for class certification: whether the Rule 23 requirements are met.” *Bowerman v. Field Asset Servs., Inc.*, 242 F. Supp. 3d 910, 927 (N.D. Cal. 2017) (citation omitted). The burden of proof remains on the plaintiff. *Id.* (citing *Marlo v. UPS*, 639 F.3d 942, 947 (9th Cir. 2011)).¹ The manner and degree of evidence required for the plaintiff to meet his burden depends on the stage of the litigation. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citation omitted). As the Ninth

¹ The Court notes that other district courts in this circuit have found that the party seeking decertification bears the burden of demonstrating that the elements of Rule 23 have not been established. *See, e.g., Zakaria v. Gerber Prod. Co.*, No. 15-cv-00200-JAK EX, 2017 WL 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 Rule 23’s class-certification requirements had been met.” *Marlo*, 639 F.3d at 947. In any event, the Court does not find that this distinction would change its analysis.

Circuit has acknowledged, “the manner and degree of evidence required at the preliminary class certification stage is not the same as at the successive stages of the litigation—i.e., at trial.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (quotation omitted).

B. Discussion

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

² Defendants argue that the “Nowlis Surveys, in combination with other evidence of consent, show that individualized inquiries into

Second, Defendants contend that a recent decision by the Consumer and Government Affairs Bureau (“Bureau”) of the FCC will necessitate individualized inquiries to determine whether class members received the advertisements through online fax services or traditional analog fax machines. *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*”). To assess Defendants’ argument, the Court reviews *Amerifactors* and considers the relevance of *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019).

i. Amerifactors Declaratory Ruling

In passing the Communications Act, Congress “delegated to the [FCC] the authority to ‘execute and enforce’ the Communications Act and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act,” and to “promulgate binding legal rules.” *See Nat’l Cable & Telecom. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 312 (2013) (Breyer, J., concurring). Pursuant

consent requires [sic] decertification.” Mot. at 16. Concerning other evidence, Defendants point to “the additional context that (1) all customers voluntarily 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.

to that authority, the FCC has provided for the disposition of “declaratory rulings,” meant to “terminat[e] a controversy or remov[e] uncertainty.” 47 C.F.R. § 1.2(a); *see also* 5 U.S.C. 554(e) (granting authority to agencies to “issue a declaratory order to terminate a controversy or remove uncertainty.”). The FCC has delegated authority to its constituent bureaus and offices to docket petitions for declaratory rulings, post notice of and seek comment on them, and issue final orders disposing of them. 47 C.F.R. § 1.2(b). These orders then become final and effective “upon release.” 47 CFR § 1.102(b)(1). Parties may apply for review of these decisions, but the decisions remain in effect unless the FCC, “in its discretion,” issues a stay pending review. § 1.102(b)(2); § 1.115.

In 1991, Congress passed the Telephone Consumer Protection Act (TCPA), granting the FCC the authority to “prescribe regulations to implement” its requirements. 47 U.S.C. § 227(b)(2). The TCPA prohibits the “use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). To establish liability, Plaintiffs must then show that the faxes were received by Plaintiffs on a “telephone facsimile machine.” *Id.* The TCPA defines “telephone facsimile machine” as “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” *Id.* § 227(a)(3).

In 2017 a petitioner sought a declaratory ruling clarifying whether faxes received by “online fax services” are covered under the TCPA. *See Amerifactors*, CG Dkt.

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

The Bureau reached its conclusion by examining the plain language of the TCPA and considering the specific harms Congress sought to address. It first defined an online fax service as “a cloud-based service consisting of a fax server or similar device that is used to send or receive documents, images and/or electronic files in digital format over telecommunications facilities that allows users to access faxes the same way that they do email: by logging into a server over the Internet or by receiving a pdf attachment [as] an email.” *Id.* at ¶ 2. It likened online fax services to “faxes sent to a “computer” or “other device,” rather than a “telephone facsimile machine.” *Id.* at ¶ 13. The Bureau also emphasized that “an online fax service cannot itself print a fax—the user of an online fax service must connect his or her own equipment in order to do so.”³ *Id.* at ¶ 11. It further determined that online fax services did not pose the specific harms Congress addressed in the

³ The Bureau distinguished its discussion of online fax services, which have no capacity to print a 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.

TCPA, namely “advertiser cost-shifting” from the use of paper and ink and “occupying the recipient’s fax machine so it is unavailable for other transmissions.” *Id.* at ¶ 11–13.

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

ii. PDR Network

In 2019 the United States Supreme Court addressed the applicability of the Hobbs Act in private litigation. *See PDR Network*, 139 S. Ct. at 2055. *PDR Network* involved a private action for damages against Petitioners, alleging

violations of the TCPA based on “unsolicited” fax advertisements sent to Respondent. *Id.* The district court dismissed the claim, holding that the faxes, which promoted a free e-book, were not “advertisements” under the TCPA, even though the FCC interpreted advertisements to include the promotion of free goods and services. *Id.* at 2054. The Fourth Circuit reversed, concluding that the Hobbs Act barred the district court from diverging from the FCC’s interpretation of the TCPA. *Id.*

The Supreme Court granted certiorari, but ultimately did not resolve whether the Hobbs Act requires a district court to follow a particular FCC order interpreting the TCPA. *See generally id.* In remanding the case to the Court of Appeals, the majority reasoned that “the extent to which the Order binds the lower court may depend on the resolution of two preliminary sets of questions that were not aired before the Court of Appeals.” *See id.* at 2053, 2055. First, the Court of Appeals would need to assess the “legal nature” of the relevant FCC order, and whether it was a “legislative rule which is ‘issued by an agency pursuant to statutory authority’ and has the ‘force and effect of law,’” or an “interpretive rule,” which lacks the force of law and merely “advise[s] the public of the agency’s construction of the statutes...which it administers.” *Id.* at 2055. Second, the Court of Appeals would need to consider whether PDR had “prior” and “adequate” opportunities to seek judicial review of the FCC order. *Id.* at 2055–56.

Notably, the Supreme Court did not determine what conclusions should be reached in addressing these preliminary questions. *Id.* at 2055–56. In a concurring opinion, Justice Kavanaugh said that the Court should

have concluded that “the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency’s interpretation of the statute is wrong.” *Id.* at 2058–59 (Kavanaugh, J., concurring). Justice Kavanaugh explained that “[i]n an as-applied enforcement action, the district court should interpret the [TCPA] . . . under the usual principles of statutory interpretation, affording appropriate respect to the agency’s interpretation.” *Id.* at 2066 (Kavanaugh, J., concurring).

iii. Analysis

Because *PDR Network* did not resolve the central issue presented here, Ninth Circuit precedent controls.⁴ And under Ninth Circuit precedent, the Court must treat *Amerifactors* as authoritative. The Ninth Circuit has held that the Hobbs Act bars district courts from considering claims that would necessarily require the court to determine the validity of, or to enjoin, set aside or suspend, a final FCC order. In *Wilson*, a plaintiff in a private enforcement action asked the court to disregard a recent FCC order issued in a proceeding in which he had not participated that would render his claims moot. On appeal, the Ninth Circuit affirmed the dismissal, holding that the district court was divested of jurisdiction by the Hobbs Act and that a “declaratory ruling...is subject to the exclusive review of the court of appeals,” even as to parties who “are not parties to FCC proceedings.” *Wilson*, 87 F.3d at 389. Because the plaintiff’s claim “raise[d] the same issues and [sought] the same relief in

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”).

substance as the declaratory ruling,” it necessarily required “judicial review” and fell under the exclusive appellate jurisdiction described by the Hobbs Act. *Id.* at 399.

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

Plaintiff contends that *Amerifactors* is an “interpretative rule” and thus is not a final order under the Hobbs Act. Dkt. No. 385 at 3. Even assuming (without deciding) that Plaintiff were correct in this characterization of *Amerifactors*,⁵ Plaintiff acknowledges that the Ninth Circuit has previously considered, and rejected, this argument. *See id.* at 5. In *Hamilton*, the Ninth Circuit held that a potential distinction between “legislative” and “interpretive” rules does not matter

⁵ Both parties suggest that *Amerifactors* must be “interpretive” because its purpose is to “interpret” the TCPA. *See* Dkt. No. 385 at 2; Dkt. No. 386 at 8. This analysis wrongly assumes that the act 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).

insofar as the “finality” and enforceability of an FCC order is concerned. *Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000).⁶ Instead, to determine the order’s finality, the Ninth Circuit focused on whether the FCC order was merely “tentative” and whether it “determines rights and gives rise to legal consequences.” *Id.*

Here, the Court finds that *Amerifactors* is a final, binding order for purposes of the Hobbs Act. The Bureau acted “pursuant to delegated authority” to issue a declaratory ruling and the ruling became effective “upon release.” *See* 47 C.F.R. § 1.2; 47 CFR § 1.102 (b)(1). The pending petition for reconsideration before the FCC does not affect the order’s finality as it applies to Defendants’ potential liability under the TCPA. *See* 47 C.F.R. §1.102 (b)(2); *Comm. to Save WEAM v. Fed. Commc’ns Comm’n*, 808 F.2d 113, 119 (D.C. Cir. 1986) (holding that an application for FCC review could not preclude an order from taking effect unless the FCC decided to stay its effectiveness). And because *Amerifactors* establishes that those who received faxes via an online fax service have different legal rights than those who received faxes on a telephone facsimile machine, it clearly “determines rights

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.” 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 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 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.

and gives rights to legal consequences.” See *Hamilton*, 224 F.3d at 1055. Moreover, Plaintiffs’ request that the Court diverge from *Amerifactors*’ fundamental holding, that online fax services do not fall under the TCPA, would “raise the same issues...as the declaratory ruling” and is thus precluded by Ninth Circuit precedent. See *Wilson*, 87 F.3d at 399.⁷

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

All persons or entities who received faxes from “McKesson” via a “stand-alone” fax machine from September 2, 2009, to May 11, 2010, offering “Medisoft,” “Lytec,” “Practice Partner,” or “Revenue Management Advanced” software or “BillFlash Patient Statement

⁷ For what it is worth, the Court agrees with the reasoning of Justice Kavanaugh’s concurrence in *PDR Network*, because requiring federal courts to treat administrative agencies’ legal interpretations as invariably binding under these circumstances would appear to pose practical as well as constitutional problems. See *PDR Network*, 139 S. Ct. at 2061–62 (Kavanaugh, J., concurring) (noting that “the default rule is to allow defendants in enforcement actions to argue 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.

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

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

Defendants argue that “the Court lacks jurisdiction over any claims of the proposed ‘Online Fax Service Class.’” *See* Reply at 5. While the Court is aware of the language in *Wilson* that could be read in isolation to suggest as much, the reality is that in cases similar to this one, including TCPA cases, the Ninth Circuit has not appeared to view *Wilson* as divesting district courts of jurisdiction altogether. In *Fober v. Management and Technology Consultants, LLC*, 886 F.3d 789, 795 (9th Cir. 2018), for example, the Ninth Circuit found that the district court correctly granted summary judgment in

favor of the defendant on the ground that plaintiff gave “prior express consent” as a matter of law. The court of appeals “presume[d] the validity of the relevant FCC rules and regulations,” *id.* at 792 n.2, and considered those rules and regulations as part of its analysis in affirming the district court’s summary judgment ruling, *id.* at 792–95. Significantly, the Ninth Circuit did not in any way suggest that the district court lacked jurisdiction to consider the case in the first place.

Similarly, in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), the Ninth Circuit affirmed the post-class-certification grant of summary judgment against a TCPA 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.

Consistent with the Ninth Circuit’s approach in *Fober* and *Van Patten*, the Court acknowledges (as it must under controlling precedent) that *Amerifactors* is authoritative and establishes that those who received faxes via an online fax service have different legal rights than those who received faxes via a traditional physical fax machine. Accordingly, in modifying the class definition, the Court simply adheres to the FCC’s interpretation and enables a process for identifying those who received faxes

via an online fax service. So rather than posing a threshold “jurisdictional” issue as Defendants assert, the question of whether the Online Fax Service subclass has a claim under the TCPA is simply a common merits question whose answer will be the same for all members of that subclass.

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

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

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

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

A. Legal Standard

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

demonstrate the absence of a triable issue of material fact. *Id.* at 323.

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

B. Discussion

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

In light of the Court’s modification of the class definition, the Court defers ruling on these motions.

Under *Amerifactors*, it appears that the Online Fax Service subclass has no cause of action as a matter of law, and is subject to a grant of summary judgment against it on that basis. As reluctant as it is to further drag out the resolution of this seemingly interminable case, the Court is inclined to provide class members an updated notice explaining that the class has now been divided into subclasses with different legal rights. The updated notice would also provide another opportunity to opt out, which potentially could be significant for members of the Online Fax Service subclass. Each party shall submit simultaneous statements, not to exceed two pages, indicating whether the party objects to or agrees with this proposal. The parties may not relitigate any of the issues decided above: the limited and simple task is for each party to state its position on the question of providing supplemental notice of the creation of subclasses, accepting all of the above issues as decided. The parties' positions on the underlying substantive questions have already been exhaustively preserved for the record, and need not be repeated.

IV. CONCLUSION

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

IT IS SO ORDERED.

-App. 45a-

Dated: 12/24/2020

/s/ Haywood S. Gilliam, Jr.
HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX F

DA 19-1247

**Before the Federal Communications Commission
Washington, D.C. 20554**

IN THE MATTER OF

AMERIFACTORS FINANCIAL
GROUP, LLC PETITION FOR
EXPEDITED DECLARATORY
RULING

RULES AND REGULATIONS
IMPLEMENTING THE
TELEPHONE CONSUMER
PROTECTION ACT OF 1991

JUNK FAX PROTECTION ACT
OF 2005

CG Docket No. 02-278

CG Docket No. 05-338

DECLARATORY RULING

Adopted: December 9, 2019

Released: December 9, 2019

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Protection Act (JFPA), prohibits any person from sending an unsolicited advertisement to a “telephone facsimile machine.”¹ In relevant part, a “telephone facsimile machine” is defined as “equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”² Construing these terms in 2003, the Commission has made clear that the prohibition does not extend to facsimile messages “sent as email over the Internet.”³

2. In 2017, Amerifactors filed a petition for declaratory ruling asking the Commission to clarify that faxes sent to “online fax services” are not faxes sent to “telephone facsimile machines.”⁴ An online fax service is “a cloud-based service consisting of a fax server or similar device that is used to send or receive documents, images and/or electronic files in digital format over telecommunications facilities”⁵ that allows users to “access ‘faxes’ the same way that they do email: by logging into a server over the Internet or by receiving a pdf attachment [as] an email.”⁶

¹ 47 U.S.C. § 227(b)(1)(C).

² *Id.* § 227(a)(3).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, 18 FCC Rcd 14014, 14133, para. 200 (2003) (2003 TCPA Order).

⁴ *See Petition for Expedited Declaratory Ruling of Amerifactors Financial Group, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed July 13, 2017) (Petition).

⁵ *Id.* at 2 n.4.

⁶ *Id.* at 1.

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

II. BACKGROUND

4. In relevant part, the TCPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”⁷ The TCPA defines the term “telephone facsimile machine” as “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”⁸

5. In 2003, the Commission made clear that the TCPA’s prohibition does not extend to facsimile messages “sent as email over the Internet.”⁹ In doing so, the Commission made clear that where the equipment itself could transcribe a fax onto paper—such as a personal computer attached to printer and modem—it would remain within the scope of the statute.¹⁰ The Consumer and Governmental Affairs Bureau reiterated this finding in the *Westfax Declaratory Ruling*, finding that the

⁷ 47 U.S.C. § 227(b)(1)(C).

⁸ *Id.* § 227(a)(3).

⁹ *2003 TCPA Order*, 18 FCC Rcd at 14133, para. 200.

¹⁰ *Id.*

“efaxes” at issue in that case were received by equipment that had “the capacity to ‘transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.’”¹¹

6. In 2017, Amerifactors filed the present petition for declaratory ruling regarding “online fax services.”¹² Amerifactors argues that (1) online fax services do not fit within the plain meaning of the TCPA’s prohibition on conventional faxes; (2) online faxes do not result in the type of harm the Congress sought to avoid in the TCPA; (3) a declaratory ruling here would be a first step toward curbing abusive litigation practices; and (4) applying the TCPA to faxes received on a device other than a telephone facsimile machine would be an impermissible restriction on commercial speech in violation of the First Amendment.¹³

7. The Bureau sought comment on Amerifactors’ *Petition*.¹⁴ Several entities and individuals filed comments. The majority of commenters support the *Petition*. In general, these commenters reiterate the arguments made in the *Petition*, including that the TCPA’s prohibitions do not apply to faxes received via an online fax service because that technology does not

¹¹ See *Westfax, Inc.*, CG Docket Nos. 02-278 and 05-338, Declaratory Ruling, 30 FCC Rcd 8620, 8623, para. 9 (CGB 2015) (*CGB Westfax Declaratory Ruling*).

¹² *Petition* at 2.

¹³ *Id.* at 10-19.

¹⁴ See *Consumer and Governmental Affairs Bureau Seeks Comment on Amerifactors Financial Group, LLC Petition for Expedited Declaratory Ruling Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 5667 (2017).

constitute a telephone facsimile machine.¹⁵ Five commenters oppose Amerifactors' petition, one of which is the plaintiff in an ongoing class action lawsuit against Amerifactors.¹⁶ In general, these commenters argue that faxes sent to fax servers are subject to the TCPA's prohibitions, and that the time and resources expended to review faxes causes harm even with online fax services.¹⁷ In addition, Career Counseling, the plaintiff in the underlying TCPA litigation against Amerifactors, argues that a declaratory ruling is procedurally inappropriate in this instance as the *Petition* raises no controversy or uncertainty to be resolved.¹⁸

III. DISCUSSION

8. Based on the record, including a great deal of information on the nature and operations of current online fax services, we grant Amerifactors' request for declaratory ruling. To the extent an unsolicited facsimile advertisement is sent to a service that effectively receives faxes "sent as email over the Internet" and is not itself "equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper," the language of the TCPA and our precedent make clear that service is not a "telephone facsimile machine" and is thus outside the

¹⁵ See, e.g., Amsterdam P&L Comments at 3; Legal & General America Comments at 2-3.

¹⁶ See Barry Comments; Biggerstaff Comments; Career Counseling Comments; Shaw Comments; Sutton Comments; see also *Career Counseling, Inc. v. Amerifactors Fin. Group, LLC*, No. 16-cv-0313-JMC (D.S.C.) (stayed pending a Commission decision).

¹⁷ See, e.g., Career Counseling Comments at 1-6; Barry Comments at 1-2.

¹⁸ See Career Counseling Comments at 8.

scope of the statutory prohibition. Our clarification is limited to an analysis of online fax services, as informed by the current record, and does not prejudge whether we would arrive at the same conclusion for other types of equipment and services.

9. As an initial matter, we find sufficient controversy or uncertainty exists to justify issuing a declaratory ruling as set out in section 1.2 of our rules.¹⁹ Although Career Counseling notes that Amerifactors makes no direct claim in its petition that any person received its faxes through an online fax service, Amerifactors indicated to the court in the underlying litigation that it “believes many, if not the majority of the alleged faxes at issue” were received by, and thus sent to, an online fax service.²⁰ In addition, the issue Amerifactors raises extends beyond the parties involved in the current litigation, as evidenced by several commenters that support clarification of this issue.²¹

10. Turning to the merits, the TCPA’s language demonstrates that Congress did not intend the statute’s prohibition to apply to faxes sent to equipment other than a telephone facsimile machine. Specifically, the language of the statute proscribes sending a fax only to a “telephone facsimile machine.”²² In contrast, Congress made clear

¹⁹ See 47 CFR § 1.2.

²⁰ Career Counseling Comments at 8, Exh. A (citing Amerifactors Mem. Supp. Mot. Stay at 2-3).

²¹ See, e.g., ABA Comments at 2; Amsterdam P&L Comments at 1-2; Jefferson Business Comments at 1; Legal & General Comments at 4.

²² 47 U.S.C. § 227(b)(1)(C); see also *Petition* at 11-12 (citing various cases holding that “where Congress includes particular language in one section of the statute but omits it in another section

that the proscription applies when such a fax is sent from other devices as well—specifically, an unsolicited facsimile advertisement can originate on any of three types of equipment: a “telephone facsimile machine,” a “computer,” or any “other device.”²³

11. Next, we turn to whether an online fax service is a “telephone facsimile machine.” As described in the record, a fax received by an online fax service as an electronic message is effectively an email. Under our precedent, faxes “sent as email over the Internet” are not subject to the TCPA.²⁴ Faxes sent to online fax services via an attachment that the consumer can delete without printing are effectively the same as “email sent over the Internet.”²⁵ Consumers can manage those messages the same way they manage email by blocking senders or deleting incoming messages without printing them. We also understand that an online fax service cannot itself print a fax—the user of an online fax service must connect his or her own equipment in order to do so. As such, an online fax service is plainly not “equipment which has the capacity . . . to transcribe text or images (or both) from an

of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”); Amsterdam P&L Comments at 3; Brinker Comments at 2; Legal & General America Comments at 2-3. Our decision is limited to online fax services, as described in the current record. We therefore do not address the possibility that personal computers or other devices might be subject to the TCPA’s protections if they essentially function as “telephone facsimile machines,” including causing the consumer harms we discuss here.

²³ 47 U.S.C. § 227(b)(1)(C).

²⁴ See *2003 TCPA Order*, 14 FCC Rcd at 14133, para. 200.

²⁵ *Id.*

electronic signal received over a regular telephone line onto paper.” Accordingly, under the plain terms of the Act, an online fax service is not a “telephone facsimile machine” and a fax sent to one is not “an unsolicited facsimile advertisement” prohibited by the TCPA.

12. What is more, we agree with commenters that faxes sent to online fax services do not cause the specific harms to consumers Congress sought to address in the TCPA.²⁶ The House Report on the TCPA makes clear that the facsimile provisions of the statute were intended to curb two specific harms: “First, [a fax advertisement] shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient’s facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.”²⁷ The record is clear that faxes sent to online fax services do not pose these harms and, in fact give consumers tools such as blocking capabilities to control these costs.²⁸ Specifically, we find that the advertiser cost-shifting that Congress sought to prevent, such as the use of a

²⁶ See *Petition* at 16-19; ABA Comments at 1-2; Amsterdam P&L Comments at 4; Legal & General America Comments at 4-5.

²⁷ H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

²⁸ See Letter from Steven A. Augustino, Counsel for Amerifactors to Marlene H. Dortch, FCC, CG Docket No. 02- 278 (dated Sept. 6, 2019); Amerifactors Reply Comments at 13-14; *Petition* at Exh. 2 (noting those online fax services that provide a blocking option). Even where online fax services charge consumers for individual faxes, providers offer functionalities that enable consumers to manage unwanted messages, including the ability to block senders or options to purchase “receipt only” packages in which no additional cost is incurred for receipt of transmissions. See, e.g., Amerifactors Reply Comments at 13-14 (discussing various online fax service plans).

recipient's paper and ink, is not a factor with online fax services. The House Report on the TCPA explained in 1991 that fax machines were "designed to accept, process, and print all messages which arrive over their dedicated lines."²⁹

13. By contrast, the record here confirms that online fax services hold inbound faxes in digital form on a cloud-based server, where the user accesses the document via the online portal or via an email attachment and has the option to view, delete, or print them as desired.³⁰ Faxes sent to online fax services use paper and ink only when the recipient *chooses* to print it using their own separately provided equipment. Neither is Congress' concern about junk faxes occupying the recipient's fax machine so it is unavailable for other transmissions an issue with online fax services. These services can handle multiple simultaneous incoming transmissions and thus receipt of any one fax does not render the service unavailable for others.³¹ In short, online fax services differ in critical ways from the traditional faxes sent to telephone facsimile machines Congress addressed in the TCPA.³² These faxes are more accurately characterized as faxes sent to a

²⁹ H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991) (emphasis added).

³⁰ *See, e.g., Petition* at 13; ABA Comments at 1-2; Legal & General America Comments at 4-5.

³¹ *Petition* at 18 (noting that because a fax reaches the user of an online fax service via email there is typically no occupation of the user's facilities).

³² For these reasons, we disagree with those commenters who suggest that granting Amerifactors' request will result in consumer harms that Congress intended to protect under the TCPA. *See, e.g., Biggerstaff Reply Comments* at 9; *Sutton Comments* at 1.

“computer” or “other device,” and not a “telephone facsimile machine.”³³

14. We disagree with those commenters who suggest that other consumer inconveniences necessitate that all computers and devices capable of being sent faxes be deemed telephone facsimile machines.³⁴ *For one*, we see no discretion contained in the statute to expand the meaning of a telephone facsimile machine beyond its defined scope. *For another*, the more general harms that such commenters point to—such as time spent monitoring unwanted faxes stored by online fax services—are more generalized harms that go beyond the specific harms Congress identified in enacting the TCPA.³⁵

15. We also disagree with those that suggest this case is governed by the *Westfax Declaratory Ruling*. That decision focused on whether the mere conversion of a conventional fax to email at some point in the transmission chain removed the fax from the TCPA’s reach—and found

³³ We agree with Amerifactors that interpreting the TCPA to mean that every “computer” or “other device” is a telephone facsimile machine, merely because it could be connected to a printer, directly or indirectly, would be overly broad and result in the kind of impermissibly expansive application of the TCPA that the D.C. Circuit recently rejected. *See* Letter from Steven A. Augustino, Counsel for Amerifactors to Marlene H. Dortch, FCC, CG Docket No. 02-278 (dated Feb. 22, 2019).

³⁴ Career Counseling Comments at 6-8 (noting time spent opening, reviewing and deleting messages); Shaw Comments at 1 (faxes emailed to the recipient take the recipient’s time); Sutton Comments at 1.

³⁵ *See, e.g., CGB Westfax Declaratory Ruling*, 30 FCC Rcd at 8624, para. 12; *2003 TCPA Order*, 18 FCC Rcd at 14134, para. 202.

that it did not.³⁶ And based on a limited record, it assumed that the “efax” in question was sent to a computer with an attached fax modem that had the capacity to print the fax, as required by statute.³⁷ That decision did not consider the online fax services that have no such capacity at issue here.

16. Having granted Amerifactors the relief it requests as described above, we decline to address its other arguments, including the claim that applying the TCPA prohibition to faxes sent to online fax services would violate the First Amendment.

IV. ORDERING CLAUSES

17. For the reasons stated above, **IT IS ORDERED**, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission’s Rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the Commission’s rules, 47 CFR §§ 0.141, 0.361, that the Petition for Expedited Declaratory Ruling filed by Amerifactors Financial Group, LLC on July 13, 2017, **IS GRANTED TO THE EXTENT DESCRIBED HEREIN.**

18. **IT IS FURTHER ORDERED** that this Declaratory Ruling shall be effective upon release.

³⁶ *CGB Westfax Declaratory Ruling*, 30 FCC Red at 8623-24, para. 10.

³⁷ *See id.* at 8623, para. 9.

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FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre

Chief

Consumer and Governmental Affairs Bureau

APPENDIX

LIST OF COMMENTERS

Commenters	Abbreviation
American Bankers Association	ABA
Amerifactors Financial Group, LLC	Amerifactors
Amsterdam Printing & Litho	Amsterdam P&L
Barry, Peter/Barry/Helwig, LLC	Berry
Robert Biggerstaff	Biggerstaff
Cynthia Brinker	Brinker
Career Counseling, Inc.	Career Counseling
David Cover	Cover
Johnny Daciolas	Daciolas
Leslie Delahoya	Delahoya
Erika Eaton	Eaton
Stephanie Elizabeth	Elizabeth
Gary Evans	Evans
Michael Friend	Friend
Javier Gonzalez	Gonzalez
Mark Gregg	Gregg
Joe Horner	Horner
Kim Jarreau	Jarreau
Jefferson Business Council	Jefferson Business
Gary Lafountain	Lafountain
Legal & General America, Inc.	Legal & General America
David Lloyd	Lloyd
Derek Mannion	Mannion
Christopher Robert	Robert
Lalo Robles	Robles
John Shaw	Shaw

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Jason Stephens
Jimmy Sutton
Mark Valencia
Westfax, Inc.

Stephens
Sutton
Valencia
Westfax