IN THE
SUPREME COURT OF THE UNITED STATES

No. A__________

CAREER COUNSELING, INC. d/b/a SNELLING STAFFNG SERVICES,
individually and as representatives of
a class of similarly situated persons,

v.

AMERIFACTORS FINANCIAL GROUP, LLC.,

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 FOURTH CIRCUIT

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April 30, 2024

IN THE
SUPREME COURT OF THE UNITED STATES

No. A__________

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

v.

AMERIFACTORS FINANCIAL GROUP, LLC

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 FOURTH CIRCUIT

To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States:

Applicant Career Counseling, Inc. d/b/a Snelling Staffing Services, ("Plaintiff"), respectfully requests a 60-day extension of time, from May 20, 2024, to and including July 19, 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 Fourth Circuit in this case.

The Fourth Circuit entered judgment on January 22, 2024. App., *infra*, 1a. The Fourth Circuit denied Plaintiff's timely petition for panel rehearing or rehearing en banc on February 20, 2024. App., *infra*, 24a. A petition for a writ of

certiorari is currently due on May 20, 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 relevant opinion of the district court are attached to this application. App., *infra*, 1a–.

1. This case is a putative class action arising from thousands of "unsolicited advertisements" that Amerifactors Financial Group, LLC ("AFGL") sent by facsimile in 2016, which Plaintiff alleged violated the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C).

2. After discovery revealed that AFGL sent an identical one-page fax advertising its financing services to 58,944 unique fax numbers, Plaintiff moved to certify a class pursuant to Fed. R. Civ. P. 23(b)(3). The district court found Plaintiff satisfied the four Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, but the district court did not proceed to consider whether Plaintiff satisfied the predominance and manageability requirements of Rule 23(b)(3). App., *infra*, 42a–47a.

3. Instead, the district court denied class certification based solely on its conclusion that Career Counseling failed to satisfy an implied, unwritten "administrative feasibility" requirement imposed by *EQT Prod. Co. v. Adair*, 764

F.3d 347, 358 (4th Cir. 2014). *Id.*, 47a. The district court concluded that the TCPA's coverage is limited to faxes received on a traditional "stand-alone" fax machine, and does not cover those viewed AFGL's fax on a computer via an "online fax service." *Id.*, 41a. The district court concluded there was no "administratively feasible" way to separate users of stand-alone fax machines from users of online fax services and denied class certification. *Id.*, 48a.

4. Plaintiff requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the Fourth Circuit's judgment and submit there is good cause for granting this request.

a. This appeal presents two questions on which the circuit courts are divided. First, with respect to the Fourth Circuit's "administrative feasibility" requirement for class certification, this "extratextual," judge-made requirement has been rejected by six other circuits. *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017); *In re Petrobras Sec.*, 862 F.3d 250, 267 (2d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015). The First, Third, and Fourth Circuits are now in the minority in imposing such a requirement. *See Cherry*, 986

F.3d at 1302 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015)).

Second, the Fourth Circuit's ruling that the TCPA is limited to "stand-alone" fax machines creates a split with the Sixth Circuit's holding in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021), that "the plain language of the TCPA . . . makes clear that a 'telephone facsimile machine' encompasses more than traditional fax machines that automatically print a fax received over a telephone line," and does not require excluding from a certified class users of "online fax services." The additional time Plaintiff seeks to seek a writ of certiorari will allow counsel to investigate further the manner in which the Fourth Circuit's ruling conflicts with the decisions of this Court and other courts of appeals.

b. In addition, counsel for Plaintiff have a number of other obligations during the period for preparation of the petition, including oral argument before the Fourth Circuit on May 10, 2024, in *Family Health Physical Med., LLC v. Pulse8, LLC*, No. 22-1392 (4th Cir.); a petition for writ of certiorari to the Ninth Circuit due May 17, 2024, in *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710 (9th Cir.); and Appellant's opening brief and appendix due in the Sixth Circuit June, 3, 2024, in *Cooper v. Neilmed Pharms., Inc.*, No. 24-3199 (6th 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 July 19, 2024.

Dated: April 30, 2024

Respectfully submitted,

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No. A_______________

Career Counseling (Snelling)
v.
AmeriFactors, Gulf Coast Bank

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 30th day of April, 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 Fourth 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 April 30th, 2024

/s/Glenn L. Hara
Glenn L. Hara

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1119

CAREER COUNSELING, INC., d/b/a Snelling Staffing Services, a South Carolina corporation, individually and as the representative of a class of similarly-situated persons,

Plaintiff – Appellant,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,

Defendant – Appellee,

and

JOHN DOES 1-5,

Defendants.

No. 22-1136

CAREER COUNSELING, INC., d/b/a Snelling Staffing Services, a South Carolina corporation, individually and as the representative of a class of similarly-situated persons,

Plaintiff – Appellee,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,

Defendant – Appellant,

and

JOHN DOES 1-5,

Defendants.

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

ARGUED: December 9, 2022 Decided: January 22, 2024

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

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

ARGUED: Glenn Lorne Hara, ANDERSON & WANCA, Rolling Meadows, Illinois, for Appellant/Cross-Appellee. Lauri Anne Mazzuchetti, KELLEY DRYE & WARREN, LLP, Parsippany, New Jersey, for Appellee/Cross-Appellant. **ON BRIEF:** John G. Felder, Jr., MCGOWAN HOOD FELDER, Columbia, South Carolina, for Appellant/Cross-Appellee. William H. Latham, Jonathan M. Knicely, NELSON MULLINS RILEY & SCARBOROUGH LLP, Columbia, South Carolina, for Appellee/Cross-Appellant.

KING, Circuit Judge:

In this putative class action initiated in the District of South Carolina, it is alleged that defendant AmeriFactors Financial Group, LLC, sent an unsolicited advertisement by fax to plaintiff Career Counseling, Inc., and thousands of other recipients, in contravention of the Telephone Consumer Protection Act of 1991 (the "TCPA"), as amended by the Junk Fax Prevention Act of 2005. By its appeal (No. 22-1119), Career Counseling contests the district court's Order and Opinion denying class certification. *See Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, No. 3:16-cv-03013 (D.S.C. July 16, 2021), ECF No. 229 (the "Class Certification Decision"). And by the cross-appeal (No. 22-1136), AmeriFactors challenges the court's subsequent Order and Opinion awarding summary judgment to Career Counseling on its individual TCPA claim. *See Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, No. 3:16-cv-03013 (D.S.C. Jan. 31, 2022), ECF No. 244 (the "Summary Judgment Decision"). As explained herein, we affirm both the denial of class certification and the award of summary judgment.

I.

The operative First Amended Class Action Complaint of November 2017 alleges a single TCPA claim premised on Career Counseling's receipt in June 2016 of an uninvited fax from AmeriFactors advertising its commercial goods and services. *See Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, No. 3:16-cv-03013 (D.S.C. Nov. 28,

2017), ECF No. 70 (the "Complaint").[1] Relevant here, the TCPA generally makes it unlawful "to send, to a telephone facsimile machine, an unsolicited advertisement." *See* 47 U.S.C. § 227(b)(1)(C).

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

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

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

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

II.

We first address Career Counseling's challenge to the district court's Class Certification Decision of July 2021, denying Career Counseling's request for class certification pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In so doing, we review the Class Certification Decision for abuse of discretion. *See Brown v. Nucor Corp.*, 576 F.3d 149, 152 (4th Cir. 2009). A district court abuses its discretion in granting or denying class certification "when it materially misapplies the requirements of Rule 23." *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). More generally, a court also abuses its discretion when its decision rests on an error of law or a clearly erroneous finding of fact. *See In re Grand Jury 2021 Subpoenas*, 87 F.4th 229, 250 (4th Cir. 2023); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir. 2002).

A.

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

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

(Continued)

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

Relying on precedent, we clarified in our *EQT Production* decision that Rule 23 also "contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *See* 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). Under that requirement — which is commonly referred to as "ascertainability" — "[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.* So, "if class members are impossible

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> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

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

to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* (alteration and internal quotation marks omitted).

The party seeking class certification must present evidence and demonstrate compliance with Rule 23. *See EQT Prod.*, 764 F.3d at 357-58. Concomitantly, "the district court has an independent obligation to perform a 'rigorous analysis' to ensure that all of the prerequisites have been satisfied." *Id.* at 358 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

B.

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

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

"telephone facsimile machine[s]" under the TCPA. *See* 47 U.S.C. § 227(b)(1)(C) (making it unlawful "to send, *to a telephone facsimile machine*, an unsolicited advertisement" (emphasis added)). And that conclusion rendered it necessary to be able to identify which of the fax recipients were using stand-alone fax machines and which were using online fax services. Because the court was not convinced that the stand-alone fax machine users are readily identifiable, it decided that the ascertainability requirement has not been satisfied.

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

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

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

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

C.

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

1.

As a threshold matter, Career Counseling urges us to abandon our precedents recognizing that Rule 23 contains an implicit ascertainability requirement. In other words, Career Counseling would have us rule that the district court committed legal error in denying class certification for failure to satisfy the ascertainability requirement, because

— notwithstanding our precedents holding to the contrary — no such requirement actually exists.

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

2.

Accepting that there is an ascertainability requirement, Career Counseling argues that the district court committed legal error in according Hobbs Act deference to the *AmeriFactors* FCC Ruling that an online fax service does not qualify as a "telephone facsimile machine" under the TCPA. Career Counseling further contends that the *AmeriFactors* FCC Ruling is no more than an interpretive rule and thus is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020) (addressing an FCC rule interpreting the meaning of the TCPA

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

term "unsolicited advertisement" and declining to accord that interpretative rule *Chevron* deference because it "doesn't carry the force and effect of law"). Although Career Counseling acknowledges that the *AmeriFactors* FCC Ruling might be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), Career Counseling asserts that the *AmeriFactors* FCC Ruling fails on its merits to qualify for such deference. *See Carlton & Harris*, 982 F.3d at 264 (explaining "that an interpretive rule is entitled to [*Skidmore* deference] only to the extent it has the power to persuade" (internal quotation marks omitted)). Additionally, Career Counseling maintains that — even if the *AmeriFactors* FCC Ruling is somehow entitled to Hobbs Act, *Chevron*, or *Skidmore* deference — that ruling (issued in December 2019) cannot be applied retroactively in these proceedings (assessing the legality of the underlying June 2016 AmeriFactors fax). According to Career Counseling, the district court therefore incorrectly limited class membership to stand-alone fax machine users and erroneously required Career Counseling to show the ascertainability of those particular fax recipients.

Put simply, we need not assess or determine whether the district court erred in according Hobbs Act deference to the *AmeriFactors* FCC Ruling, whether the ruling is otherwise entitled to *Chevron* or *Skidmore* deference, or whether the ruling can be applied retroactively. Instead, we are satisfied to rule — de novo — that pursuant to its plain statutory language, the TCPA prohibits the sending of unsolicited advertisements to what the district court labelled as "stand-alone fax machines," but not to what the court accepted to be "online fax services." And we therefore conclude that the court properly limited class

membership to stand-alone fax machine users and required Career Counseling to demonstrate their ascertainability.

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

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

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

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

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

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

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

from the traditional faxes sent to telephone facsimile machines Congress addressed in the TCPA").[5]

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

Notably, although we rely solely on the plain statutory language for our conclusion that an online fax service does not qualify as a "telephone facsimile machine" under the TCPA, this interpretation is consistent with the 1991 Report of the House Committee on Energy and Commerce recommending the TCPA's enactment. *See* H.R. Rep. No. 102-

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

317 (1991). In relevant part, after explaining that the "[f]acsimile machines [of the time were] designed to accept, process, and print all messages which arrive over their dedicated lines," the Report specified "two reasons" why the sending of unsolicited advertisements by fax was "problematic": (1) "it shifts some of the costs of advertising [including ink and paper costs] from the sender to the recipient"; and (2) "it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." *Id.* at 10. While those problems continue to exist with stand-alone fax machines, they do not exist with online fax services, as the recipient can choose whether the print a particular fax and there can be multiple incoming transmissions at once.

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

3.

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

As detailed in the Class Certification Decision, to identify which of the nearly 59,000 recipients of the June 2016 AmeriFactors fax were using stand-alone fax machines and which were using online fax services, Career Counseling sent a subpoena to the telephone carrier associated with each recipient's fax number. *See* Class Certification Decision 19. The subpoena asked, inter alia, whether the carrier provided an online fax service in connection with the particular number. *Id.* at 19 & n.10. According to Career Counseling, as of mid-March 2021, it had received responses indicating that more than 20,000 of the recipients were not — and only 206 of the recipients were — provided online fax services by the subpoenaed carriers. *Id.* at 19. From there, Career Counseling asserted that the more than 20,000 recipients without online fax services from the subpoenaed carriers "thus received the [June 2016 AmeriFactors fax] on a stand[-]alone fax machine." *Id.* at 20 (second alteration in original) (internal quotation marks omitted). As Career Counseling would have it, a class consisting of more than 20,000 stand-alone fax machine users is therefore ascertainable. *Id.*

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

determine whether the recipient was using "another provider's online fax service product" or "a stand-alone fax machine." *Id.* (internal quotation marks omitted).

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

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

are satisfied to affirm the court's denial of Career Counseling's request for class certification.[6]

III.

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

Career Counseling's TCPA claim requires a showing that AmeriFactors "sen[t], to a telephone facsimile machine, an unsolicited advertisement." *See* 47 U.S.C. § 227(b)(1)(C). There has been no dispute that the June 2016 AmeriFactors fax was sent to a "telephone facsimile machine," as the evidence is that Career Counseling was using a stand-alone fax machine at the relevant time. *See* Summary Judgment Decision 4 & n.5, 10-11. There also has been no dispute that the fax was "unsolicited," *see id.* at 10-11,

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

meaning "transmitted to any person without that person's prior express invitation or permission, in writing or otherwise," *see* 47 U.S.C. § 227(a)(5). Although AmeriFactors unsuccessfully argued in the district court that the fax does not constitute an "advertisement," *see* Summary Judgment Decision 11-14 — i.e., "any material advertising the commercial availability or quality of any property, goods, or services," *see* 47 U.S.C. § 227(a)(5) — it has abandoned that contention on appeal. *Cf. Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 470-72 (4th Cir. 2023) (continuing litigation over whether fax constituted "advertisement" within meaning of TCPA).

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

The *Akin Gump* FCC Ruling, however, sought to clarify liability in situations in which the "advertiser" utilized the services of a "fax broadcaster" to send a TCPA-violating fax advertisement on the advertiser's behalf. *See Akin Gump*, 35 F.C.C.R. at 10425.

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

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

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

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

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

IV.

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

AFFIRMED

FILED: February 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1119 (L)
(3:16-cv-03013-JMC)

CAREER COUNSELING, INC., d/b/a Snelling Staffing Services, a South Carolina corporation, individually and as the representative of a class of similarly-situated persons

Plaintiff - Appellant

v.

AMERIFACTORS FINANCIAL GROUP, LLC

Defendant - Appellee

and

JOHN DOES 1-5

Defendant

No. 22-1136
(3:16-cv-03013-JMC)

CAREER COUNSELING, INC., d/b/a Snelling Staffing Services, a South Carolina corporation, individually and as the representative of a class of similarly-situated persons

Plaintiff - Appellee

v.

AMERIFACTORS FINANCIAL GROUP, LLC

Defendant - Appellant

and

JOHN DOES 1-5

Defendant

O R D E R

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

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

For the Court

/s/ Nwamaka Anowi, Clerk

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

Career Counseling, Inc. d/b/a Snelling Staffing Services, a South Carolina corporation, individually and as the representative of a class of similarly situated persons,	)	Civil Action No.: 3:16-cv-03013-JMC
Plaintiff,	)	**ORDER AND OPINION**
v.	)	
Amerifactors Financial Group, LLC, and John Does 1–5,	)	
Defendants.	)	

Plaintiff Career Counseling, Inc. d/b/a Snelling Staffing Services, on behalf of itself and all others similarly situated, filed the instant putative class action seeking damages and injunctive relief from Defendants Amerifactors Financial Group, LLC ("AFGL") and John Does 1–5 (collectively "Defendants") for alleged violations of the Telephone Consumer Protection Act ("TCPA") of 1991, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, and the regulations promulgated under the TCPA by the United States Federal Communications Commission ("FCC"). (ECF No. 70.)

This matter is before the court on Career Counseling's Motion for Class Certification, Motion to Appoint Class Counsel, and Motion to Appoint Class Representative pursuant to Rule 23 of the Federal Rules of Civil Procedure (ECF No. 197). Specifically, Career Counseling "requests that the [c]ourt certify [it]s proposed Class A, or, in the alternative, Class B, pursuant to Rule 23(a) and Rule 23(b)(3), appoint [Career Counseling] the class representative, and appoint [it]s counsel as class counsel pursuant to Rule 23(g)." (ECF No. 197 at 3.) AFGL opposes the Motions arguing that Career Counseling "fails to meet its burden to establish predominance or that

its proposed class is ascertainable, as required under both Rule 23 and Fourth Circuit law" and "cannot demonstrate that it is an adequate or typical class representative, or that its proposed class counsel can meet their duty to the proposed class." (ECF No. 206 at 9, 10.) For the reasons set forth below, the court **DENIES** Career Counseling's Motion for Class Certification, and **DENIES AS MOOT** its Motion to Appoint Class Counsel and Motion to Appoint Class Representative. (ECF No. 197.)

I. RELEVANT BACKGROUND TO PENDING MOTIONS

A. The TCPA and the JFPA

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

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

at 4–5.

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

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

As a result of the foregoing, the JFPA expressly prohibits the faxing of unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C). The JFPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The JFPA creates a private right of action for a person or entity to sue a fax sender that sends an unsolicited advertisement and allows recovery of

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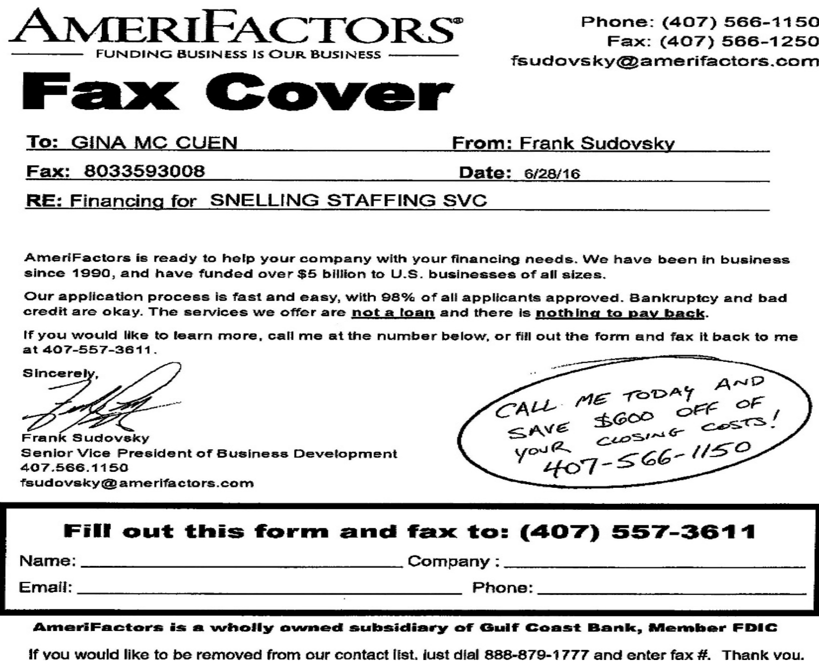
[1] Testimony in the JFPA legislative history outlined concerns about the prior written consent requirement from the FCC. For example, National Association of Realtors Broker Dave Feeken testified that not only would a written consent requirement be costly and time-consuming for businesses, but it would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

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

B. The Parties

Career Counseling is an employment staffing agency, which acts as a middleman between employers and prospective workers. (ECF No. 197-7 at 4/27:6–13.[2]) AFGL is an accounts receivable financing firm that engages in factoring. (ECF No. 206-2 at 74/4:17–19.) Factoring is a process in which AFGL purchases a business's accounts receivable of unpaid invoices for a discounted price with the intention of collecting the full value of the unpaid invoices at a later date. (ECF No. 206-2 at 74/4:17–23; ECF No. 197-4 at 4/6:12–7:4.) In June of 2016, AFGL became interested in marketing by fax and, as a result, contracted with AdMax, a fax marketer. (ECF No. 197-4 at 4/7:5–25.)

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



AMERIFACTORS®
FUNDING BUSINESS IS OUR BUSINESS

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

Fax Cover

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

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

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

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

Sincerely,

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

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

Fill out this form and fax to: (407) 557-3611
Name: ____ Company: ____
Email: ____ Phone: ____

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

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

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

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

On September 2, 2016, Career Counseling filed a putative Class Action Complaint in this court alleging violation of the TCPA. (ECF No. 1 at 8 ¶ 27–13 ¶ 36.) On October 28, 2016, AFGL filed a Motion to Dismiss. (ECF No. 29.) After the parties responded and replied to the Motion to Dismiss (ECF Nos. 43, 47), the court entered an Order that granted AFGL's Motion to Dismiss pursuant to Rule 12(b)(1) and dismissed the Class Action Complaint without prejudice. (ECF No. 61 at 10.) After receiving leave from the court (*see* ECF No. 67), Career Counseling filed a First Amended Class Action Complaint on November 28, 2017, alleging revised class claims for violation of the TCPA. (*See* ECF No. 70.) AFGL then filed a Motion to Dismiss (ECF No. 72) on December 21, 2017, and a Motion to Stay Litigation Pending Resolution of Petition Before the FCC (ECF No. 76) on February 2, 2018.[3] On September 28, 2018, the court granted the stay, but denied the Motion to Dismiss with leave to refile. (ECF No. 88.) The court subsequently extended the stay twice. (ECF Nos. 92, 96.)

In response to the petition by AFGL asking the FCC "to clarify that faxes sent to 'online fax services' are not faxes sent to 'telephone facsimile machines,'" the Consumer and Government Affairs Bureau[4] ("CGAB") issued a declaratory ruling on December 9, 2019, finding that an online fax service that receives faxes "sent as email over the Internet" is not protected by the TCPA. *See*

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

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

Amerifactors Fin. Grp., LLC, CG Docket Nos. 02-278, 05-338, DA 19-1247, 2019 WL 6712128 (CGAB Dec. 9, 2019) (Pet. for Expedited Declaratory Ruling). Specifically, the CGAB found in relevant part:

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

Amerifactors Fin. Grp., LLC, 2019 WL 6712128, at *1.

The court lifted the stay on January 8, 2020, but stayed the case again on April 16, 2020, after being informed by AFGL that it had sent a Notice of Constitutional Challenge (ECF No. 120) to the Attorney General of the United States pursuant to Rule 5.1(a) of the Federal Rules of Civil Procedure drawing into question the constitutionality of the TCPA, as amended by the JFPA. On May 18, 2020, the Government filed a response to AFGL's Notice of Constitutional Challenge asserting that "intervention [wa]s premature prior to Defendants' filing[] a motion to dismiss on constitutional grounds." (ECF No. 126 at 2.)

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

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

as to their respective positions at a hearing on May 19, 2021. (ECF No. 217.)

II. JURISDICTION

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

III. LEGAL STANDARD

A. Class Certification

Rule 23(a) provides that certification is only proper if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition to the foregoing requirements, the United States Court of Appeals for the Fourth Circuit has held that a class cannot be certified if the class members are not identifiable or ascertainable, stating ". . . Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)); *see also Krakauer v. Dish Network, LLC*, 925 F.3d 643, 655 (4th Cir. 2019) ("Under this principle, sometimes called 'ascertainability,' 'a class cannot be certified unless a court can readily identify the class members in reference to objective criteria.'" (quoting *EQT Prod. Co.*, 764 F.3d at 358)).

Once the Rule 23(a) prerequisites are met, the proposed class must still satisfy one (1) of

three (3) additional requirements for certification under Rule 23(b). *See EQT Prod. Co.*, 764 F.3d at 357 (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003)). Career Counseling seeks certification under Rule 23(b)(3); therefore, it must show that "questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b) (emphasis added). "The predominance requirement is similar to but 'more stringent' than the commonality requirement of Rule 23(a)." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (citing *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001)).

A party must produce enough evidence to demonstrate that class certification is in fact warranted. *See Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). If one of the requirements necessary for class certification is not met, the effort to certify a class must fail. *See Clark v. Experian Information Solutions, Inc.*, 2001 WL 1946329, at *4 (D.S.C. March 19, 2001) (citing *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 205 (7th Cir. 1993)). The court must go beyond the pleadings, take a "'close look' at relevant matters," conduct "a 'rigorous analysis' of such matters," and make "'findings' that the requirements of Rule 23 have been satisfied." *See Gariety v. Grant Thornton, LLP,* 368 F.3d 356, 365 (4th Cir. 2004) (internal and external citations omitted). While the court should not "include consideration of whether the proposed class is likely to prevail ultimately on the merits," *id.* at 366 (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177–78 (1974)), "sometimes it may be necessary for the district court to probe behind the pleadings before coming to rest on the certification question." *Id.* (*citing Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)).

B. Appointment of Class Representative

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

C. Appointment of Class Counsel

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

> (A) must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class; (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and (E) may make further orders in connection with the appointment.

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

IV. ANALYSIS

A. The Parties' Arguments

1. Motion for Class Certification

Pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, Career

Counseling moves the court to certify the following proposed class:

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

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

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

(*Id.* at 2.)

In support of its Motion, Career Counseling asserts that it satisfies Rule 23(a)'s criteria because (1) fax logs demonstrate that AFGL successfully sent faxes; (2) there are six (6) questions that are common to all class member's claims[5];(3) its claims are identical and based on the same legal theory as the other class members; and (4) it is an adequate class representative because it "has done everything it believes necessary to protect the class" and "[t]here has been no showing of either an actual or potential conflict between Plaintiff and the members of the proposed Classes." (ECF No. 197-1 at 18–20.) Career Counseling further asserts that this case satisfies one (1) of Rule 23(b)'s categories because common questions regarding AFGL's transmission of an unsolicited fax advertisement predominate over any individual issues and caselaw clearly supports that proposition that a class action is "a superior method of adjudicating mass TCPA violations."

[5] Career Counseling specified that the six (6) questions are as follows: "whether the fax is an advertisement, whether AFGL is the sender, whether AFGL can prove its affirmative defenses of 'prior express invitation or permission' or 'established business relationship,' whether the fax was sent from a telephone facsimile machine, computer, or other device, to telephone facsimile machines, whether the *Amerifactors* and *Ryerson* Orders are entitled to *Skidmore* deference, and whether those Orders can be applied retroactively, can all be resolved at once with common evidence." (ECF No. 197-1 at 19.)

(*Id.* at 22 (citing *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) ("[C]lass certification is normal" in TCPA cases "because the main questions, such as whether a given fax is an advertisement, are common to all recipients.")).) In this regard, Career Counseling asserts that "class members have little economic incentive to sue individually, given that each class member would be limited to $500 to $1,500 per fax, and the TCPA does not provide for shifting of attorney fees." (*Id.* at 23.)

AFGL argues that class treatment is inappropriate because in order "[t]o determine whether each Fax recipient received the Fax on a 'telephone facsimile machine,' as required by the TCPA," the court will "have to conduct an individualized inquiry into the type of equipment on which the recipient received the Fax." (ECF No. 206 at 41.) AFGL asserts that fax logs do not "show which faxes were sent to an online or email-based facsimile service versus which faxes were sent to a traditional fax machine." (*Id.* (citing ECF No. 206-2 at 117 ¶ 53).) AFGL argues this inquiry "will overwhelm any other purportedly common issues." (*Id.* at 42.) Moreover, "individualized inquiries are required to determine the manner in which a recipient received the Fax." (*Id.* at 45.)

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

2. Motion to Appoint Class Representative

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

AFGL opposes the appointment of Career Counseling as class representative. AFGL argues that Career Counseling is an inadequate representative because its actions during discovery

demonstrate that it lacks knowledge about the case and is a pawn for its counsel. (*See* ECF No. 206 at 21–24.) To this point, AFGL asserts that Career Counseling's "corporate representative repeatedly referred to legal counsel in response to questions about the most basic aspects of this litigation, including the discovery investigation, settlement negotiations and its obligations as class representative." (*Id.* at 24 (citing, *e.g.*, *Physicians Healthsource Inc. v. Allscripts Health Sols. Inc.*, 254 F. Supp. 3d 1007, 1023 (N.D. Ill. 2017) ("A plaintiff who seeks to be the class representative cannot simply shift its duties to class counsel.")).) AFGL further asserts that Career Counseling's appointment to class representative could negatively affect any class recovery because Career Counseling "is a repeat TCPA plaintiff and has trolled for TCPA violations in the fax context – admitting that it provided at least 100 faxes to its counsel for review" while not attempting "to opt out of receiving any further faxes." (*Id.* at 25.) Finally, AFGL argues that Career Counseling should not be appointed class representative because its claims are "not typical because it received the Fax on a traditional fax machine, unlike numerous other class members." (*Id.* at 26.)

3. Motion to Appoint Class Counsel

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

AFGL opposes the appointment of Career Counseling's attorneys as class counsel. More specifically, AFGL argues that the law firm of Anderson and Wanca is inadequate under Rule 23(g) because it has previously been found to have engaged in ethical impropriety by recording telephone conversations in violation of state law. (ECF No. 206 at 20, 27 (citing ECF No. 206-3).) AFGL next asserts that Anderson and Wanca has a conflict with one (1) putative class member, American HomePatient, Inc. ("AHI"), because the firm has brought a TCPA claim

against AHI in another case. (*Id.* at 20 (citing *Presswood, D.C., P.C. v. Am. HomePatient, Inc.*, No. 4:17-cv-01977-SNLJ, ECF No. 1-1 (E.D. Mo. July 14, 2017)).) Finally, AFGL argues that Career Counseling's attorneys throughout the litigation of this matter have demonstrated an inability to efficiently handle class-based discovery. (*Id.* at 28.)

4. Relevance of the CGAB's Ruling

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

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

B. The Court's Review

1. Relevance of the CGAB's Ruling

On December 9, 2019, the CGAB issued a declaratory ruling effectively finding that faxes sent to 'online fax services' are not faxes sent to 'telephone facsimile machines.'" *See Amerifactors Fin. Grp.,* 2019 WL 6712128. The court observes that the parties' instant class certification dispute requires it to first consider whether the CGAB's ruling is entitled to Hobbs Act deference.[6] To this point, "[i]f the Hobbs Act applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations." *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015). The Hobbs Act is applicable if a ruling is (1) of the FCC, (2) final, and (3) legislative instead of interpretive. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055–56 (2019) (citing 28 U.S.C. § 2342(1)).

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

[6] The Hobbs Act states that the court of appeals has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission" made reviewable by 47 U.S.C. § 402(a). *See* 28 U.S.C. § 2342. 47 U.S.C. § 402(a) explains that any "proceeding to enjoin, set aside, annul, or suspend any order of the Commission" may be brought under the manner prescribed in 28 U.S.C. § 158 except for those listed in 28 U.S.C. § 402(b). 28 U.S.C. § 402(b) further lays out a list of exceptions to this rule whereby decisions from the Commission may be appealed directly to the Court of Appeals for the District of Columbia, but none of those exceptions apply in this case. Therefore, the district courts are required to comply with such orders unless the order is reversed by the FCC or otherwise adjudicated by the court of appeals.

Transmission Servs. Inc. v. BellSouth Telecomms., Inc., 352 F.3d 872, 880 (4th Cir. 2003). The appropriate authority has been delegated to the CGAB both by the FCC and by Congress in statute. *See* 47 C.F.R. § 0.141. Therefore, the CGAB acts as a delegated authority under the FCC, and any order from the CGAB should be treated as if it were from the FCC.

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

The FCC has statutory authority to "promulgate binding legal rules" to carry out the Communications Act of 1934 (which includes the TCPA). *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2006). That authority was delegated to the CGAB by the FCC and Congress. As for three (3) step notice and comment rulemaking procedure, there does not seem to be disagreement between the parties on steps two (2) and three (3). To fulfill step two, the CGAB issued a public notice seeking comment on the AFGL's petition for declaratory ruling under the TCPA. (*See* ECF No. 98-1 at 7.) Several entities and individuals filed

their comments about the AFGL's petition, including Career Counseling, its proposed expert witness, and three (3) others opposing AFGL's petition. *Id.* (*See* ECF No. 206 at 23.) To fulfill step three (3), the CGAB wrote an introduction to the declaratory ruling, outlining their purposes of answering AFGL's petition and clarifying the language of the TCPA. (*See* ECF No. 98-1 at 1-3.)

The parties, however, disagree on whether the CGAB issued a general notice of proposed rulemaking to fulfill step one (1). Career Counseling argues that the CGAB's public notice for comment on the AFGL's petition "does not even come close to meeting the APA requirements" and that "no rule was ever published in the Federal Register or codified in the FCC's regulations." (ECF No. 211 at 17.) While the Administrative Procedure Act, 5 U.S.C. § 553, generally requires a notice of proposed rulemaking be published in the Federal Register, it makes an exception when "persons subject [to the proposed rule] . . . are either personally served or otherwise have actual notice thereof in accordance with law." *See id.* This "actual notice" must include (1) the time, place, and nature of public rule making proceedings, (2) reference to the legal authority under which the rule is proposed, and (3) the terms of the proposed rule or a description of the subjects and issues involved. *Id.* The public notice issued by the CGAB includes all of these requirements. *See Consumer and Governmental Affairs Bureau Seeks Comment on Amerifactors Fin. Grp., LLC Petition for Expedited Declaratory Ruling Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 5667 (2017). Therefore, the public notice did not need to be published in the Federal Register to meet the APA requirements. *See* 5 U.S.C. § 553. Additionally, Career Counseling filed a comment against AFGL's petition in response to the public notice, meaning that Career Counseling did have knowledge of the proceedings and a chance to submit their opinion for consideration. (ECF No. 98-1 at 7.) This

means that the CGAB did fulfill step one (1) of the notice and comment process, adequately giving public notice to all parties. Therefore, because the CGAB's declaratory ruling was issued by "an agency pursuant to statutory authority" and has "force and effect of law" from completing the three (3) step notice and comment rulemaking process, the ruling is legislative and not interpretive.[7] *PDR Network*, 139 S. Ct. at 2055.[8]

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

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

[8] Career Counseling points out that the United States Supreme Court ruled in *PDR Network* that a different FCC ruling was interpretive instead of legislative. However, in that case, both parties conceded that the rule was interpretive, negating the need for extensive analysis. Additionally, the Supreme Court in *PDR Network* relied heavily on the absence of a notice and comment period, whereas the rule in question in this case followed a much different process and did have a notice and comment period initiated by a public notice for comment on the issue. Therefore, the ruling that the relevant sections of the FCC rule was interpretive in *PDR Network* does not contradict the legislative status of the CGAB's ruling in this case.

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

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

2. Motion for Class Certification

a. Federal Rule of Civil Procedure 23(a)

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

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

Third, typicality, which is similar to commonality, is satisfied here because Career Counseling and the putative class have an interest in prevailing in similar legal claims. *Nolan v. Reliant Equity Partners, LLC*, 08-cv-062, 2009 WL 2461008, at *3 (N.D. W. Va. Aug. 10, 2009). All class members, including Career Counseling, must eventually establish that they received unsolicited faxes from AFGL to a stand-alone fax machine.

Fourth, adequacy of representation is satisfied here. Despite AFGL's protestations to the contrary, Career Counseling appears to be capable of fairly and adequately representing the

interests of the putative class members who received a fax to a stand-alone fax machine.

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

In this case, Career Counseling must prove that a class of all persons or entities who were successfully sent the fax in question to a stand-alone fax machine is ascertainable. (ECF No. 197-1 at 1.) To accomplish this task, Career Counseling started with the 58,944 numbers to which the fax in question was sent. (*Id* at 5.) From there, Career Counseling issued subpoenas to Local Number Portability Administrator of the Number Portability Administrative Center to identify all phone carriers for all phone numbers on the list. (ECF No. 197-10 at 1.) Next, they used the responses to subpoena each identified phone carrier to determine whether the subscriber of each phone number was utilizing "online fax services" on the date of the faxing.[10] (*Id.*) Based on the replies to their subpoenas, Career Counseling asserts the following:

1. As of March 16, 2021, 20,989 numbers on the original list of numbers that were sent a fax were not provided an online fax service from their phone carrier (*id.* at 4); and
2. As of March 16, 2021, 206 numbers on the original list of numbers that were sent a fax were provided an online fax service from their phone carrier. (*Id.*)

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

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

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

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

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

Job Sequence	Job Name	Date (UTC)	Fax Number	Pages Sent	Customer I	Result
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157396744	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157396862	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157230853	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157231515	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157232160	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157210751	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157211101	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157219377	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157028535	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157030139	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2156998862	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157075141	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157082427	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157129099	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157237700	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157238859	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157250287	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157233571	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157390990	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157393428	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157399515	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157415887	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157284227	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157322354	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157443456	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157443787	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157445717	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157475720	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157482768	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157503010	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157430105	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157327479	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157353407	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157515735	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157519388	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157437066	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157572575	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157855645	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157855847	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157856030	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157856151	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157856545	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157856644	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157577024	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157638118	1		Sent
BFX-81057910	AmeriFactorsFaxblastJur	Jun 28 2016	2157638218	1		Sent

EXHIBIT 1
Sorted by Fax Number

Robert Biggerstaff
9-18-2020
Exhibit 4

Fax Number	Faxes	Fax Number	Faxes	Fax Number	Faxes	Fax Number	Faxes	Fax Number	Faxes	Fax Number	Faxes
1. 201-217-0082	1	72. 201-440-1108	1	143. 201-623-0992	1	214. 201-896-2795	1	285. 202-315-3292	1	356. 203-226-9818	1
2. 201-217-4625	1	73. 201-440-1455	1	144. 201-641-6413	1	215. 201-902-9926	1	286. 202-315-3655	1	357. 203-230-0453	1
3. 201-221-8641	1	74. 201-440-4956	1	145. 201-641-8088	1	216. 201-909-0976	1	287. 202-331-9348	1	358. 203-230-8122	1
4. 201-223-4607	1	75. 201-440-7140	1	146. 201-651-1320	1	217. 201-909-8521	1	288. 202-337-5880	1	359. 203-230-9971	1
5. 201-225-7311	1	76. 201-444-6148	1	147. 201-656-9964	1	218. 201-930-0099	1	289. 202-342-6500	1	360. 203-234-7126	1
6. 201-225-7312	1	77. 201-444-6685	1	148. 201-659-7970	1	219. 201-930-1883	1	290. 202-362-9375	1	361. 203-234-8090	1
7. 201-246-9290	1	78. 201-444-9732	1	149. 201-662-0912	1	220. 201-931-1800	1	291. 202-387-3292	1	362. 203-235-0244	1
8. 201-251-1221	1	79. 201-445-2810	1	150. 201-662-1967	1	221. 201-933-0484	1	292. 202-387-7669	1	363. 203-235-1496	1
9. 201-257-8955	1	80. 201-445-8575	1	151. 201-666-4681	1	222. 201-933-0968	1	293. 202-393-4517	1	364. 203-235-5625	1
10. 201-261-3040	1	81. 201-445-8958	1	152. 201-670-7789	1	223. 201-933-8990	1	294. 202-393-4836	1	365. 203-237-5391	1
11. 201-261-7339	1	82. 201-445-9811	1	153. 201-670-8707	1	224. 201-933-9574	1	295. 202-393-5541	1	366. 203-238-0738	1
12. 201-262-2550	1	83. 201-447-1750	1	154. 201-692-0179	1	225. 201-934-6488	1	296. 202-398-8595	1	367. 203-238-1314	1
13. 201-262-3543	1	84. 201-447-6932	1	155. 201-712-7019	1	226. 201-934-8266	1	297. 202-408-1030	1	368. 203-238-2444	1
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36. 201-337-3156	1	107. 201-488-0983	1	178. 201-798-8781	1	249. 201-955-3735	1	320. 202-628-7773	1	391. 203-262-6715	1
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45. 201-342-8618	1	116. 201-529-0252	1	187. 201-825-8878	1	258. 201-986-1210	1	329. 202-722-4584	1	400. 203-265-9371	1
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52. 201-384-6930	1	123. 201-567-9078	1	194. 201-847-5305	1	265. 202-223-1068	1	336. 202-783-6631	1	407. 203-268-7958	1
53. 201-391-3565	1	124. 201-567-9151	1	195. 201-847-6475	1	266. 202-223-1787	1	337. 202-785-1057	1	408. 203-268-9961	1
54. 201-391-4189	1	125. 201-568-1312	1	196. 201-848-8479	1	267. 202-223-3331	1	338. 202-785-7343	1	409. 203-269-0687	1
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56. 201-405-0388	1	127. 201-568-7962	1	198. 201-863-7890	1	269. 202-223-6730	1	340. 202-797-9705	1	411. 203-269-3402	1
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63. 201-432-9701	1	134. 201-585-9633	1	205. 201-866-8282	1	276. 202-289-7499	1	347. 202-833-9478	1	418. 203-270-9619	1
64. 201-433-7453	1	135. 201-592-9196	1	206. 201-868-3449	1	277. 202-291-4715	1	348. 202-842-0182	1	419. 203-271-3989	1
65. 201-437-2926	1	136. 201-599-1947	1	207. 201-871-6895	1	278. 202-291-5259	1	349. 202-861-4209	1	420. 203-272-1896	1
66. 201-438-1326	1	137. 201-604-1131	1	208. 201-880-0745	1	279. 202-293-1095	1	350. 202-877-6590	1	421. 203-272-2278	1
67. 201-438-1615	1	138. 201-608-4556	1	209. 201-883-1333	1	280. 202-293-3480	1	351. 202-955-6363	1	422. 203-272-3151	1
68. 201-438-1905	1	139. 201-612-1323	1	210. 201-883-1822	1	281. 202-296-2888	1	352. 202-974-6262	1	423. 203-272-4389	1
69. 201-438-2618	1	140. 201-612-8795	1	211. 201-886-2010	1	282. 202-296-5233	1	353. 202-986-4030	1	424. 203-272-5671	1
70. 201-438-5380	1	141. 201-612-9548	1	212. 201-891-4407	1	283. 202-296-6369	1	354. 203-207-9780	1	425. 203-281-4437	1
71. 201-439-1145	1	142. 201-621-4798	1	213. 201-894-0213	1	284. 202-296-7558	1	355. 203-226-7333	1	426. 203-281-6372	1

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

In contrast to the aforementioned, AFGL presents several Declarations to demonstrate that Career Counseling's proposed Class B does not satisfy the ascertainability requirement. In the first such Declaration, attorney Whitney M. Smith asserts there are 4,000 numbers in Class B that are associated with Verizon as the telephone carrier and Verizon "does not have information available to allow it to determine whether the customer associated with the telephone numbers used the number with a fax . . . service." (ECF No. 206-1 at 3 ¶ 10.) In the Second Declaration of Tammy Deloach, a paralegal at Charter Communications Operating, Inc. observes that 1,291 of the phone numbers in the fax log belong to subscribers of Charter and it "is unable to determine whether a VOIP number assigned to a customer account is utilized for voice calls or fax transmissions . . . . cannot determine whether a VOIP subscriber used another provider's online fax service product . . . . [and] does not have a mechanism by which it can identify how a subscriber is using its voice service, including whether a subscriber procured online fax service from a third party or was using a stand-alone fax machine or any other technology to receive faxes." (ECF No. 225-1 at 2–3 ¶ 9.) Finally, in the Declaration of Lisa Likely, the Director for AT&T Corp. states that 12,874 of the numbers on the fax log belong to AT&T subscribers and AT&T cannot identify whether the subscriber used "a stand-alone fax machine or any other technology to receive faxes" or "confirm whether a subscriber received . . . a fax or used a fax machine." (ECF No. 226-1 at 3 ¶¶ 14, 15.)

To certify Career Counseling's proposed Class B, the court must find that the ascertainability requirement is established by a preponderance of the evidence. *E.g.*, *E&G, Inc. v.*

Mount Vernon Mills, Inc., C/A No. 6:17-cv-318-TMC, 2019 WL 4034951, at *3 (D.S.C. Aug. 22, 2019) ("A plaintiff bears the burden of showing by a preponderance of the evidence that class certification is appropriate under Rule 23." (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011))). More specifically, the fax logs must convey that the fax was successfully received by the recipient. *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 2016 WL 75535, at * (N.D. Ohio Jan. 7, 2016) ("[O]nly persons to whom faxes were 'successfully sent' are proper claimants under the TCPA." (citing *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 632–34 (6th Cir. 2015); *Am. Copper*, 757 F.3d at 545))).

In the Fourth Circuit, class certification is inappropriate when "class members are impossible to identify without extensive and individualized fact-finding" as it needs to be administratively feasible for the court to determine which individuals are members of the class. *EQT Prod. Co.*, 764 F.3d at 358. In considering the totality of evidence presented by the parties, the court is not persuaded that a predominance of the evidence supports finding that a fax designated as successfully sent on Career Counseling's fax logs reached a stand-alone fax machine.[13] More specifically, if the purpose of TCPA/JFPA is to address a consumer's loss of paper and toner, the aforementioned fax logs are deficient because they do not show that a device using toner and paper received the successfully sent fax. The court finds that it would need to make an individualized inquiry of each class member to determine if the fax number identified in the fax log actually was linked to a stand-alone fax machine on June 28, 2016. Because such individualized inquiries are necessary to ascertain the class, Class B is not ascertainable, and class

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

certification is inappropriate. Accordingly, the court finds that Career Counseling cannot satisfy all of the requirements of Rule 23(a).

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

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

3. Motion to Appoint Career Counseling Class Representative

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

4. Motion to Appoint Class Counsel

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

V. CONCLUSION

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

IT IS SO ORDERED.

United States District Judge

July 16, 2021
Columbia, South Carolina