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United States District Court,
C.D. California.

Edward Simon
v.
Healthways, Inc. et al.

Case No. CV 14-08022-BRO (JCx)
|
Signed December 17, 2015

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ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [63]

BEVERLY REID O'CONNELL, United States District Judge

I. INTRODUCTION

***1** Currently pending before the Court is Plaintiff Edward Simon's Motion for Class Certification. (Dkt. No. 63.) Plaintiff's class action alleges violations by Defendants Healthways, Inc., Healthways WholeHealth Networks, Inc. and Medversant Technologies, L.L.C. (collectively, "Defendants") of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (hereinafter, "TCPA") and California Business and Professions Code section 17538.43 (hereinafter, "Section 17538.43"). The Court has considered all of the papers filed in support of and in opposition to the instant Motion, and oral argument of counsel at the hearing held on November 30, 2015. For the reasons explained below, the Court **DENIES** Plaintiff's Motion.

II. BACKGROUND

A. Factual Background

Defendant Healthways WholeHealth Networks, Inc. ("HWHN"), a wholly-owned subsidiary of Defendant Healthways, Inc., manages nationwide networks of healthcare providers, comprised mostly of chiropractors, physical therapists, and alternative medicine practitioners. (Decl. of Ann Kent in Supp. of Opp'n to Mot. for Class Certification ("Kent Decl.") ¶ 2; Kent Dep. at 76:23–77:16.) Defendant Medversant Technologies, L.L.C. ("Medversant") provides technology solutions for the management of healthcare provider data. (Dep. of Joe Beckerman ("Beckerman Dep.") at 14:3–15.) One of Medversant's technologies is ProviderSource, a secure platform for credentialing and monitoring healthcare practitioners. HWHN uses ProviderSource to verify the credentials of current and prospective network members. (Beckerman Dep. at 21:12–22:5; Kent Dep. at 98:22–99:13.) Medversant also sells a secure email program called ProMailSource. (Beckerman Dep. 55:7–18.) This lawsuit concerns seven "junk" fax transmissions sent on June 16, June 24, July 7, July 22, August 13, and August 20, 2014, to 10,613 unique fax telephone numbers. (Biggerstaff Rpt. ¶¶ 24, 53.) The facsimiles refer to and discuss Medversant's ProMail Source service, describing it as "a HIPAA compliant email solution." (*See* Decl. of Scott Z. Zimmermann in Supp. of Mot. for Class Certification ¶ 14, Ex. A.)

Plaintiff Edward Simon, D.C., is a chiropractor practicing in North Hollywood, California, who claims to have received at least one, possibly two, of Defendants' fax transmissions. (Decl. of Edward Simon, DC in Supp. of Mot. for Class Certification ¶¶ 1–3.) Plaintiff Affiliated Health Care Associates, P.C. ("Affiliated") subsequently joined the lawsuit, (*see* Dkt. No. 51), claiming to have received two of Defendants' fax transmissions, (Decl. of Jaroslaw Slusarenko in Supp. of Mot. for Class Certification ¶ 5), but has since withdrawn its motion for appointment of class representative, (*see* Reply at 1 n. 1). As such, any reference to the singular "Plaintiff" in this Order will be in regard to Plaintiff Simon.

B. Procedural History

Plaintiff Simon filed his original class action complaint against Defendants on September 16, 2014, in the Superior

Court of California, County of Los Angeles. (Dkt. No. 1, Ex. A.) Plaintiff's original complaint alleged that Defendants' faxes violated the TCPA and Junk Fax Prevention Act of 2005 ("JFPA"), as well as Section 17538.43, for two reasons: (1) Defendants failed to obtain his prior express permission as defined in 47 U.S.C. § 227(a)(5); and, (2) Defendants failed to include the "Opt–Out Notice" required by the TCPA and JFPA. (Dkt. No. 1, Ex. A ¶¶ 1, 13–15.) Defendants removed the case to federal court on October 16, 2014, claiming that the Court has original jurisdiction under 28 U.S.C. § 1331 because it arises under the TCPA, as well as under the Class Action Fairness Act (or "CAFA"). (Dkt. No. 1 at 2.) On May 28, 2015, Plaintiff Simon, along with Affiliated, filed their First Amended Complaint, (*see* Dkt. No. 51 (hereinafter, "FAC")), alleging two causes of action for: (1) violations of the TCPA, (FAC ¶¶ 30–35); and, (2) violations of Section 17538.43, (FAC ¶¶ 36–40).

1. FCC Waiver

***2** When Plaintiff filed this lawsuit, the law was unclear as to whether the TCPA required an opt-out notice for *solicited* faxes. On October 30, 2014, however, the FCC issued an order clarifying that even solicited faxes—those sent with a party's prior express permission—require "opt-out" notice. (Dkt. No. 36 at 5–29.) The FCC recognized "that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether [the FCC's] requirement for opt-out notices applied to them." (Dkt. No. 36 at 5.) Due to this uncertainty, the FCC granted parties a retroactive waiver from the opt-out requirement and invited similarly situated parties—those who sent fax ads without opt-out notice *but with* the parties' prior express permission—a six-month window to seek a similar waiver. (Dkt. No. 36 at 5.) The waiver does not affect the prohibition against sending unsolicited fax advertisements. (Dkt. No. 36 at 19.)

On January 8, 2015, about two months after the FCC issued its order, Medversant filed a petition with the FCC for a retroactive waiver from the opt-out requirement. (Dkt. No. 36 at 31–36.) On March 2, 2015, approximately four months after the FCC decision, Healthways and WholeHealth also filed a petition for waiver. The next day, Defendants asked this Court to stay the instant action as a result of Defendants' petitions pending before the FCC. (Dkt. No. 35.) This Court denied Defendants' Motion to Stay on April 7, 2015. (Dkt. No. 46.) On August 28, 2015, the FCC granted Defendants' Petitions for Retroactive Waiver of Section 64.1200(a)(4)(iv) of the Commission's rules, excusing the opt-out notice requirement, with respect to faxes sent prior to April 30, 2015, provided Defendants received prior express permission. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CGC Dkt. No. 02–278, DA 15–976, ¶ 1 n.2 (Aug. 28, 2015) (available at *https://apps.fcc.gov/edocs_public/attachmatch/DA–15–976Al.pdf*) (hereinafter, "Waiver Order").

2. Motion for Class Certification

Plaintiffs brought the instant Motion for Class Certification on October 5, 2015. (Dkt. No. 63.) In their Motion, Plaintiffs specified two classes for which they seek certification:

- **TCPA Class:** All persons and entities that were subscribers of facsimile telephone numbers to which material that discusses, describes, or promotes "ProMailSource" and other property, goods or services of Defendants, or any of them, was sent via facsimile transmission on or after September 16, 2010, including, without limitation, in June, July and August 2014 (the "TCPA Class"). (Specifically, the class members of the TCPA Class are those that were sent fax transmissions promoting, among other things, "ProMailSource" on July 16, June 24, July 7, July 22, August 13 and August 30, 2014.)

- **Section 17538 Class:** All persons and entities that were subscribers of facsimile telephone numbers to which material that discusses, describes, or promotes "ProMailSource" and other property, goods or services of Defendants, or any of them, was sent via facsimile transmission on or after September 16, 2010, including, without limitation, in July and August 2014 (the "17538 Class"). (Specifically, the class members of the Section 17538 Class are those that were sent fax transmissions promoting, among other things, "ProMailSource" on July 22, August 13 and August 30, 2014, fax transmissions listed in connection with the TCPA Class.)

(Mot. at 11; *see also* FAC ¶ 22.) Defendants jointly opposed this Motion on November 2, 2015. (Dkt. No. 73.) Plaintiff timely replied on November 23, 2015. (Dkt. No. 90.)

III. EVIDENTIARY OBJECTIONS

Plaintiff filed various evidentiary objections regarding certain passages from the declarations of Kenneth K. Lee ("Lee Decl."), Tanya L. Forsheit, Noor Alikhan, and Ann Kent, filed by Defendants in support of their Opposition to Plaintiff's Motion for Class Certification. (*See* Dkt. No. 92–2.) The Court may "consider inadmissible evidence in deciding whether it is appropriate to certify a class." *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 965 n.147 (C.D.Cal.2015) ("Since a motion for class certification is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence.... At the class certification stage, the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims." (internal quotations omitted)); *accord Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 337 n.3 (N.D.Cal.2010) ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial."); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D.Cal.2008) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). As such, the Court **OVERRULES** Plaintiff's objections.

IV. LEGAL STANDARD

***3** A party seeking class certification bears the burden of establishing that the prospective class satisfies each requirement of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.2001).

Under Rule 23(a), the party seeking certification must establish all four of the following: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed.R.Civ.P. 23(a). This requires proof that:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.; *accord Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2548 (2011). Certification should be granted only if, "after a rigorous analysis," the court determines that the prospective class satisfies the requirements of Rule 23(a). *Wal–Mart Stores*, 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)) (internal quotation marks omitted).

The same principles apply to a Rule 23(b) analysis. *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013). Under Rule 23(b)(3), the representative of the putative class must establish that: (1) common questions "predominate over any questions affecting only individual members"; and, (2) class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (internal quotation marks omitted).

When reviewing motions for class certification, district courts generally are bound to take the substantive allegations of the complaint as true. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir.1982) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir.1975)). But "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal–Mart Stores*, 131 S.Ct. at 2551. Thus, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* (quoting *Falcon*, 457 U.S. at 161) (internal quotation marks omitted). Ultimately, district courts have "broad discretion to determine whether a class should be certified and to revisit that certification throughout the legal proceedings before the court." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL–CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir.2010).

V. DISCUSSION

Plaintiff seeks certification of the two classes described above —the TCPA Class and the Section 17538 Class—pursuant to Rules 23(a) and 23(b)(3).

The TCPA prohibits any person from "us[ing] any telephone facsimile machine ... to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The statute defines an "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).

***4** Section 17538.43 provides that it is "unlawful for a[n] ... entity, if ... [the] entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine." Cal. Bus. & Prof.Code § 17538.43(b)(1). The definition of "unsolicited advertisement" under Section 17538.43 is substantially similar to § 227's definition of the term. (*Compare* Cal. Bus. & Prof.Code § 17538.43(a)(2), *with* 47 U.S.C. § 227(a)(5).)

Defendants oppose certification on numerous grounds, including that named Plaintiff Simon is not a typical or adequate representative under Rule 23(a). Defendant's argue that under Rule 23(b)(3), Plaintiff fails to show that common questions predominate and that a class action is the superior method for adjudication of Plaintiff s claims. Defendants argue that "the key issue in this case is whether class members gave prior express permission to receive faxes like the ProMailSource faxes." (Opp'n at 2.) The Court agrees that determining this "key issue" would require an individualized analysis that prevents this Court from granting Plaintiff's Motion for Class Certification.

A. Plaintiff Fails to Satisfy Rule 23(b)

As mentioned, Plaintiff seeks class certification under Rule 23(b)(3). Certification under this provision is appropriate where: (1) common questions "predominate over any questions affecting only individual members"; and, (2) class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Prods.*, 521 U.S. at 615 (internal quotation marks omitted). For the following reasons, the Court finds that common questions do not predominate. Certification is therefore inappropriate.

Rule 23(b)(3) requires a showing that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Amgen, Inc. v. Connecticut Ret. Plans & Tr. Funds*, 133 S.Ct. 1184, 1209–10 (2013). The predominance inquiry "tests whether [the] proposed classes are sufficiently cohesive to warrant adjudication by representation" and "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods.*, 521 U.S. at 623. In doing so, it "focuses on the relationship between the common and individual issues" of the class. *Hanlon*, 150 F.3d at 1022; *see also Local Joint Exec. Bd. of Culinary Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.2001). In other words, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed.1986)). A finding of commonality under Rule 23(a)(2) is insufficient by itself to satisfy Rule 23(b)(3). *Id.* ("[The predominance] analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2)."); *see also Nguyen v. BDO Seidman, LLP*, No. SACV 07–01352–JVS (MLGx), 2009 WL 7742532, at *2 n.2 (C.D.Cal. July 6, 2009) (denying plaintiff's motion for class certification where plaintiff did not meet the requirements of Rule 23(b)(3), although noting that the requirements of Rule 23(a) "could be met"). Nevertheless, predominance does not require that the legal and factual issues be identical across the class. Certification is proper where "[a] common nucleus of facts and potential legal remedies dominates [the] litigation." *Id.*; *see also Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 577 (S.D. Cal. 2013) ("[P]redominance in TCPA cases primarily turns on whether a class-based trial on the merits could actually be administered.").

***5** Plaintiff claims that the "case arises out of a common nucleus of fact and standardized conduct by Defendants." (Mot. at 15.) "The faxes advertised the same things and were prepared and approved in the same manner. The faxes were transmitted by the same senders to the same groups of recipients in the same manner. The faxes violated the TCPA and section 17538.43 in the same ways." (Mot. at 15.) Plaintiff proposes six "common legal issues that can be determined on a class-wide basis," including: (1) whether Defendants' faxes are advertisements; (2) what entity is responsible for sending the faxes; (3) whether recipients gave prior express permission to be sent Defendants' faxes; (4) the legal effect of Defendants' failure to place opt-out notices on their faxes; (5) the measure of class damages; and, (6) whether damages should be increased due to a "knowing" or "willful" violation. (Mot. at 15–24.) Plaintiff also provides a list of seven additional "common issues" based on Defendants' own assertions. (Mot. at 24–25.) "What matters to class certification ... is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart*, 131 S.Ct. at 2551 (internal quotation marks and citation omitted).

Defendants counter that Plaintiff cannot establish predominance in this case because "individual issues regarding prior express permission and the content of the faxes predominate over any common issues of law or fact." (Opp'n at 12–13.) The Court finds that the individual issues regarding prior express permission predominate here. [1]

Defendants contend that Defendants obtained prior express permission to send faxes to the providers in the HWHN network in a "variety" of ways. (Opp'n at 14.) According to Defendants, providers gave their prior express permission when they: (1) joined the networks and provided Healthways with their fax numbers, (*id.* at 15–18); (2) orally provided their fax numbers to HWHN and requested that HWHN send them faxes, (*id.* at 18–20); or, (3) registered online through ProviderSource to be credentialed with Medversant, (*id.* at 20–21).

District courts in the Ninth Circuit have cautioned that "courts should not simply accept a party's argument that consent requires individualized inquiries without evidence demonstrating consent is, in fact, an individualized issue," *Blair v. CBE Grp., Inc.*, 309 F.R.D. 621, 629 (S.D.Cal.2015), and that "courts should ignore a defendant's argument that proving consent necessitates individualized inquiries in the absence of any evidence that express consent was actually given," *Kristensen v. Credit Payment Servs.*, 12 F. Supp.3d 1292, 1307 (D.Nev.2014). These warnings are of no moment here; Defendants provide evidence demonstrating that the issue of prior express permission is individualized in this case. For example, Defendants offer a spreadsheet—HWHN's internal customer service log—that contains notes such as "[f]ax preferred," "prefers a fax," and "would prefer to fax," indicating that certain providers may have orally provided prior express permission. (Lee Decl. ¶ 11, Ex. 10 at 7 (indicating "[f]ax preferred" for certain providers).) At the hearing, Defendants' counsel further elaborated on the factual inquiries this Court would need to determine regarding each fax recipient's prior express permission. Medversant's counsel described the various ways providers could be credentialed —in paper or online, or a combination of both, further highlighting the individualized inquiry that would need to take place in order to determine whether a provider gave Defendants his or her or its prior express permission.

***6** Plaintiff responded, in his papers and at the hearing, that even assuming Defendants had prior express permission, rendering the faxes "solicited," Defendants still violated the opt-out notice requirements. Plaintiff cited to various cases including *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 560–61 (C.D.Cal.2012) and *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F.Supp.3d 482, 496 (W.D.Mich.2014), *as amended* (Jan. 12, 2015). First, these cases are persuasive, but nonbinding authority. More importantly, however, the Court finds that Plaintiff's cases do not apply to the facts of this putative class action for the following reasons.

Plaintiff relied upon *Vandervort* to support his argument regarding certification of "a TCPA class based on an advertiser's failure to comply with the opt-out disclosure requirements." (Mot. at 21; *see also* Reply at 18.) But the reasoning in *Vandervort* is not applicable here because the FCC has specifically granted Defendants a retroactive [2] waiver excusing Defendants from providing opt-out notice on fax advertisements sent prior to April 30, 2015, if Defendants had prior express permission. *Cf. Vandervort*, 287 F.R.D. at 560–61 (explaining that the trial would not require defendant to put on evidence of consent as to each recipient).

Plaintiff argues, however, that the waiver's effect is limited to FCC enforcement actions, relying on *Stryker Sales.* (*See* Mot. at 22 n.21.) In *Stryker Sales*, Judge Robert J. Jonker of the Western District of Michigan suggested that retroactive waivers do not impact Article III courts because: (1) a ruling would "rest[ ] not merely on the FCC's regulation, but on the statutory term itself"; (2) "nothing in the waiver —even assuming the FCC ultimately grants it—invalidated the regulation itself"; and, (3) "the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power." *Stryker Sales Corp.*, 65 F.Supp.3d at 498 (citing *Turza*, 728 F.3d at 688). In the context of a motion for summary judgment, the court found that "[i]t would be a fundamental violation of the separation of powers for the administrative agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court." *Id.*

On August 28, 2015—post–*Vandervort* and *Stryker Sales* —the FCC's Consumer and Governmental Affairs Bureau issued its Waiver Order, granting a retroactive waiver to over 100 petitioners, including Defendants. *See* Waiver Order ¶ 1 n.2. The Bureau itself described when the "limited retroactive waiver" would apply: "assuming that proper consent was obtained—petitioners qualify for limited retroactive waivers

if they did not include the requisite opt-out notice." *Id.* ¶ 17. The Bureau "reiterate[d] the Commission's statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes." *Id.* Rather, "[t]hat remains a question for triers of fact in the private litigation." *Id.*

***7** The Bureau's order also addressed the "separation of powers" argument raised in Stryker Sales:

> As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

Id.¶ 13 (internal footnotes omitted).

The Court agrees with the Bureau's conclusion that the FCC has the authority to grant such a retroactive waiver. *See* 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection."); 47 C.F.R. § 1.2, 1.3; *see also NCTA v. Brand X*, 545 U.S. 967, 980 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, ... and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act.") (citations omitted); *id.* at 983–84 ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.... Instead, the agency may ... choose a different construction [than the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."); *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir.1990) ("The FCC has authority to waive its rules if there is 'good cause' to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest." (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C.Cir.1969))). Moreover, the retroactive waiver is directly related to the FCC's regulation regarding solicited advertisements; the plain language of the TCPA only requires opt-out notice on unsolicited advertisements. Although "[c]ourts routinely certify TCPA class actions precisely because the requirement of an opt-out notice obviates the need to consider consent," prior express permission is relevant to whether the retroactive waiver applies to Defendants' faxes from 2014. *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, No. 12–33440–CIV, 2014 WL 7366255, at *5 (S.D.Fla. Dec. 24, 2014).

As discussed, the retroactive waiver, which excuses Defendants from following the opt-out notice requirement for facsimile advertisements sent with prior express permission prior to April 30, 2015, only applies to solicited advertisements. Whether the retroactive waiver applies to this case therefore necessarily depends upon whether Defendants transmitted the faxes with or "without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5). (*See also* Mot. at 22 ("[T]o take advantage of the Bureau's order ... Defendants would have to show that they obtained prior express permission.").) *Cf. Doctor Diabetic*, 2014 WL 7366255, at *8 (finding predominance "easily satisfied" where consent was "irrelevant and so there [were] no significant issues subject only to individualized proof"). The Waiver Order itself states prior express consent "remains a question for triers of fact in the private litigation." Waiver Order ¶ 17. As such, prior express permission is a critical—and individualized—issue in this class action.

***8** The Court cannot and will not engage in hundreds of mini-trials to determine whether a putative class member provided Defendants his or her or its prior express permission. Accordingly, the Court finds that class action is not superior to individual suits as a means to adjudicate this dispute; putative class members may seek recovery in small claims court. [3]

VI. CONCLUSION

Because Plaintiff fails to satisfy the requirements of Rule 23(b)(3), the Court **DENIES** Plaintiff's Motion for Class Certification.

IT IS SO ORDERED.

All Citations

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Footnotes

1 Defendants also argue that there are various "notable" differences between the seven transmitted versions of the fax. (Opp'n at 23.) The Court is unpersuaded that the list of distinctions outlined by Defendants suggest the predominance of individual issues in this case. A factfinder's determination as to whether each version of the fax constitutes an "advertisement" would apply to all recipients of that particular fax. "Class certification is normal in litigation under § 227, because the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Ira Holtzman, C.P.A. v. Turza,* 728 F.3d 682, 684 (7th Cir.2013), *reh'g denied* (Sept. 24, 2013), *cert. denied sub nom. Turza v. Holtzman,* 134 S.Ct. 1318 (2014). Defendants fail to cite to evidence, and ask this Court to speculate: "if the Court determines that a particular version of the ProMailSource fax is not an advertisement, then there would be no need to evaluate the issue of prior express permission for network members who only received that version of the fax." (Opp'n at 23.) It is unclear how this scenario supports Defendants' assertion that individual issues predominate. Rather, whether each of the seven fax transmissions is an advertisement or not are common questions that "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon,* 150 F.3d at 1022. However, the Court finds that this common issue does not predominate in this case where prior express permission is a material and relevant issue.

2 As an initial matter, Plaintiffs argue that "[t]he Consumer & Government Affairs Bureau is not 'the FCC,' " and that "[a]n order by the Bureau is an 'action by subordinate employees' where 'not appealed to, or passed on, by the Commission.' " (Mot. at 22 n.20 (quoting *MPower Commc'ns Corp. v. Ill. Bell Tel. Co.,* 457 F.3d 625, 631 (7th Cir.2006)).) In *MPower,* the Seventh Circuit explained that the "dispute was arbitrated by the FCC's Wireline Competition Bureau; that Bureau's decision was not appealed to, or passed on, by the Commission." *MPower,* 457 F.3d at 631. "Under the Administrative Procedure Act, federal agencies make binding decisions through rulemaking or adjudication; the Virginia arbitration was neither," *Id.* The Bureau's order in this case, however, is an adjudication, signed by the "FEDERAL COMMUNICATIONS COMMISSION," *see* Waiver Order at 17, as if the "Bureau were speaking for the Commission," *MPower,* 457 F.3d at 631.

3 The Court notes that Plaintiff's argument that the TCPA and Section 17538.43 lack a fee-shifting provision is unavailing. *(See* Mot. at 28.) If individual plaintiffs litigated these causes of action, they would be required to bring the claims in small claims court, without legal representation. *Smith v. Microsoft Corp.,* 297 F.R.D. 464, 469 (S.D.Cal.2014) ("Even though the TCPA, unlike many consumer protection statutes, does not provide for attorney's fees, an alternative method of handling the instant controversy exists: namely, individual plaintiffs may bring TCPA cases in small claims court without an attorney.").