UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Amber Goins, *on behalf of herself and others similarly situated,*	)	Case No. 6:17-cv-00654-GAP-KRS
Plaintiff,	)	
v.	)	
Wal-Mart Stores, Inc., d/b/a Walmart and Palmer Recovery Attorneys, PLLC, f/k/a Palmer, Reifler & Associates,	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Request for Relief

Amber Goins ("Plaintiff") respectfully requests that this Court certify the following class, and appoint Greenwald Davidson Radbil PLLC ("GDR") as class counsel:

> All persons and entities throughout the United States (1) to whom Palmer Recovery Attorneys, PLLC, on behalf of Wal-Mart Stores, Inc., placed, or caused to be placed, more than one call, (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of Palmer Recovery Attorneys, PLLC's calls, (3) via vendor TCN Incorporated, (4) from April 6, 2013 through the date of class certification.

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act ("TCPA") makes it unlawful for "any person . . . to make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii).[1]

[1] "Unwanted and illegal robocalls are the FTC's number-one complaint category, with more than 1.9 million complaints filed in the first five months of 2017 alone." *FTC Escalates the Fight against Illegal Robocalls Using Consumer Complaints to Aid Industry Call-Blocking Solutions*, FEDERAL TRADE COMMISSION (Aug. 1, 2017), *https://www.ftc.gov/news-events/press-releases/2017/08/ftc-escalates-fight-against-illegal-robocalls-using-consumer*

"There are two elements to an auto-dialer TCPA claim that a plaintiff must [prove]: (1) a call to a cellular telephone; (2) via an automatic telephone dialing system." *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-CV-1459-ORL, 2013 WL 6865772, *4 (M.D. Fla. Dec. 31, 2013), *aff'd*, 797 F.3d 1302 (11th Cir. 2015);[2] *see also Mohamed v. Am. Motor Co., LLC*, 320 F.R.D. 301, 316 (S.D. Fla. 2017) (reciting elements of TCPA claim). Prior express consent "is not an element of [a] TCPA claim," *Connelly v. Hilton Grant Vacations Co., LLC*, No. 12CV599 JLS KSC, 2012 WL 2129364, at *3 (S.D. Cal. June 11, 2012), but is an affirmative defense. *Buslepp v. B & B Entm't, LLC*, No. 12–60089–CIV, 2012 WL 4761509, *4 (S.D. Fla. Oct. 5, 2012).

But with respect to calls to wrong or reassigned telephone numbers—like the calls Palmer Recovery Attorneys, PLLC ("PRA") made on behalf of Wal-Mart Stores, Inc., d/b/a Walmart ("Walmart") here—prior express consent is not an available defense. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (explaining that only the current subscriber to a telephone number can provide valid consent to receive calls made by an automatic telephone dialing system); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 641 (7th Cir. 2012); *see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 2015 WL 4387780 (F.C.C. July 10, 2015) (the "called party" who must provide prior express consent "is the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call," or "the non-subscriber customary user" of a number).

Statement of Relevant Facts

I. PRA collects monies resulting from alleged shoplifting incidents at its retailer clients.

PRA describes itself as a "leading civil recovery law firm in the loss prevention/asset protection industry." ECF No. 26 at ¶ 8. More specifically, PRA assists with "civil recovery for

[2] Unless otherwise stated, internal quotations and citations are omitted.

retailers," in that it collects monies owed as a result of shoplifting incidents. *See* Deposition of Mark Hansen, Nov. 30, 2017 ("Hansen Dep."), at 9:9-12; 10:1-20.[3]

II. Walmart—a PRA client—hired PRA to collect from accused shoplifters, on its behalf.

As one of PRA's retailer clients, Walmart refers between 500 to 2,000 shoplifting cases to PRA each day for collection efforts. *Id*. at 59:1-13. PRA's relationship with Walmart is governed by a written collection agreement, *id*. at 59:17-19, which controls how PRA collects monies that are owed to Walmart as a result of alleged shoplifting incidents at Walmart stores. *Id*. at 60:12-24.

III. PRA utilized a vendor—TCN Incorporated—to place calls to accused Walmart shoplifters on Walmart's behalf.

As part of its collection efforts, PRA blasts prerecorded collection calls to telephone numbers provided to it by Walmart. *Id*. at 21:15-19. During the relevant time period, PRA used a company called TCN Incorporated ("TCN") to place such calls. *Id*. at 24:18-23; *see also* Declaration of Jesse Bird at ¶¶ 6-8, 11-15, attached as Exhibit 2.

Specifically, PRA utilized TCN's "Standard Software," which is its "proprietary software autodialer system." *Id*. at ¶¶ 6-7. This "Standard Software" is "a tool to automatically place and complete calls with pre-recorded messages to their customers and contacts similar to if the customer purchased a hardware autodialer." *Id*. at ¶ 7. As TRN explained:

> The Standard Software, as Reifler and Associates ("Palmer Reifler") used it to make the calls at issue in this matter, has the capacity to (and did) store telephone numbers to be called, and automatically dial such numbers after they are uploaded by customers of TCN and after the customer has designated a time for the call campaign. In other words, after telephone numbers are uploaded, the customer sets the campaign parameters, selects the start and end time for the campaign, and launches the campaign. Once the call campaign is launched all of the calls in that campaign proceed automatically until the campaign is completed or terminated.

[3] Mr. Hansen, who has been PRA's general manager for almost 16 years, testified on behalf of PRA pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Hansen Dep. at 7:22-8:7; 15:14-18; 16:2-5. Referenced portions of Mr. Hansen's testimony are attached as Exhibit 1.

Id. at ¶ 8.

Additionally, every call placed by PRA via TCN, when answered or when picked up by a called party's voicemail, automatically played an artificial or prerecorded voice message. Hansen Dep. at 30:21-31:13 (Q So to be clear, then, for every call PRA makes through TCN, if a live human being picks up the phone or if a voice message or answering machine picks up the phone, an automatic -- sorry -- a prerecorded voice message will begin to play? A Yes.).

IV. PRA, on behalf of Walmart, placed a host of calls to Plaintiff's cellular telephone number.

Plaintiff obtained her personal cellular telephone number—850-483-XXXX—in February 2017. Declaration of Amber Goins at ¶ 5, attached as Exhibit 3. PRA, on behalf of Walmart, placed at least 16 calls to telephone number 850-483-XXXX in February and March 2017. *See* Ex. 2, Ex. A (documenting outbound calls). Upon answering each of PRA's calls, Plaintiff was greeted by an artificial or prerecorded voice message. Goins Dec. at ¶ 9.

V. Neither PRA nor Walmart has any business relationship with Plaintiff, nor did Plaintiff give PRA or Walmart express consent to robocall her cellular telephone.

Walmart associated Plaintiff's telephone number with a person named Kenya Johnson, who Walmart accused of shoplifting at one of its retail stores. Walmart then provided Plaintiff's cellular telephone number to PRA for the purpose of facilitating its collection efforts. Hansen Dep. at 21:15-22-12. Walmart never referred a case against Plaintiff to PRA, and PRA did not receive Plaintiff's name from Walmart. *Id*. at 22:6-12. PRA concedes that it did not obtain prior express to call Plaintiff's cellular telephone number. *Id*. at 21:15-25 (Q … Does PRA have any documentation demonstrating Miss Goins' consent to receive calls on a mobile or cellular telephone? A No. We receive a number directly from Wal-Mart. Q Was the phone number that PRA received directly from Wal-Mart also with the name of Amber Goins? A No. Q It was the name of a different person? A Yes.).

VI. PRA did nothing to confirm that Plaintiff's cellular telephone number belonged to the intended recipient of its calls before placing autodialed calls to it.

PRA did nothing to confirm that Plaintiff's cellular telephone number belonged to the intended recipient of its calls before using TRN to place calls to it. *See id*. at 48:24-49:20. In fact, PRA takes no steps to confirm that telephone numbers it receives from Walmart belong to the intended recipients of its calls before autodialing—instead, PRA relies on call recipients to inform it that it is calling the wrong number. *See id*. at 49:21-14 (Q So is the only way for PRA to know that it's calling a wrong number, for the called party to affirmatively inform PRA of that? A Yes.).

VII. PRA designated Plaintiff's cellular telephone number as a wrong number after Plaintiff informed it that she was not the intended recipient of its calls.

On March 24, 2017, Plaintiff placed a call to PRA and informed PRA that it was calling the wrong number. *Id*. at 46:22-47:12; Goins Dec. at ¶ 12. As a result, PRA placed Plaintiff's cellular telephone number on its internal wrong number list. Hansen Dep. at 49:25-50:21; 51:1-10; 53:6-22.

VIII. PRA, during the relevant time period, placed calls, on behalf of Walmart, to more than 20,500 unique telephone numbers that it designated as wrong numbers—including Plaintiff's.

From April 1, 2013 through April 2017, PRA designated more than 20,500 unique telephone numbers—to which it placed calls on behalf of Walmart—as wrong numbers. *Id*. at 82:11-85:5; 86:18-25 (Q So it's your understanding, then, for the phone numbers on Exhibit 8, the overwhelming majority, if not all of them, are designated wrong number because somebody over the phone told PRA it was a wrong number? A Yes. Q And that would be as a result of a call that PRA made to that person? A Yes.).

Plaintiff's cellular telephone number appears on PRA's wrong number list, which PRA produced to Plaintiff. *Id*. at 85:9-16; 87:1-9.

Argument

Under Rule 23 of the Federal Rules of Civil Procedure, the party seeking class certification must satisfy the four requirements of Rule 23(a) and, pertinent here, the requirements of Rule 23(b)(3). As set forth below, because Plaintiff satisfies each of these elements, this Court should certify the proposed class.

I. Plaintiff's proposed class is well suited for class treatment.

As Judge Easterbrook wrote: "Class certification is normal in litigation under [the TCPA], because the main questions . . . are common to all recipients." *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013). And this is especially true in wrong-number cases, like this matter, where courts do not have to inquire as to whether each putative class member may be subject to an independent consent defense. *See, e.g.*, *West v. Cal. Servs. Bureau, Inc.*, No. 16-CV-3124-YGR, 2017 WL 6316823, at *10 (N.D. Cal. Dec. 11, 2017) (certifying over the defendant's objection a "wrong number" TCPA class); *Johnson v. Navient Solutions, Inc.*, 315 F.R.D. 501 (S.D. Ind. 2016) (same); *Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303, 306 (S.D. Cal. 2015) (same); *Johnson v. NPAS Sols., LLC*, No. 9:17-CV-80393, 2017 WL 6060778, at *1 (S.D. Fla. Dec. 4, 2017) (certifying for settlement purposes a "wrong number" TCPA class); *Reid v. I.C. Syst. Inc.*, No. 2:12-cv-02661-ROS, Doc. 230 (D. Ariz. Nov. 9, 2017) (same); *Munday v. Navy Fed. Credit Union*, No. SACV151629JLSKESX, 2016 WL 7655807, at *12 (C.D. Cal. Sept. 15, 2016) (same); *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-CV-2424-T-23JSS, 2016 WL 6908118, at *1 (M.D. Fla. Nov. 22, 2016) (Merryday, J.) (same); *Picchi v. World Fin. Network Nat'l Bank, N.A.*, No. 11-cv-61797, Doc. 131 (M.D. Fla. Jan. 30, 2015); *accord McMillion v. Rash Curtis & Assocs.*, No. 16-CV-03396-YGR, 2017 WL 3895764, at *10 (N.D. Cal. Sept. 6, 2017) (certifying, over the defendant's objection, two "non-debtor" TCPA classes).

II. Plaintiff satisfies the requirements of Rule 23(a).

A. The proposed class is so numerous that joinder of all members is impracticable.

Rule 23(a) requires that a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "As a general rule, a group of more than forty satisfies the numerosity requirement of Rule 23 . . . ." *Collins v. Erin Capital Mgmt., LLC*, 290 F.R.D. 689, 694 (S.D. Fla. 2013).

To satisfy numerosity, however, "[p]arties seeking class certification do not need to know the precise number of class members," rather, they may "make reasonable estimates with support as to the size of the proposed class." *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 696 (S.D. Fla. 2004). In turn, "[t]he court may make commonsense assumptions in order to find support for numerosity." *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 605 (S.D. Fla. 2002) (citing *Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983)).

Here, during the proposed class period, PRA placed calls, on behalf of Walmart, to more than 20,000 unique telephone numbers that it designated as wrong numbers. *See supra*, Statement of Facts, Section VIII. Thus, the class is sufficiently numerous such that joinder is impracticable.

B. Questions of law and fact are common to all members of the proposed class.

Rule 23(a)(2) requires the existence of common questions of law or fact. Fed. R. Civ. P. 23(a)(2). Commonality mandates "only that there be questions of law or fact common to the class." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013). A plaintiff can therefore satisfy commonality by presenting a single common claim. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011).

This case presents a host of common questions. First, whether PRA placed calls via an automatic telephone dialing system is a common question. *See Murphy*, 2013 WL 6865772, at *4.

To be sure, PRA utilized TCN to place calls to each class member. *See supra,* Statement of Facts, Section III. Accordingly, whether TCN's dialer, as used by PRA, is an automatic telephone dialing system as defined by the TCPA is a question that results in an answer common to all members of the proposed class. *See Cabrera v. Gov't Emps. Ins. Co.*, No. 12-61390-CIV, 2014 WL 11894430, at *3 (S.D. Fla. Sept. 29, 2014) (finding that "common questions . . . apt to drive the resolution of the case, includ[e] (1) whether [the defendant] placed the calls at issue; [and] (2) whether it did so using an automated dialing system or prerecorded or artificial voice").[4]

Second, whether Walmart is liable for calls made by PRA on its behalf and at its direction, is a common question to all class members.

Third, that each class member is entitled to the same statutorily mandated relief under 47 U.S.C. § 227(b)(3)(B), gives rise to another common question. *See Gehrich v. Chase Bank USA, N.A.*, No. 12 C 5510, 2016 WL 806549, at *4 (N.D. Ill. Mar. 2, 2016) ("Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 251 (N.D. Ill. 2014) ("Those who are members of one of the proposed classes by definition received the same calls . . . made by or for one of the defendants, using the same artificial or prerecorded voice technology. This is a common alleged injury presenting a common question . . . . Here there is a common injury, resulting from receipt of the allegedly offending calls . . . . The Court likewise determines that there are questions of law or fact common to each class member.").

[4] *See also Legg v. Voice Media Grp., Inc.*, No. 13-62044-CIV, 2014 WL 1766961, at *4 (S.D. Fla. May 5, 2014) ("[W]hether [the defendant] used a system to send its text messages that was an automatic telephone dialing system within the meaning of the TCPA is an issue susceptible to common proof that is central to the resolution of each class member's claims."); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 104 (N.D. Ill. 2013); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 567 (W.D. Wash. 2012).

Finally, another question common to all class members is whether liability for calls placed to wrong or reassigned telephone numbers attaches under the TCPA. *See Osorio*, 746 F.3d at 1250-52; *Soppet, LLC*, 679 F.3d at 641; *see also* 30 FCC Rcd. 7961, 2015 WL 4387780.

C. Plaintiff's claims are typical of the claims of the members of the proposed class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties be typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[T]ypicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Cooper v. So. Co.*, 390 F.3d 695, 713 (11th Cir. 2004). "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

Here, Plaintiff and the members of the proposed class were each harmed in the same way by PRA's and Walmart's common practice: the use of prerecorded calls to cellular telephone numbers in an attempt to reach persons other than the intended recipients of their calls. Moreover, as PRA indisputably placed multiple calls to Plaintiff's cellular telephone number, on behalf of Walmart, that were intended for someone other than Plaintiff, Plaintiff's claims are typical of those of the class. *See supra*, Statement of Facts, Sections IV-V. Indeed, Plaintiff's cellular telephone number appears on PRA's wrong number list. *See id.*, Sections VII-VIII.

Plaintiff's claims are therefore typical of the claims of the members of the proposed class. *See Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 696 (S.D. Fla. 2015) ("The Court finds that the proposed class representative satisfies the typicality requirements because Plaintiff, like each of the class members, was purportedly sent the same fax and each class member's claim is based on the same legal theory and same set of facts as Plaintiff's claim."); *Cabrera*, 2014 WL

11894430, *4 ("The Court finds that Plaintiff's claims are typical of the proposed cellular-only class because his claims arise from the same practice—[the defendant's] use of LiveVox to place calls to cellular numbers—and are premised on the same TCPA violation."); *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679, 690 (S.D. Fla. 2014) (finding typicality in a TCPA matter where the named plaintiff received the same communication as did the members of the class).

D. Plaintiff, and her counsel, will fairly and adequately protect the interests of the members of the proposed class.

Rule 23(a)(4) requires that the representative plaintiff fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). "This adequacy of representation analysis encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

Here, Plaintiff is capable of, has, and will continue to protect the interests of the members of the proposed class. From the outset, Plaintiff has been, and remains to date, very involved in this matter. She communicates regularly with her counsel, responded to PRA's discovery requests, and is prepared to make all necessary decisions involving this case with class members' best interests in mind. Goins Dec. at ¶¶ 13-19.

As well, Plaintiff retained counsel experienced and competent in class action litigation, including that under the TCPA. *See* Declaration of Michael L. Greenwald, ¶¶ 9-10, attached as Exhibit 4. Indeed, courts have not only appointed GDR class counsel in dozens of consumer protection class actions in the past few years alone, but many have also taken care to highlight GDR's wealth of experience and skill. *See id.* at ¶¶ 12-16; *see also James*, 2016 WL 6908118, at *1 (noting that "Michael L. Greenwald, James L. Davidson, and Aaron D. Radbil of Greenwald Davidson Radbil PLLC, each . . . has significant experience litigating TCPA class actions.").

III. Plaintiff satisfies the requirements of Rule 23(b)(3).

A. The questions of law and fact common to the members of the proposed class predominate over any questions affecting only individual class members.

"To satisfy the predominance requirement, the named plaintiff must establish that the issues subject to generalized proof in the class action, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *Manno,* 289 F.R.D. at 689. However, "[i]t is not necessary that all questions of fact or law be common; it is enough that there exist some common questions and that they predominate over individual questions." *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 666 (S.D. Fla. 2014).

Here, to establish a TCPA violation, Plaintiff, and the members of the proposed class, must show that: (1) PRA placed calls, on behalf of Walmart; (2) to their cellular telephone numbers; (3) by using an automatic dialing system or an artificial or prerecorded voice. *Mohamed,* 320 F.R.D. at 315. As such, "whether [Defendant] used an automated telephonic dialing system to [place the subject calls] and caused injuries to the class members is an issue that predominates over those that may be considered individualized." *Id*.; *see also Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 (explaining that "[t]he facts necessary to establish liability [under the TCPA] relate to Defendant's common course of conduct and the transmissions of the [communications]," and finding that "common issues predominate over any individual issues that may arise"); *accord Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290 BEN NLS, 2013 WL 444619, at *4 (S.D. Cal. Feb. 5, 2013) ("The central inquiry is whether Wells Fargo violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met.").

Moreover, that the members of the proposed class are unintended recipients of PRA's calls, who necessarily did not provide Walmart or PRA with prior express consent to place calls to their cellular telephone numbers, means that prior express consent does not serve as an obstacle to

predominance, as it might in other scenarios arising under the TCPA. *See Johnson,* 315 F.R.D. at 502 (certifying, over the defendant's objection, a "wrong-number" TCPA class, and rejecting the defendant's contention that individual issues would "overwhelm the litigation and destroy the required commonality of facts");[5] *Abdeljalil*, 306 F.R.D. at 311 (rejecting the defendant's argument that consent defeated predominance in connection with a TCPA "wrong-number" class, and finding that "plaintiff has met his burden of demonstrating that questions of fact and law predominate over individualized issues"); *see also C-Mart, Inc.*, 299 F.R.D. at 691 (explaining that "[w]ith consent and application of the [established business relationship] Safe Harbor being eliminated as criteria that serve to define (and defeat) the class . . . . predominance is satisfied").

No matter, even if issues regarding prior express consent existed—they do not—common issues would still predominate. *See Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 ("The Court agrees with the Court in *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 338 (E.D. Wis. 2012), *aff'd,* 704 F.3d 489 (7th Cir. 2013), that any issues relating to whether any of the recipients gave permission to receive faxes prior to transmission or whether any of the plaintiffs had an established business relationship with the defendant can be handled within the framework of a class action.").

As Judge Merryday noted in *James*: "Also, the class satisfies Rule 23(b)(3)'s predominance requirement. Class-wide proof can answer the predominant questions (whether Chase auto-dialed each person and whether each call violates the TCPA). The determination whether the TCPA's

[5] Noteworthy, the individual issues that the defendant listed, which the court noted would not predominate over common issues, included: "difficult damage calculations, individual determinations of who the telephone user was, when the call was made and proof that [the defendant] actually made the calls . . . difficult[y] [in] determining the identity of users . . . [and] the distinct possibility that every record marked as a wrong number may not have actually been a wrong number." *Johnson*, 315 F.R.D. at 502.

'emergency-call' exception or the purported one-call 'safe harbor' relieve Chase of liability might require individualized proof, but a small number of individualized questions fails to destroy predominance." 2016 WL 6908118, at *1.

B. A class action is superior to other available methods for the fair and efficient adjudication of this matter.

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

In general, litigating TCPA claims as part of a class action is superior to litigating them in successive individual lawsuits. *See Reliable Money Order, Inc.*, 281 F.R.D. at 339 ("[M]any courts have found class actions to be an appropriate method of adjudication of TCPA violations."); *see also, e.g., Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 ("[T]he Court finds that a class action is superior to other methods for adjudicating the putative class members' TCPA claims."). This is especially true here, where the class likely has thousands of members.

As well, here, no one class member has an interest in controlling the prosecution of this action. Simply, the claims of all members of the proposed class are identical, they arise from the same standardized conduct, and they result in uniform damages calculated on a per-violation basis. *See James*, 2016 WL 6908118, at *1 ("This class action, which resolves the controversy more fairly and efficiently than a series of individual actions, satisfies Rule 23(b)(3)'s superiority requirement. Because the TCPA permits a maximum award of $500 absent a willful violation, each class member lacks a strong financial interest in controlling the prosecution of his action.").

Moreover, absent a class action, thousands of claims like Plaintiff's—all of which stem from PRA's identical conduct in autodialing wrong numbers on behalf of Walmart—will likely go un-redressed. *See Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442, 446 (N.D. Ohio 2012) ("Under the TCPA, each individual plaintiff is unlikely to recover more than a

small amount (the greater of actual monetary loss or $500). Individuals are therefore unlikely to bring suit against [the defendant], which makes a class action the superior mechanism for adjudicating this dispute."); *Green v. Serv. Master On Location Servs. Corp.*, No. 07 C 4705, 2009 WL 1810769, at *3 (N.D. Ill. June 22, 2009) ("[R]esolution of the issues [under the TCPA] on a classwide basis, rather than in thousands of individual lawsuits (which in fact may never be brought because of their relatively small individual value), would be an efficient use of both judicial and party resources."); *accord Abdeljalil*, 306 F.R.D. at 312.

Additionally, there are unlikely to be serious difficulties in the management of this case as a class action.[6] This is, in part, because PRA has in its possession (and has produced to Plaintiff) not only each telephone number to which it placed calls, on behalf of Walmart, during the class period, but also a list of each telephone number to which it attached a wrong number designation. And based on this information, the names and addresses of the associated individuals can be identified in a practical and efficient manner. *See* Expert Report of Anya Verkhovskaya, attached as Exhibit 5. *Accord Birchmeier*, 302 F.R.D. at 254 (rejecting argument that class was not

[6] Even if real manageability concerns did exist—they do not—failure to certify a class action under Rule 23(b)(3) solely on manageability grounds is disfavored. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663-64 (7th Cir. 2015) ("[B]efore refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be challenging to identify particular class members. District courts have considerable experience with and flexibility in engineering solutions to difficult problems of case management. In addition, a district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation. . . . Under this comparative framework, refusing to certify on manageability grounds alone should be the last resort."), *cert. denied*, 136 S. Ct. 1161 (2016); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (holding that refusal to certify a class "on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule").

manageable because it would allegedly be either impossible, or costly and onerous, to obtain the identities of the subscribers for the phone numbers of 930,000 proposed class members).

A class action is therefore the superior method to adjudicate this controversy. *See Manno*, 289 F.R.D. at 690 ("In addition, the Court finds that the large number of claims, along with the relatively small statutory damages, the desirability of adjudicating these claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of these claims, all indicate that [a] class action would be the superior method of adjudicating the plaintiffs' claims under the . . . TCPA.").

IV. The proposed class is ascertainable.

A. A class defined by objective criteria—as the proposed class is—is ascertainable.

The focus of ascertainability is on "the adequacy of the class definition itself," not "on whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Mullins* 795 F.3d at 659; *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017) (explaining that "the district court did not err in declining to condition class certification on Plaintiffs' proffer of an administratively feasible way to identify putative class members"), *cert. denied sub nom. Conagra Brands, Inc. v. Briseno*, No. 16-1221, 2017 WL 1365592 (U.S. Oct. 10, 2017); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) ("we considered—and rejected—the defendants' claim that the class properly could [not] be certified without . . . 100% accuracy"), *cert. denied*, 136 S. Ct. 1493 (2016).

An ascertainable class, therefore, is simply one for which the class definition is based on objective criteria:

> Historically, courts analyzing ascertainability have required something quite narrow. "Ascertainability has traditionally been defined as the existence of a class whose members can be identified by reference to objective criteria in the class definition." Daniel Luks, *Ascertainability in the Third Circuit: Name That Class*

> *Member*, 82 Fordham L. Rev. 2359, 2369 (2014). The leading class action treatise similarly notes that "courts essentially focus on the question of whether the class can be ascertained by objective criteria." Newberg on Class Actions § 3.3 (5th ed.)[.]

Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 952 (11th Cir. 2015) (Martin., J, concurring); *see also Briseno*, 844 F.3d at 1124 (affirming the district court's holding that "it was sufficient that the class was defined by an objective criterion"); *accord Rikos*, 799 F.3d at 525 ("[F]or a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria."); *Mullins*, 795 F.3d at 659 ("Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria.").

More particularly, a class is ascertainable where its definition is (1) not amorphous or imprecise, but clearly defined, (2) not limited by subjective criteria, but rather objective criteria, and (3) not a fail-safe class, or one defined in terms of success on the merits. *See id*. at 659-60; *accord C-Mart, Inc.*, 299 F.R.D. at 687.

Here, the class definition is not vague. Instead, it identifies a particular group of individuals harmed in a particular way during a specific period of time. Nor is the class definition limited by subjective criteria. For example, it is not made up of "persons frustrated by PRA's autodialed calls." Nor does the class definition create a fail-safe class, such as "all persons who have a valid TCPA claim against PRA and Walmart." So if PRA or Walmart prevail, *res judicata* will bar class members from re-litigating their claims. Accordingly, the proposed class is ascertainable.

B. In the context of a TCPA class action, records of telephone numbers to which a defendant placed calls—as exist here—constitute objective criteria by which a class can be identified.

While a class defined by reference to objective criteria is all that is required to meet the ascertainability requirement, the existence of a list of telephone numbers to which a defendant

placed calls makes membership in a TCPA class readily identifiable. *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 997 (8th Cir. 2016) ("[F]ax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable."); *Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014) ("[T]he record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement."); *Mey v. Venture Data, LLC*, No. 14-123, Doc. 247 at 26 (N.D. W. Va. June 6, 2017) (certifying a TCPA class, and pointing out that "numerous reliable databases exist from which a class administrator can accurately identify names and addresses based on a list of telephone numbers"); *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 193560, at *2 (E.D. Mo. Jan. 18, 2017) (finding a TCPA class "sufficiently ascertainable" based on list of telephone numbers); *Avio, Inc. v. Alfoccino, Inc.*, 311 F.R.D. 434, 442 (E.D. Mich. 2015) (finding a TCPA class "sufficiently ascertainable" because "Plaintiff possesses a list of numbers to which the fax was sent, and it is certainly feasible to determine which individuals and businesses received the faxes at those numbers").

Here, PRA has produced records of all telephone numbers it called during the class period via TCN on behalf of Walmart, as well as a list of the telephone numbers to which it attached a wrong number designation. As a result, the proposed class—which is defined by reference to objective criteria—is readily identifiable.[7]

[7] The court's opinion in *Tillman v. Ally Fin. Inc.*, No. 16-313, 2017 WL 7194275 (M.D. Fla. Sept. 29, 2017), is thus inapposite. There, Judge Steele refused to certify a proposed TCPA class defined by reference to Ally's internal "wrong number" and "do not call" codes, which likely swept in many of Ally's own customers who indicated that their telephone numbers were no longer correct, or who asked Ally not to call certain numbers. 2017 WL 7194275, at *3-4. Those customers, the reasoning went, might have been subject to consent defenses, which the court felt defeated commonality and predominance. *Id*. at *7. But there is no such concern here, as the proposed class of unintended call recipients excludes, by definition, anyone PRA and Walmart

C. In any event, requiring that every member of a class be identifiable at the class certification stage runs contrary to the plain language of Rule 23.

Rule 23's notice provision states that for any class certified under Rule 23(b)(3), a court must direct to the class members the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Thus, embedded in Rule 23 is a specific acknowledgment that some class members might not be identifiable. *See Briseno*, 2017 WL 24618, at *7 (noting Rule 23 "recognizes it might be impossible to identify some class members for purposes of actual notice") (quoting *Mullins*, 795 F.3d at 665). As such, interpreting Rule 23 to permit class certification only where each member of the class can be identified is irreconcilable with the text of Rule 23.

And that class membership need only "be determined with reasonable—but not perfect—accuracy" should not be surprising, given that "there is no need to identify [a class's] individual members in order to bind all members by the judgment." *Rikos*, 799 F.3d at 526; *accord Bias v. Wells Fargo & Co.*, 312 F.R.D. 528, 539 (N.D. Cal. 2015) (holding that "ascertainability does not demand . . . mathematical precision."). In fact, "[w]here the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable." *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975).

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intended to reach, and from whom PRA or Walmart obtained prior consent. No matter, as described below, even if consent were a concern here—it is not—it would not overwhelm Rule 23.

In addition, unlike here, Ally did not track wrong numbers, which was a factor in the decision to determine it may be an individual issue whether someone was a wrong number in that case. However, that is not the case here, where PRA has already compiled a list of wrong numbers, which is one of the reasons why the court in *Sliwa v. Bright House Networks, LLC*, No. 2:16-cv-235-FtM-29MRM, ECF No. 124 at 14-15 (M.D. Fla. Feb. 14, 2018) (attached as Exhibit 6), distinguished *Tillman* when it granted a motion to compel class discovery in a TCPA case pending before Judge Steele.

D. The heightened ascertainability standard—which engrafts an "administratively feasible" requirement onto Rule 23—has not only receded, but every court of appeals to address in a published opinion its initial emergence has rejected it.

To the extent the Eleventh Circuit's unpublished opinion in *Karhu*—which is "not considered binding precedent," *see* U.S. Ct. of App. 11th Cir. Rule 36-2—conflicts with the Sixth, Seventh, Eighth, and Ninth Circuits' ascertainability-related opinions in *Rikos*, *Mullins*, *Sandusky*, and *Briseno*, it should not be considered persuasive. This is because the Eleventh Circuit's opinion in *Karhu* rests, in large part, on the short-lived heightened ascertainability standard first invoked by the Third Circuit in *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012). The Third Circuit has since, however, not only criticized the heightened ascertainability standard it applied in *Marcus*, but also walked back the standard significantly.

Indeed, almost immediately after the Third Circuit issued its opinion in *Marcus*, Judge Ambro, who authored the opinion, began to chip away at the heightened ascertainability standard:

> Because [the ascertainability doctrine] is a creature of common law, I believe that we should be flexible with its application, especially in instances where the defendant's actions cause the difficulty. Where, as here, a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the consumers who make up that class should not be made to suffer.

Carrera v. Bayer Corp., No. 2-08-cv-04716, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing *en banc*).

Subsequently, in reversing a district court's denial of class certification based on ascertainability grounds, the Third Circuit, in *Byrd v. Aaron's Inc*., clarified that "ascertainability only requires the plaintiff to show that class members can be identified." 784 F.3d 154, 165 (3d Cir. 2015). It additionally took the opportunity to critique the defense bar for "seiz[ing] upon [the] lack of precision [in the requirement] by invoking the heightened ascertainability requirement with increasing frequency in order to defeat class certification." *Id*. at 161-62.

And through a concurring opinion in *Byrd*, Judge Rendell noted that, given "the lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus . . . the time has come to do away with this newly created aspect of Rule 23." *Id.* at 172 (Rendell, J., concurring). Judge Rendell also refuted each of the rationales offered in defense of the heightened ascertainability standard and concluded that the requirement "contravenes the purpose of Rule 23 and . . . disserves the public." *Id*. at 175-77.

Then, in *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, the Third Circuit rebuffed one of the very premises on which the now-defunct heightened ascertainability standard laid:

> Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership. Rule 23 does not require an objective way of determining class membership at the certification stage, but only that there be objective criteria for class membership and a reliable and administratively feasible means of determining whether these criteria are met. . . . The conclusion that affidavits in combination with [the defendant's] database categorically failed to meet the ascertainability standard was inconsistent with these precedents.

67 F.3d 434, 440 (3d Cir. 2017).[8]

Following suit, each circuit court of appeals to address ascertainability in a published opinion since *Marcus* has flatly rejected the Third Circuit's heightened ascertainability standard. *See Mullins*, 795 F.3d at 658 ("We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to

[8] This undercuts a central assumption on which the majority opinion in *Karhu* rests, which is that "a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits), without first establishing that self-identification is administratively feasible and not otherwise problematic." *Karhu*, 621 F. App'x at 948.

certify classes."); *Rikos,* 799 F.3d at 525 (citing *Mullins* in declining to follow the Third Circuit's heightened ascertainability approach); *Sandusky Wellness Ctr., LLC,* 821 F.3d at 996 ("Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class must be adequately defined and clearly ascertainable."); *Briseno*, 844 F.3d at 1123.

E. Notwithstanding, even if Plaintiff were required to show an administratively feasible method by which potential class members could be identified, she has done so.

PRA maintains—and has produced—records of all telephone numbers it called, on behalf of Walmart, and designated as wrong numbers. *See supra*, Statement of Facts, Section VIII. Based on this information, the names and addresses of the individuals associated with these telephone numbers can be identified in an administratively feasible manner. *See* Ex. 5; *accord Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 694 ("The proposed class definition here is similar to those approved by numerous courts in other . . . TCPA class actions. The majority of courts to consider the issue have concluded that such a definition, supported by a report like [the plaintiff's expert's] report prepared for this case, satisfies Rule 23's implicit ascertainability and administrative feasibility requirement.") (collecting cases); *Physicians Healthsource, Inc.*, 2014 WL 7366255, at *4 ("[The plaintiff's expert's] methodology is sound and reliable, and it provides a manageable process for identifying class members using objective criteria . . . . Therefore, the class is ascertainable."); *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) ("Where certain class members' names and addresses cannot be determined with reasonable efforts, notice by publication is generally considered adequate."), citing Fed. R. Civ. P. 23(c)(2)(B); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 394 (M.D.N.C. 2015) (a plaintiff is not required to prove "without a doubt," that every putative class member would be able to recover to satisfy the ascertainability requirement).

In *Cordoba v. DIRECTV, LLC*, the court was not persuaded by DIRECTV's argument that the class was not ascertainable because the call data may be overinclusive. 320 F.R.D. 582, 597-98 (N.D. Ga. 2017) (certifying TCPA class). The *Cordoba* court reasoned that excusing the defendant of its liability for flagrantly violating the TCPA by not maintaining adequate records, resulting in the inability to "identify which individuals on the list" were called, would create the same "perverse incentive" discussed in *Krakauer*. *Id.* at 597 (citing *Krakauer*, 311 F.R.D. at 398 (refusing to permit companies to create an almost foolproof shield against class liability by keeping insufficient records)). As the court in *Krakauer* explained:

> If the Court were to deny certification because Dish does not keep an accurate list as the regulations require and Dish itself cannot identify which individuals on the list actually requested not to be called, it would create the perverse incentive for entities to keep poor records and to violate the TCPA's clear requirement that such a list be kept.

311 F.R.D. at 398.

And should this Court certify the class, Plaintiff will facilitate notice in a Court-approved manner to the persons associated with these wrong number designations. If the Court determines it necessary, these class members can then submit a claim to participate in this case. That is, class members can identify themselves, by way of a sworn statement made in connection with a claim form sent to them as part of a notice program, as an unintended recipient of PRA's calls. *See Mullins*, 795 F.3d at 669 ("a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.").[9]

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[9] *See also Briseno*, 844 F.3d at 1132 (rejecting the argument that "self-serving affidavits" cannot be used to identify class members); *Rikos*, 799 F.3d at 526-27 (noting the propriety of using affidavits to identify class members); *accord City Select Auto Sales Inc.*, 67 F.3d at 440 ("The conclusion that affidavits in combination with [the defendant's] database categorically failed to meet the ascertainability standard was inconsistent with these precedents."). Noteworthy, the Third

Walmart and PRA, likely, will criticize self-identification by affidavit. But arguments repudiating self-identification necessarily fall flat:

> A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits, subject as needed to audits and verification procedures and challenges, to identify class members. *** The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward. A district court can tailor fair verification procedures to the particular case, and a defendant may need to decide how much it wants to invest in litigating individual claims.

Mullins, 795 F.3d at 669.[10]

Significant, then, is that Walmart and PRA possess the information needed to verify or contest the statement of any person claiming to be an unintended call recipient. To start, PRA maintains (and has produced) records of all telephone numbers called on behalf of Walmart. Thus, it can be easily confirmed whether PRA made a call on behalf of Walmart to a particular telephone number. Second, PRA and Walmart possess the names of the persons they intended to contact at

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Circuit's holding in *City Select Auto Sales Inc.* undercuts Judge Goldberg's statement in *Karhu* that "a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits), without first establishing that self-identification is administratively feasible and not otherwise problematic." 621 F. App'x at 948. This is important because in making his statement, Judge Goldberg—a United States Court of International Trade judge, sitting by designation—relied on an earlier Third Circuit opinion disapproving of affidavits as a means to identify class members.

[10] *See also Byrd*, 784 F.3d at 173-74 (Rendell, J. concurring) ("It is up to the judge overseeing the class action to decide what she will accept as proof when approving the claim form. Could not the judge decide that, in addition to an individual's 'say so' that he is a member of the class, the claimant needs to submit an affidavit from another household member or from his doctor corroborating his assertion that he did, in fact, take Bayer aspirin? Is that not permissible and appropriate?").

each particular number. Should a claimant's name match the intended recipient of PRA's calls, PRA would have good reason to challenge class membership.[11]

To the extent additional concerns remain, class members can produce records from their cellular providers documenting that (a) their phone number is wireless and (b) the proposed class member is the subscriber.[12, 13] Separately, if the name that public record databases associate with the telephone number matches the name that PRA's records associate with the telephone number, PRA would have more evidence to challenge class membership.[14] Thus, any due process concerns are unavailing. *See Briseno*, 844 F.3d at 1132 (explaining that the need for self-identification and

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[11] Even if self-identification by affidavit was not a permissible method to identify class members—it is—and even if this process, or a similar process, were required to identify class members on the front end—it is not—the need for "laborious" efforts to identify class members, short of mini-trials, does not preclude certification. *See Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 560 (D. Md. 2006); *see also Cummings v. Starbucks Corp.*, No. 12-6345, 2014 WL 1379119, at *16 (C.D. Cal. Mar. 24, 2014) (finding a proposed class ascertainable despite the defendant's argument that it would be "laborious" to review individual personnel files).

[12] Unlike cases involving low-cost products for which most consumers would not have proof of purchase, call recipients can prove they received calls from PRA by producing call records and documents showing they are the subscriber to the telephone number called, as Plaintiff did here. Thus, even if affidavits were insufficient—they are not—proposed class members can readily obtain supporting evidence from their telephones and wireless carriers. *Krakauer*, 311 F.R.D. at 394 (certifying TCPA class); *Krakauer*, WL 3206324, at *3-10 (M.D.N.C. July 27, 2017) (outlining claims process).

[13] Even if class members could not this, the ability to identify whether a particular telephone number is assigned to a cellular telephone service on a given historical date is not complicated. Indeed, vendors such as Tel-Lingua offer services capable of querying the historical local number portability database. *See, e.g.*, Tel-Lingua, *LNP Lookup Application*, available at *https://www.tel-lingua.com/demo_lnp-lookup.php* (last accessed Mar. 5, 2018). Pertinent to this matter, and for the sake of example, when Plaintiff's telephone number in question is inputted into Tel-Lingua's LNP Lookup Application, a "wireless" designation is returned for each of the respective dates on which PRA, on behalf of Walmart, placed calls to her cellular telephone number.

[14] *See, e.g., https://www.risk.neustar/compliance-solutions/tcpa* (last visited Mar. 5, 2018) (statement from Neustar that it can "[i]nstantly verify whether a specific phone number is wireless or wireline to learn if TCPA regulations apply – and verify the identity of the current subscriber to determine if they are the same party who provided you with consent.").

related discovery from absent class members, if necessary, does not disturb a defendant's due process rights, and noting that "there is no due process right to a *cost-effective* procedure for challenging every individual claim to class membership").[15]

Conclusion

Plaintiff respectfully requests that this Court certify the proposed class, appoint Plaintiff as the class representative, and appoint GDR as class counsel.

Date: March 6, 2018

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on March 6, 2018, via the Court Clerk's CM/ECF system, which will provide notice to all counsel of record.

/s/ Michael L. Greenwald
Michael L. Greenwald

[15] Even if the proposed class were potentially over-inclusive—which it is not—it remains ascertainable. *See Nepomuceno v. Midland Credit Mgmt., Inc*., No. 14-05719, 2016 WL 3392299, at *4 (D.N.J. June 13, 2016) ("Whether the proposed definition includes individuals who did not receive Defendant's letter does not prevent the individuals in the definition from being identified and, therefore, does not affect whether Plaintiff has satisfied the ascertainability requirement."); *see also Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct."); *Krakauer,* 311 F.R.D. at 394 (holding in a TCPA class action that the plaintiff was "not required to prove that, without a doubt, every single person on the class list would be able to recover to satisfy the ascertainability requirement.").