UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONA HUNTER and ANNE MARIE VILLA, on behalf of themselves and all others similarly situated, Plaintiffs, v. TIME WARNER CABLE INC., Defendant.	15 Civ. 6445 (JPO)(JLC) Oral Argument Requested

BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS AND AGENCY MATERIALS

OTHER AUTHORITIES

INTRODUCTION

[redacted] Plaintiffs seek these astronomical damages based on telephone calls that TWC attempted to place to its own customers: There is no dispute that *every* call TWC placed was intended to reach an existing customer at a telephone number provided by the customer, and with that customer's "prior express consent." [redacted]—*i.e.*, because some of TWC's customers' phone numbers had been disconnected and "reassigned" to new individuals by the time of the calls. Actually determining whether TWC called the wrong person without his or her consent requires identifying who answered the phone and what that person's relationship was to TWC and/or TWC's customer. But it impossible to do so using non-individualized methods—an obvious problem that causes individual issues to predominate over common ones, precluding class certification.

To attempt to overcome this problem, Plaintiffs attempted a shortcut. They tried to define the class in a way that, they argue (at 15-16), only includes individuals who did not consent to be called by TWC. They then purchased "reverse lookup" data from LexisNexis, which Plaintiffs contend accurately identifies the "customary user" of a telephone number at the time TWC placed a given call. Their expert then developed a "methodology" that compares the name of that purported customary user to the name of TWC's customer in its outbound call log. Whenever there is a "match" between those names, the individual identified by LexisNexis is presumed to have consented to the call. And whenever there is a so-called "mismatch," Plaintiffs say that TWC lacked consent to make the call, the individual identified by LexisNexis properly belongs in the class, and that liability automatically ensues because an "artificial or prerecorded voice" must have played on the call.

Plaintiffs' methodology is riddled with defects, any one of which is sufficient to defeat class certification.

Plaintiffs Cannot Establish Predominance Because Their Methodology Does Not Overcome the Highly Individualized Issues of Consent, Liability, and Membership in the Class

Fundamental to a finding of "predominance" in this case is that Plaintiffs have identified a *reliable* methodology that avoids the necessity of [redacted] to determine who received a call without consent, and therefore who belongs in the class and to whom TWC may be liable. But Plaintiffs' methodology fails at the threshold because it is not possible to determine using non-individualized methods who received a call at any time in the past, or even who was the primary user of a phone at such a time. The FCC has explicitly recognized as much, which is why it recently decided to develop an official government database of reassigned numbers on a going-forward basis. *See infra* n.9. [redacted], even a cursory

examination of the data Plaintiffs obtained from LexisNexis demonstrates that it is non-comprehensive and incapable of identifying historical "customary users" of phone numbers.

These problems above are not merely theoretical: They *demonstrably* render Plaintiffs' proposed methodology unreliable to a remarkable degree:

- Under Plaintiffs' methodology, one of the named Plaintiffs (Ms. Villa) *is not a member of the class*, [redacted]
- Plaintiffs' expert relies on two "illustrative" examples of supposed wrong number recipients identified by his methodology. After an extensive, individualized investigation, TWC can show that in fact it had consent to place the calls in question.
- To ensure these results are not abnormal, TWC's expert generated a random sample of 75 of Plaintiffs' alleged recipients of wrong number calls. After a time-consuming and burdensome individualized investigation involving examination of customer accounts, inbound call records, payment records, call recordings, phone calls to the numbers, and results reported by a private investigator, TWC can show that Plaintiffs' methodology reports inaccurate results for at least 65 of those 75—*an error rate of at least 86%.*

TWC will conduct these same and additional individualized inquiries at trial, including potentially calling each TWC subscriber and cross-examining each class member in accordance with its due process rights. A methodology with an error rate of *at least* 86% simply cannot be used to foreclose those rights consistent with the Constitution and applicable precedent.

Numerous Additional Individualized Issues Remain that Also Preclude a Finding of Predominance

Plaintiffs face a host of additional highly individualized factual inquires that cannot be addressed on a class-wide basis:

- Even assuming Plaintiffs' methodology could accurately determine the customary user of a phone number, the mere fact that individual's name does not match TWC's customer's name does not mean that TWC lacked consent to place the call. To name just one obvious example, the two individuals may have some relationship, such as where a TWC account is in a wife's name and the phone number listed on the account is primarily used by her spouse. Where such a relationship is present, it is obvious that the phone number at issue was not randomly reassigned to a stranger, [redacted]. Instead, TWC almost invariably would have held consent from the related party, which can be granted by *any* "customary user" of the telephone at issue or through an intermediary (like TWC's customer). Plaintiffs' expert made no effort to verify whether or not such relationships existed and admits it would not be practical to do so on a class-wide basis.

- Even if Plaintiffs' methodology could accurately report that TWC reached a "wrong number," that does not mean that the recipient could properly belong in the class or have a viable claim as part of the class. That is because the alleged wrong number recipient identified by LexisNexis may be a TWC customer. Under TWC's subscriber agreement, TWC's customers grant contractual consent to contact them *for any purpose*, including to receive "wrong number" calls. And TWC's customers also agree to a number of other limitations on claims, including to litigate only in arbitration (where the arbitrator decides questions of arbitrability) and not to pursue relief as part of a class. Identifying whether the individual identified by LexisNexis is a current or former TWC customer is a difficult task that also cannot be completed on a class-wide basis.

- Plaintiffs seek to impose liability only under the TCPA's prohibition on the use of an "artificial or prerecorded voice." But for liability to attach under that prohibition, such a voice "must actually play" on a call. *Ybarra v. Dish Network, LLC*, 807 F.3d 635, 640 (5th Cir. 2015).

It is not possible to determine on a class-wide basis, however, whether such a voice played on any given call—only that it *might* have played. The evidence for Plaintiff Hunter demonstrates that TWC's own records cannot be relied upon as proof that a voice played on any given call.

- Because this case does not involve telemarketing calls, there can be liability under the "artificial or prerecorded voice" prohibition only for calls placed to *cell phones*. Plaintiffs and their experts entirely overlook this basic limitation, however, and fail to provide any methodology to identify whether a number called by TWC was assigned to a cell phone at the time of the call.

- In addition, Plaintiffs need to *prove* that all members of the class actually experienced Article III injury, but cannot do so on a non-individualized basis. Likewise, Plaintiffs seek treble damages of $1,500 per call for "willful[] or knowing[]" violations of the TCPA, but proving entitlement to such damages also would require an individualized inquiry into what TWC knew about each phone number when it placed each call.

Plaintiffs Failed To Demonstrate the Other Requirements To Certify a Damages Class

The same individualized issues that preclude a finding of predominance likewise preclude a finding of commonality. Here, there are no true "common questions" relevant to the putative class, and the purported common questions that Plaintiffs proffer, such as "whether Defendant called class members using an artificial or prerecorded voice" and "whether Defendant had prior express written consent" are incapable of common *answers* for all the same reasons discussed above. The necessity for so many individualized assessments likewise shows that proceeding as a class action would not be superior to individualized adjudication. Indeed, Plaintiffs' methodology is so wildly inaccurate that it almost certainly would extinguish the claims of some individuals who *did* receive a rare "wrong number" call, by failing to identify those individuals as class members who should receive notice. Thus, the due process rights not just of TWC but the very

individuals Plaintiffs purport to represent are implicated. Individualized adjudication avoids these problems, and the substantial statutory damages available under the TCPA—$500 to $1,500 *per call*—provide an ample incentive to bring individual TCPA suits.

Plaintiffs Failed To Demonstrate the Requirements for an Injunctive Class

Certification of a class under Rule 23(b)(2) for injunctive relief also is barred because Plaintiffs face no realistic prospect of any future harm (*i.e.*, prospective future calls from TWC), and therefore lack standing to obtain prospective injunctive relief or to represent a class seeking such relief. And even if Plaintiffs did have standing, they have not identified a non-individualized methodology to identify which individuals are actually entitled to any injunctive relief in their favor, for the same reasons discussed above.

ARGUMENT

Under Rule 23(a), there are four prerequisites to class certification: "(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." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015). The Court conducts a "rigorous analysis" of whether plaintiffs have "in fact" proven each of the Rule 23 requirements by a preponderance of the evidence. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

To certify a class for damages in this context, a plaintiff must also satisfy the requirements of Rule 23(b)(3): "(1) predominance—'that the questions of law or fact common to class members predominate over any questions affecting only individual members'; and (2) superiority—'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Nextel*, 780 F.3d at 137. "Predominance" requires that "(1) resolution of any

material legal or factual questions … can be achieved through generalized proof, and (2) these [common] issues are more substantial than the issues subject only to individualized proof." *In re Petrobras Sec. Litig.*, 862 F.3d 250, 270 (2d Cir. 2017). The Court takes a "close look" at whether "common issues" "are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.*

Rule 23(b)(2) permits certification of a class for injunctive relief if the plaintiff shows that the defendant "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Here, Plaintiffs have failed to sustain their burden of proving that a class under either Rule 23(b)(3) or Rule 23(b)(2) can be certified.

I. INDIVIDUALIZED ISSUES PREDOMINATE, PRECLUDING CERTIFICATION OF A DAMAGES CLASS

Individual issues in this case plainly predominate over common ones, precluding certification. Plaintiffs seek to certify a class of all "individuals … who … *received* at least one call … where … they are not listed in Defendant's records as the intended recipient of the call." Motion, ECF No. 211 at 10.[1] And under 47 U.S.C. § 227(b)(1)(A)(iii), an individual's claim may proceed only if it can be shown for that individual that (1) TWC played an "artificial or prerecorded voice" on a call to him or her, (2) at a number assigned to a cellular telephone, (3) without first obtaining the "prior express consent" of the "called party." Here, neither class membership nor liability can be established [redacted].

[1] The full class definition is: "All individuals in the United States who (1) from October 16, 2013 to the date that class notice is disseminated, (2) received at least one call, (3) on either their cellular or residential telephone, (4) where Defendant placed the call using its IVR Platform, (5) the attempt status for the call in Defendant's call log is listed as 'Live_Voice' or 'Answering_Machine', and (6) they are not listed in Defendant's records as the intended recipient of the call." *Id.*

A. Insurmountable Individualized Issues of Consent, Liability, and Class Membership Preclude Certification

"[C]ourts must consider potential defenses in assessing the predominance requirement." *Myers v. Hertz Corp.*, 624 F.3d 537, 550-51 (2d Cir. 2010); *see also Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008). As applied to defenses, the predominance requirement is more than just a procedural requirement: "where individualized [questions] … predominate … certification is inappropriate and raises due process concerns for defendants." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 589, 595 (S.D.N.Y. 2013) (Oetken, J.) (explaining that "due process concerns imbue defendants with the right to defend each claim when [issues] are too individualized"). Even though a defendant will bear the burden of proving an affirmative defense at trial (like "prior express consent"), *Plaintiffs* bear the burden of showing that such defenses will not cause individualized issues to predominate over common ones. *Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *8 (N.D. Ill. Sept. 27, 2018); *Jacobs v. Quicken Loans, Inc.*, No. 15-81386-CIV, 2017 WL 4838567, at *2 (S.D. Fla. Oct. 19, 2017). "[C]lasses that require highly individualized determinations of member eligibility" also weigh against a finding of predominance. *In re Petrobras Sec. Litig.*, 862 F.3d at 278; *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 463 (S.D.N.Y. 2018).[2]

Here it is undisputed that TWC had consent to call every person it *intended* to call through the interactive voice response ("IVR") platform at issue. [redacted]

[2] Difficulty is determining class membership is also sometimes considered under the rubric of ascertainability. *See In re Petrobras Sec. Litig.*, 862 F.3d at 269 (ascertainability "asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries"). For all the same reasons discussed below, Plaintiffs' class is also not ascertainable.

[redacted] *Latner v. Mount Sinai Health Sys.*, 879 F.3d 52, 54 (2d Cir. 2018) (voluntary provision of phone number to caller also amounts to "prior express consent" to be called).[3] [redacted]

In evaluating predominance in a "wrong number" case like this, questions of class membership, liability, and consent are inextricably intertwined: If common proof cannot effectively exclude from the class those who have consented, mini-trials after class certification will necessarily be required to determine the absence of consent for each class member (and thus liability), precluding a finding of predominance. Plaintiffs acknowledge as much, as they admit their proposed class is by definition intended to exclude those who have consented to receive calls from TWC. Motion at 2 (seeking to represent a class of "consumers whom [TWC] called *without*

[3] After the D.C. Circuit's decision in *ACA International*, it is an open question how the FCC will construe the statutory term "called party," and in turn whether (in the context of calls to reassigned wireless numbers) TWC needed only the consent of the individual it *intended* to call, or instead needed the consent of the new subscriber or a "customary user" of the phone at the time the call was received. The FCC's 2015 Order determined that "called party" meant the actual recipient of a call, regardless of who the caller intended to reach. *ACA Int'l v. FCC*, 885 F.3d 687, 705-06 (D.C. Cir. 2018). At the same time, the FCC recognized that it would be unreasonable to impose liability on a caller who initially had consent but then called a reassigned number, so the agency created the so-called "one call" safe harbor. *Id.* at 706. The D.C. Circuit concluded that it was arbitrary and capricious to limit the safe harbor to one call, so it vacated the entire "called party" framework of the 2015 Order. *Id.* at 706-08. The FCC is currently considering how to respond to the court's remand of these issues, including whether to define "called party" as the intended recipient of the call or whether to re-adopt aspects of the prior interpretation with an expanded safe harbor. *See* Public Notice, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act, CG Docket Nos. 18-152, 02-278, DA 18-1014 at 3-4 (May 14, 2018). If the FCC adopts the "intended recipient" standard, there could be no liability to the purported class here and Plaintiffs would be forced to abandon the case. Therefore, TWC assumes for the limited purpose of this motion that it was required to obtain consent from the subscriber or customary user of any reassigned cell phone number.

consent" (emphasis added)); Motion at 15-16 (arguing that their class definition obviates any issues of consent). But Plaintiffs' attempt to circumvent individualized issues fails utterly; rather, individualized issues of consent overwhelmingly predominate over common questions, precluding certification.

Where a caller obtains telephone numbers directly from its intended recipients (as here), courts have generally held that resolution of "prior express consent" would require individualized factual inquiries, precluding certification. *See, e.g.*, *Wilson v. Badcock Home Furniture*, No. 8:17-CV-02739-T02-AAS, 2018 WL 6660029, at *5 (M.D. Fla. Dec. 19, 2018) (denying class certification because, "[r]ather than engage in random robocalling, Defendant only calls numbers in its records and its intent was to call actual known customers in arrears."); *Booth v. Appstack, Inc.*, No. C13-1533-JLR, 2015 WL 1466247, at *11 (W.D. Wash. Mar. 30, 2015) ("Where there is evidence that some class members gave prior express consent but others did not, courts have found that … individualized inquiries … predominate"). Indeed, decisions have noted the "'chorus'" of courts "'that have found such individualized inquiries on the consent issue' precluded class certification." *Ung v. Universal Acceptance Corp.*, 319 F.R.D. 537, 541 (D. Minn. 2017); *Davis v. AT&T Corp.*, No. 15CV2342-DMS (DHB), 2017 WL 1155350, at *5-6 (S.D. Cal. Mar. 28, 2017) (denying certification of "wrong number" class because prior express consent issue "would require an inquiry into each call recipient's individual circumstances" to determine, *inter alia*, whether the number was called because a customer "provided a number belonging to another person, such as a spouse or other family member"); *Tillman v. Ally Fin. Inc.*, No. 2:16-cv-313-FtM-99CM, 2017 WL 7194275, at *7 (M.D. Fla. Sept. 29, 2017) (denying class certification of "wrong number" class, because "individualized inquires in certain circumstances might be needed to determine an individual's authority to provide consent to call"); *Jacobs*, 2017 WL 4838567, at

*2; *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 12 C 9431, 2016 WL 6037625, at *10 (N.D. Ill. Oct. 14, 2016); *KHS Corp. v. Singer Fin. Corp.*, No. CV 16-55, 2018 WL 4030699, at *5 (E.D. Pa. Aug. 23, 2018). The reason for these decisions is readily apparent: if the starting proposition is that the caller *had* consent to place every call, individualized issues almost always will predominate because establishing either class membership, or liability at trial, requires an individualized determination of an *absence* of consent for each call.[4]

In an effort to circumvent that fatal issue, Plaintiffs' experts have attempted to design a methodology that identifies individuals TWC called without consent. To demonstrate the methodology, Plaintiffs' expert, Colin Weir, evaluated a random sample of 8,549 unique phone numbers that TWC called.[5] But as is amply demonstrated below, that methodology does nothing to eliminate the need for individualized inquiries of consent.

1. Plaintiffs' Methodology Does Not Even Purport to Identify the Members in Plaintiffs' Proposed Class Definition

Although Plaintiffs seek (at 10) to certify a class consisting entirely of those who "received" calls without consent, they have failed to set forth *any* methodology capable of identifying such individuals. The reason why is obvious: Even if it were possible to identify on a class-wide basis the individual who most frequently used a phone at a given time (it is not), it is impossible to determine who "received"—that is, answered—a call that may have been placed five years ago. To name just one example, the primary user of the phone may have been in the middle

[4] To be sure, some putative "wrong number" classes have been certified, but those cases did not grapple with the serious issues presented here and, moreover, plaintiffs there generally relied on defendants' *own records* reporting that they had made wrong number calls (such as notes recorded by live agents). *See, e.g.*, *Reyes v. BCA Fin. Servs., Inc.,* No. 16-24077-CIV, 2018 WL 3145807, at *7 (S.D. Fla. June 26, 2018); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 391 (M.D.N.C. 2015). Plaintiffs have no comparable evidence here.

[5] Weir Decl. ¶ 16; Weir Depo. 93:14-20.

of carrying in the groceries at the time the call was placed, and the call was therefore answered by that individual's spouse, relative, roommate, etc. Plaintiffs' own expert acknowledged that "[t]here's no way to know" the person "who actually answered a particular phone call." Randall Snyder Depo., Ex. D to Prins Decl., 88:5-90:2. Plaintiffs' experts have therefore failed to serve their essential purpose, and class certification should be denied on that basis alone.[6]

Rather than identify who actually received any of the disputed calls as proposed in the class definition, Plaintiffs' experts have attempted—unsuccessfully—to identify the called numbers' purported "customary user," which they define as the primary user of the phone. *See* Weir Decl., ECF No. 213 ¶ 13; Colin Weir Depo., Ex. E to Prins Decl., 61:16-21; Snyder Depo. 70:17-21. Even if the Court permitted Plaintiffs to modify their class definition at this late stage (it should not) to refer to "customary users" of phones receiving calls, rather than "recipients" of calls, the methodology would still fail to eliminate individualized issues for many reasons discussed below.

2. Because It Is Not Possible To Identify a Customary User of a Phone at any Given Time Using Primary Source Data, Plaintiffs' Methodology Must Rely on Admittedly Unreliable "Compiled" Data

Plaintiffs are forced to rely on reverse lookup data in an effort to *infer* who was the customary user of a telephone number at a given point in time. The only entities that possess any *firsthand* information are the phone providers themselves, of which there are many hundreds (and nearly 100 *cellular* providers alone). Snyder Depo. 184:7-10; Ken Sponsler Decl. at 11. But the only information a carrier would typically have is about the *subscriber*, rather than the *customary*

[6] In addition to causing individualized issues of class membership and liability to predominate, *In LIBOR*, 299 F. Supp. 3d at 463, because it is admittedly *impossible* to determine class membership, Plaintiffs have also failed to demonstrate the related standard of ascertainability—that the class be defined "using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec. Litig.*, 862 F.3d at 269; *see also Leyse v. Lifetime Entm't Servs.*, LLC, 679 F. App'x 44, 47 (2d Cir. 2017).

user, of the phone. Snyder Depo. 184:3-22. A majority of U.S. households now use only a cellular phone (and, as described *infra* at 39-40, TWC could only have liability here based on calls placed to cell phones). But carriers lack even *subscriber* information for many cell phone numbers. Specifically, carriers generally do not even collect subscriber data for many *pre-paid* phone plans (like those branded "MetroPCS," "Cricket," and "Boost"). [redacted] *see also* Snyder Depo. 185:6-17. Over 100 million individuals in the United States currently subscribe to such prepaid cellular plans.[7] Even with respect to *post-paid* cellular plans, carriers cannot identify the actual primary user of many of their phone lines because of the widespread use of family and other "group" calling plans—*i.e.*, plans with multiple telephone lines under a single "master" subscriber/account. Snyder Depo. 184:15-22; [redacted] Such family plans predominate among post-paid cellular plans. Sponsler Decl. at 17-18. Due to these and other issues, [redacted] Understandably, then, Plaintiffs' expert admits that subpoenaing information from cellular carriers to determine who used a phone at a particular time is not a viable approach. Snyder Depo. 184:3-185:17.

Notwithstanding this fundamental problem, Plaintiffs claim (at 19) that a third-party "reverse lookup" provider, LexisNexis, can identify the "customary user" of a phone number at any point in time. According to Plaintiffs' experts, LexisNexis collects contact information

[7] Sponsler Decl. at 15.

provided by consumers to third parties like banks, utilities, and government entities in connection with consumers' loan applications, utility service applications, driver's licensing applications, and other transactions, and allegedly reports the "customary user" of the phone at any given time. Snyder Decl. ¶¶ 19-20; Snyder Depo. 35:2-13, 75:5-13; Weir Depo. 29:21-31:4. As detailed in TWC's accompanying *Daubert* motions, Plaintiffs' experts' reliance on LexisNexis is misplaced for numerous reasons, including that they have not examined LexisNexis's underlying data, could not identify a single source of data that LexisNexis relies on, and do not know the error rate in that data—which is unsurprising, because LexisNexis does not disclose this information. *See* Sponsler Decl. at 25. Despite opining under oath that Plaintiffs' methodology using LexisNexis could "definitively" identify the customary user of a phone, Plaintiffs' lead expert ultimately admitted under cross-examination that he has *never even used LexisNexis*. Snyder Depo. 44:8-10.[8]

[redacted]

[8] As described in more detail in the accompanying *Daubert* motions, Plaintiffs' primary expert—Randall Snyder—opined about the reliability of Plaintiffs' methodology, while Plaintiffs' secondary expert—Colin Weir—executed that methodology.

[9] Other prominent compiled data providers acknowledge the same limitations. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, 30 FCC Rcd 7961, 8006 n.297 (2015) ("2015 FCC Order"). (citing a letter from Neustar, a prominent provider, stating that it is "not aware of any authoritative telecommunications database that links all consumer names with their telephone numbers"); Sponsler Decl. at 24. The FCC has developed an extensive administrative record on this issue and, in December 2018, concluded that existing commercial reverse-lookup databases are neither comprehensive nor reliable. *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Report and Order, CG Docket No. 17-59, FCC 18-177, ¶ 6 (Dec. 13, 2018) ("[T]hese databases are not comprehensive, and thus callers and consumers alike continue to be frustrated by unwanted calls to reassigned numbers."); *see also id.* ¶¶ 2, 20, 64. This deficiency prompted

[redacted] it is unsurprising that courts have repeatedly denied class certification in cases that relied on reverse-lookup tools to identify purported customary users of mobile phones. *See, e.g.*, *Jacobs*, 2017 WL 4838567, at *3 n.4 (rejecting suggestion that "by using an outside service, [the expert] has been able to identify users of particular telephone numbers," in light of the well-known "problems with those outside services"); *Sherman v. Yahoo! Inc.*, No. 13CV0041-GPC-WVG, 2015 WL 5604400, at *6 (S.D. Cal. Sept. 23, 2015); *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 473 (S.D. Cal. 2014); *Balschmiter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 523-24 (E.D. Wis. 2014).[10] Here, based on [redacted] and Plaintiffs' experts alone, the Court should deny class certification.

3. The Data Underlying Plaintiffs' Methodology Demonstrates Numerous Individualized Issues of Consent, Liability, and Class Membership

Even assuming, counterfactually, that LexisNexis can identify the "customary user" of a number in certain circumstances, it is readily apparent that Plaintiffs' methodology does not eliminate the need for individualized inquiries to determine class membership and consent.

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the FCC to establish a new government-run reassignment database, which will be populated based on mandatory reports by phone carriers. *Id.* ¶ 3.

[10] To be sure, some courts have accepted reverse lookups for use in TCPA class actions. But none of those courts seriously grappled with the problems identified above, [redacted]

First, LexisNexis does not identify many associations that certainly exist. For example, in discovery Plaintiffs identified their *historical* telephone numbers (numbers other than the ones at issue in this case) as [redacted] (Hunter) and [redacted] (Villa), but [redacted].[11] [redacted] This "missing association" problem has pronounced effects in this case: Based on the sample outbound calling data Mr. Weir analyzed, he claims that 9.8% of the phone numbers that TWC called (and **43.1%** of the unique telephone numbers that he says were "mismatched") were "straight mismatches," *i.e*. telephone numbers that were *never* associated with TWC's customer. Fuite Decl. ¶ 37; Weir Depo. 125:13-126:1. But it is implausible on its face that 9.8% of the time, TWC's customers provided TWC with a number with which they were *never* associated, in order to be contacted about their own accounts. *See* Zitko Decl. ¶¶ 4, 19; Zitko Depo. 143:24-144:11.

Second, LexisNexis does not capture dates of many associations. For example, for 17.7% of the rows of identity data returned by LexisNexis to Plaintiffs, LexisNexis provided a possible consumer identity *without the date* that individual was allegedly "first seen" associated with that telephone number. *See* Weir Depo. 46:16-51:7; Fuite Decl. ¶ 29. Mr. Weir's methodology simply *ignored* those identities, Weir Depo. 94:6-9; Fuite Decl. ¶ 29, [redacted] In fact, in 3.7% of the "mismatched" calls Plaintiffs identified

[11] *See* Fuite Decl. ¶ 32; Plaintiffs Objections and Answers to Defendant's Fifth Set of Interrogatories, Ex. A to Prins Decl., Response to Interrogatory No. 10; Hunter Depo. 32:24-34:03; *see also* Hunter Depo. 13:18-14:5; [redacted]

as giving rise to liability to putative class members, LexisNexis *did* report TWC's customer's name as associated with the phone number, but Mr. Weir just *dropped* TWC's customer's name from his analysis because there was no "first seen" date data available for that customer identity. Fuite Decl. ¶ 31.[13] Individualized inquiries would be necessary to figure out when a "dropped" individual was actually associated with the number, whether that individual belongs in the class, and whether TWC had consent to call when the individual was associated with the number.

Third, even in cases where LexisNexis does identify an association and the date that association began (called the "first seen" date), that date is not a reliable proxy for actual evidence of when the individual actually began *using* the number. [redacted] Plaintiffs' methodology simply *assumes* that the LexisNexis "First Seen" is the same as the date the individual became associated with a number, even though both Plaintiffs' expert [redacted] admit this is not a sound assumption. Weir Depo. 60:5-23; 160:12-162:4; [redacted] This problem is fatal because it makes it impossible to accurately identify who was associated with a number at a particular time, which in turn makes it impossible to make non-individualized determinations of class membership and consent.

[redacted]

[13] Plaintiffs' other expert, Mr. Snyder, was not even aware that Mr. Weir had thrown out data that LexisNexis had returned, Snyder Depo. 140:24-141:4, and was also totally unaware of the meaning of the LexisNexis "First Seen" date. *Id.* 123:23-124:8.

[redacted] *two months* ***after*** *TWC admittedly stopped calling her* in December 2015. *Id.*; Plaintiffs' Responses to TWC's RFAs, Ex. B to Prins Decl., Response to RFA No. 16. At the time of TWC's calls, [redacted] As a result, under Plaintiffs' methodology, *Plaintiff Villa is not a member of the proposed class*. *Id.*[14]

Plaintiff Hunter's telephone number on which she brings her claims [redacted] illustrates just the opposite problem, w[redacted] Ms. Hunter testified she obtained her number in 2015, Hunter Depo. 30:21-31:7, [redacted]

These date reliability problems are not unique to the named plaintiffs. Among the 10,000 phone numbers Mr. Weir evaluated, for 541 of them, TWC's *customer* was "First Seen" with the number *after* that number had been listed on the customer's TWC account and TWC started calling the customer. Fuite Decl. ¶ 36. In such cases, TWC started calling the customer an average of 554 days *before* that customer name was "first seen" associated with that number in LexisNexis's data (median, 435 days). *Id.* [redacted]

[14] Thus, Plaintiff Villa is neither a typical nor an adequate class representative. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) ("a class representative must be part of the class"); *Donaca v. Dish Network, LLC*., 303 F.R.D. 390, 396 (D. Colo. 2014).

[redacted]

Finally, LexisNexis simply lacks *any* information at all for many telephone numbers—for 3% of the numbers that Mr. Weir sent to LexisNexis, LexisNexis returned no results. Fuite Decl. ¶ 28. [redacted] To determine whether the individuals associated with those numbers belong in the class, or instead whether TWC had consent to contact the number, individualized analysis (rather than reliance on LexisNexis) would necessarily be required. Yet Plaintiffs have no class-wide solution to that problem. Instead, they attempted to sidestep the issue by simply deeming all calls to numbers for which LexisNexis lacked data to be "matches." Weir Depo. 107:2-9; Fuite Decl. ¶ 28. But, as described *infra* at 45, that is no solution because it raises significant due process concerns for individuals associated with those numbers.

4. The Name Matching Process Upon Which Plaintiffs' Methodology Relies Also Demonstrates Numerous Individualized Issues of Consent, Liability, and Class Membership

Plaintiffs' methodology suffers from another fatal flaw: To determine whether TWC's customer "matches" the reported LexisNexis identity, they rely solely on a crude name-matching algorithm. Fuite Decl. ¶ 39. Plaintiffs simply assume that a call is a "match" if the TWC customer and LexisNexis identity have *either* the same first name *or* the same last name. Snyder Depo. 85:1-8; Weir Depo. 119:9-120:2; Fuite Decl. ¶ 39. But Plaintiffs are attempting the impossible: How can a computer tell whether "[redacted]" and "[redacted]" are the same person from their name alone? Plaintiffs tried to clear that hurdle using a "Jaccard Score"—which represents

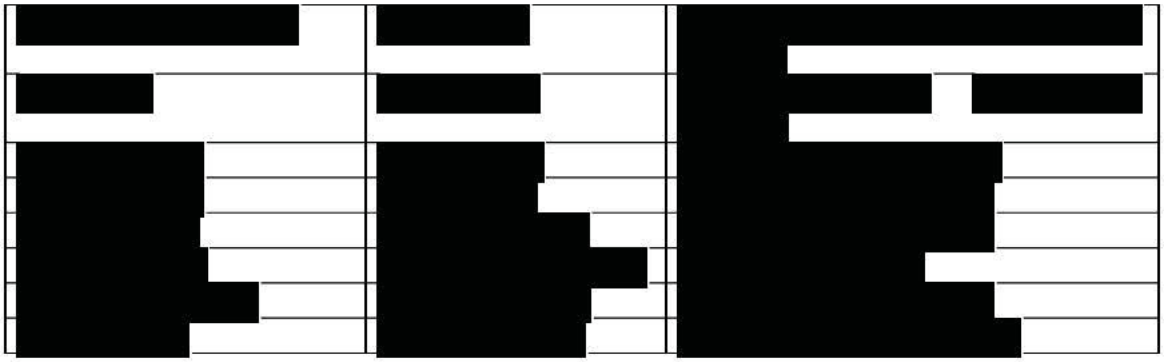
[redacted]

the similarity of two strings of text. Fuite Decl. ¶ 41. But very small changes in Plaintiffs' arbitrary selection of the threshold score of .5 will expand or contract the class by as much as 7-10%. *Id.* ¶ 43. For example, "Alisha Edwards" and "Alicia Howell" are considered "mismatched" under Plaintiffs' existing score, but they would have been considered a "match" if a threshold value of .4 had been used instead. Fuite Decl. ¶ 42. Plaintiffs' expert admitted that "there's no quote unquote correct [Jaccard] threshold that you could use." Weir Depo. 115:4-17; *see also id.* 205:23-209:7 (explaining that altering the .5 threshold to .4 would result in a "mix of both" additional false negatives, and reductions in false positives). Nor can human review fix these problems, as such review is "not practical to do … on a large scale." Weir Depo. 209:25-213:18. Ultimately, Mr. Weir admitted under cross-examination that his name-matching algorithm cannot identify whether TWC's customer and the LexisNexis identity are actually the "same person." Weir Depo. 218:5-15; *see also id.* 215:16-219:2. Thus, individualized inquiries are necessary to determine whether the TWC customer and the LexisNexis identity are the *same person* or otherwise have some relationship. This is demonstrable in at least two ways:

False mismatches: Plaintiffs' process generates "mismatches" where TWC was plainly not calling a wrong number. The entities/individuals identified in LexisNexis would be members of the class, yet at trial TWC would have an individualized consent defense to liability. For example:

LexisNexis Identity	"Mismatched" TWC Customer Name	Likely Reason for "Mismatch"
[redacted]	[redacted]	[redacted]

[redacted]



False matches: Plaintiffs' assumption that a call is a "match" if the TWC customer and LexisNexis identity have *either* the same first name *or* the same last name will generate a huge number of "false matches." For example, Mr. Weir's methodology considered many names to be *matches* solely because of a shared first name (like "John Smith" and "John Hammersmith"). Fuite Decl. ¶ 39. To determine whether those names refer to the same person (*i.e.*, a person who changed his surname) or not, an individualized inquiry is necessary. Plaintiffs' proposed solution of ignoring that problem (by deeming the calls to be matches) raises obvious due process concerns for those individuals. *See infra* at 45.

B. An Unduly Burdensome, Individualized Inquiry into Plaintiffs' Alleged Mismatches Demonstrates a Very High Rate of False Positives and Other Individualized Issues

The pervasive methodological flaws described above not surprisingly translate into grossly inaccurate results, including in particular with respect to the purported "mismatches" used to identify class members (*i.e.*, individuals whom TWC purportedly called without consent). Where a defendant can demonstrate that a significant proportion of putative class members may have provided consent, certification is obviously inappropriate, because that showing removes any doubt that individualized issues of prior express consent and class membership predominate. *See, e.g.*, *Johnson v. Yahoo! Inc.*, No. 14 CV 2028, 2018 WL 835339, at *2 (N.D. Ill. Feb. 13, 2018)

[redacted]

(while "vague assertions about consent [a]re insufficient," "a defendant could defeat class certification if it presented specific evidence showing that a significant percentage of the class consented"). TWC can easily make such a showing here.

In response to Plaintiffs' motion for class certification, TWC and its experts undertook a painstaking, granular analysis of the purported "mismatches" and confirmed that (i) intensely individualized inquiries will be required at trial to determine whether consent was present, and (ii) Plaintiffs' claimed mismatches are inaccurate an overwhelming percentage of the time. In his report, Plaintiffs' expert highlighted two "illustrative" examples of individuals who he claims belong in the class because they were contacted at "reassigned numbers" without consent. Weir Decl. at 6-7. But exhaustive research on these individuals reveals that consent *was* present. Moreover, TWC and its experts undertook similar time-consuming, individualized inquiries for a random sample of 75 other "mismatched" putative class members, and can show that in at least 65 of those cases, TWC very likely had consent, while the remaining 10 were simply indeterminate. In other words, Plaintiffs' methodology has a demonstrable error rate of *at least 86%*.

1. Plaintiffs' Two Lead Examples of "Wrong Number" Recipients Are Almost Certainly Incorrect

Plaintiffs' expert provides in "Table 1" of his declaration "Illustrative Examples of the Matching Process," identifying two individuals who allegedly received "wrong number" calls from TWC at "reassigned numbers." Weir Decl. at 7. Specifically:

Call date	Telephone Number	TWC Customer Name	Lexis Customer Name	Lexis First Seen Date	Match?
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Id. That is, Mr. Weir claims that the number [redacted] was reassigned from TWC's customer [redacted] on or before February 6, 2017, and that the number [redacted] was reassigned from TWC's customer [redacted] on or before November 1, 2016. *Id.* at 7 & ¶¶ 25-26; Weir Depo. 165:9-166:15; 166:20-168:17; Snyder Depo. 125:15-18; 127:10-16. Mr. Weir concludes that TWC placed 30 wrong number calls to [redacted] (from March 2, 2017 to June 11, 2018) and 34 wrong number calls to [redacted] (from November 3, 2016 to February 27, 2018) after they supposedly received reassigned numbers from TWC's customers. *Id.*; *see also* Taylor Decl. ¶ 30. But hours of highly individualized analysis demonstrate that TWC almost certainly had valid consent to place all of those calls.

[redacted] TWC placed all calls to [redacted] at the telephone number of record on her account, [redacted]. Zitko Decl. ¶ 31. Mr. Weir says that this telephone number was reassigned to [redacted] on or before February 6, 2017. Weir Decl. at 7 & ¶¶ 25-26. But after that date, the [redacted] number called into TWC's IVR system *at least **20** times* to make payments and obtain technical support on [redacted] account, as recently as October 29, 2018. Zitko Decl. ¶ 32; Taylor Decl. ¶ 34. Indeed, a recording from *May 1, 2018*—long after the "wrong number" calls allegedly started—reflects a female voice seeking to make a payment on [redacted] account. Transcript of Call 2BC08B425AE910C1, Ex. B to Zitko Decl.; Zitko Decl. ¶¶ 32, 44. These facts demonstrate that [redacted] (or someone closely affiliated with her) was still using the phone number to pay [redacted] bills and interact with her account well after the alleged wrong number calls began. *Id.*; Taylor Decl. ¶ 32. Does the putative class member, [redacted], also have some relationship to the phone? Perhaps. It appears he may have lived at

common addresses with [redacted] from 2015 to 2018.[20] But that possibility just underscores the need for individualized inquiry: At trial, TWC would be entitled to call both [redacted] and [redacted] to the stand to establish whether either or both customarily use the phone and, even if [redacted] solely uses it, whether he authorized [redacted] to list it on her TWC account.

[redacted] TWC placed all calls to [redacted] at the telephone number of record on her account, 207-329-8498. Zitko Decl. ¶ 33. Mr. Weir says that this telephone number was reassigned to [redacted] by November 1, 2016. Weir Decl. at 7 & ¶¶ 25-26. But after the November 1, 2016 mismatch date, that number called into TWC's IVR system *at least **57** times* to make payments and obtain technical support on that account. Zitko Decl. ¶ 34; Taylor Decl. ¶ 33. Call recordings reveal that [redacted] likely made all these calls: On March 9, 2017, [redacted] called in from the [redacted] number *three* times to obtain technical support, identifying herself each time. Zitko Decl. ¶¶ 35, 45-47; Exs. C, D, E to Zitko Decl. Not only that, but on March 8, 2018, her husband [redacted] set up a new account, yet [redacted] called in from the same [redacted] number to discuss that account, including on a recording dated June 2, 2018. Zitko Decl. ¶¶ 36, 48; Ex. F to Zitko Decl. Does the putative class member, [redacted], also have some association with the phone number? Perhaps. It appears [redacted] and [redacted] may have shared a common address in the past. *See* Botello Decl. ¶ 12. And Facebook indicates that [redacted] *Id.* ¶¶ 13-15. Thus, [redacted] appear to be family—not strangers involved in a random reassignment of a cellular number.

[20] *See* Botello Decl. ¶¶ 9-11. Plaintiffs' expert agreed that "if Lexis is reporting that … the customary user of the phone, has the same address as our customer's address," "[i]t's pretty likely we were calling the right person." Snyder Depo. 98:20-25.

2. A Detailed Individualized Analysis of a Random Sample of 75 of Plaintiffs' Alleged "Wrong Number" Recipients Reveals That Almost All of Them Are Demonstrably Inaccurate

These problems are by no means limited to [redacted]: A similarly individualized and burdensome inquiry into a statistically significant random sample of 75 of the 1,943 individuals who Plaintiffs contend received "wrong number" calls demonstrates that, in reality, TWC likely had consent to contact almost all the numbers in question. Specifically, TWC and its expert reviewed the following evidence: call recordings; records of inbound telephone calls to TWC from the telephone numbers in question; bill payment transactions associated with the numbers in questions; and CNAM caller ID data. Taylor Decl. ¶¶ 8, 18-22. Based on such evidence, TWC's expert, John Taylor, determined that 60 out of the sample of 75 supposed "wrong number" contacts are incorrect, while the remaining 15 were indeterminate. *Id.* & Table 1.

For these remaining 15 individuals, TWC placed calls to its customers' telephone numbers of record and, to the extent an individual answered the call, made appropriate disclosures and requested information relevant to this case. *See* Sam Weintraub Decl. ¶¶ 3-6. Through those efforts, TWC was able to determine that at least 2 of the remaining 15 alleged "wrong number" recipients actually represented right-number contacts. *See* Weintraub Decl. ¶¶ 7(a), 7(d); Taylor Decl. ¶ 27. Finally, for the remaining 13 individuals who remained indeterminate, TWC hired a former FBI agent to conduct research as to the relationships between TWC's customers and the alleged LexisNexis user. *See* Botello Decl. ¶¶ 1-7. For 3 of these 13 putative class members, the private investigator was able to identify probable relationships (friends, family, shared address, etc.) between the putative class member and TWC's customer, *id.* ¶¶ 72-73, 76-81, 106-112, making it more likely than not that TWC had consent to place these calls, too. Taylor Decl. ¶ 27.

Of course, these categories of evidence are just a small subset of what TWC, consistent with its due process rights, would be entitled to rely on at trial. In sum, after an extraordinary

amount of time spent performing individualized, person-by-person analysis, TWC and its experts were able to determine that, for at least 65 of the 75 sampled individuals, and probably for all 75, it is more likely than not that TWC had consent to make the calls. *See* Taylor Decl. ¶¶ 17-29 (explaining in detail the evidence in support of this determination for each one of the calls).

These types of gross errors are unsurprising, because—as described in more detail in the accompanying *Daubert* motions—Plaintiffs' experts admitted that they did nothing to verify the accuracy or reliability of their own results in identifying true wrong number calls. Mr. Weir *refused* to opine on the error rate he would consider "reliable," and could not even estimate his methodology's error rate. Weir Depo. 79:10-18; 80:23-82:7; 181:4-11; 180:11-19; 196:7-19; 192:3-4 ("Q But you don't know the error rate, correct? A. I have not calculated an error rate."). Indeed, Mr. Weir refused to opine as to whether his methodology would be reliable if *90% of the time* it wrongly labeled TWC's customer's as "mismatches," because "I'm not opining anything per se is a wrong number call." *Id.* 176:4-178:11. By contrast, Mr. Snyder did opine that Mr. Weir's methodology is "reliable and accurate" in identifying wrong number calls in his report (Snyder Decl. ¶ 24), but admitted that he has never even used LexisNexis, Snyder Depo. 44:8-10, could not name a single source from which LexisNexis acquires data, *id.* 47:2-7; 48:14-23; 53:14-54:6; 55:2-5, 56:24-57:4, and did not even review Mr. Weir's programming code, the LexisNexis data in this case, or the output results of Mr. Weir's code in reaching that conclusion. *Id.* 39:11-40:16; 41:17-42:7; 43:1-5; 43:9-22; 95:15-97:12. Despite stating in his report that the methodology could "definitively" determine wrong number calls, Mr. Snyder later clarified that *his* definition of "reliable" is a methodology that is right over "50 percent" of the time. *Id.* 104:23-105:1 ("I would consider [it] reliable if it's over 50 percent….").

Tellingly, Plaintiffs' methodology does not come close to meeting even that unreasonably permissive standard. There can be no doubt that a methodology with such a high error rate cannot be used as a basis to certify a class or foreclose TWC from presenting individualized evidence of consent at trial. *See, e.g.*, *Johnson v. Yahoo!, Inc.*, 2018 WL 835339, at *2-3 (explaining that "a defendant could defeat class certification if it presented specific evidence showing that a significant percentage of the class consented," "perhaps between 20 to 25%").

C. Even Assuming Plaintiffs' Methodology Was 100% Reliable at Identifying a Customary User of a Phone at a Given Time, Individualized Issues of Consent, Liability, and Class Membership Would Remain

Even if Plaintiffs could accurately determine the identity of the primary "customary user" of a number at each point in time—and as the analysis above makes clear, they cannot—determining that that individual is different than the TWC account holder is not sufficient to resolve the issue of prior express consent on a class-wide basis. Individualized issues still would predominate because there are many circumstances where, although the name of the customary user of a phone differs from that of TWC's customer, TWC nevertheless would have held valid consent to place the call in question.

First, even under the FCC's now-vacated definition of "called party," consent is valid if obtained from *either* the *subscriber* (*i.e.*, phone account holder) *or* a "*customary user*" of the phone (*i.e.*, someone who regularly uses the phone). 2015 FCC Order, 30 FCC Rcd 7961, ¶ 73. In many cases the *subscriber* and the *customary user* identified by Plaintiffs will be different individuals, because most post-paid cellular plans are part of multi-line accounts (*e.g.*, family plans), where the "master" subscriber will differ from the user of each line. *See* Sponsler Decl. at 17-18. But Plaintiffs' methodology admittedly does nothing to identity the *subscriber* associated with a given

telephone number.[21] And Plaintiffs' experts admit it is not feasible to obtain that information from the cellular carriers. Snyder Depo. 184:3-14. Plaintiffs' methodology simply ignores instances where the *subscriber* associated with a telephone number provides consent to TWC to call a specific number, but the so-called "customary user" of that number identified by plaintiff's expert is a different individual. Therefore, at trial, TWC must be allowed to call each class member to the stand to determine the identity of the subscriber of his or her phone plan, and then call the subscriber to the stand to determine whether that individual is TWC's account holder.

Second, the putative class member may have a relationship with the TWC account holder, such that it is far more likely than not that TWC had consent, either because (i) the class member authorized TWC's customer to provide the phone number to TWC, and thus consent was validly conveyed to TWC through an "intermediary," or (ii) the class member directly provided consent to TWC to use that number on TWC's customer's account, or (iii) TWC's customer *herself* is a "customary user" of the phone that was not identified by LexisNexis.[22] TWC's experience in TCPA litigation confirms that such related-party consent scenarios arise frequently.[23]

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21 [redacted]

22 *See, e.g.*, *GroupMe, Inc./Skype Petition for Expedited Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278, 29 FCC Rcd. 3442, ¶ 6 (2014) ("[A] consumer's prior express consent may be obtained through and conveyed by an intermediary."); 2015 FCC Order, 30 FCC Rcd 7961, ¶ 75 (explaining that *any* customary user of a phone may consent).

23 [redacted]

These situations frequently arise in TWC's day-to-day business operations because TWC often services *households* where multiple people interact with an account. *See* Zitko Depo. 136:19-137:4; Zitko Decl. ¶¶ 23-28; Leianna Cooper Decl. ¶¶ 4, 9. Customers often prefer, for reasons of convenience or necessity, to list a specific householder member's or other related individual's number on their TWC account. Zitko Decl. ¶¶ 23-28. For example, "Sarah Miller" may establish TWC service at the home she owns, but in her household they always list the number of her spouse "Jay Williams" on their accounts (perhaps because within that relationship, Jay is responsible for paying the cable bill, while Sarah pays the mortgage). Thus, it is entirely natural that TWC might call its customer "Sarah Miller," and yet LexisNexis would report that TWC had in fact reached a supposedly "mismatched" number associated with "Jay Williams." Similar situations frequently arise with married couples, unmarried couples, roommates, families where the account holder may not be a native English speaker, adult children of senior dependents, parents with college-age children, and so on. *Id.*; Zitko Depo. 135:20-136:1. The possibilities are almost endless, but to attempt to quantify how often parties with a relationship to the TWC account holder interact with TWC, [redacted]

Thus, even assuming that Plaintiffs could determine a "mismatch" between TWC's customer and the customary user of a telephone *with 100% accuracy*, that tells the fact-finder nothing about the *relationship* of the mismatched individuals or whether there was consent to place the call. Instead, at best, such a "mismatch" would only be the *beginning* of an intensely individualized, fact intensive inquiry to determine the relationship between the person TWC called and TWC's customer, and their authority to grant "consent." For similar reasons, courts have

repeatedly concluded that reverse-lookup services cannot be used to avoid individualized issues of consent that preclude a finding of predominance. *See, e.g.*, *Davis*, 2017 WL 1155350, at *6 ("reverse number lookup[s]" would not be "determinative of consent or lack thereof," because "if Defendant's customer provided a number belonging to another person, such as a spouse or other family member, an inquiry into that customer's authority to provide consent to call that number would be required"); *Jacobs*, 2017 WL 4838567, at *3 (rejecting claim that "by using an outside service, [the expert] has been able to identify users of particular telephone numbers," as "consent could be given by someone other than the subscriber, such as a third-party affiliate, or spouse of a call recipient"); *Tomeo*, 2018 WL 4627386, at *10 (finding there was no "common way to isolate those who have already consented to calls" given that the defendant's customer may have "provided a number belonging to another person, such as a spouse or other family member").

Third, even if Plaintiffs could prove that TWC dialed a wrong number, individualized issues of liability and class membership would still remain, because it is possible that TWC *still* had consent to place the call at issue. TWC has (directly or through its affiliates) over 27 million customers.[24] Accordingly, even on a "wrong number" call TWC would have a significant chance of reaching one of its *current* customers, and has a still greater chance of reaching someone who is a current *or* former customer. *Id.* Indeed, Plaintiffs' own LexisNexis data indicates that *at least* 21% of the putative class members may be TWC subscribers.[25] Importantly, all TWC subscribers (and users of its service) are contractually bound to a subscriber agreement. Flores Decl. ¶ 5; Zitko Depo. 138:10-139:14. Under the most recent residential subscriber agreement, for example, TWC

[24] Charter Communications, 2017 Annual Report, 5 (2017), https://ir.charter.com/static-files/1446750d-6d85-4e23-8746-37e56a565e81; *see also* Zitko Depo. 138:6-16; Flores Decl. ¶ 5.

[25] At least 425 of the 1,943 "mismatched" putative class members supposedly may have received landline telephone/VoiP telephone service from TWC and its affiliates. Fuite Decl. ¶ 46.

"may call or text Subscriber … including but not limited to at any number Subscriber provides to [TWC] *for any purpose*" (emphasis added), including through "use" of "artificial or recorded voices." Flores Decl. ¶ 5(a); HUNTER_00001093, Ex. A to Flores Decl. at 1098. Thus, TWC's customers consent to receive even *wrong number* calls from TWC. *Id.*; Zitko Depo. 137:24-138:16. [redacted] Thus, at trial individualized inquiries would be required to determine whether each class member is a current or former subscriber of TWC or its affiliates, and which version(s) of the subscriber agreements apply.

As discussed earlier, TWC's expert generated a random sample of 75 putative class members; for almost all of them (52 out of 75), TWC was able to identify at least one possible account holder with the same name as the mismatched call recipient—and in many cases, *dozens*. Zitko Decl. ¶¶ 40-43. Although that exercise standing alone took about 20 hours, *definitively* determining which of those individuals *in fact* are TWC customers would be a highly burdensome, individualized, and manual inquiry. *Id.* ¶ 41; Zitko Depo. 151:4-25, 152:1-13; *see also* Flores Decl. ¶¶ 19-21. At trial, each class member would need to be called as a witness, and for those who were shown to be subject to TWC's or its affiliates' subscriber agreements, TWC would move

[redacted]

to compel arbitration and enforce its other contractual rights, including contractual "prior express consent" and a class-action waiver. Such individualized issues provide an additional reason why class certification is inappropriate here. *See, e.g.*, *Tillman*, 2017 WL 7194275, at *7 ("[T]he Court would be required to make individualized determinations as to … which version of the contract they entered into, the consent language (if any) contained within the contract, and whether the contract contains an arbitration provision…."); *Johnson v. Yahoo! Inc.*, 2018 WL 835339, at *3 (finding that "individual consent issues will predominate" where defendant searched its accounts for putative class members and "[c]ertain common names matched with thousands of Yahoo! user accounts" of individuals who may have "accepted [terms of service]"); *Hill v. T-Mobile USA, Inc.*, No. 2:09-CV-1827-VEH, 2011 WL 10958888, at *6, *19 (N.D. Ala. May 16, 2011).

D. Even Ignoring All These Fundamental Problems, Plaintiffs' Methodology Fails Because It Depends Entirely on Evidence that Will Be Inadmissible at Trial

To obtain certification the proponent must establish that class-wide liability may ultimately be determined *at trial* through some form of *admissible evidence*. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (reversing grant of class certification because affidavits from class members to prove they suffered injury "would be inadmissible hearsay at trial, leaving a fatal gap in the evidence for all but the few class members who testify in person"); *cf. In re LIBOR*, 299 F. Supp. 3d at 471. But Plaintiffs will be unable to admit the LexisNexis data at trial for the "truth of the matter asserted"—*i.e.*, to show that a person was the "customary user" of a specific telephone number. LexisNexis data is not primary-source data—it is not a phone user's testimony as to the number she uses, or even the cellular provider's business records. [redacted] Even at this initial step, the consumer's report of the number at which she can be reached is hearsay not

subject to any exception. *See* Fed. R. Evid. 801(c). [redacted] *Each of these steps* is hearsay. The "unreliability inherent in multi-level hearsay statements by declarants lacking personal knowledge of the matters asserted" is well established. *Amerisource Corp. v. RxUSA Int'l Inc*., No. 02-CV-2514 (JMA), 2009 WL 235648, at *3 (E.D.N.Y. Jan. 30, 2009). To admit this evidence at trial, Plaintiffs would need to establish a recognized hearsay exception for each level in the chain. *See* Fed. R. Evid. 801(c), 802. For example, to substantiate a "business records" exception, *each level in the chain* would require satisfaction of all of the foundational requirements of Rule 803(6)(A)-(E) (including a custodian of records), [redacted]. *See* Fed. R. Evid. 805, 803(6); *see also Ortho Phafrm. Corp. v. Cosprophar, Inc*., 828 F. Supp. 1114, 1119 (S.D.N.Y. 1993). [redacted].[29]

E. Even as to Calls Placed Without Consent, Numerous Individual Issues Remain

1. Individual Issues Remain as to Whether an Artificial Or Prerecorded Voice Played on any Given Call

Even if the issue of consent could be resolved through individualized fact-finding at trial, it would still be necessary to determine whether an "artificial or prerecorded voice" *played* on each

[29] Nor may Plaintiffs simply take inadmissible evidence and bring it in through the "back door" by incorporating it into expert testimony. Fed. R. Evid. 703 ("But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."); *see also Emigh v. Consol. Rail Corp*., 710 F. Supp. 608, 612 (W.D. Pa. 1989) ("[W]hen the underlying source is so unreliable as to render it more prejudicial than probative … Rule 703 cannot be used as a backdoor to get the evidence before the jury.").

call at issue. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (making it unlawful to "make any call … using … an artificial or prerecorded voice" to a cellular telephone without consent). To trigger liability, "an artificial or prerecorded voice *must actually play*" on a given call—it is not sufficient that the calling system merely has the ability to play such a voice. *Ybarra*, 807 F.3d at 640 (emphasis added); *see also Abramson v. Caribbean Cruise Line, Inc.*, No. 14-CV-435, 2014 WL 2938626, at *4 (W.D. Pa. June 30, 2014) ("[B]ecause the caller hung up before anything was said, there can be no violation … since it cannot be determined that a prerecorded voice was used."); *Roberts v. Medco Health Sols.*, 4:15-CV-1368-CDP, 2016 WL 3997071, at *2 (E.D. Mo. July 26, 2016) ("any calls that were blocked by the call-blocking application [did] not constitute violations"); *Fitzhenry v. ADT Corp.*, No. 12-CV-80180, 2014 WL 6663379 (S.D. Fla. Nov. 3, 2014) (denying class certification because determining whether a voice played would require listening to each call).

Plaintiffs falsely represent (at 1) that TWC's IVR platform "uses an artificial or prerecorded voice on every connected call." [redacted], Plaintiffs cannot prove that a prerecorded voice actually played on a given call without an individualized inquiry, *i.e.* testimony from each putative class member concerning [redacted]

Plaintiffs assert that a prerecorded voice played on a given call based on the codes "Live_Voice" and "Answering_Machine" in TWC's calling records, claiming (at 7) that, for these two codes, "Defendant has acknowledged[] these are the calls on which its IVR Platform played an artificial or prerecorded voice." But that too is simply false. [redacted]

[redacted]

- [redacted]
- [redacted]

Notably, TWC's records for *Plaintiff Hunter alone* make clear that such records cannot be used to determine whether a prerecorded voice actually played on a given call. On June 15, 2015, Plaintiff Hunter blocked the phone number used by TWC's IVR platform using First Orion Corporation's "Metro Block-It" application on her telephone. *See* Matt Rateliff Aff. at 2. First Orion's business records indicate that 23 calls TWC placed to Hunter's number were successfully blocked by Metro Block-It between June 15, 2015 and February 1, 2016.[30] But in fact, four of the blocked calls are coded in TWC's records with the result "Live_Voice":

[30] Plaintiff Hunter allegedly received these calls on her ZTE Olympia phone, Hunter Depo. 37:14-16, on which she had installed First Orion's Metro Block-It application, *id.* at 115:11-116:3. On that phone model, Metro Block-It either sends unwanted calls—*i.e.*, those originating from numbers blacklisted by the user—directly to voicemail, or blocks them entirely through a "pick up and hang up" process. Jeff Stalnaker Aff. ¶¶ 7, 9. In First Orion's records, calls sent to voicemail

	T-Mobile Records			Charter Records			PrivacyStar Records		
Date	Time	Duration	Completion Code	Cust. Phone	Attempt Time	Attempt Status	Time	Action	Result
7/28/2015	17:16:59		Completed Successfully	[redacted]	28-JUL-15 01.19.00 PM	LIVE_ VOICE	07/28/2015 10:16:58 AM	Incoming Call	Blocked
8/4/2015	18:03:23		Completed Successfully	[redacted]	04-AUG-15 02.05.24 PM	LIVE_ VOICE	08/04/2015 11:03:21 AM	Incoming Call	Blocked
8/7/2015	18:21:19		Completed Successfully	[redacted]	07-AUG-15 02.23.21 PM	LIVE_ VOICE	08/07/2015 11:21:18 AM	Incoming Call	Blocked
8/18/2015	21:34:55		Completed Successfully	[redacted]	18-AUG-15 05.36.57 PM	LIVE_ VOICE	08/18/2015 02:34:54 PM	Incoming Call	Blocked

See Zitko Decl. ¶ 18; T-MOBILE_00000047, Ex. A to Cathleen Ismael Decl. (T-Mobile call records); Ismael Decl. at 1; HUNTER_00000955, Ex. A to Zitko Decl. (TWC call records); Rateliff Aff. at 2-3 (First Orion call blocking records).[31] The calls had a "null" length in T-Mobile's records, confirming that the calls were blocked and there was no time for any message to play: [redacted]

[redacted] First Orion's records confirm that these calls were instead blocked through a "pick up and hang up process." *See supra* n.30; Zitko Depo. 98:1-24; Zitko Decl. ¶¶ 17-18. Indeed, TWC provided the first of these four calls to Plaintiffs' expert, who opined that if the IVR platform "dialed somebody and they had call-blocking software, it would probably be recorded as live voice." Snyder Depo. 159:19-21; *see also id.* 160:12-17. He further opined:

> Q. And because that blocked call would have been disconnected before anything else happened on the phone, no artificial or prerecorded voice would have played on that call; correct?

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are recorded as "missed," while those that are blocked entirely are recorded as "blocked." *Id.* ¶¶ 8, 12. In this case, 23 calls placed by TWC to Hunter's number were successfully blocked through a "pick up and hang up" process. *See* Rateliff Aff. at 2-3.

[31] TWC has confirmed that these records represent data from the same four calls, notwithstanding the offset of 2 minutes and 1-2 seconds between the time recorded in TWC's records and that recorded in the other companies' records. Zitko Decl. ¶¶ 17-18; Peppercorn Decl. ¶¶ 39-42.

A. That's right.

Id. 160:24-161:2.[32]

There is no basis to conclude that Plaintiff Hunter is the only putative class member affected by this issue: [redacted] Reflecting the popularity of these third-party solutions, many cellular providers and device manufacturers preinstall such applications on their phones. [redacted][33] [redacted]

[32] On redirect, Plaintiffs' counsel tried to mend Mr. Snyder's testimony, *id*. at 187:10-193:19, but even if Plaintiffs claim there is room for reasonable dispute as to whether a prerecorded voice actually played on these four calls, TWC has a due process right to put that question to a jury on an individual basis, just as TWC does with respect to each of the other "Live_Voice" and "Answering_Machine" calls to putative class members, based on testimony from the call recipient, call recordings held by the recipient (if any), and other available evidence.

[33] *See also Caller Name ID*, https://www.verizonwireless.com/solutions-and-services/caller-name-id/ ("Got an Android device? Most already come preloaded with Caller Name ID."); AT&T, *AT&T Unveils AT&T Call Protect to Help Customers Manage Unwanted Calls* (Dec. 20, 2016), http://about.att.com/story/att_call_protect.html; Simon Hill, *How to Block Calls on an iPhone*, Digital Trends (Aug. 28, 2018), https://www.digitaltrends.com/mobile/how-to-block-calls-on-an-apple-iphone/ ("Apple has a built-in call-blocking utility in its iOS operating system.").

[redacted]

The insufficiency of TWC's records to establish whether a prerecorded voice played during a given call (much less whether such a voice was received and heard, and thus the class member has standing) independently precludes class certification. For example, in *Fitzhenry*, the court found that individual issues predominated because the class methodology included instances in which the prerecorded message may not have successfully played on the proposed class member's answering machine. 2014 WL 6663379 at *6-7. The court noted that "the only way to determine whether a message was actually delivered is to listen to the 36,748 calls." *Id.* at 7. Here, even that is not possible because the calls were not recorded—instead, testimony by every class member would be necessary.

2. Individual Issues Remain as to Whether the Individual Who Received The Call Received It on a *Cellular* Telephone

Plaintiffs include in their putative class (at 10) individuals who allegedly received a call "on either their cellular *or residential telephone*." (emphasis added). But Plaintiffs completely overlook that individuals who received calls on a *residential landline have no claim as a matter of law*. Section 227(b)(1)(B) of the Communications Act, the part of the TCPA that governs calls to residential landlines, provides for liability if a caller "initiate[s] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, *unless the call is … exempted by rule or order by the Commission under paragraph (2)(B)*." (emphasis added). And the FCC has promulgated such exemptions, at 47 C.F.R. § 64.1200(a)(3)(iii), providing that a prerecorded call to a "residential line" is completely exempt from liability if it is "made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing." It is undisputed that TWC's

IVR *payment reminder* calls were not telemarketing or advertisements; the Court has already entered partial summary judgment finding that "Plaintiffs have failed to carry their burden to show that calls to them made by Time Warner were made for 'telemarketing purposes.'" Order, ECF No. 154 at 21-22; *see also* Zitko Decl. ¶ 4. Thus, any putative class member who received a call on a *residential landline* has no claim here. *Franasiak v. Palisades Collection, LLC*, 822 F. Supp. 2d 320, 323 (W.D.N.Y. 2011); *Rantz-Kennedy v. Discover Fin. Servs*., No. CIV. CCB-12-2853, 2013 WL 3167912, at *3 (D. Md. June 20, 2013), *aff'd*, 544 F. App'x 183 (4th Cir. 2013). And this Court has recognized that a class cannot be certified where its members have no right to recovery as a matter of law. *Downie v. Carelink, Inc*., No. 16-CV-5868 (JPO), 2018 WL 3585282, at *8 (S.D.N.Y. July 26, 2018) (Oetken, J.).

3. Individual Issues Remain as to Whether the Putative Class Members Possess Article III Standing

Even if Plaintiffs could show a class-wide methodology to establish which calls a prerecorded voice played on without consent (they cannot), individualized issues of Article III injury still predominate over any common questions. *See Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 108 (2d Cir. 2007). Plaintiffs must show that *every* putative class member has standing. *Calvo v. City of N.Y.*, No. 14-CV-7246 (VEC), 2017 WL 4231431, at *3 (S.D.N.Y. Sept. 21, 2017) ("[I]n this Circuit, a class cannot be certified if any person captured within that definition lacks Article III standing."). A mere allegation of a TCPA-related injury like "cost, waste of time, annoyance, and invasion of privacy" may be sufficient to *allege* standing at the motion to dismiss stage. *See Rotberg v. Jos. A. Bank Clothiers, Inc.*, No. 16-CV-2962 (JPO), 2018 WL 5787480, at *4 (S.D.N.Y. Nov. 5, 2018) (Oetken, J.). But at trial, Plaintiffs will need to *prove* those injuries occurred. *Lewis v. Casey*, 518 U.S. 343, 358 (1996). That cannot be done without an individualized examination into the circumstances of each call because the only

class-wide evidence available—the IVR data—does not itself reflect any concrete injury. Each class member must prove that he or she actually was aware of the call and felt disrupted or that their privacy was invaded, that they incurred some expense, or so on. That is not amenable to class-wide proof, [redacted]. *See Fitzhenry*, 2014 WL 6663379 at *7 n. 9 (finding that the individualized issue of whether "the prerecorded message [was] received" or instead played over an answering machine greeting was an "individual issu[e]" that "predominate[d]" given that "it is difficult to conceive of an injury based on the prerecorded nature of the message when no one hears that message").

4. Individual Issues Remain as to Whether TWC "Knowingly" Committed Any Violation

As Your Honor has recognized, in some cases "individualized damages calculations [may] predominate over the common damages claims," which is an "important factor" in "whether common questions of law and fact predominate." *Emilio v. Sprint Spectrum L.P.*, No. 11-CV-3041 (JPO), 2017 WL 3208535, at *10 (S.D.N.Y. July 27, 2017) (Oetken, J.). Here, Plaintiffs seek (at 12) at least $500 for each call, but up to treble damages of $1,500 for any "willful[] or knowing[]" violations. *See* 47 U.S.C. § 227(b)(3)(B).

Yet Plaintiffs' own claims illustrate that individual damages calculations will predominate based on whether each call was placed "willfully or knowingly" without consent. For example, a prerecorded voice might have played on, at most, two of the calls that TWC allegedly placed to Plaintiff Villa. *See* VILLA-0001001, Ex. I to Zitko Decl. at 1; Zitko Decl. n.2 & ¶ 37. But the record evidence shows that TWC stopped calling Plaintiff Villa before she could contact TWC and request that it do so. Peppercorn Decl., ECF No. 116 ¶¶ 8-11. By contrast, an artificial or prerecorded voice might have played on, at most, 11 of the calls that TWC allegedly placed to Plaintiff Hunter. *See* HUNTER_00000955, Ex. A to Zitko Decl. at 2-3; Zitko Decl. n.2 & ¶ 37.

Plaintiff Hunter maintains that all of those alleged violations were knowing and/or willful (Second Am. Compl., ECF No. 178 ¶¶ 75-78), but testified that some of the calls to her came before she asked TWC to stop calling, and some calls came after she did so. Hunter Depo. 58:5-12; 100:8-101:23. Whether or not that is true, TWC is entitled to a jury finding as to (i) when, if at all, Plaintiff Hunter actually told TWC to stop calling; (ii) whether calls prior to, or, subsequent to that date can be "willful" or "knowing." *See, e.g.*, *Manuel v. NRA Grp. LLC*, 722 F. App'x 141, 144 n.4 (3d Cir. 2018) (noting that "[a]fter a two-day trial on treble damages, a jury found that NRA did not willfully or knowingly violate the TCPA"). [redacted] TWC has shown that it has a good faith entitlement to rely on the numbers its customers provide, at least until TWC is notified by a third party that it may have a wrong number. That is a highly individualized jury question.

II. PLAINTIFFS FAIL TO SATISFY THE REMAINING ELEMENTS FOR CLASS CERTIFICATION

Plaintiffs have also failed to show commonality or superiority.

[redacted]

A. Plaintiffs Have Failed To Show Commonality

Although the question of "commonality" might appear redundant of the "predominance" requirement, it is of particular importance here because Plaintiffs seek certification of a class for injunctive relief under Rule 23(b)(2), as to which a requirement of commonality applies, but not of "predominance." Although commonality requires that "there are questions of law or fact common to the class," Rule 23(a)(2), "[t]hat language is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" *Dukes*, 564 U.S. at 349-50. Plaintiffs engage in just such a misreading: They propose (at 12) purported common questions like "whether Defendant's conduct constitutes a violation of the TCPA" and "whether class members are entitled to statutory damages" or "equitable relief." Such ultimate questions of liability, damages, and relief are not common questions as a matter of law. *Dukes*, 564 U.S. at 349-50.

Plaintiffs' other purported "common questions" (at 12), *i.e.*, "whether Defendant called class members using an artificial or prerecorded voice," "whether Defendant had prior express written consent[35] from class members to place such calls," the amount of "statutory damages" individuals are entitled to, and "whether Defendant's conduct was knowing and/or willful," are not "common questions" because they are incapable of common *answers* for all the same reasons discussed above. "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. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350. For example, in *Shamblin v. Obama for America*, a case cited by Plaintiffs, the court found that "there can never

[35] Plaintiffs' reference to "prior express ***written*** consent" is simply wrong, because that requirement applies only to a call that "introduces an advertisement or constitutes telemarketing." 47 C.F.R. § 64.1200(a)(2), 64.1200(a)(3)(iii), which TWC did not place here. *See supra* at 39-40.

be" a common answer to the question of "whether the subscriber consented to be called" because consent is necessarily an individualized inquiry. No. 8:13-CV-2428-T-33TBM, 2015 WL 1909765, at *7 (M.D. Fla. Apr. 27, 2015); *Balthazor v. Cent. Credit Servs., Inc.*, No. 10-62435-CIV, 2012 WL 6725872, at *4 (S.D. Fla. Dec. 27, 2012) (finding failure to show commonality and predominance where "[r]esolution of each putative class member's TCPA claim would necessarily involve an individual assessment of whether each class member consented to receive telephone calls"); *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV, 2008 WL 5479111, at *8 (S.D. Fla. Dec. 11, 2008) (similar). As discussed above, commonality is also lacking due to numerous other non-common issues, like whether a prerecorded voice played, Article III injury, and the measure of damages; those same problems equally defeat a showing of commonality as well.

B. Plaintiffs Have Failed To Show Superiority

Plaintiffs have not demonstrated that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The superiority analysis requires "consideration of … alternative methods of adjudication" and a "comparison" between such alternatives and the class action mechanism. *In re Beacon Assocs. Litig.*, Nos. 09 Civ. 777(LBS)(AJP), 09 Civ. 8362(LBS), 2012 WL 1569827, at *11 (S.D.N.Y. May 3, 2012). Superiority includes the requirement that a class be manageable, which "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

The superiority requirement is not met here for the same reason that Plaintiffs cannot show predominance or commonality: the individualized issues discussed above provide too many individualized assessments for class-wide determination to be superior to the individual claims being brought separately. *See Shamblin*, 2015 WL 1909765 at *13 (determining that "class wide resolution of the dispute is not superior to other methods of adjudication" largely because the court

"already determined that Shamblin has not satisfied the predominance prong of Rule 23(b)(3)"); *Gannon v. Network Tel. Servs.*, No. CV 12-9777-RGK PJWX, 2013 WL 2450199, at *4 (C.D. Cal. June 5, 2013); *Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 376 (D. Colo. 2015).

Given the large number of individualized inquiries identified above, it is difficult to imagine how this case could be tried in a manageable manner consistent with TWC's due process rights, which is probably why Plaintiffs failed to present any trial plan with their motion. This "belies any suggestion that a fair administration of the class claims could 'save[] the resources of both the court[] and the parties,'" and precludes certification. *Sacred Heart Health Sys. v. Humana Military Healthcare Servs*., 601 F.3d 1159, 1184 (11th Cir. 2010); *Acker v. Bishop*, No. 2:06-CV-0710, 2007 WL 1308385, at *2 (W.D. La. Mar. 27, 2007) (Counsel's "failure to offer any realistic [trial] plan … adds weight to this court's conclusion that a class action is not superior….").

The due process rights of absent class members also counsel against a finding of commonality. Given the unreliability of Plaintiffs' methodology at identifying individuals in the class, it is highly likely that some individuals with potentially valid claims will have those claims *foreclosed* without ever receiving class notice. To name just one example, as discussed *supra* at 19, [redacted]. A customary user of one of those numbers may fall within Plaintiffs' proposed class definition, yet because Plaintiffs' methodology simply ignores these numbers, the individual would never receive a class notice. *See Pelman v. McDonald's Corp.,* 272 F.R.D. 82, 99 n.41 (S.D.N.Y. 2010); *Dukes*, 564 U.S. at 363 (in this context, "absence of notice and opt-out violates due process").

Finally, wrestling with all these difficult problems is simply unnecessary: Although a common rationale for finding superiority present is that a claim, pursued individually, would constitute a "negative value" case, *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.,*

209 F.R.D. 323, 350 (S.D.N.Y. 2002), individual TCPA suits are commonplace, in light of the substantial statutory damages available under the statute. Individuals have brought claims against TWC in the rare situation where TWC might have reached a wrong number. *See* Flores Decl. ¶¶ 6-18. [redacted]

III. PLAINTIFFS' ALTERNATIVE REQUEST FOR AN INJUNCTIVE CLASS FAILS BECAUSE THEY CANNOT SATISFY THE OTHER RULE 23(B)(2) REQUIREMENTS

A. Plaintiffs Lack Standing To Seek Injunctive Relief and Are Therefore Not Typical or Adequate Class Representatives

Finally, Plaintiffs lack standing to seek injunctive relief, and certification of a class under Rule 23(b)(2) therefore cannot be granted. *See In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, No. 13-CV-150 JPO, 2015 WL 5730022, at *8 (S.D.N.Y. Sept. 30, 2015) (Oetken, J.) (denying "certification of class seeking injunctive and declaratory relief under Rule 23(b)(2)" because plaintiffs "lack standing to seek a forward-looking injunction"). The named Plaintiffs *themselves* must have standing to pursue injunctive relief; the standing of other *class members* to pursue such relief cannot support certification. *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 68 (S.D.N.Y. 2013) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)).

For a court to award prospective injunctive relief, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "Past exposure to illegal conduct does not in itself show a present case or controversy

regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

Here, Plaintiffs lack standing to seek injunctive relief because there is no basis to conclude that they face a "real or immediate threat" of being subject to the alleged illegal conduct again. *City of L.A. v. Lyons*, 461 U.S. 95, 96 (1983). Plaintiff Villa admits that TWC stopped calling her alleged telephone number over *three years ago*, and no later than December 8, 2015, prior to service of the summons in Plaintiff Villa's original action against TWC. *See* Ex. B to Prins Decl., Response to TWC's First Requests for Admission (Oct. 31, 2018), RFA No. 16; *Villa v. TWC*, No. 1:15-cv-09576, Summons (Dec. 9, 2015), ECF No. 6. Likewise, Plaintiff Hunter admits that TWC stopped calling her number *almost three years ago*, by February 10, 2016, and approximately a *month and a half* prior to Plaintiff Hunter's joinder to this lawsuit on March 28, 2016. *See* Response to TWC's First Requests for Admission, RFA No. 15; First Amended Complaint, ECF No. 178 (joining Hunter as a plaintiff).

Moreover, TWC's calling systems technologically cannot place outbound calls unless a telephone number is listed on some account, and TWC long ago removed Plaintiffs' telephone numbers from its internal account records, on February 4 and March 21, 2016, respectively. Peppercorn Decl., ECF No. 116 ¶¶ 11, 17; Zitko Decl. ¶ 39. TWC's policies also require that once a "wrong number" is removed, TWC will not place additional calls to that number (unless an individual re-initiates contact from that number). Zitko Decl. ¶ 39. Because TWC does not have Plaintiffs' numbers available for calling in its systems, TWC's internal policies prevent it from contacting Plaintiffs' numbers again, and there is no plausible reason for TWC to call Plaintiffs again (and TWC has not done so in *three years*), Plaintiffs lack standing to obtain injunctive relief. *Lyons*, 461 U.S. at 111; *also* Zitko Decl. ¶ 39; Peppercorn Decl., ECF No. 116 ¶ 18.

This Court previously considered TWC's arguments in the context of summary judgment, and found that "because Plaintiffs have not yet been able to take discovery into Time Warner's systems and procedures, it would be premature for the Court to determine that Time Warner has adequately foreclosed the possibility of future violations," while noting that "[f]urther discovery may reveal that Time Warner has, in fact, taken steps to ensure that future violations will not occur, rendering injunctive relief unnecessary." ECF No. 154 at 23. Plaintiffs have had the opportunity to take such discovery, discovery is now closed, and discovery has established TWC's unblemished track record of three years without placing any further calls to Plaintiffs. That is sufficient to find that Plaintiffs lack standing to seek a prospective injunction. Judge Snyder of the Central District of California, for example, found that a 1.5 year lapse since the last call (which was also placed before the lawsuit was served) deprived a plaintiff of standing to seek injunctive relief. *Miller v. Time Warner Cable Inc*., No. 8:16-CV-00329-CAS-ASX, 2016 WL 7471302, at *4 (C.D. Cal. Dec. 27, 2016); *see also Aghdasi v. Mercury Ins. Grp., Inc.,* No. CV 15-4030-R, 2016 WL 5899301, at *2 (C.D. Cal. Jan. 12, 2016) (similar). Any claim that TWC may call Plaintiffs' numbers again is too remote and speculative to give rise to standing to pursue injunctive relief. Because they lack standing, they are also atypical and inadequate representatives of an injunctive class. *See, e.g.*, *Washington v. Vogel*, 156 F.R.D. 676, 684, n.11 (M.D. Fla. 1994).

B. Even If Plaintiffs Had Standing, They Are Not Entitled to Certification

Rule 23(b)(2) requires that the defendant have acted on grounds that "apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 564 U.S. at

360. "It does not authorize class certification when each individual class member would be entitled to a different injunction … against the defendant." *Id.*

Here, a class for injunctive relief cannot be certified, because Plaintiffs have not shown that "a single injunction … would provide relief to each member of the class." *Id.* The only putative class members who might have an entitlement to *any* injunction would be individuals who (i) were true "wrong number" recipients that TWC reached without consent, (ii) are not themselves current or former subscribers of TWC or its affiliates; and (iii) face the prospect of future harm. *See supra* at 7, 30-32, 40-41.[36] Thus, all of the individualized issues above that defeat predominance and commonality apply equally to preclude certification under Rule 23(b)(2). It is impossible to determine which putative class members are entitled to *any relief* under the TCPA "without a member-by-member analysis and individualized proof," presenting "disparate factual circumstances" that preclude certification under Rule 23(b)(2). *Ung*, 319 F.R.D. at 543; *accord*, *Ginwright v. Exeter Fin. Corp*., 280 F. Supp. 3d 674, 690 (D. Md. 2017).

In addition, Plaintiffs have only requested (at 21) an injunction "requiring that Defendant stop making the types of calls at issue in this case," but "[a] claim for an injunction that simply orders a defendant to comply with the TCPA and follow the law is not a proper for class certification under Rule 23(b)(2)." *Ginwright*, 280 F. Supp. 3d at 690; *see also Ung*, 319 F.R.D. at 543-44. An injunctive class is also improper here because "the requested monetary relief predominates over the claims for equitable relief." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 18 (2d Cir. 2003); *accord Ung*, 319 F.R.D. at 543-44 ("a potential recovery of hundreds

[36] Notably, even according to Plaintiffs' own methodology, 397 of the 1,943 "mismatched" telephone numbers (20%) have not received a single call since August 1, 2015, *i.e.*, prior to the service of the original complaint in this action. Fuite Decl. ¶ 48. Moreover, 505 of the 1,943 "mismatched" telephone numbers (26%) have not received a single call since December 1, 2015, *i.e.*, prior to either Plaintiff Hunter or Villa's filing of any complaint. *Id.*

of millions of dollars" shows "this is a case driven by money, not equitable relief"). Indeed, proceeding as an injunctive class would be particularly unfair to class members with valid claims, who would have potentially significant damages claims extinguished by claim preclusion in exchange for an injunction they may neither need nor want. *See, e.g., In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 367 (S.D. Iowa 2008) (finding plaintiffs inadequate where certification of injunctive claims risked "res judicata" foreclosing class members' future damages claims).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification should be denied.

Dated: January 23, 2019

By: /s Andrew D. Prins
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