No. 20-

In the United States Court of Appeals for the Eighth Circuit

J.T. HAND, individually and on behalf of a class of all others similarly situated,

Plaintiff-Respondent,

v.

BEACH ENTERTAINMENT KC, LLC d/b/a Shark Bar, THE CORDISH COMPANIES, INC., ENTERTAINMENT CONSULTING INTERNATIONAL, LLC,

Defendants-Petitioners.

On Petition for Leave to Appeal from an Order of the United States District Court for the Western District of Missouri, Western Division, Case No. 4:18-cv-00668-NKL, The Honorable **Nanette K. Laughrey**, Judge Presiding.

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f) AND FRAP 5

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1 and Local Rule 26.1A, Defendants state that:

Beach Entertainment KC, LLC d/b/a Shark Bar is a limited liability company organized under the laws of Maryland and does not have a parent corporation. There is not a publicly traded company that owns 10 percent or more of its stock.

Entertainment Consulting International, LLC is a Maryland limited liability company organized under the laws of Maryland and does not have a parent corporation. There is not a publicly traded company that owns 10 percent or more of its stock.

The Cordish Companies, Inc. is a Maryland corporation organized under the laws of Maryland and does not have a parent corporation. There is not a publicly traded company that owns 10 percent or more of its stock.

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Introduction

Pursuant to Fed. R. Civ. P. 23(f), Defendants[1] petition this Court for review of a district court order ("Order") certifying a class in a case arising under the Telephone Consumer Protection Act ("TCPA"). That Order is manifestly erroneous. Among other things, it fails a basic tenet of Rule 23 – litigation conducted by a class "representative" should bind an absent class of similarly situated persons. The class certified under the Order, however, will not be bound by the outcome of Plaintiff's claim. Rather, the Order anticipates different answers to key liability questions that will result in different outcomes for class members.

Plaintiff's claim is, thus, not "representative" of the absent class's claims, as required by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The Order contemplates that Plaintiff may win or lose based on evidence that pertains uniquely to him, and that absent class members will win or lose will depending on how individualized evidence pertains to each one of them. These individualized inquiries, and the various resulting outcomes, defeat the purpose of a class action.

The District Court certified a class under the TCPA's "Do Not Call" ("DNC") provision, Section 227(c), and the regulations promulgated thereunder. Unlike the TCPA's more commonly-litigated "robocall" provision, which claim

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[1] Beach Entertainment KC, LLC, d/b/a Shark Bar ("Shark Bar"), Entertainment Consulting International, LLC ("ECI") and The Cordish Companies, Inc. ("Cordish," and collectively, "Defendants").

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was dismissed by the District Court here, the DNC provision applies *only* to "residential telephone subscribers" who listed their numbers on the National Do Not Call Registry ("NDNCR"), and do not apply to calls made with "prior express permission" or where the caller had an "established business relationship" ("EBR") with the call recipient. Thus, in order to determine whether any individual is entitled to relief, the court must determine whether each class member (i) was a residential telephone subscriber, and either (ii) gave Shark Bar permission to text them, or (iii) had an EBR with Shark Bar.

This case involves text messages sent by Shark Bar, a popular bar and restaurant, to its customers who completed a written form to enter a contest to win a happy hour. The contest entry forms are available only at the venue, and include an express agreement to receive text messages. Plaintiff does not dispute that the forms are adequate to create permission, and that anyone who filled out a form is not entitled to relief under the TCPA. Yet the class that the District Court certified includes *anyone* "who received more than one text message from Shark Bar in any twelve month period to a number included on the [NDNCR]," regardless of whether they completed contest entry forms and therefore have no TCPA claim.

Plaintiff's claims are plainly not representative of the class as a whole. While Shark Bar obtained consent from virtually every class member, and although Shark Bar's records show that Plaintiff himself completed a contest entry

form, Plaintiff contends that he did not actually do so. Plaintiff also claims that he responded "stop" to a Shark Bar text, but he could not produce any phone record to show that he had done so, and did not recall when he had supposedly done so. Shark Bar's text logs, the accuracy of which Plaintiff relies on to establish texts sent and received, shows that Plaintiff never sent Shark Bar a single text.

On the key liability question of "prior express permission," the District Court held that there is record evidence "common to all class members" demonstrating that Shark Bar obtained such permission through the contest entry forms. The problem, though, is Plaintiff claims that he – unlike absent class members – never completed a contest entry form. As a result, Plaintiff is in an irreconcilable conflict with the absent class on a dispositive question. This alone rendered class certification a manifest error.

On a separate dispositive liability question, the Order recognizes that at least some absent class members, and potentially Plaintiff himself, had an EBR if they purchased anything from Shark Bar within an 18-month period. The Order proposes to determine which class members had an EBR by "cross-referencing various credit card records." Notably, neither party suggested this approach, and nothing in the record shows it is even possible, particularly without the credit card information for each absent class member. Moreover, numerous people within the certified class likely created an EBR by paying in cash, and identifying these class

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members will require highly individualized inquiries. Regardless, the Order directly conflicts with *Dukes*, because the answers to the dispositive EBR question cannot be "resolve[d] . . . in "one stroke." 564 U.S. at 350.

On yet another dispositive question – "residential subscriber" – which the Order describes as an "essential element" of Plaintiff's claim, the Order relieved Plaintiff of his Rule 23 burden to demonstrate that the question could be resolved in "one stroke." In fact, when addressing Defendants' summary judgment motion challenging that Plaintiff was not a "residential subscriber," the District Court acknowledged that establishing this element depends upon each individual's phone use. While the District Court denied Defendants' motion on this ground, the trier of fact will have to decide this dispositive issue based on evidence unique to Plaintiff. If Plaintiff does not succeed on this element at trial, this will result in judgment against the absent class regardless of whether any could independently satisfy it.

In sum, and as set forth more fully below, this Court should grant this Petition so that it may review an unquestionably wrong class certification decision, without requiring the parties and District Court to go through a trial that cannot possibly result in a proper classwide judgment under Rule 23.

Statement of Jurisdiction

This District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to Fed. R. App. P. 5 and Fed. R. Civ. P. 23(f).

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Questions Presented

1. Whether the District Court erred in certifying a class where Plaintiff's claim is predicated on evidence that is unique to him, and the result obtained as to Plaintiff's claim will not be applicable to the absent class?

2. Whether the District Court erred in certifying a class where individualized evidence will result in different outcomes for differently situated class members, thus defeating Rule 23's predominance requirement?

Statement of Relevant Facts and Procedural History

Overview of the Litigation and the DNC Claim. On April 27, 2020, the District Court issued the Order, which: (i) certified a class with respect to Plaintiff's DNC Claim, (ii) granted, in part, and denied, in part, Defendants' summary judgment motion, and (iii) denied Plaintiff's summary judgment motion.

As the Order outlines, to succeed on the DNC Claim, Plaintiff is required to prove that he received more than one "telephone solicitation" in a twelve-month period to his "residential telephone" number that is registered on the NDNCR.[2] A20-21, citing 47 U.S.C. §227(c); 47 C.F.R. § 64.1200(c). Under the TCPA, "telephone solicitation" only includes telemarketing calls/texts, and does *not* include calls to persons with whom the caller has an EBR, which, as the District Court found, includes persons who made purchases at Shark Bar within 18-months

[2] The TCPA provides for statutory damages of "up to $500" for individuals who establish a DNC Claim. A20.

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of receiving a text message. A20, 24, 26-27. A "telephone solicitation" also does ***not*** include "calls to any person with that person's prior express invitation or permission." 47 C.F.R. 64.1200(f)(14)(i); A66-67.

With respect to the "residential subscriber" element, the District Court found that a cell phone user "can qualify" for this "essential" element, but recognized that factual determinations are required to resolve that element, including "whether a wireless subscriber uses their phone in the same manner in which they would use their residential landline phone" and potentially "whether a person maintained a traditional land line in additional to their wireless line," or whether a person "used the number for business purposes." A22, n. 5

Shark Bar's Happy Hour Program. Shark Bar[3] is a restaurant and bar in Kansas City, Missouri. It held contests for its customers to win happy hour events. A2. During the class period, Shark Bar's customers could complete a contest entry form to participate through a variety of ways, including by completing (i) a paper card available at Shark Bar ("Paper Card"), (ii) a sign-in sheet, or (iii) a Google form, or online contest entry form. A135, ¶ 6. Although the entry forms varied by type and changed over time, they included an agreement by the persons completing them to receive text messages from Shark Bar. A140-44; *see also* A2-3. Shark Bar

[3] Defendant ECI provides consulting services to Shark Bar. A5-6. Defendant Cordish is a passive entity that conducts no operations and has no employees. A7-8. Both ECI and Cordish dispute that they are liable for any alleged conduct by Shark Bar, but, because those issues are not the proper subject of this Petition, they do not seek review of the District Court's Order on this issue at this time.

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personnel entered information from these forms into a customer database; in the case of the paper forms completed, this data entry was done manually. A3, 5. At oral argument, Plaintiff's counsel conceded that, with respect to electronic entry forms, such individuals were excluded from the class because "there are actual records of when people signed up electronically that they checked the box evidencing consent. . . . and we're not trying to include people where the records establish or show that they have somehow signed up their number." A176.

While Shark Bar did not maintain the submitted Paper Cards themselves for consumer privacy and other reasons, there is no dispute that it did maintain detailed records that identify each person who completed a Paper Card, the information provided (*i.e.*, names, phone numbers and dates of birth), and often the approximate date on which the Paper Card was submitted. A136, ¶¶ 11, 13. Shark Bar obtained contact information *only* from its customers; it never obtained contact information from any other source. A135-36, ¶ 10. Neither Plaintiff, nor the District Court, dispute that the Paper Cards adequately reflect permission; thus, anyone who completed a Paper Card lacks a DNC claim under the TCPA.

Shark Bar communicated by text message only with contest winners, who had agreed to receive text messages via the entry forms, to inform them that they had won and to plan the happy hour event. A137, ¶ 19. Customers understood that they were providing their phone numbers to receive text messages about winning a

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happy hour. A146, ¶ 4; A149, ¶ 4. Shark Bar held thousands of happy hours events for text recipients (contest winners), who utilized the happy hours for both social and business purposes. A135, ¶ 5; A137 ¶ 21. Indeed, a significant number of the happy hours held were by local businesses treating their employees or business associates. A137, ¶ 21.

Plaintiff Disputes That He Submitted Any Contest Entry Form. Plaintiff "does not dispute that Shark Bar obtained individuals' contact information" as described above; but he claims he never completed any entry form whatsoever and never otherwise provided his contact information to Shark Bar. A3. This contention is contrary to Shark Bar's records, which reflect that Plaintiff did, in fact, complete an entry form on or about November 2, 2013, with the records accurately reflecting Plaintiff's name, gender, phone number, and email address (Plaintiff's full birthdate is off by about one month). *Id.*

Text Messages Sent by Shark Bar. Shark Bar maintained, and produced in discovery, text logs reflecting all texts sent and received by Shark Bar during the class period, including the phone numbers to which texts were sent or received, the time and dates, and the content of such texts. A48; A137-38, ¶¶ 19-25. The text logs confirm that the texts were directed to Shark Bar customers who entered the contest, and individual back-and-forth exchanges show that recipients expected and desired to receive the messages sent by Shark Bar. A137, ¶ 21, A194-95, 198.

Plaintiff does not dispute these facts. A3. In fact, for reasons that Plaintiff never explained, he did not seek to certify the class defined in his complaint, but rather attempted to exclude persons who responded positively to texts.[4] A46. It appears that Plaintiff may have changed course in an attempt to avoid including two individuals in the classes Plaintiff sought to certify, who submitted declarations that they: (a) were customers of Shark Bar; and (b) voluntarily completed Paper Card entry forms and understood that, by doing so, they had agreed to receive text messages from Shark Bar. A145-50.

A Disputed Issue of Fact Exists As To Whether Plaintiff Had an EBR. Shark Bar sent Plaintiff four texts, on March 18, 2015, February 24, 2016, September 6, 2017, and December 14, 2017, to notify him that he won a happy hour. A3-4. The District Court found it was undisputed that Plaintiff made purchases from Shark Bar in May 2016, which would create an EBR. A3, 27. The District Court found, however, that a disputed issue of fact existed as to whether, and if so, when, Plaintiff texted "stop" in response to one of the texts, thus, terminating his EBR with Shark Bar. A27. Shark Bar's text logs demonstrate that Plaintiff never responded, or sent any inbound text, to Shark Bar – let alone one that said "stop" – as he claims. A46, 48. Plaintiff, for his part, could not recall

[4] Plaintiff attempts to do this by excluding responses including certain words; however, this effort failed to exclude all positive responses. A46, 72. Plaintiff also excluded persons who completed electronic entry forms. Notably, Plaintiff's class definition does not reflect these exclusions; he addresses them in a footnote. A119.

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when he purportedly texted "stop," nor could he produce any record of this alleged request. A4. While Plaintiff argued, and the District Court purported to accept, that the accuracy of Shark Bar's text logs could be relied upon for other purposes, Plaintiff must convince a trier of fact that those records are inaccurate to prevail on his individual claim. A46-48.

Plaintiff's Certification Motion. In his Certification Motion, Plaintiff argued that liability on the DNC Claim can be established on a classwide basis merely "by showing that the text messages sent to members of the Do-Not-Call Class meet the regulatory definition of 'telephone solicitation.'" A128-29. Plaintiff offered no classwide mechanism to address other questions that are dispositive of the claim, including whether class members (i) had an EBR, (ii) gave "prior express permission or invitation," or (iii) meet the essential "residential subscriber" element. A113-33. Nor did Plaintiff explain how he was a common, typical or adequate representative of a class of persons who were irreconcilably different than him – because they completed contest entry forms providing permission and, according to Plaintiff, he did not.

The Order. The District Court found that discovery pertaining to Plaintiff's particular use of his cell phone, and the fact that he had a separate phone for business purposes, was sufficient to withstand summary judgment as to the "essential" residential subscriber element. A23-24. With respect to EBR, the

District Court held that while Plaintiff's purchases at Shark Bar were sufficient to establish an EBR, a disputed issue of fact existed as to whether Plaintiff terminated the EBR by allegedly texting "stop." A27.

The District Court granted Plaintiff's motion to certify the DNC Class. The District Court noted that "prior express invitation or permission is likely to be primary at trial," and found "evidence in the record that is common to all class members that indicates this was their general policy" – referring to the use of entry forms to obtain permission. A69, 74. But the District Court did not address that such evidence would *not* be common or potentially even applicable to Plaintiff, who claims he never completed a contest entry form. A3. The District Court also recognized that a review of individual texts of absent class members could be evidence of consent as to subsequent texts. A72.

As to EBR, the Order states that whether or not each class member had an EBR could be determined by "cross-referencing various credit cards and the class list," even if it is "time consuming." A75. But Plaintiff did not demonstrate, and therefore the District Court could not have found, that this is even feasible – particularly without the class member credit card information or information on who paid cash. The District Court also found that it did not need to be concerned with class members who made cash purchases at Shark Bar, because Defendants did not provide examples of class members who paid in cash or offer evidence

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about the percentage of cash transactions. A76. But this was not Defendants' burden under Rule 23. As to Plaintiff, his EBR will depend on whether a trier of fact believes he texted "stop," which is supported only by his own testimony.

The Order also held that whether each absent class member's cell phone constituted a "residential telephone" is somehow susceptible to classwide resolution, even though evidence of an individual's phone use is necessary to establish this element. Although the Order refers to this issue as an "essential element" of Plaintiff's claim in the summary judgment portion of the Order, the District Court characterized Defendants' Rule 23 challenge on this issue as "the mere mention of a defense." A77.

Relief Sought

The Court should grant this petition for leave to appeal pursuant to Rule 23(f), and reverse the Order granting class certification.

Argument

This Court has "unfettered discretion" over whether to allow a petition for permission to appeal under Federal Rule of Civil Procedure 23(f). Advisory Committee Notes to Rule 23(f). Interlocutory review is permitted when the requirements for class certification were not met and review was improperly granted. *See, e.g.*, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013) (permitting an interlocutory appeal and reversing certification because

the class failed to meet the predominance requirement). This Court reviews a district court's class certification orders for abuse of discretion; however, its rulings on issues of law are reviewed *de novo* and "the court abuses its discretion if it commits an error of law." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013).

Here, interlocutory review is warranted because the Order so clearly defies the basic tenets of Rule 23, setting this case on a collision course to violate the due process rights of not only Defendants, but also the absent class.

I. The Order Misapplies the Requirements of Rule 23(a)

Commonality is only satisfied where a common contention is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "In other words, a proponent of certification must satisfy the commonality requirement by showing that a classwide proceeding will 'generate common answers apt to drive the resolution of the litigation.'" *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (quoting *Dukes*, 564 U.S. at 350 (internal quotation omitted)). And, "[a] proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation." *In re Milk Prods. Antitrust Litig.*,

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195 F.3d 430, 437 (8th Cir. 1999). The District Court unquestionably misapplied Rule 23's commonality, typicality and adequacy requirements.

As this Circuit has recognized, "the presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) (granting appeal under Rule 23(f) and reversing the district court's certification order). Here, the question of whether Plaintiff provided "prior express permission" will not generate an answer that is common to the class. Indeed, the District Court acknowledged that anyone who filled out Shark Bar's contest entry forms gave permission, and is not entitled to relief under the TCPA. Thus, if a trier of fact finds that Plaintiff did not give permission – accepting his claim that he did not complete a contest entry form – that does not resolve whether the absent class provided permission when they completed entry forms. The Order envisions that Plaintiff could win for himself, but lose for the class. This demonstrates exactly why Plaintiff cannot adequately represent a class of persons who completed contest entry forms, when he claims he never did so. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 767 (5th Cir. 2020) (reversing certification because named plaintiff's claim was not typical of the claims or defenses of the class).

With respect to EBR, the trial will focus on whether Plaintiff responded "stop" to a Shark Bar text, notwithstanding that the text logs show that he did not.

Plaintiff should lose on this point because it is not credible. The text logs show the absence of such text, Plaintiff's recollection is vague at best, and Plaintiff was unable to provide phone records to show that he sent this alleged text. This is precisely the type of issue that "threatens to play a major role" – and is unique to Plaintiff – that defeats class certification. Even the Order envisions addressing EBR on an individual, class member by class member, basis – reaching different answers for each – defeating any suggestion Plaintiff's claim is "representative," "common," or "typical" as required by Rule 23. "This Court has previously rejected certification of classes where trial would require considering varied circumstances." *Luiken*, 705 F.3d at 374. The same result should be reached here.

II. This Appeal Should Be Permitted To Correct the District Court's Ruling on Predominance

This Court reverses class certification orders where the resolution of key legal questions will vary based on "the facts of a particular class member's claim." *Powers v. Credit Mgmt. Servs., Inc.* 776 F.3d 567, 572 (8th Cir. 2015); *see also In re St. Jude Medical, Inc.*, 522 F.3d 836, 839 (8th Cir. 2008) (reversing certification order where individualized issues of proof predominated). Where evidence necessary to adjudicate a claim, as here, "varies from [class] member to [class] member, then it is an individual question," and class certification should be denied. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

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In TCPA actions, interlocutory review has been granted where, as in this case, "members of a proposed class will need to present evidence that varies from member to member." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274-75 (11th Cir. 2019). In *Cordoba*, the Eleventh Circuit vacated the district court's certification order interlocutory, where "[i]t appears . . . that each plaintiff will likely have to provide individualized proof that they have standing . . . [and] [t]here is no indication that the district court considered this real world problem at all." *Id.* Here, too, there is no mechanism to resolve, on a classwide basis, issues related to whether each class member (i) gave permission, (ii) had an EBR and (iii) is a "residential subscriber." The Order should be reversed on this ground as well.

A. Permission Requires An Individualized Inquiry

Courts have concluded that, for purposes of the TCPA's DNC provision, "by releasing his telephone number . . . Plaintiff consented to receiving calls." *Morris v. Hornet Corp.*, 2018 WL 4781273, at *6 (E.D. Tex. Sept. 14, 2018); *Murphy v. DCI Biologicals Orlando, LLC*, 2013 WL 6865772, at *9 (M.D. Fla. Dec. 31, 2013) (because plaintiff provided his number to defendant "his 'solicitation call' claims fail on this ground"). The District Court recognized that evidence in the record supports that Shark Bar obtained permission to send texts from contest entrants. A74. Plaintiff claimed he was not a contest entrant. Thus, to represent a class of persons like him, Plaintiff would need to show a mechanism to prove, on a

classwide basis, that absent class members were not contest entrants. He could not do this because the record evidence demonstrates the opposite. A3.

Indeed, Plaintiff "did not dispute" that Shark Bar obtained contact information through the process outlined above, and instead, argued that Defendants' inability to produce the actual paper forms completed by absent class members precluded Defendants from establishing consent.[5] A130-31; A158-59. The District Court rejected this argument, noting that "prior express invitation or permission is likely to be a primary issue at trial" and that "there is evidence in the record here that is common to the class to support Defendants' position that such prior express invitation or permission was obtained." A74. This presents the same scenario that the Fifth Circuit addressed in *Gene And Gene LLC v. BioPay LLC*, reversing a certification order where plaintiff "failed to advance a viable theory of generalized proof to identify those persons, if any" who did not consent to receive faxes from the defendant. 541 F.3d 318, 329 (5th Cir. 2008); *accord Balthazor v. Cent. Credit Servs., Inc.*, 2012 WL 6725872, at *4 (S.D. Fla. Dec. 27, 2012) (denying certification because plaintiff did not proffer sufficient classwide

[5] On reply, Plaintiff also suggested that the issue of consent could be addressed through the use of affidavits. A159. The District Court did not address this suggestion but courts have repeatedly rejected the use of affidavits under similar circumstances because "[d]efendant has a right to challenge . . . any submitted affidavits purporting to self-identify as class members on the ground of consent." *Sandoe v. Bos. Sci. Corp.*, 333 F.R.D. 4, 9 (D. Mass. 2019); *see also Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims.").

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evidence on consent). Plaintiff here did not offer a classwide method to resolve this inquiry and therefore certification was improper.[6]

B. The Existence of an EBR Creates Individualized Issues

An EBR is defined to include, *inter alia*, relationships with customers who engaged in a transaction with the caller, with or without consideration, "within the eighteen (18) months immediately preceding the date of the telephone call." 47 C.F.R. § 64.1200(f)(5); *see also* A26. Class members with whom Shark had an EBR cannot establish they received a telephone solicitation, as required to maintain a DNC Claim. A24. The existence of an EBR also requires an individualized inquiry that destroys predominance.

In addition to offering evidence of an EBR with Plaintiff, Defendants also offered unrebutted evidence that purchase records alone would be insufficient to identify which putative class members may have an EBR because "Shark Bar does not have a record of individuals who paid for food or beverages in cash."[7] A76. The District Court dismissed this evidence, and concluded, without any evidentiary support, that EBR could resolved by "cross-referencing various credit card records

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[6] The District Court compounded its error by dismissing evidence confirming Shark Bar's records accurately reflected contest entrants. Such evidence shows that class members unlike Plaintiff, even accepting his "story" as true, do not dispute that they completed the contest entry forms. A71.

[7] Plaintiff offered no mechanism to exclude individuals who had an EBR with Shark Bar or to identify individuals who paid in cash. Instead, Plaintiff sought to minimize the importance of this inquiry by arguing that an EBR was not created through a purchase alone. A160. The District Court, however, properly rejected this argument. A27 (evidence of a purchase was sufficient to create an EBR).

and the class list." A75. This conclusion cannot be reconciled with its denial of Defendants' motion for summary judgment, which determined that a disputed issue of fact existed as to whether Plaintiff terminated his EBR with Shark Bar. A27. The District Court erred by granting certification because, as even the Order recognizes, the question of EBR will vary from class member to class member, depending on whether they (i) made a purchase at Shark Bar, and (ii) may have terminated the EBR, particularly given that the Order allows class member testimony to rebut the absence of an EBR-terminating text in the text logs.[8] A76.

C. Identifying Residential Telephone Subscribers Requires An Individualized Inquiry

As the Order recognized, a cell phone – even if registered on the NDNCR– would not qualify as a "residential" telephone where an individual also maintained a traditional landline, or used the number for "business purposes." A22, n. 5. Plaintiff did not offer, and the District Court erroneously did not require, any methodology as to how this issue could be resolved on a classwide basis.

The individualized nature of this inquiry is not theoretical. The District Court relied upon evidence related to Plaintiff's use of his particular cell phone to conclude that Plaintiff survived summary judgment. A23. The same District Court issued a decision one day after the Order, in a similar case, denying summary

[8] Although not addressed by the District Court, under the TCPA, the completion of a contest entry form also created an EBR. 47 C.F.R. § 64.1200 (f)(5) (defining EBR to include a two-way communication, even without consideration).

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judgment because "there was a dispute of fact regarding whether [named plaintiff's] use of the cell phone qualifies him as a 'residential telephone subscriber' or whether it is a business line." *Smith et al. v. Truman Road Development, LLC, et al.*, 4:18-cv-00670-NKL, 2020 WL 2044730, at *12 (W.D. Mo. Apr. 28, 2020) (Laughrey, J.). Plaintiff, here, offered no evidence that this issue could be resolved on a classwide basis, as in other cases relied upon by the District Court. *Compare Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 391 (M.D.N.C. 2015) (expert analyzed call records and cross-referenced landline numbers against publicly available databases to remove business lines) *with* A160.

Conclusion

For the reasons set forth above, the Petition should be granted.

Dated: May 11, 2020 By: */s/ Jacqueline M. Sexton*

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<u>CERTIFICATE OF COMPLIANCE</u>

I certify that Defendants' Petition under Fed. R. Civ. P. 23(f) for Permission to Appeal an Order Granting Class Certification complies with the requirements of the Fed. R. App. 5 and 32 because it has been prepared in a proportionally spaced type face in 14-Times New Roman font and it contains 4,936 words, excluding the parts not required by Fed. R. App. P. 32(f).

Dated: May 11, 2020

/s/ Jacqueline M. Sexton
Jacqueline M. Sexton

Counsel for Petitioners

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the petition in non-scanned PDF format. I hereby certify that the Petition and Supporting Appendix has been scanned for viruses and that they are virus-free.

Dated: May 11, 2020

/s/ Jacqueline M. Sexton
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of May, 2020, an electronic copy of the Petition was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, and that a true and correct copy of the above and foregoing document was mailed by First-Class Mail, postage prepaid, or dispatched to a third-party commercial carrier for delivery within 3 calendar days, to the following participants:

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