No. 20-8006

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.; and ENTERTAINMENT CONSULTING INTERNATIONAL, LLC,

Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Western District of Missouri
Case No. 4:18-cv-00668
Honorable Nanette K. Laughrey

PLAINTIFF-RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL

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INTRODUCTION

Defendants-Petitioners (collectively, and in the singular, "Shark Bar") engaged in a years-long telemarketing campaign sending over 475,000 text messages to more than 73,000 phone numbers. Because at least 4,800 of those numbers—including that of Plaintiff-Respondent J.T. Hand—were registered on the National Do-Not-Call Registry, Mr. Hand filed suit against Shark Bar under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA").[1] And because Shark Bar's Do-Not-Call violations could be established on a common basis using common evidence, the district court certified a class of individuals who received text messages from Shark Bar to numbers registered on the Do-Not-Call list.

Shark Bar now seeks interlocutory review of the district court's certification decision by pointing to three affirmative defenses it purports present individualized issues that predominate over the undisputedly common ones. But Judge Laughrey already considered

[1] Mr. Hand's complaint sought relief for violations other than Shark Bar's Do-Not-Call violations, but those claims are not at issue on the petition for permission to appeal.

and rejected Shark Bar's arguments against class certification, and Shark Bar offers no reason to review her decision at this juncture as opposed to after final judgment. In any event, district courts enjoy wide latitude to certify classes, and Judge Laughrey did not abuse her discretion in certifying the class here. Mr. Hand's prima facie case can be established for all class members in a single stroke using common evidence, the affirmative defenses to which Shark Bar points do not raise individualized issues, and even if they do, they do not threaten to overwhelm the common issues in this case. Shark Bar's petition should be denied.

ARGUMENT

I. Shark Bar Fails to Explain Why Immediate Review is Warranted.

"Interlocutory appeals are generally disfavored." *Dean v. Cty. of Gage, Neb.*, 807 F.3d 931, 937-38 (8th Cir. 2015) (internal quotations omitted). Broadly speaking, there are a just few grounds on which immediate appellate review of a class certification order is appropriate: "(1) when there is a death-knell situation for either the plaintiff or defendant …; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions … that is likely to

evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous." *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-06 (D.C. Cir. 2002).[2]

The only one of these grounds Shark Bar even mentions to support its request for interlocutory review is manifest error. But manifest error in this context means things like "expressly appl[ying] the incorrect Rule 23 standard or overlook[ing] directly controlling precedent," *Prado-Steiman*, 221 F.3d at 1274-75, neither of which Shark Bar argues the district court did here. "[M]erely demonstrating that the district court's ruling is questionable generally will be insufficient to support a Rule 23(f) petition in the absence of other factors supporting immediate review." *Id.* at 1275. Here, Shark Bar points to no factors other than its disagreement with Judge Laughrey's ruling to warrant immediate review. For that reason alone, its petition should be denied.

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[2] Though this Court has not itself "refin[ed] a circuit standard for review of such petitions," *Liles v. Del Campo*, 350 F.3d 742, 746 n.5 (8th Cir. 2003), it looks to the grounds set out by other circuit courts. *See, e.g.*, *P.A.C.E. v. Sch. Dist. of Kansas City*, 312 F.3d 341, 343 (8th Cir. 2002) (citing *Lorazepam*, 289 F.3d at 102-06; *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 292-95 (1st Cir. 2000); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999)*; Elizabeth M. v. Montenez*, 458 F.3d 779, 783 (8th Cir. 2006) (citing *Prado-Steiman v. Bush*, 221 F.3d 1266, 1271-77 (11th Cir. 2000)).

II. Class Certification Was Appropriate Here.

In any event, the class certification order was not wrong. "The district court is accorded broad discretion to decide whether certification is appropriate," *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012), and Judge Laughrey did not abuse her discretion in certifying the Do-Not-Call class here.

A. Class Members' Do-Not-Call Claims Can Be Established With Common Evidence.

In support of its petition, Shark Bar repeatedly cites *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). But contrary to Shark Bar's suggestion, *Dukes* doesn't require *everything* to be decided "in one stroke," just a significant issue—"an issue that is central to the validity" of each class member's claim. *Id.* at 350. *Dukes* is about commonality, not predominance, and with respect to commonality, "even a single common question" will do. *Id.* at 359 (internal quotations omitted). *See also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) ("Commonality is not required on every question raised in a class action."). Shark Bar does not dispute that there are common questions here: the two primary being (1) whether the text messages sent to class members by Shark Bar constitute "telephone solicitations" under the

relevant Do-Not-Call regulation, and (2) whether two of the three Defendants can be liable for the sending of those text messages by the third. Order at 57-58.

The issue here is whether those common questions "predominate over any questions affecting only individual [class] members." Fed. R. Civ. P. 23(b)(3). They do. "At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010). That is, "[t]he predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). *See also In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-MD-2090, 2016 WL 4697338, at *9 (D. Minn. Sept. 7, 2016), *petition to appeal grant of class certification denied*, No. 16-8019, 2016 WL 9712044 (8th Cir. Nov. 7, 2016). Here, each class member's prima facie case can be established by common evidence.

To make a prima facie showing on their Do-Not-Call claims against Defendant Beach Entertainment KC (the entity that sent the

text messages), each class member would need to establish that the text messages they received meet the regulatory definition of "telephone solicitation."[3] Whether a text message meets that definition depends on the purpose of the message. *See* 47 C.F.R. § 64.1200(f)(14) ("The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services[.]"). Here, all the text messages at issue (which all said basically the same thing) were sent for the same reason—promoting Shark Bar—and a prima facie case that Beach Entertainment violated the Do-Not-Call regulations can thus be established through common evidence. *See* Order at 58 (finding that the text messages "are all documented in Defendants' records, contain the

[3] The Do-Not-Call claims are brought under 47 U.S.C. § 227(c)(5), which provides a cause of action to any person who has received more than one telephone call within any 12-month period from the same entity in violation of certain regulations. The relevant regulation provides that "[n]o person or entity shall initiate any telephone solicitation to … [a] residential subscriber who has registered his or her telephone number on the national do-not-call registry[.]" 47 C.F.R. § 64.1200(c)(2). The class definition is limited to individuals who received more than one text message from Shark Bar to a number registered on the Do-Not-Call list, *see* Order at 47, so the only issue for determining a prima facie case against Beach Entertainment is whether the messages were "telephone solicitations."

same or similar language, and based on Plaintiff's evidence appear to have been sent for the same purpose"). *See also Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016) ("Class certification is normal under [the TCPA] because the main questions, such as whether a given [communication] is an advertisement, are common to all recipients.") (internal quotations omitted); *Golan v. Veritas Entm't, LLC*, No. 14CV00069, 2017 WL 193560, at *5 (E.D. Mo. Jan. 18, 2017) (holding that whether calls constituted "telephone solicitation" was a predominating common question), *petition for permission to appeal class certification order denied*, No. 17-8006, 2017 WL 3273862 (8th Cir. Feb. 22, 2017).

To make a prima facie showing on their Do-Not-Call claims against the other two Defendants—The Cordish Companies, Inc. ("Cordish") and Entertainment Consulting International, LLC ("ECI")—each class member would have to establish that Cordish and ECI were liable for Beach Entertainment's sending of the text messages. This question, too, can be answered by common evidence, as it will depend entirely on the level of control that Cordish and ECI exercised over Beach Entertainment with respect to the text message campaigns, not

on any issues particular to individual class members. *See, e.g.*, Order at 35-45, 58; *Moser v. Health Ins. Innovations, Inc.*, No. 17-cv-1127, 2019 WL 3719889, at *7 (S.D. Cal. Aug. 7, 2019) (collecting cases finding that non-caller liability for TCPA violations is a common question). Indeed, on summary judgment, the district court has already determined—solely on evidence common to all class members—that Cordish and ECI cannot be *directly* liable for the Shark Bar text messages, but that a reasonable jury could find—again, based solely on common evidence—that Cordish and ECI could be found *vicariously* liable for sending the text messages. Order at 35-45.

Simply put, because each class member's prima facie Do-Not-Call claim can be established against each Defendant by common evidence, those common questions predominate. *See Avritt*, 615 F.3d at 1029; *Halvorson*, 718 F.3d at 778.

B. Individual Issues Do Not Predominate.

Shark Bar points to three purportedly individualized questions it argues predominate over the common questions: (1) whether class members consented to receive the text messages, (2) whether class members had an "existing business relationship" with Shark Bar, and

(3) whether class members phone numbers were residential. None of these questions destroys predominance.

To start, all of these issues are affirmative defenses, and a district court does not abuse its discretion by certifying a class despite the existence of individualized affirmative defenses. *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 833 (8th Cir. 2016) ("When there are issues common to the class that predominate, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as … affirmative defenses peculiar to some individual class members.'") (quoting *Tyson Foods Inc. v. Bouaphakeo*, 1036 S. Ct. 1036, 1045 (2016)) (emphasis omitted); *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 375 (8th Cir. 2018) (same). *See also Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012) ("[T]he fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.") (internal citation omitted); *Mowbray*, 208 F.3d at 296 ("Although a necessity for individualized [affirmative defense] determinations invariably weighs

against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier.").

Regardless, none of the three affirmative defenses to which Shark Bar points present predominating individualized questions.

Prior Express Consent. While a caller will not be liable for calling someone on the Do-Not-Call registry if it has obtained the recipient's prior express permission, "[s]uch permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." 47 C.F.R. § 64.1200(c)(2)(ii). Here, while Shark Bar purports to have obtained written consent from class members via paper cards or sign-in sheets, there are no signed, written agreements in evidence because Shark Bar shredded any such documents. Order at 69. Thus, in order to prevail on an affirmative defense of consent, Shark Bar will have to (1) establish the legal proposition that circumstantial evidence of consent is sufficient despite the regulation's requirement that consent "must be evidenced by a signed, written agreement," and (2) convince a

jury that it only put a consumer's phone number into its database if it had obtained their signed, written consent.

Both showings will be common to all class members. The first is simply a legal question independent of any individual evidence or circumstance of particular class members. And establishing the second, as the district court here correctly held, relies on common evidence of Shark Bar's general policy: the contents of Shark Bar's databases, sample agreements, testimony from Shark Bar staff describing data collection policies, and staff training materials. Order at 69. Plaintiff will likewise contest Shark Bar's assertion that only phone numbers for which it had obtained consent were placed in its databases with his own common evidence showing how numbers in the databases can come from sources other than the consumers themselves. *See* dkt. 128 at 4 n.5.

Shark Bar complains that, with respect to parrying a consent defense, Mr. Hand "could win for himself, but lose for the class" because he asserts that he did not provide a signed consent agreement to Shark Bar while the rest of the class did. Pet. at 14. But Shark Bar's gripe rests on two misunderstandings. First, Shark Bar's suggestion that the

class is composed "of persons who completed contest entry forms," *id*., is just wrong. The class is defined as all individuals on two lists created from Shark Bar's database records who received more than one text message from Shark Bar in any twelve-month period to a number included on the National Do-Not-Call Registry. Order at 47. While Shark Bar takes the position that everyone in the class completed contest entry forms demonstrating their consent to receive text messages, Shark Bar's failure to retain any of those purported forms (contrary to FCC suggestion)[4] means that it is left with just the common circumstantial evidence discussed above to try to establish that consent was given.

Second, Mr. Hand's individual assertion that he didn't provide consent only becomes relevant if Shark Bar has succeeded in establishing the two threshold propositions of its consent defense discussed above: that, as a legal matter, circumstantial evidence of its

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[4] *See In re Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7998, ¶ 70 & n.251 (2015) ("We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent.").

data collection policies can substitute for actual documentary evidence of signed agreements, and that, as a factual matter, phone numbers were only placed in Shark Bar's databases if it had obtained consent. Where threshold issues such as these are common to all class members, class certification is appropriate, even if—depending on the answers to the common threshold questions—individual issues may subsequently arise. *See, e.g.*, *Young*, 693 F.3d at 545 ("[W]here a threshold issue is common to all class members, class litigation is greatly preferred."); *In re Petrobras Sec.*, 862 F.3d 250, 274 (2d Cir. 2017) ("[D]istrict courts can, for example, bifurcate the proceedings to home in on threshold class-wide inquiries[.]"); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1276 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020) (affirming class certification where "threshold questions … can be decided on a class-wide basis.").

In any event, if individual testimony regarding whether a particular class member did or did not provide prior express consent ultimately becomes necessary, such testimony can be solicited from class members during a later stage in the proceedings. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017) ("[W]e see no

reason to refuse class certification simply because [a class member] will present her affidavit in a claims administration process after a liability determination has already been made."); *Mullins v. Digital Direct, LLC*, 795 F.3d 654, 666-68 (7th Cir. 2015) ("Relying on concerns about what are essentially claim administration issues to deny certification and to prevent any recovery on valid claims upsets the balance a district judge must consider."). And again, to the extent Shark Bar's consent defense becomes an evidentiary morass, it is a mess of Shark Bar's own making. Order at 74 ("Defendants failed to retain the physical copies of the forms that they allege demonstrate the requisite prior express invitation or permission, and the Court will not deny class certification because Defendants now contend that an individual inquiry is necessary to corroborate that consent.").

Existing Business Relationship. A party making calls to a number on the Do-Not-Call list will not be liable for a TCPA violation if the caller and the called party have an "established business relationship." 47 C.F.R. § 64.1200(f)(14)(ii). The district court held here that a single purchase (of a drink, say) can establish such a relationship. Order at 25. In addition, a consumer can terminate an

established business relationship by informing the caller that they no longer wished to be called. 47 C.F.R. § 64.1200(f)(5)(i).

Shark Bar voices two concerns regarding this defense. First, it argues that with respect to established business relationship, the focus at trial will be on the individualized question of whether Mr. Hand terminated such a relationship with Shark Bar by responding "stop" to one of its texts. Pet. at 14-15. But that question is a red herring because Shark Bar started texting Mr. Hand before he ever visited the bar. As Shark Bar acknowledges, the earliest Mr. Hand could have established a business relationship with Shark Bar was May 2016. Pet. at 9. Shark Bar, however, had texted him at least twice in a twelve-month period prior to that—in March 2015 and February 2016. *Id*. Thus, Shark Bar has no existing business relationship defense with respect to those two text messages, which alone can serve as the foundation for Mr. Hand's Do-Not-Call claim. *See* Order at 24 and n.7. Whether such a relationship was later created and/or terminated is irrelevant and certainly will not be the focus of trial.

Second, Shark Bar complains that "purchase records alone would be insufficient to identify which putative class members may have an

[existing business relationship]" with Shark Bar. Pet. at 18. But as with its prior express consent defense, any lack of sufficient records is nobody's fault but Shark Bar's. *See Mullins*, 795 F.3d at 668 ("[R]efusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions."). And again, to the extent individual class member testimony as to the existence or lack of an established business relationship with Shark Bar becomes necessary, it can be obtained through affidavits at a later stage in the proceedings. *Briseno*, 844 F.3d at 1132; *Mullins*, 795 F.3d at 666-68.

Residential Subscriber. Shark Bar lastly complains that whether class members are "residential subscribers" under the relevant Do-Not-Call regulation cannot be resolved on a class-wide basis. Pet. at 19-20. Shark Bar is wrong. The FCC has established a presumption that wireless subscribers who ask to be put on the national Do-Not-Call list (i.e., every class member) are "residential subscribers." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14039 (2003). And while this presumption may be rebuttable, "[t]hat the defendant might attempt to pick off the

occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Haliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

In any case, Shark Bar presents no evidence to rebut the presumption that every class member is a residential subscriber. It doesn't point to a single example of a non-residential subscriber included in the class, and "the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)." *Bridging Communities, Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016). *See also Torres v. S.G.E. Mgmt., LLC*, 838 F.3d 629, 646 (5th Cir. 2016) ("Because the Defendants failed to demonstrate that such individualized issues will affect even a single class member at trial, we find no error in the district court's conclusion that individualized issues of causation will not predominate.").

CONCLUSION

Because Shark Bar provides no reason why review of the district court's class certification order is warranted now as opposed to following final judgment, and, in any event, the district court did not abuse its

discretion in certifying the Do-Not-Call class, Shark Bar's petition should be denied.

Dated: May 21, 2020

Respectfully submitted,

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s/Roger Perlstadt

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s/Roger Perlstadt