UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-62230-CIV-MARTINEZ/SNOW

BLAKE TISHMAN, P.A., a Florida Professional Corporation, individually and as the representative of a class of similarly-situated persons,

Plaintiff,

v.

BAPTIST HEALTH SOUTH FLORIDA, INC., BAPTIST SLEEP CENTERS, LLC, and JOHN DOES 1-10,

Defendants.
_____/

REPORT AND RECOMMENDATION

This cause is before the Court on the Plaintiff's Motion for Class Certification (ECF No. 56), which was referred to the undersigned by the Honorable Jose E. Martinez, United States District Judge (ECF No. 63).

I. BACKGROUND

This case was filed on November 14, 2017, seeking damages for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*., as amended by the Junk Fax Prevention Act of 2005 (TCPA). According to the Amended Complaint, filed on December 26, 2017, the Plaintiff, on behalf of itself and a proposed class of recipients of unsolicited faxes received from Defendants, seeks injunctive relief and damages of $500 for each negligent violation of the TCPA, and treble damages, up to $1,500, for each knowing and/or willful violation of the TCPA. Plaintiff's Amended Complaint (ECF No. 16), at 14-15. Plaintiff also brings a claim for conversion, alleging that Defendants' faxes improperly converted the class members' fax machines, paper, toner,

and employee time (to process the incoming faxes) to Defendants' own use, for which Plaintiff and the proposed class seek damages, punitive damages, attorney's fees and costs. Id., at 17.[1] The Court has granted the Defendants' motion to strike the Plaintiff's fee demand as to the conversion claim, as not authorized under Florida law. Order entered Sept. 13, 2018 (ECF No. at 33), at 16.[2]

The Plaintiff alleges that Defendants, a health care organization and medical providers specializing in diagnosing and treating sleep disorders, sent three advertisements by fax in early 2017, which were attached as Exhibits A-C to the Amended Complaint. Id., at ¶ 25. The Defendants' faxes provided information about the Defendants' diagnostic centers and sleep center services, access to which requires a patient to have a prescription written by a doctor. Id., at ¶¶ 16, 20. The President of the Plaintiff entity is Blake Tishman, D.C., who can "write prescriptions, including those for mammography screening, ultrasounds, x-rays and sleep tests." Id., at ¶ 5. According to the Plaintiff, the advertisements were "direct commercial solicitations seeking to obtain monetary payments, directly from Plaintiff," or "indirect commercial solicitations seeking to obtain monetary payments indirectly from Plaintiff, through Defendants' sale of services to Plaintiff's patients." Id., at ¶¶ 30-31.

The Defendants assert, in their affirmative defenses, that they did not "send" the subject faxes and that even if they did, the faxes do not advertise the commercial availability of "property, goods, or services" and, thus, are not prohibited advertisements governed by the TCPA. According to Defendants, the faxes were "merely non-commercial messages from a non-profit

[1]The Plaintiff failed to plead a basis for the Court's exercise of jurisdiction over this state law claim. While supplemental jurisdiction is available, pursuant to 28 U.S.C. § 1367, the Court may decline to exercise such jurisdiction under certain circumstances.

[2]No attorneys' fees are provided for in the TCPA. Order (ECF No. 33), at 15.

organization." Answer and Affirmative Defenses (ECF No. 37), at 10. The Defendants' motion to dismiss, arguing that the faxes were not advertisements, was denied. See Orders entered Sept. 13, 2018, and Feb. 11, 2019 (ECF Nos. 33, 61).

The Defendants also have raised affirmative defenses of express permission or consent, asserting that Plaintiff and the proposed class had consented to the fax transmissions by seeking medical credentials at Defendants' health care facilities or by referring patients to those facilities and by providing contact information to facilitate communications between class members and the Defendants' health care facilities. See Answer and Affirmative Defenses (ECF No. 37), at 9.

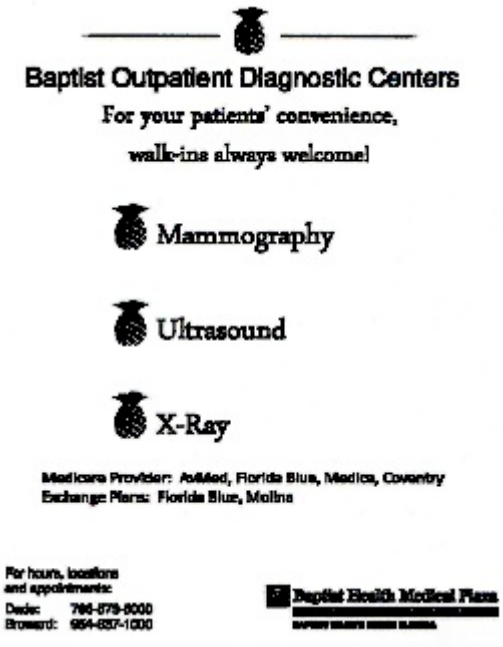
II. DISCUSSION

The Plaintiff seeks class certification, under Rule 23(b)(3), of a class which first was defined in the pleading as including any person or entity who was sent a facsimile "after November 14, 2013 about outpatient diagnostic tests or home sleep tests available from or through" the Baptist Defendants. Id., at ¶ 39. The Plaintiff's Motion for Class Certification, filed on January 31, 2019, modified the definition of the class to include:

> All persons to whom Baptist successfully sent one or more facsimiles during a 2017 mass-fax broadcast indicating the availability of Baptist's outpatient diagnostic services for the recipients' patients or customers, including mammography, ultrasound, x-ray, home sleep studies, calcium scoring, heel scoring, addiction treatment, B Mask, and body fat analysis products and services.

Plaintiff's Motion for Class Certification (ECF No. 56), at 1. (The Plaintiff defines "mass-fax broadcast" as "transmission of a unique fax image to 40+ recipients on the same date at the same approximate time." Id., at 1, n1.) The only faxes which have been provided to the Court are the faxes which were attached to the pleading: Exhibits A and B are the same document, which contains

information related to "Baptist Outpatient Diagnostic Centers" and Exhibit C is a document related to Baptist Sleep Centers.[3] Images of the two documents are reproduced here:


Baptist Outpatient Diagnostic Centers

For your patients' convenience,

walk-ins always welcome!

Mammography

Ultrasound

X-Ray

Medicare Provider: Aetna, Florida Blue, Medica, Coventry

Exchange Plans: Florida Blue, Molina

For hours, locations and appointments:

Dade: 786-879-8000

Broward: 954-657-1000

Baptist Health Medical Plans


Baptist Sleep Centers

What are the benefits to a Home Sleep Test?

Convenience is one of the most compelling reasons for a patient to choose a Home Sleep Test. The test is performed by the patient in the comfort and familiar surroundings of their own home

- Loud snoring
- Choking and gasping during sleep
- Shortness of breath during sleep
- Increased frequency of urination at night
- Feeling groggy in the morning
- Feeling fatigue during daytime hours
- Excessive sleepiness during the day
- Dry mouth in the morning
- Morning headache
- Lack of focus and concentration

For your convenience you can schedule appointments while patients are at your office.

To schedule a Home sleep study, call 786-662-8250 in Miami-Dade or 954-657-1600 in Broward, weekdays, 8:30 a.m. - 5 p.m.

A doctor's prescription is required.

The Defendants argue that the proposed class does not meet the requirements for class certification under Rule 23(b)(3) because the Plaintiff has failed to demonstrate that the class has common issues of fact and law which predominate over questions only affecting individual members of the proposed class, and also has failed to demonstrate that other prerequisites for a class action have been satisfied.

A. Class action requirements

Rule 23(a) of the Federal Rules of Civil Procedure authorizes a member of a class of

[3]The Plaintiff has filed a motion asking the Court to compel the Defendants to provide information about other faxes sent in 2017 (ECF No. 60), which motion is addressed in a separate order.

plaintiffs to sue as a representative of that class only if the following are satisfied:

> (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.

Fed. R. Civ. P. 23(a). The provisions of Rule 23(a) "are commonly referred to as 'numerosity, commonality, typicality, and adequacy of representation.'" Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (citation omitted). Courts impose an additional requirement, implicit in Rule 23(a), that a proposed class be "adequately defined and clearly ascertainable." Little, 691 F.3d at 1304.

A party seeking class certification bears the burden of establishing each element of Rule 23(a). London v. Wal-Mart Stores, 340 F.3d 1246, 1253 (11th Cir. 2003) (reversing certification of class where plaintiff who was stockbroker and friend of proposed class counsel failed to establish that he was adequate representative). "Rule 23 does not set forth a mere pleading standard.... [The Plaintiff] must affirmatively demonstrate [its] compliance with the Rule." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Prior to certifying a class, a court must be satisfied, "after a rigorous analysis," that the requirements of Rule 23 have been met. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) (finding that proposed class of female employees alleging sex discrimination could not meet "commonality" requirement of Rule 23(a)(2)). That rigorous analysis frequently "will entail some overlap with the merits of the plaintiff's underlying claim." Id., at 351.

Even if all of the provisions of Rule 23(a) are satisfied, a court may certify a class

only if one of the conditions stated in Rule 23(b) also are met. The party seeking class certification "must not only 'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, ... [but] must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

In this case the Plaintiff seeks certification under Rule 23(b)(3), which requires that:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The Supreme Court has described the "predominance" condition in Rule 23(b)(3) as "even more demanding than Rule 23(a)," and noted that the court has a duty to "take a 'close look' at whether common questions predominate over individual ones." Comcast Corp., at 34 (citations omitted) (holding that proposed class of cable subscribers alleging antitrust conduct did not meet Rule 23(b)(3) "predominance" requirement, where damages from specifically alleged conduct were not capable of measurement on classwide basis); see also Gorss Motels, Inc. v. Safemark Systems, LP, No. 6:16-cv-01638-Orl-31DCI, 2018 WL 1635645 (M.D. Fla. April 5, 2018) (denying class certification under Rule 23(b)(3) where issues of consent to receive advertising faxes required individualized inquiry, noting that provisions of Rule 23(b)(3) are "'far more demanding'

obstacle for certification than Rule 23(a)") (citations omitted).[4]

A court's rigorous analysis of a class certification question may involve probing "behind the pleadings" in order to discern whether certification is appropriate. Wal-Mart, 564 U.S. at 350.[5] The court does not have a license, however, "to engage in free-ranging merits inquiries at the certification stage." Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) (affirming certification of proposed class of investors alleging securities fraud, as merits of underlying claims need not be proven in order to satisfy Rule 23(b)(3)). "Merits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id., at 466.

B. The underlying claims of the class

1. The TCPA claims

The Telephone Consumer Protection Act, 47 U.S.C. § 227, was adopted in 1991, and amended by adoption of the Junk Fax Prevention Act in 2005.[6] The Eleventh Circuit has observed

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[4]The decision denying class certification in Gorss Motels, Inc., has been appealed to the Eleventh Circuit, as Case No. 18-12511, Gorss Motels, Inc. v. Safemark Systems, LP (appeal docketed June 15, 2018).

[5]The class in Wal-Mart sought certification as either a Rule 23(b)(3) or a Rule 23(b)(2) class. A Rule 23(b)(2) class is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As noted by Justice Ginsburg, in her concurring opinion, the majority did not reach the Rule 23(b)(3) analysis. Wal-Mart, 564 U.S. at 368 n1 (Ginsburg, J., concurring in part and dissenting in part). The majority of the Supreme Court found that the class had not satisfied the commonality requirement of Rule 23(a)(2), and that certification of the proposed class as to their claims for backpay was improper under Rule 23(b)(2). Wal-Mart, 564 U.S. at 346 n2.

[6]The Court's reference in this Report to the TCPA refers to the TCPA, as amended by the Junk Fax Prevention Act, unless specifically stated to the contrary.

that "the TCPA's prohibition against sending unsolicited fax advertisements was intended to protect citizens from the loss of the use of their fax machines during the transmission of fax data." Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1252 (11th Cir. 2015).[7]

The TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send ... to a telephone facsimile machine ... an unsolicited advertisement." 47 U.S.C. § 227(b). According to the TCPA, an "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). Thus, to state a claim under the TCPA, a plaintiff must sufficiently allege that: (1) the faxes were advertisements, (2) the defendant sent the challenged faxes to a telephone facsimile machine using a "telephone facsimile machine, computer, or other device," and (3) the faxes were unsolicited. 47 U.S.C. § 227(b)(1)(C).

The Defendants allege that the faxes received by the Plaintiff were not advertisements. Answer and Affirmative Defenses (ECF No. 37), at 10. As noted above, the Defendants' motion to dismiss based on this argument was denied. See Orders (ECF Nos. 33, 61). "[G]iven the content of the Baptist Sleep Centers fax [Exh. C to the pleading] and the well-pleaded allegations of Plaintiff's Complaint, this Court finds that this communication intended to encourage Dr. Tishman to 'send or encourage patients to use' Defendants' sleep home study and qualifies as advertising." Order (ECF No. 61), at 6, citing Florence Endocrine Clinic, PLLC v. Arriva Medical,

[7]Similarly, in a case involving alleged violations of the TCPA's restriction on phone calls, the Eleventh Circuit observed that "[t]he TCPA was enacted to address certain invasive practices related to 'unrestrictive telemarketing,' and is designed to protect consumers from receiving unwanted and intrusive telephone calls." Schweitzer v. Comenity Bank, 866 F.3d 1273, 1276 (11th Cir. 2017).

LLC, 858 F.3d 1362, 1367 (11th Cir. 2017). The Court's ruling, as to a motion to dismiss, does not guarantee that the Plaintiff ultimately will be able to establish that the faxes are advertisements.

The Defendants also allege that the faxes were sent only to those who had either expressly invited or permitted the fax messages or had consented to or solicited the fax messages and that no violation of the TCPA has been established. Id., at 9.[8] Indeed, Defendants have sought summary judgment based on evidence they assert is undisputed and which, they argue, demonstrates that the employees of the Plaintiff consented to the receipt of the challenged faxes (even if they were advertisements) from the Defendants to the Plaintiff and, thus, there is no basis for a TCPA claim. (ECF No. 71) The Plaintiff disagrees, and argues that an employee's subjective understanding of "consent" does not satisfy the "prior express invitation or permission" requirement of the TCPA. The Plaintiff also argues that the employees' alleged consent is not dispositive because the Defendants' corporate designee admitted that the Defendants never sought permission from a medical provider to send fax "advertisements." (ECF No. 76, at 2-3, 12-13)

The TCPA allows certain unsolicited advertisements to be sent by fax. Permissible unsolicited advertisements are faxes sent:

> (i) from a sender with an established business relationship with the recipient,
>
> (ii) the sender obtained the recipient's fax number through "voluntary communication" within the context of such established business relationship

[8]One court in this district has held that under the TCPA's prohibition on text messages express consent is not an element of a plaintiff's *prima facie* case but rather is an affirmative defense for which a defendant bears the burden of proof. Keim v. ADF Midatlantic, LLC, 328 F.R.D. 668, 681 (S.D. Fla. 2018), citing Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1044 (9th Cir. 2017). Another court in this district has noted that "[w]hether the burden is on the Plaintiff or the Defendant, ultimately consent is an issue that would have to be determined on an individual basis at trial." Hicks v. Client Servs., Inc., No. 07-61822, 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008) (declining to certify class under TCPA where proposed class failed to meet commonality and predominance requirements of Rule 23).

> from the recipient or the recipient agreed to make its information available in a directory, advertisement, or site on the Internet, and
>
> (iii) the unsolicited advertisement contains a notice meeting the opt-out requirements of the TCPA.

47 U.S.C. § 227(b)(1)(C). Defendants specifically argue that they have not raised an "established business relationship" (EBR) defense. "Baptist is not availing itself of the EBR defense." Defendants' Reply in Support of Defendants' Motion for Final Summary Judgment (ECF No. 80), at 7. Although the Defendants have not raised an EBR defense, they have raised the defense of express permission/invitation/consent and, as noted by Judge Martinez, "[t]he existence of express invitation or permission to receive communications has the same effect [as an EBR]." Order Granting Plaintiff's Motion for Reconsideration (ECF No. 61), at 4 n.1.

The Federal Communications Commission (FCC) is the agency authorized to issue regulations to implement the TCPA.[9] In 2006 the FCC issued a rule governing *solicited* faxes, which extended to senders of solicited faxes the statutory requirement, found in 47 U.S.C. § 227(b)(1)(C)(iii), that senders of unsolicited faxes must include an opt-out notice on the advertisement. In 2017 the FCC's efforts were invalidated by a decision written by then-Circuit Judge Kavanaugh, in Bais Yaakov of Spring Valley v. Fed'l Commc'n Comm'n, 852 F.3d 1078, 1083 (D.C. Cir. 2017), which held that "[t]he text of the [TCPA] does not grant the FCC authority to require opt-out notices on solicited faxes." In vacating an order of the FCC which had applied the 2006 Rule, Judge Kavanaugh wrote that "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements.... [and it] is the Judiciary's job to

[9]For example, implementing regulations provide that a recipient of a fax advertisement may revoke previously granted permission by sending a request to the sender of the fax. 47 C.F.R. 64.1200(a)(4)(vi).

respect the line drawn by Congress, not to redraw it as we might think best." Id., at 1082. [10]

At least one circuit court of appeals has determined that the decision of the D.C. Circuit as to the validity of the FCC's 2006 Rule, which was entered in a case which had been consolidated with other cases challenging the FCC regulation, pursuant to 28 U.S.C. § 2112, is binding in other Circuits. Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc., 863 F.3d 460, 467 (6th Cir. 2017), cert. denied, 138 S. Ct. 1284 (2018). The Eleventh Circuit has not yet addressed the effect of the decision in Bais Yaakov, but two district courts in Florida have applied the decision. See Gorss Motels, Inc. v. Safemark Systems, LP, No. 6:16-cv-01638-Orl-31DCI, 2018 WL 1635645 (M.D. Fla. April 5, 2018) (citations omitted) (applying decision in Bais Yaakov as persuasive, even if not binding, as to whether opt-out notice required on solicited faxes); Licari Family Chiropractic Inc. v. Eclinical Works, LLC, No. 8:16-cv-3461-MSS-JSS, 2018 WL 1449581 (M.D. Fla. Feb. 16, 2018) (same). In a federal district court decision in a TCPA case in Connecticut, Gorss Motels, Inc. v. Otis Elevator Co., No. 2019 WL 1490102 (D. Conn. April 4, 2019), the court noted that in light of the ruling in Bais Yaakov, "[o]nly where consent is not found would the trier of fact look to the sufficiency of the opt-out notice," and determined that class certification was not appropriate.[11]

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[10]The same plaintiff in that case, Bais Yaakov of Spring Valley, has a pending appeal of a decision of a district court in Massachusetts, which declined to certify a class under the TCPA because the proposed class of those who received an unsolicited fax was a "fail-safe" class incapable of refinement to correct the problem it raised regarding *res judicata* of the outcome, and also because the issue of individual consent precluded a finding of predominance of the common issues of the class. Bais Yaakov of Spring Valley v. ACT, Inc., 328 F.R.D. 6 (D. Mass. 2018), *appeal docketed*, Bais Yaakov of Spring Valley v. ACT, Inc. No. 18-8023 (1st Cir. Nov. 6, 2018).

[11]The same plaintiff also recently lost in its efforts to certify a class under the TCPA in the Northern District of Indiana. Gorss Motels, Inc. v. Brigadoon Fitness Inc., No. 1:16-CV-330-HAB, 2019 WL 2171506 (N.D. Ind. May 20, 2019) (finding that proposed class could not satisfy

The Plaintiff has alleged in its pleading that the Defendants' faxes all failed to include the opt-out notice. Am. Complaint (ECF No. 16), at ¶¶ 2, 36, 60. If this Court finds that the decision in Bais Yaakov is binding, or at least persuasive and worthy of application, then the Plaintiff's allegations as to the lack of an opt-out notice would apply only to those faxes which were unsolicited. See, e.g., Licari Family Chiropractic Inc. v. Eclinical Works, LLC, No. 8:16-cv-3461-MSS-JSS, 2018 WL 1449581 (M.D. Fla. Feb. 16, 2018) (denying motion to certify class because proposed class definition that included members who may have solicited the fax and, thus, need not have been provided an opt-out notice was overly broad, and noting that defendant presented evidence that considerable number of recipients had expressly consented to receipt of faxes).

As damages, the Plaintiff seeks statutory damages of $500 per received fax, pursuant to 47 U.S.C. 227(b)(3)(B), plus treble damages if the Defendants knew that the fax advertisements were unsolicited. "If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." 47 U.S.C. § 227(b)(3). "The requirement of 'willful[ ] or knowing[ ]' conduct requires the violator to know he was performing the conduct that violates the

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predominance requirement because of "unlimited mini-trials" required to determine whether there was express permission to receive faxes sent by vendor to franchisees of hotel chain). The court in that case noted that "[w]hether a fax was sent without express permission is a question common to the class only if similar evidence and methodology will suffice to answer the question for each member or the issue is susceptible to generalized, class-wide proof. It is an individual question if members of the proposed class will need to present evidence that varies from member to member." Id. The Court's brief review of reported decisions indicates that Gorss Motels brought more than ten actions under the TCPA relating to faxes it received from vendors, and courts have recently been uniform in denying class certification to Gorss Motels "because the issue of consent required individualized proof for each class member." Gorss Motels, Inc. v. Otis Elevator Co., No. 2019 WL 1490102 (D. Conn. April 4, 2019) (denying class certification and referencing two other cases in the same district which had reached same conclusion).

statute." Lary, 780 F.3d at 1107 (declining to impose treble damages in default judgment entered under TCPA where plaintiff failed to plead that defendants acted willfully or knowingly). In Lary, and in this case, the plaintiff's pleading did not specifically allege that the defendants knew they were sending an unsolicited fax and in Lary, the plaintiff failed to present evidence entitling him to treble damages upon entry of the default judgment.

The Plaintiff also seeks injunctive relief as to the TCPA claim but there appears to be no dispute that the Defendants no longer send the subject faxes, nor any advertising by fax, and thus the Plaintiff may not be able to establish a likelihood of future harm or the inadequacy of a remedy at law. See, e.g., Lary v. Trinity Physician Fin. & Ins. Servs., 780 F.3d 1101, 1107 (11th Cir. 2015) (denying injunctive relief where defendant consented to entry of default judgment in TCPA case in favor of plaintiff).[12]

2. Conversion

The Plaintiff seeks damages, including punitive damages, for its claim based on the conversion of its fax machine and supplies. If this state law claim is properly before the court, a question which none of the parties has addressed, state law controls the determination of the elements. To establish a claim for conversion, the Plaintiff (and the class) must demonstrate that the Defendants' actions were "an act of dominion wrongfully asserted over another's property inconsistent with his ownership therein." Palm Beach Golf, 781 F.3d at 1258-59, citing Warshall v.

[12]The Plaintiff deposed Brian Segal, a sales and support analyst for the Defendants who sent the challenged faxes at the direction of the Defendants' medical staff and was "the only person responsible for sending out these informational faxes." Transcript of Deposition of Brian Segal (ECF No. 56-4), at 8, 14-16, 22. Mr. Segal testified that when the Plaintiff filed this lawsuit (in November 2017) the Defendants "[s]topped all [informational faxes]," and he hasn't sent once since. Id., at 15.

Price, 629 So.2d 903, 904 (Fla. 4th DCA 1993) (internal quotations omitted).[13] In Palm Beach Golf, the Court of Appeals reversed the lower court's determination that the use of the plaintiff's paper and ink in its fax machine for receipt of a single one-page fax, which occupied the plaintiff's fax machine for one minute, was "'*de minimis*' and therefore such a claim must fail" under Florida's pleading standards. Id., at 1259. Finding that Florida's heightened pleading standard did not apply, the Eleventh Circuit reversed the dismissal of the plaintiff's conversion claim. Id., at 1260-61.[14]

C. Plaintiff's compliance with Rule 23(a)

1. Adequacy of class definition and ascertainability of the class

According to the Amended Complaint, Defendants "sent advertisements by facsimile" to Plaintiff and more than 39 other persons. (ECF No. 16, at ¶¶ 12-13, 24, 37) The Plaintiff received three faxes in 2017, as noted above, one of which was the same document sent on two occasions (in January and March of 2017) and which referenced diagnostic tests. The other fax, sent to the Plaintiff on April 11, 2017, referred to the availability of at-home sleep tests. The Plaintiff seeks to represent "[a]ll persons" to whom Defendants successfully sent one or more faxes in 2017 "indicating the availability of Baptist's outpatient diagnostic services for the recipients' patients or customers ...."

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[13]The Eleventh Circuit also has noted that "[c]ourts have concluded that the use of a fax machine to print a fax, including the depletion of the machine's ink and paper, constitutes property damage." G.M. Sign, Inc. v. St. Paul Fire & Marine Ins. Co., __ F. App'x ___, n.3, 2019 WL 1579792 (11th Cir. April 12, 2019).

[14]In his dissent as to the holding on the sufficiency of the plaintiff's stated claim for conversion, District Judge Hinkle noted that "there is much to be said for the view that [a conversion claim based on the sending of a single unsolicited fax] runs afoul of the principle that the law does not deal with trifles." Palm Beach Golf, 781 F.3d at 1261 (Hinkle, J., concurring in part and dissenting in part). Judge Hinkle was not addressing the majority's determination that the allegation that a single unsolicited fax was sent is sufficient to state a claim under the TCPA, a holding with which he concurred.

Motion for Class Certification (ECF No. 56), at 6.

The Eleventh Circuit has noted that an identifiable class exists if its members can be ascertained by reference to "objective criteria." Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014) (internal quotation and citation omitted).[15] It is the Plaintiff's burden to establish that identification of the class members is manageable and administratively feasible. Id.. "'Administrative feasibility' means 'that identifying class members is a manageable process that does not require much, if any, individual inquiry.'" Id. (citation omitted). "It is well within the Court's authority to redefine" a proposed class to bring it within the scope of Rule 23, but if a plaintiff fails to demonstrate that the proposed class is clearly ascertainable, "then class certification is properly denied." Groover v. Prisoner Transportation Servs., LLC, No. 15-cv-61902, 2018 WL 6831119 (S.D. Fla. Dec. 26, 2018) (denying class certification, even after redefining and narrowing the class definition), citing Walewski v. Zenimax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012).

This Circuit's ascertainability requirement has been described as "fairly strong." Mullins v. Direct Digital, LLC, 795 F.3d 654, 661 n.2 (7th Cir. 2015), citing Karhu v. Vital Pharms., Inc., 621 F. App'x 945 (11th Cir. 2015). In Karhu, the Eleventh Circuit held that a plaintiff "cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." Karhu, 621 F. App'x at 948 (affirming denial of class certification where plaintiff presented only bare proposal that court could ascertain class members through defendant's sales data and also had failed to timely raise

[15]The decision in Bussey is unpublished. Pursuant to 11th Cir. R. 36-2, unpublished opinions are not considered binding precedent, but may be cited as persuasive authority.

alternative method of ascertainability).

a. The Defendants' procedures for sending the challenged faxes

Before addressing whether the Plaintiff has established that the proposed class is ascertainable, the Court discusses the method used by the Defendants in sending the faxes at issue.

On January 29, 2019, just before the close of discovery, the Plaintiff deposed Brian Segal, a "sales and support analyst" for the Defendants and the only person responsible for sending the faxes that are the subject of this litigation. Deposition of Segal, at 13, 29 (ECF No. 56-4, at 6, 15).[16] Mr. Segal stated that the Defendants used a software program, RightFax, to send faxes to physician offices and to send interoffice faxes. Id., at 21 (ECF No. 56-4, at 7). Mr. Segal stated that he had used RightFax on those occasions when Defendants "would have new education pieces that we would send out to offices, to send informational faxes to them.... [using] a list given to us from our medical staff office that was – that resided in Salesforce [a software platform]." Id., at 21-22 (ECF No. 56-4, at 7-8). The information in the list on Salesforce was entered by the medical staff and included a physician's name, address, phone number, fax number, and other "data, stuff that would help a sales rep before they would walk into an office." Id., at 23 (ECF No. 56-4, at 9). Defendants also had a "do not fax" list, which was based on information from the medical staff who input the data. Id., at 24 (ECF No. 56-4, at 10).The medical staff dictated what would be in the faxes and also to whom they would be sent. Id., at 28 (ECF No. 56-4, at 14). "So everything that happens goes through the medical staff office." Id.

[16]The Plaintiff has provided only excerpts of Mr. Segal's deposition transcript and therefore citations to the document pages in the record are not the same as the citation to pages of the transcript itself.

Mr. Segal stated that the fax number to which a fax was sent, and a report as to whether the fax deployed, was available in a report in the RightFax software, but that the "system didn't really have a way to" save the data. Id., at 34 (ECF No. 56-4, at 20).[17]

b. The diagnostic centers fax sent on January 5, 2017

The Defendants do not have information concerning the transmission on January 5, 2017, of the document received by the Plaintiff relating to imaging services. See Amended Answers of Baptist Health South Florida to Interrogatories Nos. 6-7 (served July 26, 2018) (ECF No. 66-2, at 11 of 15). The Plaintiff has offered no expert testimony or other persuasive evidence to establish that an identifiable class exists as to the transmission on January 5, 2017.[18] This lack of a log of transmissions of that fax is critical. Similarly, the lack of a fax log was important to the court in Sandusky Wellness, 863 F.3d at 467. The trial court in that case could not determine who had received one of the challenged faxes because fax logs did not exist. The Sixth Circuit noted that "no circuit court has ever mandated certification of a TCPA class where fax logs did not exist, and we decline to be the first." Id., 863 F.3d at 473.[19]

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[17]He also stated that it was not possible to send "different faxes to different lists at the same time." Id., at 38 (ECF No. 56-4, at 22).

[18]It is unclear why the Plaintiff, whose counsel reportedly is very experienced in class actions, decided not to present expert testimony. The scheduling Order in this case was entered on June 8, 2018. (ECF No. 25) The parties were to exchange expert witness summaries and reports no later than November 13, 2018, and the deadline for all discovery, including expert discovery, was set as January 31, 2019. Id. On November 13, 2018, *the date on which the deadline was to expire*, the Plaintiff sought an extension of the deadline to exchange expert summaries and reports. (ECF No. 50). As of that date the Plaintiff had not yet determined "whether experts on behalf of Plaintiff will be necessary at all." Id. The Court cannot condone such an approach to a plaintiff's duty to actively litigate its case.

[19]The Second Circuit also has affirmed a trial court's decision to decline class certification where a plaintiff alleged that Lifetime made a series of telephone calls which

It may be that the Plaintiff can prove the elements of its individual TCPA claim as to this fax, but the Plaintiff has not established that there is an ascertainable class as to the sending of the diagnostic centers fax on January 5, 2017.

c. The diagnostic centers fax sent on March 21, 2017

On the evening of March 21, 2017, the Defendants successfully transmitted a fax relating to the services of their diagnostic centers (Exh. B to the Plaintiff's pleading) to 1,950 recipients. Amended Answers of Baptist Health South Florida to Interrogatory No. 7 (served July 26, 2018) (ECF No. 66-2 at 11 of 15). According to a document produced by the Defendants, which appears to be a log of 2,272 numbers to which faxes were sent, the faxes were sent at 9:13 pm on March 21, 2017 (ECF No. 65-1).[20] The Defendants assert that while they attempted to send that fax to 2,328 numbers, those 2,328 numbers were shared by 4,159 physicians. Deposition of Segal at 56 (ECF No. 66-21, at 7). "RightFax has a function that only sends one fax to each phone number. Many physicians - many physician offices have multiple doctors in them. My list will show every doctor, but only one fax was ever sent to each office phone number." Id.

As an example of this circumstance of shared fax numbers, the Court notes that the Plaintiff itself shares its fax number with a separate entity owned by Blake Tishman's father. The Plaintiff claims to have received the challenged faxes at its fax number: (954) 510-2227. Motion for

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violated the TCPA but failed to produce a list of all called numbers. Leyse v. Lifetime Entm't Servs., Inc., 679 F. App'x 44 (2nd Cir. 2017) (finding that plaintiff failed to describe an ascertainable class).

[20]The Court has used the number 2,272 because that is the number of lines in the chart; the Court has not taken the time to search through the chart for duplications of names or numbers, and notes that it was the Plaintiff's burden to provide a clear interpretation of this chart and the Plaintiff failed to do so.

Class Certification (ECF No. 56), at 7. That fax number is for the Coral Springs office of the two businesses operated by Dr. Blake Tishman and his father Dr. Jerry Tishman. Deposition of Blake Tishman, at 11 (ECF No. 66-24, at 3). Dr. Blake Tishman testified that he and his father operate two different businesses: Tishman Chiropractic Center, and Tishman Chiropractic Centre. Id. According to Dr. Blake Tishman, his corporation is Blake Tishman, P.A. (the Plaintiff in this case), and that corporation does business as Tishman Chiropractic Center. Id., at 12 (ECF No. 66-24, at 4).[21]

The Plaintiff has failed to provide a compelling argument in response to the Defendants' assertion that the 2,328 fax numbers on the log were shared by more than 4,000 physicians. According to the Plaintiff, "multiple different persons may have standing as to the same TCPA-violating fax transmission," but that is not the issue here, where the Court must determine whether the class is ascertainable based on objective criteria and in an administratively feasible manner.[22] Moreover, the Court is not convinced by the Plaintiff's argument. See, e.g., Kopff v. World Research Group, LLC, 568 F. Supp.2d 39, 42 (D.D.C. 2008) (assistant who retrieved

[21]The Defendants provided only excerpts of the deposition testimony of Blake Tishman and, thus, the page citations to the record do not correspond to the same pages in the transcript.

[22]The Plaintiff's reply memorandum cites Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.,757 F.3d 540 (6th Cir. 2014), for the proposition that multiple persons may have standing as to a single fax transmission. In that case, the plaintiff's expert witness provided an opinion that the defendant had successfully transmitted an advertisement by fax to 10,627 unique fax numbers. The defendant argued that some of the faxes might not have been received by the intended recipient or that the list included some persons who were not the owners of the fax machines or fax numbers. The Sixth Circuit rejected the idea that a TCPA claim could only be brought by the owner of the fax *machine*, but did not specifically address the question of ownership of the fax number. The court noted that the defendant failed to argue that the class was not objectively ascertainable. Because the defendant had forfeited such argument, and the court found no reason to excuse the forfeiture, the court's observation that the "fax numbers are objective data satisfying the ascertainability requirement," id., at 545, is arguably only dicta. Moreover, the case did not have the issue presented here: the number of unique numbers to which Defendants sent the fax on March 21, 2017, bears almost no relation to the number of physicians related to those fax numbers.

unsolicited fax addressed to company president, who was also her spouse, lacked standing to bring TCPA claim).[23]

There appears to be no simple method for determining which of the 4,159 physicians, whose 2,328 fax numbers were sent the Defendants' faxes, and of which only 1,950 were received, are in the class that the Plaintiff wishes to represent. The Court notes that Dr. Blake Tishman testified that he didn't know who owned the fax number used at his own office. Id., at 32 (ECF No. 66-24, at 6).[24] Tellingly, the Plaintiff has filed a motion *in limine* seeking to preclude evidence relating to ownership of the fax numbers/lines used by the members of the class. (ECF No. 84, at 9-11) While the Plaintiff is correct that the TCPA does not require proof of ownership of a fax machine to succeed on a claim, and instead a plaintiff need only match a fax number to the subscriber, the Court at the class certification stage must be able to ascertain the class through reference to objective criteria, and it is the Plaintiff's burden to provide such information.

Another troubling point is that in its Motion for Class Certification, the Plaintiff refers to the fax on March 21, 2017, as having been sent 1,939 times to 1,939 unique fax numbers (ECF No. 56, at 7-8), and fails to correct that reference in its Reply memorandum, or fails to explain why

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[23]The court in Kopff observed: "For example, if the undersigned were to be sent unsolicited facsimiles, in violation of the TCPA, at the fax machine in chambers addressed specifically to 'the Honorable Paul L. Friedman,' it cannot be that the Court's judicial assistant, law clerks and interns would each have a cause of action by virtue of walking by the machine and picking up the facsimile." Kopff, 568 F. Supp.2d at 42.

[24]The Plaintiff's discovery responses reveal that the Plaintiff "opened its chiropractic practice in 2014, and took ownership of the fax number previously owned by a predecessor, *i.e.*, the same fax number to which the subject faxes were sent." Plaintiff's Responses to Second Requests for Production Request No. 2 (ECF No. 56-13, at 15). The Defendant argues that the Plaintiff corporation is not the subscriber of the fax number to which the challenged faxes were sent. According to the Commercial Services Agreement with Advanced Cable Communications (the provider of the fax line), the subscriber is Tishman Chiropractic Center. (ECF No. 66-4, at 7)

the Plaintiff maintains that there were 1,939 fax numbers involved when the Defendant reports the fax was sent to 1,950 recipients.

Finally, the Plaintiff relies on the district court decision in Palm Beach Golf Center-Boca, Inc. v. Sarris, 311 F.R.D. 688 (S.D. Fla. 2015), in support of its argument that the class here has been defined objectively by reference to "(a) the fax content, (b) the successful transmission of the fax to the recipient, and (c) the time and means of transmission." Motion for Class Certification (ECF No. 56), at 15. The Plaintiff overlooks, however that the decision in Palm Beach Golf that the class was "well-defined and ascertainable" was based on a proposed class definition similar to a definition approved by "numerous other courts" involving faxes sent by the same sender, Business to Business Solutions, and was "supported by a report [of plaintiff's expert]." Id., at 693-94.[25]

In summary, the lack of precision about the number of fax numbers or recipients of the fax sent on March 21, 2017, and particularly the question of whom the Court should look to as a member of the class, when a single number might represent dozens of physicians/individuals/entities, indicates that the Plaintiff has not met its burden. The Plaintiff has

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[25]The district court in Palm Beach Golf had previously held, *inter alia*, that the plaintiff fax recipient who had no recollection of receiving the unsolicited fax lacked standing to bring an action under the TCPA, Palm Beach Golf Center-Boca, Inc. v. Sarris, 981 F. Supp. 2d 1239 (S.D. Fla. 2013), a decision which was reversed by the Eleventh Circuit, at Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015) (finding standing for purposes of Article III where plaintiff's fax machine was "unavailable for legitimate business messages while processing ... the junk fax"). As noted in Bobo's Drugs, Inc. v. Fagron, Inc., 314 F. Supp. 3d 1240, 1245 (M.D. Fla. 2018), the Eleventh Circuit's decision in Palm Beach Golf addressed a fax transmitted in 2005, prior to the Federal Communication Commission's promulgation of regulations in 2006 and 2008 which clarified that a "sender" of a fax under the TCPA "will not always be the same party that actually transmits the facsimile to the recipient." The Defendants have argued that they were not the senders of the challenged faxes because neither of the Defendants provides goods or services or transmitted the faxes. Defendants' Response to Motion *in limine* (ECF No. 92), at 4-5. The Court need not address that issue at this time.

failed to demonstrate that the class can be "ascertained by reference to objective criteria," and that "identifying class members is a manageable process that does not require much, if any, individual inquiry." Bussey, 562 F. App'x at 787.

d. The sleep centers fax sent on April 11, 2017

The fax relating to the Defendants' sleep centers which the Plaintiff received on April 11, 2017, was successfully transmitted to 2,014 recipients. Amended Answers of Baptist Sleep Centers to Interrogatory No. 7 (ECF No. 66-3, at 11-12 of 15). According to a log produced by the Defendants, that fax was sent to 2,362 numbers at 9:55 pm on April 11, 2017. (ECF No. 65-2)[26] Again, as noted above, the Plaintiff's Motion for Class Certification refers to a different number of transmissions. According to the Plaintiff, the fax on April 11, 2017, was sent 2,002 times to 2,002 unique numbers. (ECF No. 56, at 7-8) The Plaintiff fails to explain this discrepancy between its numbers and those of the Defendants.[27]

The Plaintiff also has not met its burden of defining an ascertainable class as to the fax sent on April 11, 2017, because presumably the number of transmitted faxes includes those sent to fax numbers shared by more than one physician, as was the problem with the fax sent on March 21, 2017, and the Plaintiff has failed to propose an administratively feasible method for determining

[26]The late evening times in these logs are consistent with the testimony of Mr. Segal that the Defendants' faxes to physicians were sent "later after business hours." Deposition of Segal, at 25 (ECF No. 56-4, at 11 of 23).

[27]In its Motion for Class Certification, the Plaintiff refers to the fax on March 21, 2017, as having been sent 1,939 times to 1,939 unique fax numbers and the fax on April 11, 2017, as having been sent 2,002 times to 2,002 unique numbers (ECF No. 56, at 7-8), "for a total of 3,941 successfully sent faxes to *2,844 unique fax numbers*" (ECF No. 56, at 8) (emphasis added). The Plaintiff does not explain how it arrived at the number 2,844. The Plaintiff's lack of care needlessly complicated the Court's review.

the class members' identities.

Further, the Court does not find that the class definition is subject to a refinement that would render the class ascertainable under this Circuit's precedent. The lists of fax numbers of the faxes sent on March 21 and April 11, 2017, include multiple numbers which are documented by the Defendants as belonging to multiple physicians. The question of notice to the class presents a challenge: to whom should the notice be addressed when dozens of physicians are affiliated with a single fax number? And, even if the Plaintiff had met its burden of defining an ascertainable class or at least had presented evidence which allowed the Court to modify the definition to meet the criteria of ascertainability, the Court finds other fatal flaws in the Plaintiff's attempt to gain class certification, discussed below.

2. Numerosity

It is undisputed that at least two different documents were sent as faxes by the Defendants in early 2017, each time to approximately two thousand fax numbers. Whether those two documents are advertisements subject to the TCPA, or whether the Defendants sent such documents without the recipients' prior permission, need not be resolved at this time in order to determine that the numerosity requirement of Rule 23(a) has been met. Amgen Inc., 568 U.S. at 466 ("Merits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.") The Court also notes that Defendants do not directly dispute that numerosity would be satisfied.

3. Commonality

"Commonality requires the plaintiff to demonstrate that the class members 'have

suffered the same injury' .... [and] that all their claims can productively be litigated at once." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). The Plaintiff argues that there are at least six common questions of law or fact:

> (1) Whether Defendants' faxes are advertisements within the meaning of the TCPA?
>
> (2) Whether Defendants obtained prior express invitation or permission to send advertisements by fax?
>
> (3) Whether the Defendants are "senders" under the TCPA?
>
> (4) Whether the Plaintiff and the Class are entitled to statutory damages?
>
> (5) Whether the Plaintiff and the Class are entitled to injunctive relief?
>
> (6) Whether the Defendants' violations, if any, of the TCPA were "willful" or "knowing" and, if so, whether the Court should award statutorily-authorized treble damages?

Plaintiff's Motion (ECF No. 56), at 17. The Defendants argue that the putative class lacks commonality on several issues which are central to the validity of the each of the class members' claims, most notably the question of whether the Defendants had obtained prior express invitation or permission or consent to send the faxes. According to the Plaintiff, the Court need find only one common question of law or fact in order to find that the Plaintiff has satisfied this aspect of Rule 23(a).

The Plaintiff is partially correct.[28] The Court need find only one common question of law or fact to satisfy the commonality requirement, but that one common question must be more

[28]For at least twenty-five years it has been the law in this circuit that Rule 23 "does not require that all the questions of law and fact raised by the dispute be common." Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1557 (11th Cir. 1986). See also, Hicks v. Client Servs., Inc., No. 07-61822 , 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008) (denying certification of TCPA class because consent must be determined on an individual basis, regardless of whose burden it was to prove lack of express consent to receive automated calls).

than just a satisfaction of one of the elements of the cause of action.

In Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), an employment discrimination case, Justice Scalia described the "crux" of the decision in that class action as commonality under Rule 23(a)(2). Noting the Rule's requirement that the plaintiff "show that 'there are questions of law or fact common to the class,'" the court stated that such "language is easy to misread, since any competently crafted class complaint literally raises common 'questions.'" Id., at 349, internal quotations and citation omitted. The court noted as an example that a common question in that case was whether all of the plaintiffs worked for Wal-Mart, but that such common question was not sufficient to obtain class certification. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' .... [and not merely] that they have all suffered a violation of the same provision of law." Id., at 349-50. The common contention "must be 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*." Id., at 350 (emphasis added).

Arguably, for the sole purpose of determining whether the commonality requirement of Rule 23(a) has been met, the class-wide question of whether the subject faxes were advertisements might provide a basis for finding that the Plaintiff has satisfied the commonality requirement, but the Plaintiff still must demonstrate that the members of the proposed class have "suffered the same injury."[29] The Defendants were permitted to send advertisements by fax to those who solicited such faxes or granted permission to the Defendants to do so, so answering the question whether the faxes

[29]It is indisputable that the answer to the question of whether the challenged faxes are advertisements under the TCPA is capable of class-wide resolution. What is less clear is whether such answer "will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart, 564 U.S. at 350.

sent to the class members were advertisements is not enough to establish that the class "suffered the same injury."

The Court agrees with the Defendants that the question of prior permission or consent is central to the resolution of this case and will address this question in the discussion of the predominance requirement of Rule 23(b). Rather than delve further into the question of commonality, the Court will address the Plaintiff's failure to demonstrate that common issues predominate, as required by Rule 23(b), as the Plaintiff's failure to do so is fatal to its request for class certification.[30]

4. Typicality

The test of typicality differs from the test of commonality by placing the focus on the named class representative as compared to the proposed class, and "encompasses the question of the named plaintiff's standing ...." . Piazza v. Ebsco Indus. Co., 273 F.3d 1341, 1346 (11th Cir. 2001). In Powell v. YouFit Health Clubs, Judge Bloom declined to certify a class based on the Defendant's alleged violations of the TCPA by sending text messages to its members with past due accounts. Powell v. YouFit Health Clubs LLC, No. 17-cv-62328, 2019 WL 926131 (S.D. Fla. Jan. 14, 2019, reconsideration denied Feb. 22, 2019). The plaintiff in that case contended that she had cancelled her membership and, thus, did not have a past due account, but could point to no evidence that YouFit was aware that the plaintiff had canceled her account.

[30]To the extent that the Court must address the state law claim for conversion, the issue of whether the subject faxes are an advertisement is not central to the validity of a claim for conversion. The Court's discussion as to the predominance, or lack thereof, relating to the requirements of Rule 23(b) as to the issue of consent under the TCPA will implicitly address the commonality question as applied to the conversion claim, because a finding of consent is fatal to a claim for conversion.

> Therefore, Plaintiff's claim is indeed unique, as she believed - either correctly or incorrectly - that her membership had been canceled when she received the offending text messages. By contrast, the class she seeks to represent would be composed of YouFit members whose accounts were delinquent. Plaintiff points to no evidence that any of the purported class members received text messages from YouFit under similar circumstances.

Id.

In the Amended Complaint, the Plaintiff alleges that its claims are typical of the other class members because Plaintiff "received Defendants' advertisements by facsimile and those advertisements did not contain the opt-out notice required by the TCPA." Amended Complaint (ECF No. 16), at ¶ 45. The Plaintiff's allegation that the opt-out notice was not provided highlights an area of its atypical posture with respect to at least some members of the class. Those class members who received solicited faxes, *i.e.*, those who had permitted the receipt of the fax, have no claim regarding the lack of an opt-out notice, pursuant to the decision in Bais Yaakov.

In its Motion for Class Certification, the Plaintiff supports its argument as to typicality by citing the decision in A Aventura Chiropractic Center, Inc. v. Med Waste Mgmt. LLC, No. 12-21695, 2013 WL 3463489 (S.D. Fla. July 3, 2013). In that case the court noted that typicality was satisfied where a plaintiff in a TCPA case argued that its fax number was on prior lists of numbers to which the defendant had sent fax blasts and, thus, "the course of conduct that produced [the plaintiff's] TCPA claim also produced the claims of the proposed class." Id. That case is distinguishable, as the Defendants herein argue that there are multiple ways in which the Plaintiff is not "typical" of the proposed class.

The Defendants argue, as they did regarding commonality, that the process of obtaining prior permission for sending the faxes, which might include the credentialing process, or in-person visits to physicians' offices, was not uniform across the proposed class. According to the

Defendants, even if the Plaintiff can prove that it did not provide permission to receive the Defendants' faxes, "that would not prove the claims of any of the other members of the proposed class because those members consist of various physicians who have varying lengths of relationships with [Defendants] ...." Defendants' Response to Motion for Class Certification (ECF No. 66), at 16.[31]

In reply, the Plaintiff claims that the "credentialing agreement" (Reply, ECF No. 67, at Exhibit 1) lacks reference to the use of a physician's fax number for advertising purposes and, thus, that agreement cannot be the basis for a finding that the Plaintiff's claims are not typical. There is no evidence, however, that the same "credentialing agreement" was used for all members of the class and, indeed, to determine what agreement was used, by which proposed class members, and when, would require the type of mini-trial that is the opposite of a class action proceeding.

The Defendants apparently obtained the Plaintiff's fax number by visiting its office. The Defendants' responses to interrogatories state that they "contacted [Plaintiff] and obtained its express authorization to communicate with [Plaintiff] by way of a facsimile number provided by personnel authorized by [Plaintiff] to provide such information or placed by [Plaintiff] in a position to provide such information to [Defendants]. In addition, [Defendants] may have one or more

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[31]The Defendants argue, for example, that there is a subset of physicians with whom Defendants have had a relationship since prior to 2005 and faxes to such individuals, even if found to be unsolicited, may not be covered by the TCPA. Defendants' Response to Motion for Class Certification (ECF No. 66), at 20, n.10, citing 47 U.S.C. 227(b)(1)(C). The Plaintiff argues that the pre-2005 exclusion in the statute "is only relevant where the defendant raises an EBR defense." Plaintiff's Reply (ECF No. 67), at 2. The Plaintiff's argument rests on the following language: "except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005; if the sender possessed the facsimile machine number of the recipient before July 9, 2005." 47 U.S.C. 227(b)(1)(C)(ii). In light of the Court's conclusions, above, the Court need not address the issue of whether physicians who had provided their fax number to the Defendants before 2005 are members of the class.

patients in common with [Plaintiff] and who have requested [Defendants] to communicate with [Plaintiff]." See Defendants' answers to Interrogatory No. 9 (ECF Nos. 60-2 and 60-3) (served April 26, 2018, and unchanged in the supplemental answers served on July 25, 2018, at ECF Nos. 60-6, 60-7).

The Plaintiff has alleged that it "did not expressly consent to receive any advertisement from Defendants by fax," Amended Complaint (ECF No. 16), at ¶ 2, and specifically alleges violation of the TCPA by the sending of an "unsolicited" advertisement, id., at ¶¶ 51-52, and that the class members were sent faxes "without their prior express invitation or permission," id., at ¶¶ 58-59. As compellingly argued by the Defendants, the Plaintiff's former employees provided evidence somewhat contradicting the Plaintiff's allegations.

Judy Weingarten, the Plaintiff's Office Manager during 2016 and 2017, was deposed by the Defendants on October 24, 2018. She testified that the Plaintiff's business cards were kept at the reception area of the office and included the Plaintiff's fax number. Deposition of Weingarten, at 7 (ECF No. 66-28, at 5). She also testified that she recalled someone coming to the office in person to ask if it was okay to send Dr. Blake Tishman advertisements by fax, and that this happened more than once. Id., at 18 (ECF No. 66-28, at 9).[32]

Theresa Petracea, a former Chiropractic Assistant for the Plaintiff, reported that she was never required to decline a request to provide the Plaintiff's fax information and that she understood that she was "authorized to provide Tishman's facsimile number to medical providers or other persons who might ask for that information by calling Tishman's offices." Declaration of

[32]Ms. Weingarten's testimony regarding persons visiting the office to obtain permission to send advertisements by fax is consistent with the Defendants' description of their methods, generally, for obtaining permission to send faxes to physicians.

Petracea dated October 16, 2018 (ECF No. 66-17). "As a matter of routine, my coworkers and I agreed to permit callers to fax information to Tishman, including, as appropriate to the situation, information as to the commercial availability or quality of goods or services in the community." Id., at ¶ 4.[33]

The Plaintiff has failed to establish that its claims are typical of the proposed class. As noted earlier, the Plaintiff shared its fax number with another business entity, which is typical of only an unknown portion of the proposed class members. There is disputed evidence as to how the Plaintiff's fax number was obtained and, thus, it is impossible at this stage of the proceedings to say that the Plaintiff's fax number was obtained in a manner typical to that of the other class members. (This is not a case in which a large list of target businesses or individuals was obtained at one time and then a faxed advertisement was sent to everyone on that list.) The Plaintiff maintains that he did not solicit the fax and, thus, any fax he received should have provided an opt-out notice. In that way, and in others discussed above, the Plaintiff's claims are not typical.

5. Adequacy of Representation

The Fifth Circuit has observed that the importance of determining whether a class

[33]Further evidence of Dr. Blake Tishman's lack of typicality with the class members which he intends to represent through his entity, Blake Tishman, P.A., may be found in the Plaintiff's discovery responses, which state that the Plaintiff "never recalls referring a patient to an outpatient diagnostic service, as opposed to their own physician, for any purpose." Plaintiff's Supplemental Response to Defendants' First Interrogatories, Interrogatory No. 3 (ECF No. 56-12, at 20). In other words, the Plaintiff may not be a physician who prescribes any of the services offered by the Defendants, as compared to those members of the class, which presumably are a majority of the class, who are prescribing physicians. Whether Dr. Blake Tishman's status as a chiropractor who "never recalls referring a patient to an outpatient diagnostic service" is relevant to a TCPA, or conversion, claim, based on the Plaintiff's receipt of faxes addressed to prescribing physicians is unclear.

representative is adequate "implicates the due process rights of all members who will be bound by the judgment." Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001) (finding reversible error where lower court presumed that class representative in securities litigation would be adequate based solely on taking judicial notice of the competency of class counsel). The Court has concerns that the Plaintiff, a corporate entity which speaks through Dr. Blake Tishman, may not be an adequate representative of the class, for some of the reasons noted above, in the discussion of typicality.

The Plaintiff argues that Dr. Blake Tishman "testified regarding his commitment to prosecuting the present claim, and TCPA violations in general," citing Exhibit L, at page 1. The cited reference contains no such testimony, nor has the Court been provided with any other source for such statement. To the contrary, the Defendants provided an excerpt of Dr. Blake Tishman's deposition which reveals that when he was asked for the basis for the Plaintiff's claim that it did not solicit the subject faxes, he responded: "I don't know." Deposition of Blake Tishman, at 42-43 (ECF No. 66-24, at 10-11). When asked whether he was aware that he was alleging that all other class members did not consent to receive the faxes, he responded: "I can't speak for other people." Id., at 43 (ECF No. 66-24, at 11) He also responded "I don't know" to several questions about the basis for this lawsuit, or what could be done to determine whether other members of the class had consented to receive, or solicited the receipt of, the faxes. Id., at 44-45 (ECF No. 66-24, at 12-13).

The Defendants argue that Dr. Jerry Tishman, the father of Blake Tishman, admits that he has filed "several" junk fax lawsuits, and is making a profit from such lawsuits. Deposition of Jerry Tishman, at 25 (ECF No. 66-25, at 3). The Court notes that three TCPA cases were filed in the Southern District of Florida, all filed on April 14, 2016, as class actions by Tishman & Tishman, P.A., represented by the same attorney representing the Plaintiff in this action, Phillip A. Bock, of

Bock & Hatch, LLC, and alleging the receipt of junk faxes.[34] In Tishman & Tishman, P.A. v. H Care Jobs, Inc, Case No. 9:16-cv-80572-WJZ, the defendant alleged that the subject fax had been sent to Tishman Chiropractic Center, a "fictitious name which is registered and owned by Blake Tishman in his individual capacity." Id., ECF No. 17, at 11. Judge Zloch dismissed the plaintiff's claim for conversion in that case, finding that the exercise of supplemental jurisdiction over that state law claim was not warranted. Id., ECF No. 5.[35] The plaintiff settled its claim with the defendants and the case was dismissed on January 24, 2017. Id., ECF No. 36. In Tishman & Tishman, P.A., v. Med Direct Capital, LLC, Case No. 9:16-cv-80573-WPD, the case settled, and the case was dismissed less than four months after it was filed. Finally, after failing to serve the defendants, the Plaintiff voluntarily dismissed its case Tishman & Tishman, P.A. v. Pure Biomed, LLC, Case No. 9:16-cv-80571-BB, just three months after filing.

The Plaintiff's Office Manager in 2016 and 2017, Judy Weingarten, testified that Dr. Blake Tishman "maintained a file containing all incoming facsimile messages that were not related to a particular patient. Whenever I would bring him such messages for his file, he seemed happy and

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[34]While the Defendants do not expand on their assertion that Dr. Jerry Tishman finds the TCPA lawsuits personally profitable, it is easy to surmise that in a case involving just one fax sent to 2,000 fax numbers, the minimum statutory damages could be $1,000,000, with the potential for such damages to be tripled. It is unclear how a representative plaintiff would profit from such a large award, if the class were certified and the award were made equally to each aggrieved member of the class. However, it appears that in at least two of the cases filed in this district by Tishman & Tishman, P.A., a settlement was reached *prior to class certification*, and for an undisclosed sum presumably paid to Tishman & Tishman, P.A.

[35]In the present case the Plaintiff also failed to allege that this Court has jurisdiction over the conversion claim, as the pleading is silent as to the question of supplemental jurisdiction. The Plaintiff states only that the Court "has jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 227." Amended Complaint (ECF No. 16), at ¶ 9. Despite the clarity of the ruling by Judge Zloch in the earlier case involving the same counsel, the Plaintiff's counsel made the same error when filing this case.

never expressed any negativity. It was my impression that he welcomed such messages for his file." Declaration of Weingarten dated Feb. 7, 2019 (ECF No. 66-27) Such information at least suggests that the Plaintiff may not be an adequate representative of a class of persons whom allegedly were harmed by the receipt of the faxes.[36] This information also indicates that even though the Plaintiff has minimally met the criteria for stating its individual TCPA claim at this stage of the proceedings, the circumstances of this case do not represent the type of situation for which the TCPA's "junk fax" prohibitions were intended.

Despite the Court's serious concerns about the adequacy of the Plaintiff to represent the class, the Court need not conclude whether the Plaintiff has demonstrated that it is an adequate representative, as the Plaintiff has failed to establish that it meets other criteria of Rule 23(a), particularly the implicit requirement that the class be ascertainable. Moreover, the Plaintiff's failure to satisfy Rule 23(b), as to predominance, is fatal to its attempt to seek class certification.[37]

D. Plaintiff's compliance with Rule 23(b)

1. Predominance of common questions

When determining whether there is a common liability issue which predominates, a court must "consider the cause of action and 'what value the resolution of the class-wide issue will have in each member's underlying cause of action.'" Hicks v. Client Servs., Inc., No. 07-61822,

[36]The Plaintiff's pleading alleges that it, and the other class members, were damaged by the Defendants' sending of the faxes. "Receiving Defendants' junk faxes caused the recipients to lose paper and toner consumed in the printing of Defendants' faxes .... [and] wasted Plaintiff's valuable time ... [and] unlawfully interrupted Plaintiff and the other class members' privacy interests in being left alone." Amended Complaint (ECF No. 16), at ¶ 65.

[37]The Defendants have not challenged the adequacy of class *counsel* and, thus, the Court will not address that issue.

2008 WL 5479111 (S.D. Fla. Dec. 11, 2008) (denying certification of TCPA class for lack of commonality and failure to demonstrate predominance of issues), citation omitted.[38] "The predominance inquiry ... is far more demanding than Rule 23(a)'s commonality requirement." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997).

In Amgen, the Supreme Court held that the "focus of Rule 23(b)(3) is on the "predominance of common *questions*," id., 568 U.S. at 466 (emphasis in original), and the class need not, at the certification stage, "prove that the predominating question will be answered in their favor, id., at 468. "While [the class] certainly must prove materiality [of the alleged misrepresentations and omissions which affected investors' purchase of stock] to prevail on the merits, we hold that such proof is not a prerequisite to class certification." Id., at 459. In essence, what the defendant had argued in Amgen was that the class had a "'fatal similarity - [an alleged] failure of proof as to an element of the plaintiffs' cause of action' ...., [and that such] a contention is properly addressed at trial or in a ruling on a summary-judgment motion," and not at the class certification stage. Id., at 470.

It is undisputed that it is unlawful under the TCPA to send unsolicited fax advertisements. The Plaintiff has alleged that the faxes it, and members of the class, received were advertisements, and Judge Martinez has denied the Defendants' motion to dismiss which argued that the faxes were not advertisements. The Plaintiff also has alleged that the faxes were unsolicited, which sufficiently states a plausible claim for relief at this stage of the proceedings at least as to those class members who did not provide express permission to the Defendants. See, e.g., Florence

[38]"[I]t is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." Hicks v. Client Servs., Inc., No. 07-61822 , 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008), citing Klay v. Humana, Inc., 382 F.3d 1241, 1254 (11th Cir. 2004).

Endocrine Clinic, PLLC v. Arriva Medical, LLC, 858 F.3d 1362 (11th Cir. 2017) (affirming dismissal of TCPA class action brought by physicians because they had failed to sufficiently allege that faxes they received were unsolicited advertisements instead of requests for information needed to complete an order already made by the physicians' patients).

The question of whether express permission or consent was given by each member of the class is an issue, however, which defeats the Plaintiff's attempt to establish that the Rule 23(b)(3) predominance requirement has been met.[39]

a. Express permission, solicitation and consent under the TCPA

A fax is solicited under the TCPA if the recipient provided "prior express invitation or permission, in writing or otherwise" to receive it. 47 U.S.C. 227(a)(5). The FCC has explained that "prior express invitation or permission" may "be given by oral or written means ... [and may] take may forms .... Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent.... Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified." Rules and Regulations Implementing the TCPA of 1991: Junk Fax Prevention Act of 2005, 71 F.R. 25967-01, 2006 WL 1151584 (May 3, 2006).[40]

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[39]This is just one example of the "likely difficulties in managing" this case as a class action. Rule 23(b)(3)(D).

[40]According to Gina Perez, an employee of the Defendants, the Defendants utilized a secondary confirmation process before entering a physician's contact information in the Defendants' database after receiving the information from a physician business development representative. Deposition of Gina Perez, at 14-15 (ECF No. 66-16, at 3-4). Such confirmation process did not include a discussion of whether it was permissible to "send advertising material

In Gorss Motels, Inc. v. Safemark Systems, LP, the court quoted the FCC's earlier statement, from 1992, regarding the determination of consent to receive telemarketing phone calls: "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." Id., citing In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 F.C.C.R. 8752, ¶ 31, 1992 WL 690928. That FCC Report and Order, released on October 16, 1992, refers to the report in Congress, which noted "that in such instances 'the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.'" Id., at n.57, citing House Report, 102-317, 1st Sess., 102nd Cong. (1991), at p. 13. While the Junk Fax Prevention Act was not passed until 2005, the Court finds instructive the description, cited above, from the guidance issued by the FCC years earlier regarding the nature of permission given "for use in normal business communications."[41]

A district court in Pennsylvania has held, in a TCPA junk fax case, that a recipient "can provide express consent by providing the sender a contact number, but only for communications 'related to the reason why he provided his number in the first place.'" Robert W. Mauthe, M.D., P.C. v. MCMC LLC, No. 18-1901, 2019 WL 2088054 (E.D. Pa. May 13, 2019) (denying motion for

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to them via fax." Id.

[41]In Schweitzer v. Comenity Bank, 866 F.3d 1273, 1277 (11th Cir. 2016), the court held that under the TCPA a consumer may partially revoke their consent to receive automated calls. To the extent that this applies also to consent to receive fax advertisements, it suggests yet another area of individualized inquiry, which is rendered even more individualized if there is an issue, as was raised by the Plaintiff, as to whether an employee had the authority to consent on behalf of the employer who owned the fax number/line. As observed by the Eleventh Circuit, "[t]he issue of consent is ordinarily a factual issue." Id., at 1280 (internal quotation and citation omitted).

summary judgment where fact question remained as to whether fax sent to physician - who had provided his fax number to defendant for purpose of receiving certain types of faxes - was closely related enough to the purpose for which he had provided his fax number). The court in Mauthe referenced another decision within its district which is instructive here, as the defense arguments are similar to those made in the present case. In KHS Corp. v. Singer Fin. Corp., No. 16-55, 2018 WL 4030699 (E.D. Pa. Aug. 23, 2018), the court denied a motion for certification of a class as to a TCPA junk fax claim, where the defendant argued that it had permission to send the challenged faxes to each of the proposed class members. The court noted that the defendant had built its business contact list (including fax numbers of those contacts) over 25 years of networking, and that "thousands of mini-trials" might be required to determine whether the proposed class members had granted permission to receive fax advertisements.

> [I]f a recipient voluntarily gives her fax number, she consents to receive material related to the reason she gave the number. [The defendant] has alleged that he received fax numbers and consent from each class member both to receive 'flyer[s],' and 'information' [about the defendant's company]. To determine whether the faxes relate to the reason that a class member gave her fax number, the Court, or a jury, would have to engage in an intensely fact specific inquiry - requiring precise analysis of the conversation as well as credibility determinations.... Ultimately, there can be no predominance in the face of such individualized disparity.

Id. (citations omitted).

b. The Defendants' method of obtaining physicians' fax information and permission/consent

The Plaintiff's fax number apparently was added to the Defendants' database as a result of one or more visits to the Plaintiff's office by Defendants' employees, known as Physician

Business Development Representatives.[42] According to the evidence, the Defendants' Representatives visited physicians' offices to provide information to the physicians about services offered by the Defendants and to update information about the physicians. The Defendants maintained information as to the specialty of individual physicians' practices, their geographic location, and other details, and the Representatives used this information to make efforts "to make the information [shared with the physicians] relevant to the office." Deposition of Segal, at 22, 24, 27 (ECF No. 56-4, at 8, 10, 13).

Ms. Lissette Egues, designated as the Defendants' corporate representative under Rule 30(b)(6), was deposed by the Plaintiff on November 28, 2018. She testified that the Representatives did not work for the Defendants' Marketing Department. Deposition of Egues, at 100 (ECF No. 66-8, at 25).[43]

On January 25, 2019, the Plaintiff deposed Jessica Lissaeur, another employee of the Defendants. She described the process of a Representative offering to send information to a physician newly connecting with Baptist Health as follows:

> Usually, we ask them for a business card with their contact information and tell them that we are going to add them to our database for multiple reasons. One would be to - if one of their patients comes to our facilities, we would need information on how to get the report to - back to the physician, so that would include phone number, fax, address. So if they send a prescription, we can call the office. ... And then also letting them know that we will use the information on the card to reach out to them, contact them with any

[42] According to the Defendants, neither the Plaintiff corporate entity nor Blake Tishman is credentialed at the Defendants' facilities. Response to Motion for Class Certification (ECF No. 66), at 17.

[43] According to the Defendants, and which is uncontroverted by the Plaintiff, the Defendants' Marketing Department is consumer oriented, while the Outpatient Services department, and its Physician Business Development representatives, focus on the physician community. Response to Motion for Class Certification (ECF No. 66), at 4 n.2.

information that we have.

Deposition of Lissauer, at 29 (ECF No. 56-9, at 4). Also on January 29, 2019, the Plaintiff deposed Janesy Dominguez, who had worked as a Representative. She stated that she would talk to the offices she visited about the use of Defendants' outpatient diagnostic centers using as a flyer the document that is also one of the faxes at issue in this litigation (Exhs. A and B to the pleading). Deposition of Dominguez, at 28 (ECF No. 66-7, at 9. She was asked about her purpose and whether it was "to get doctors to send their patients to Baptist Outpatient diagnostic centers for all their imaging needs?" She responded "yes." Id.

Ms. Egues testified that the faxes sent by Baptist "are educational in form, and we sent them to physicians that gave us consent to send them faxes." She stated that "if we ask a physician, Can we fax you information? and they say yes, and then we follow up and say somebody else calls and says, Is this your phone number? Is this your fax? and they give it to us again, they're giving us consent twice to use their fax without any limitations." Deposition of Egeus, at 159 (ECF No. 56-8, at 8). Ms. Egues was asked the following:

> Q: Do you have any evidence that in seeking the consent as you've described it from a medical provider to have their name and contact information added to the Baptist Health database, that anybody, the sales rep or the IT person calling them, that anybody specifically asks, Can we use your fax number to send you marketing or advertising material? do you have any evidence that anybody from or acting on behalf of Baptist Health asks that?
>
> A: That specific question, no.
>
> Q: Do you have any evidence that anyone acting for or on behalf of Baptist Health communicating with any medical provider about the use of their fax number ever uses the word advertising or marketing at all?
>
> A: To my knowledge, no.

Id., at 159-60 (ECF No. 56-8, at 8-9) Defense counsel properly objected to the form of each of these

questions.

On January 28, 2019, the Plaintiff took the deposition of Ana Torres. The Plaintiff provided only excerpts of Ms. Torres's deposition transcript. Ms. Torres was asked: "Q: Did you ever ask physician [sic] in your territory whether you could send faxes advertising or promoting Baptist Health's services? A: No. Q: Were you ever instructed to do that? A: No." Deposition of Torres, at 28-29 (ECF No. 56-5, at 8-9). On the same date the Plaintiff also deposed Leonardo A. Francis, Jr. Mr. Francis stated that he never asked physicians whether he could send advertising material by fax and was never told by the Defendants to ask physicians for their permission for Baptist to send advertising material via fax. Deposition of Francis, at 21-22 (ECF No. 56-6, at 5-6).

The Court is not persuaded by the Plaintiff's reliance on responses it obtained when it posed objectionably compound questions during the depositions of the Defendants' employees. When Plaintiff's counsel posed the question "did you ever get permission to fax an advertisement?" the Defendants' witnesses, not surprisingly, testified that they did not, because the Defendants maintain that what they sent were not advertisements. For example, Ms. Lissauer stated that Defendants "don't send advertisements." Deposition of Lissauer, at 29 (ECF No. 56-9, at 4).[44]

At this stage of the proceedings, the Court need not decide whether prior permission *was obtained* by the Defendants' employees in their interactions with physicians and their offices. The Court instead must determine whether the Plaintiff has established that the critical question of

[44]The Plaintiff, in making the argument that a specifically-worded question was not posed, effectively ignores the FCC's guidance regarding the fact that consent can take "many forms." Further, at least one district court has found that a recipient "can provide express consent [to receive faxes] by providing the sender a contact number," at least for the purpose of communications "related to the reason why he provided his number in the first place." Robert W. Mauthe, M.D., P.C. v. MCMC, LLC, No. 18-1901, 2019 WL 2088054 (E.D. Pa. May 13, 2019) (internal quotation and citation omitted).

prior permission/consent is one susceptible of class-wide resolution. If the Plaintiff has not done so, then the Plaintiff has failed to establish, as required by Rule 23(b)(3), that class-wide questions of law or fact predominate over questions requiring individualized inquiry as to each class member.

c. Proffered evidence of consent

The Defendants provided declarations of the managers of at least three medical practices which received the allegedly unsolicited faxes. Each of those declarations states that their medical "[p]ractice always has given its prior express invitation or permission to Baptist Health and its affiliated entities to transmit advertisements from them to the Practice concerning the Programs, including by means of facsimile messages." See Declaration of Audry Castellanos-Virdaurre, Pres., Ladies First OBGYN LLC (ECF No. 66-5), Declaration of Timothy L. Grant, MD (ECF No. 66-10), and Declaration of David Seiden, MD (ECF No. 66-22).

In addition, the Defendants provided the Declaration of Judy Weingarten, who worked for the Plaintiff in 2016 and 2017 as its Office Manager. Declaration of Weingarten (ECF No. 66-27). "During my employment with [Blake Tishman, P.A.], ... I was authorized by Tishman to provide Tishman's facsimile number to medical providers or other persons who might ask for that information by calling Tishman's offices. As a matter of routine, I agreed to permit callers to fax information to Tishman, including, as appropriate to the situation, information as to the commercial availability or quality of goods or services in the community. I was never required to decline such a request or to direct such a request to any other employee of Tishman for handling." Id., at ¶ 3.

The Plaintiff, in its Reply memorandum, argues that several physicians who provided declarations indicating that they had provided permission to the Defendants to receive the faxes later "admitted in deposition they had not given prior express permission." Reply (ECF No. 67), at 1. Again, the Court finds troubling that the Plaintiff has made a representation not supported by the

record. At least two of the citations provided by the Plaintiff were inaccurate, and two other citations refer to pages of the depositions not in the record. A broad reading of the deposition testimony that is in the record supports, at most, that the physicians could not recall the specifics of when or how they gave their permission. The Court finds the declarations persuasive, despite the Plaintiff's argument to the contrary, which was unsupported by the record. The Plaintiff's counsel is cautioned that serious consequences might result if the Plaintiff makes such unsupported assertions in further submissions to this Court.

d. The predominance of the permission/solicitation/consent issue

In support of its argument that the issue of prior express permission has not been credibly challenged because the Defendants here refer to having obtained prior (or implied) *consent*, rather than express permission, to send the subject faxes, the Plaintiff cites Physicians Healthsource, Inc. v. Allscripts Health Sols., Inc., 254 F. Supp.3d 1007, 1035 (N.D. Ill. 2017).[45] The Plaintiff focuses on the discussion in Allscripts Health as to whether the express permission or invitation required under the TCPA can be inferred based on "circumstances or conduct." In that case, the court remarked that:

> It's clear from the materials the defendants have submitted on this point that they are using the term 'consent' advisedly - and tendentiously - and not as a convenient shorthand for express permission or invitation. For example, the defendants submit the declarations of [proposed class members] who swear that they ... consented to receive fax ads ....[but] not one of these declarants can testify that they provided *express* permission to the defendants to send them faxes [and they] don't even have any recollection of receive any faxes from the defendants.

[45]Although the Plaintiff made this argument in the context of the Rule 23(a) requirement of commonality, such argument would also apply to the analysis of predominance, under Rule 23(b)(3).

Id., at 1035 (emphasis in original). The court found that common issues predominated, in part because the court found that the entire class was subject to the requirement of an opt-out fax, regardless of whether a class member had solicited the fax advertisement. (The court stated that it was compelled to follow Seventh Circuit precedent, despite acknowledging the then-recent announcement of the decision in Bais Yaakov as to the FCC's lack of authority to require an opt-out notice on solicited faxes.) "The objections relating to predominance that defendants raise here are based on class-wide evidence - some unwritten policy or a database list - that would rise or fall throughout the class without the specter of unlimited mini-trials." Id., at 1037. The court also observed that:

> If the defense of 'established business relationship' is removed from the equation, as defendants have chosen to do here, it would seem that, in every case, individualized issues of express permission would predominate, thus precluding class actions in junk fax cases. Yet, class certification in these cases is the norm. Most courts have found on the record before them, that common issues predominate even when the defendants raise the defense of express permission if the defendants' proof is based on some sort of class-wide database, routine, or system.

Id., at 1037 (emphasis in original, citations omitted). Nevertheless, the Court declined to certify the class because the plaintiff was not an adequate representative. Id., at 1027-28.

The Court finds the decision in Allscripts Health distinguishable on several points. In the present case the Defendants provided declarations from recipients of the faxes who not only knew that they had received information transmitted by the Defendants but also stated that they "always [had] given ... prior express invitation or permission" to the Defendants "to transmit advertisements ... including by means of facsimile messages." Declaration of Lanny E. Pauley (April 20, 2018) (ECF No. 66-15). In addition, while the Defendants have offered some evidence of their methods of obtaining permission and consent from physicians to receive the subject faxes, such

evidence is not sufficiently class-wide in its application. The reliance on the opt-out notice as a class-wide issue in Allscripts Health is another area of distinction.

Several months after the decision was issued in Allscripts Health, another district court in the same district found that the Bais Yaakov decision was controlling and that, accordingly, consent was an individualized issue precluding class certification. Alpha Tech Pet Inc. v. LaGasse, LLC, No. 16C513, 2017 WL 5069946 (N.D. Ill. Nov. 3, 2017). Defendants in that case provided multiple types of consent-related evidence, including consent forms, entries in the defendants' database, a description of the defendants' methods of obtaining consent and declarations from 25 customers who had consented but whose consent was not otherwise shown in the database or by a form. The court noted that "evaluation of the specific evidence available to prove consent thus reveals numerous individual questions that spell doom for plaintiffs' proposed classes." Id. (internal quotation and citation omitted). See, also, Gorss Motels, Inc. v. Otis Elevator Co., No. 2019 WL 1490102 (D. Conn. April 4, 2019) (noting that in light of ruling in Bais Yaakov, "[o]nly where consent is not found would the trier of fact look to the sufficiency of the opt-out notice," and class certification was not appropriate).[46]

While the present case does not have as many types of consent-related evidence as were present in the Alpha Tech Pet case, the Defendants have described their method for obtaining permission to transmit faxes and also provided several declarations from physicians who had agreed to receive faxes.

The decision of the Middle District of Florida, in Gorss Motels, Inc. v. Safemark

[46]See, also, Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 685 (7th Cir. 2013) (court concluded that fax logs listing the fax number of each recipient of a challenged fax supported the lower court's determination that questions of law or fact predominated over questions affecting only individual members of the proposed class).

Systems, LP, is instructive. "The predominance requirement in TCPA [class] actions often turns on whether individualized inquiries - rather than generalized proof - are required to demonstrate an individual class member's prior express consent. Whether the issue of prior express consent can be resolved with generalized proof depends on the circumstances of each case." Gorss Motels, Inc. v. Safemark Systems, LP., No. 6:16-cv-01638-Orl-31DCI, 2018 WL 1635645 (M.D. Fla. April 5, 2018). In Gorss Motels, the plaintiffs, two operators of hotels, sued a vendor, Safemark, which had been approved by the plaintiffs' franchisor as a "supplier" to the franchisees. The plaintiffs argued that Safemark had violated the TCPA by sending faxes in 2013 and 2015 which provided information or were marketing materials related to the safes offered for sale or lease by Safemark. Safemark argued that the faxes were sent based on the franchisees' agreement to purchase certain items from the franchisor's approved suppliers and also that, as to the faxes sent in 2013, approximately 13% of the 7,402 faxes sent by Safemark were sent to "former or current customers of Safemark, whose fax numbers were provided directly by the customer and/or [the franchisor]." Id.. The court declined to certify a class under the TCPA, because "issues of consent cannot be resolved without individualized inquiry."[47]

Although not decided under the junk fax provisions of the TCPA, but rather under

[47]The decision denying class certification in Gorss Motels, Inc., has been appealed to the Eleventh Circuit, as Case No. 18-12511, Gorss Motels, Inc. v. Safemark Systems, LP (appeal docketed June 15, 2018). In a later decision in that case, Judge Presnell granted summary judgment to the defendant, and denied the plaintiffs' motion for summary judgment, finding that one of the franchisees had given permission to be contacted by the franchisor's "Approved Suppliers" and as to the other franchisee, "no reasonable factfinder could determine that [the fax it received] was unsolicited," because it had given permission to receive advertising faxes in relation to the Approved Supplier program. Gorss Motels, Inc. v. Safemark Systems, LP, No. 6:16-cv-01638-Orl-31DCI, 2018 WL 5996963 (M.D. Fla. Nov. 15, 2018). That decision also was appealed, as Case No. 18-15232 (appeal docketed Dec. 18, 2018), and the appeals have been consolidated.

the TCPA's prohibition on using an automated dialing system to call cellular phones, the decision of Judge Dimitrouleas in Hicks v. Client Servs., Inc., No. 07-61822, 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008), is instructive here. "[The plaintiff] does not ... describe how she intends to [show at trial the lack of express consent by herself and the class members] without the trial degenerating into mini-trials on consent of every class member." Id. Judge Dimitrouleas found it irrelevant, for the purposes of the class certification inquiry, who had the burden of proving permission or consent. "Whether the burden is on the Plaintiff or the Defendant [to produce evidence of lack of consent], ultimately consent is an issue that would have to be determined on an individual basis at trial." Id.

The Court finds that the Plaintiff has failed to establish, as required by Rule 23(b)(3), that class-wide questions of law or fact predominate over questions requiring individualized inquiry as to each class member, because an individualized inquiry is required to determine whether each class member provided permission or consent.

2. Superiority of the class action mechanism

Even if the Court had found that common questions of law or fact predominate over the questions as to individual class members, that is not the end of the inquiry. Such a finding must be accompanied by a finding that the class action mechanism is superior as a method to fairly and efficiently adjudicate the parties' controversy. Fed. R. Civ. P. 23(b)(3). "The predominance and efficiency criteria are of course intertwined. When there are predominant issues of law or fact, resolution of those issues in one proceeding efficiently resolves those issues with regard to all claimants in the class." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 n.12 (11th Cir. 1997) (directing decertification of a class of customers and employees alleging discrimination by motel chain). Although the Court finds that the Plaintiff has failed to establish that it met the

predominance criteria, the Court will address the question of superiority, to provide the District Court with a Report on all aspects of the Plaintiff's compliance, or lack thereof, with Rule 23.

"Class actions allow claims that would be too impractical to litigate individually to proceed as part of a consolidated action that can address questions common to each claim." Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC, Case No. 12-22330, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014) (certifying, under TCPA junk fax provisions, class of doctors who received fax from drug company, where expert had identified members of proposed class and consent was irrelevant), citing Palm Beach Golf, 771 F.3d at 1283. Until recently, courts generally observed, even with some misgivings, that TCPA actions "are routinely certified as class actions because the 'large number of claims, along with the relatively small statutory damages, the desirability of adjudicating these claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of these claims' all point toward the superiority of a class action." Id.[48]

As observed by Judge Seitz several years ago, "misgivings" about the wisdom of a bounty statute "are not appropriate considerations for a court assessing the superiority of a class action." Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC, Case No. 12-22330, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014).

> Although assessing superiority under Rule 23(b)(3) may involve assessing the practical benefits to class members of a class action, a court cannot use it as an excuse to save a defendant from this liability simply because there are questions as to Congress's judgment. And the prospect of unconstitutionally

[48]"Congress expressly created the TCPA as a 'bounty statute' to increase the incentives for private plaintiffs to enforce the law." Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC, Case No. 12-22330, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014), citing Palm Beach Golf, 771 F.3d at 1283. See, also, Allscripts Health, 254 F. Supp. 3d at 1037 (N.D. Ill. 2017) ("class certification in these cases is the norm").

> excessive liability is not a reason to deny certification of an otherwise valid class-after certifying a class, courts can always reduce an award based on an evaluation of a defendant's overall course of conduct.

Id.[49] As discussed above, the Plaintiff here has not established that this case is an "otherwise valid" class for certification under Rule 23.

Unlike the facts before the Sixth Circuit in the Sandusky Wellness case, 863 F.3d 460, 467, where those defendants acknowledged that they had asked class members if they would agree to receive marketing information, here the Defendants dispute that they were sending marketing information.[50] The trial court in Sandusky Wellness nevertheless found that individualized questions of consent prevented common questions from predominating and, thus, denied the plaintiff's request for class certification. The Sixth Circuit affirmed that decision. "While class certification may be 'normal' under the TCPA ... that does not mean that it is automatic." Id., 863 F.3d at 473.

As discussed above, the Court has found that the issue of whether a recipient had provided permission to the Defendants is not uniform across the class, or at least not relatively consistently discernable, and it follows from that conclusion that the class action mechanism will not efficiently and fairly serve the needs of this case. The Court's determination on this issue applies

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[49]Judge Seitz is not alone in her observations suggesting questions about the wisdom of Congress's judgment as to TCPA claims. "Whether it is good public policy to use the cumbersome and costly process of adjudication to resolve disputes about annoying fax ads is for Congress to decide." Craftwood II, Inc. v. Generac Power Systems, Inc., 920 F.3d 479, 481 (7th Cir. 2019).

[50]Nor does this case present a situation where a defendant bought a list of contacts from a marketing company and then sent a fax advertisement to that large list of numbers (otherwise unrelated to the defendant), which might support a finding of efficiency in proceeding as a class, because the issue of consent, at least from the perspective of the sender's use of the list, was susceptible to a class-wide determination.

with equal force to both the Plaintiff's TCPA and conversion claims.

III. CONCLUSION

A district judge has broad discretion when deciding whether to certify a class. Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1169 (11th Cir. 2010), citing Klay v. Humana, Inc., 382. F.3d 1241, 1251 (11th Cir. 2004) ("[r]ecognizing the 'awesome power of a district court' in controlling the availability of the class action mechanism"). "[W]ith great power comes great responsibility," id., and, after careful review of the parties' arguments and controlling caselaw, the Court finds that the Plaintiff has failed to meet its burden of demonstrating that a class should be certified.

Consistent with the above, it is

RECOMMENDED that Plaintiff's Motion for Class Certification (ECF No. 56) be DENIED.

The parties will have 14 days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Jose E. Martinez, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained therein, except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1.

DONE and SUBMITTED at Fort Lauderdale, Florida this 10th day of June, 2019.

LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to: Counsel of Record