No. 14-8031

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMANDA BALSCHMITER, individually and on behalf of all others similarly situated,

Plaintiff-Petitioner,

v.

TD AUTO FINANCE LLC,

Defendant-Respondent.

On Petition from the United States District Court
for the Eastern District of Wisconsin
No. 13-cv-1186 – Hon. J.P. Stadtmueller

DEFENDANT-RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO FILE APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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December 30, 2014

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Appellate Court No: 14-8031

Short Caption: Balschmiter v. TD Auto Finance LLC

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Attorney's Printed Name: Mark T. Stancil

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

TABLE OF AUTHORITIES—Continued

Page(s)

Regulations

Rules

Other Authorities

INTRODUCTION

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, prohibits automated calls to cell-phone users without their "prior express consent." *Id.* § 227(b)(1)(A). But far from involving an unsolicited communication, this case started with calls—made by plaintiff Amanda Balschmiter *to* defendant TD Auto Finance (TDAF)—that went like this:

> Defendant (answering): Welcome to TD Auto Finance.
>
> Plaintiff: Yeah. I need to make a payment. . . .
>
> Defendant: May I have the first and last name of the person associated with the loan?
>
> Plaintiff: Victor Loshek.
>
> Defendant: Thank you. And . . . [w]hat was your first and last name[?]
>
> Plaintiff: Amanda Balschmiter. . . .
>
> Defendant: Moving forward, does TD Auto Finance have permission to contact you on your cell, [redacted]-2069?
>
> Plaintiff: Yes.

Ex. F at 2-3.[1] This exchange is nowhere mentioned (much less quoted) in the petition for review. Thus, contrary to Balschmiter's assertion (Pet. 1), this case does not involve "TDAF's harassment of people" who lacked "any . . . previous relationship" with TDAF but "whose friends or family owe TDAF money." Rather, it involves a plaintiff who *contacted TDAF* for the express purpose of handling a debt, gave TDAF her cell-phone numbers, and explicitly authorized TDAF to call her.

This individual suit is bad enough, but the bigger problem is that Balschmiter

[1] Exhibits A-E are found in the appendix to the petition. Exhibits F and G are found in the appendix to this answer in opposition.

seeks to certify a class of thousands of people allegedly like her—*i.e.*, any *non-customer* to whom TDAF made an automated call. Because TDAF requires its personnel to obtain express consent before allowing automated calls, however, many of the class members likewise would have given consent. The district court denied Balschmiter's motion, and she seeks this Court's interlocutory review.

The Court should deny Balschmiter's petition or summarily affirm. For starters, she does not need class certification to make her individual claim viable. The TCPA provides for damages of $500 or $1,500 per call, and she claims to have received hundreds of such calls. Thus, Balschmiter's individual claim—like the claims of her putative class members—could, if established, fetch six figures or perhaps more.

Moreover, review is unwarranted because the district court's order was correct:

First, Balschmiter incorrectly claims that the district court required her to identify every class member "by name." Pet. 10. The court held merely that Balschmiter's proposed "reverse-lookup" method for identifying class members—which both parties' experts agreed could not "reliably provide subscriber information at a specified date in the past" (Ex. A ("Op.") at 32)—was deeply flawed, particularly since this case "involv[ed] such a large window of time" (Op. 34). Accordingly, the proposed class failed the "ascertainability" requirement implicit in Rule 23.

Second, Balschmiter asserts that the district court incorrectly rejected her argument that non-customers of a debt collector give "prior express consent" only if they specifically consent to automated calls about another person's debt. But she never made this argument below. The district court rejected the argument she *did*

make—namely, that non-customers of a debt collector may *never* give "prior express consent." Even if her new argument were not forfeited, it lacks legal support; even if accepted, it could not satisfy Rule 23(b)(3)'s predominance requirement.

Third, Balschmiter erroneously claims that this Court rejects the Fifth Circuit's interpretation of Rule 23(c)(4) (and, thus, that the district court wrongly relied on Fifth Circuit law in refusing to certify an "issues class"). The Seventh Circuit case she cites does not even discuss Rule 23(c)(4), and, if anything, this Court's cases track the Fifth Circuit's. In any event, the "issues class" she urges on this Court is not the "issues class" she urged on the district court.

Fourth, Balschmiter reads into the district court's opinion a holding that plaintiffs may not certify a class under Rule 23(b)(2) and obtain an injunction when damages would follow. But that holding is not there. The court held only that, under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Rule 23(b)(2) certification is inappropriate where—as here—damages are the predominant remedy sought.

JURISDICTION

Balschmiter's statement of jurisdiction is not complete and correct. See *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1048 (7th Cir. 2007). The district court has jurisdiction under 28 U.S.C. § 1331 because Balschmiter's claims are brought under 47 U.S.C. § 227. Balschmiter alleges, but TDAF disputes, that the district court also has jurisdiction under 28 U.S.C. § 1332(d)(2). This Court has jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). The order sought to be reviewed was entered on November 20, 2014, and Balschmiter filed her petition on December 4, 2014.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in making the case-specific determination that Balschmiter's "reverse lookup" methodology, which both parties' experts admitted could not "reliably provide subscriber information at a specified date in the past," was too inaccurate—particularly over an unusually long class period of more than five years—to ascertain class members.

2. Whether the district court abused its discretion in holding that individual issues of consent predominate over class-wide issues where: (i) Balschmiter forfeited her argument that the TCPA requires consent specifically to automated calls about another person's debt; (ii) even if not forfeited, her new proposed consent standard lacks a statutory or regulatory basis; and (iii) in any event, that standard would require individual issues of consent to predominate.

3. Whether the district court abused its discretion in declining to certify an "issues class" under Federal Rule of Civil Procedure 23(c)(4), where: (i) Balschmiter sought certification of a different "issue" below; and (ii) even if her argument is not forfeited, the standard the district court applied is consistent with this Court's law.

4. Whether the district court abused its discretion by holding that the damages sought in this case are not incidental and that, following the explicit command in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), certification under Federal Rule of Civil Procedure 23(b)(2) is therefore inappropriate.

STATEMENT

Balschmiter's boyfriend, Victor Loshek, bought a used car in April 2012. Op. 2. TDAF was the servicer on Loshek's car loan, on which Loshek defaulted in July

2012. *Id.* Balschmiter later called TDAF about that loan. *Id.* TDAF's account records reveal that, as in the call excerpted on page 1, Balschmiter gave express consent for TDAF to call her on two cellular phone numbers. TDAF—following its policies, which require consent before making automated calls (Op. 4)—made automated calls to Balschmiter regarding the loan.

Balschmiter filed this putative class action in October 2013. Dkt. 1 (Complaint). She alleged that TDAF had called her "cellular telephone" number(s) using an "automatic telephone dialing system," thus violating the TCPA. See 47 U.S.C. § 227(b)(1)(A). TDAF responded, in part, that Balschmiter had given "prior express consent" to the calls, negating her claim. See *id.*; Dkt. 14 (Answer) at 9.

In July 2014, Balschmiter moved to certify the following class:

> All persons within the United States who, on or after October 21, 2009, received a non-emergency telephone call from or on behalf of TDAF to a cellular telephone through the use of an automatic telephone dialing system . . . , who did not have a contractual relationship with TDAF.

Ex. B (Second Amended Complaint) ¶ 30; Ex. D ("Class Cert. Brief") at 11. She argued that this class definition rendered TDAF's consent defense inapplicable. "[T]he TCPA," she claimed, "does not permit a defendant to obtain prior express consent to autodial *non-customers* at all." Class Cert. Brief 1; see *id.* at 19-22.

In a carefully reasoned, 45-page opinion, the district court denied class certification. Four holdings from the court's opinion are relevant here. *First*, it held that the proposed class did not satisfy the ascertainability requirement implicit in Rule 23 because Balschmiter's "reverse lookup" procedure was unwieldy and unreliable. Op. 32-34. The district court found that, as "both parties' experts agree," "there is no

reverse-lookup provider that can reliably provide subscriber information at a specified date in the past." Op. 32. The court recognized that consumers frequently change—and phone companies reissue—phone numbers, such that a list of names associated with certain numbers today does not accurately define who owned or used those numbers previously.

Second, the district court held that the class did not satisfy the predominance requirement of Rule 23(b)(3). Rejecting Balschmiter's theory that non-customers can *never* consent to calls under the TCPA, the court held that individualized questions of consent would predominate over common issues. Op. 15-27, 37-44.

Third, the court denied Balschmiter's request to certify an "issues" class under Rule 23(c)(4) to determine that non-customers cannot, as a matter of law, give consent under the TCPA. The court explained that "Rule 23(c)(4) cannot be used to manufacture predominance," and found that the issues class failed because it lacked predominance and ascertainability. Op. 14-15.

Fourth, the court below held that, under *Wal-Mart*, the proposed class could not be certified under Rule 23(b)(2) because the main relief Balschmiter seeks is monetary, not injunctive. Op. 14.[2]

REASONS FOR DENYING THE PETITION

I. Review Is Unwarranted Because the Denial of Certification Is Not the "Death Knell" for This Lawsuit

Contrary to Balschmiter's suggestion (Pet. 8-9), this is not a "small-stakes class

[2] The district court rejected TDAF's arguments that Balschmiter also failed to establish commonality, typicality, and superiority. TDAF reserves the right to challenge those determinations, if necessary, although space is too scarce to do so here.

action" in which "the denial of class status sounds the death knell of the litigation." See *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Balschmiter omits to mention that her individual claim would be worth significant money should she prevail. She claims that TDAF called her "four or five times a day" (Ex. G (Balschmiter Dep.) at 64:14) "for a year" (Pet. 3). That is more than 1,000 calls—even heavily discounting her own figures, there are hundreds of calls at issue. And the TCPA provides damages of $500 per call, or $1,500 if the call is (as Balschmiter contends) "willful[]." 47 U.S.C. § 227(b)(3). By her own reckoning, then, her individual lawsuit seeks hundreds of thousands of dollars.

Such a large claim is well beyond the "death knell" threshold. As this Court has recognized, Rule 23(f) revived the "death knell" doctrine that the Supreme Court had eliminated in 1978. *Blair*, 181 F.3d at 834.[3] Claims the size of Balschmiter's were too large to qualify. *E.g.*, *Domaco Venture Capital Fund v. Teltronics Servs., Inc.*, 551 F.2d 508, 509 (2d Cir. 1977) (per curiam) (claim of $27,426 in 2014 dollars was too large); *Falk v. Dempsey-Tegeler & Co.*, 472 F.2d 142, 143 (9th Cir. 1972) ($80,233 too large); *Gosa v. Sec. Inv. Co.*, 449 F.2d 1330, 1332 (per curiam) (5th Cir. 1971) ($19,477 too large).[4] Because Balschmiter easily could proceed on her individual claim, this Court should not grant review under Rule 23(f).

[3] More recent numbers are rare, as "'[t]he vast majority'" of Rule 23(f) decisions "'are not published.'" Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 277 (2008) (quoting Judge Wood).

[4] All claim amounts were converted to 2014 dollars using the CPI Inflation Calculator at http://data.bls.gov/cgi-bin/cpicalc.pl.

II. Review Is Unwarranted Because the District Court's Holding Is Correct

Balschmiter has no "solid argument in opposition to the district court's decision." See *Blair*, 181 F.3d at 834. In an effort to conjure up a plausible argument, her petition mischaracterizes the district court's holding, raises forfeited theories, and distorts the law—none of which establishes that district court abused its discretion. See *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755 (7th Cir. 2014) ("Our review of the decision to deny class certification is for abuse of discretion."). Accordingly, Rule 23(f) review—much less summary reversal—is unwarranted.

A. The district court did not abuse its discretion in determining that the proposed class was not ascertainable

The ascertainability requirement implicit in Rule 23 requires plaintiffs to "show . . . that the class is indeed identifiable as a class." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). The district court correctly held that Balschmiter had not satisfied this requirement because her "reverse lookup" methodology was messy and unreliable. Op. 32. Because *any* class must be ascertainable, affirming the district court on this issue renders it unnecessary to reach the other issues.

1. Balschmiter attacks a standard that the district court did not use

Balschmiter misstates the district court's ascertainability holding. Lifting one sentence out of context, she contends that the "essence" of the district court's holding was to "require[] the actual identification of every class member by name" before certification or adjudication on the merits. Pet. 10. Not so.

The district court held merely that plaintiffs must offer a method that *ultimately* would identify—to some reasonable degree of accuracy—who is in the class. As

Balschmiter's own authorities confirm, "ascertainability requires . . . that the court be able to identify class members *at some stage* of the proceeding." William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed. 2013) (emphasis added) (cited at Pet. 9) ("*Newberg*"). Thus, the district court correctly held, in the sentence Balschmiter plucks out, that "[a]scertainability in this case is about 'identifying and providing notice to the class members as individuals, not merely numbers on a list.'" Op. 32 (quoting *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 473 (S.D. Cal. 2014)). Nothing the district court said, nor anything on which it relied (including *Smith*, see 297 F.R.D. at 473), required the plaintiff to provide a list of class members.

2. The district court stated the correct standard and properly applied it

The rest of the district court's ascertainability holding, which Balschmiter ignores, confirms that the district court did not adopt the rule she challenges and that it faithfully applied the correct legal standard. The court held that a plaintiff "must show . . . that the proposed class is 'currently and readily ascertainable based on objective criteria.'" Op. 9 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)); accord Pet. 9-10. It added: "If it is impossible to identify class members 'without extensive and individualized fact-finding or "mini trials," then a class action is inappropriate.'" Op. 10 (quoting *Marcus*, 687 F.3d at 593).

That is surely the correct statement of the law. Ascertainability exists to prevent "problems . . . in defining *and identifying* the members of the class." *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (emphasis added). In other words, it is not enough to recite "objective criteria" to define who is in the class. *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 475 (N.D. Ill. 2009), aff'd, 606 F.3d 391 (7th Cir. 2010) (per curiam)

(quoted at Pet. 10). Those criteria must also "make it *administratively feasible* for the court to determine whether a particular individual is a class member." *Id.* (emphasis added); accord *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012) (rejecting certification where identifying class members was "a complex, highly individualized task"); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Newberg* § 3:3 ("In addition to asking whether there are objective criteria by which class membership may be determined, courts also ask whether an analysis of th[ese] criteria is administratively feasible."); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1760 (3d ed. 2005) (must be "administratively feasible for the court to determine whether a particular individual is a member").

Applying this standard, the court correctly held that Balschmiter's class-identification procedure would require individualized fact-finding and thus was not administratively feasible. See Op. 10.[5] The reason—which Balschmiter's petition fails to address—is her flawed "reverse lookup" methodology.

Here is the practical problem with Balschmiter's theory: The parties agreed to a list of cellular phone numbers to which TDAF made automated calls during the class period. Pet. 10-11. From this list, the parties have removed numbers that a TDAF customer provided on a credit application, because the proposed class excludes TDAF customers. But that step does not remove all customers from the list; people often change their phone numbers. The task, then, is to remove numbers

[5] Relatedly, the district court held that the procedure would create "problems of over-inclusion and under-inclusion." Op. 33; see *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (proscribing any "class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances").

that customers used but that were not provided on their credit applications. That is, just because a number was not on a credit application does not mean that it was not used by a customer years later when TDAF called it.

To solve this problem, Balschmiter relies on a "reverse lookup" methodology. In a normal lookup, you start with a name and retrieve a phone number; in a reverse lookup, you start with a phone number and retrieve a name. Several companies compile directories of cellular phone numbers to enable reverse lookups. This method yields a name for each number TDAF called. The parties then could remove from the plaintiff list any name that also appears on TDAF's customer list.

But, as detailed in the district-court record,[6] the problems with reverse lookups are legion. For starters, reverse-lookup directories purport to identify only who is using the cell phone *now*. See *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 109 (N.D. Ill. 2013). A phone's current owner often is not "'the person subscribing to the called number *at the time the call is made*.'" Op. 32 (quoting *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012)). That is especially problematic because the class period stretches back more than five years; the longer the class period, the more out-of-date a reverse-lookup list becomes. Op. 33-34. Moreover, even Balschmiter's "expert[] conce[ded] that reverse-lookup services can be inaccurate" (Op. 32-33)—that is, the name in the directory differs from the name of the number's current user. (Reverse-lookup services cobble their directories together from sources like supermarket loyalty card applications, which can be inaccurate.)

[6] *E.g.*, Dkt. 44 (Declaration of Dr. Debra J. Aron); Dkt. 46 (Defendant's Opposition to Motion for Class Certification) at 10-15.

Tellingly, the services do not warrant their directories to be accurate.

Even if reverse lookups accurately reported names for particular points in the past, TDAF's preliminary review of a sample of files (see Pet. 14; Ex. E (TDAF Br.) at 4-5) has exposed still further problems. The names in the reverse lookup directory often do not match the names on TDAF's customer list. For example, manual review is necessary to determine whether "Dean II, Richard M." is a different person from "Ricky Dean, Jr." The same problem occurs with people who have changed their names for marriage or other reasons. Yet another problem: Records show that customers often ask TDAF to call *them* at *someone else's* number. (They may not have their own phone, or it might be broken.) Without reviewing the records one by one, there is no way to know whether a number in the reverse lookup corresponds to a TDAF customer.

Due to these myriad problems, the district court held that Balschmiter's reverse-lookup procedure flunked the ascertainability test. And because these problems grow worse with time, the court was particularly reluctant to use reverse lookups for "a class definition that spans over five years." Op. 33. Balschmiter cites no "decision involving such a large window of time where ascertainability was met solely based on reverse-lookups." Op. 34. The district court did not abuse its discretion by declining to endorse such a problem-plagued method.

3. Balschmiter's arguments about Birchmeier *and* Carrera *are inapposite*

a. Contrary to Balschmiter's assertion (Pet. 11-12), the district court properly distinguished *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014). *Birchmeier* involved two sub-groups. The first comprised cell-phone numbers

to which the defendants had made automated calls. *Id.* at 245-48. The court held that it was possible to match names to numbers—but not using reverse lookups. Instead, the plaintiffs planned to use "information kept on file by the various phone companies, which," unlike reverse lookups, "actually *does* encompass historical subscriber data." *Id.* at 247-48. Balschmiter has not proposed using phone-company records, perhaps because they do not go back to 2009. See *Smith*, 297 F.R.D. at 473. (The *Birchmeier* class covered just one year.)

Birchmeier's second sub-group comprised people who "own records prov[ing] that they received the calls—such as their telephone records, bills, and/or recordings of the calls," whether or not their numbers appeared in defendants' call logs. 302 F.R.D. at 245; see *id.* at 248-51. No part of Balschmiter's proposed class definition requires class members to have retained such records.

b. Balschmiter's discussion of *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), is irrelevant. The district court never mentioned, let alone relied on, *Carrera*'s holding that a class definition must "permit[] a defendant to challenge the evidence used to prove class membership." *Id.* at 308. Instead, the district court cited *Carrera* principally to restate the holding in *Marcus* that "a plaintiff must show . . . that the class is currently and readily ascertainable." Op. 8 n.5, 9 (citations and quotation marks omitted). *Carrera* may be broader than *Marcus* in other regards, but the district court did not rely on *Carrera* for those propositions.

B. Balschmiter's new theory of consent under the TCPA—presented for the first time in her petition—is incorrect

Anyone who has given "prior express consent" to a phone call cannot assert a

TCPA claim based on that call. 47 U.S.C. § 227(b)(1)(A). Balschmiter's "sole" theory on consent below was that a non-customer *cannot* consent to calls under the TCPA. Op. 42. The district court rejected that theory and held that individual questions of consent therefore predominated over class-wide questions, precluding certification. Op. 15-27, 37-44. Balschmiter now advances a fundamentally different theory of consent, but she has forfeited that argument. Regardless, her new argument is wrong, and even if it is right, individual questions would still predominate.

1. Balschmiter forfeited her new consent theory by failing to raise it below

Balschmiter advanced one theory of "prior express consent" in the district court and presses a fundamentally different one in this Court. Because she never raised her new argument below, she has forfeited it, and this Court should not consider it.

Balschmiter's original theory was that only customers may give consent. Class Cert. Brief 1 ("[T]he TCPA does not permit a defendant to obtain prior express consent to autodial *non-customers* at all."). She argued that because no class member was a TDAF customer, individual questions of consent would not exist and so could not predominate over class-wide questions. See *id.* at 19-22. Because the district court rejected Balschmiter's premise that non-customers cannot consent, it necessarily rejected her predominance argument. Op. 42-43 ("The plaintiff's sole reliance on the theory that no member of the class could *ever* consent effectively torpedos her ability to prove that individual consent issues will not predominate.").

Balschmiter's new theory, by contrast, is that debt collectors *may* obtain consent from non-customers—but only of a very specific kind. Under this theory, non-customers must "specifically give express permission for TDAF to" (i) "robocall

them" (ii) "about other people's debts." Pet. 16. Consent like Balschmiter's ("statements that TDAF could contact them on [a cellular] number," Pet. 17), she claims, is not enough. Balschmiter contends that the district court erred when it allowed *this* affirmative defense to defeat predominance. Pet. 17.

Balschmiter forfeited her new consent theory. "A party 'waive[s] the ability to make a specific argument for the first time on appeal when the party fail[s] to present that specific argument to the district court, even though the issue may have been before the district court in more general terms.'" *Frey Corp. v. City of Peoria*, 735 F.3d 505, 509 (7th Cir. 2013) (quoting *United States v. Ritz*, 721 F.3d 825, 828 (7th Cir. 2013)). Balschmiter "has changed [her] theory after losing below and that prevents [the Court] from considering it." *Ritz*, 721 F.3d at 828; accord *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012) ("[T]he waiver doctrine charges litigants with raising the arguments they present on appeal in the district court, not just the facts on which their appellate arguments will rely.").

2. Balschmiter's new consent theory is inconsistent with the statute and with the holdings of other courts

Forfeiture aside, Balschmiter's new consent theory is wrong. The TCPA itself requires "prior express consent," 47 U.S.C. § 227(b)(1)(A); it is silent about consent to automated calls or calls about someone else's debt. Because the TCPA does not further define "consent," courts have looked to its common-law meaning. *E.g.*, *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013). Balschmiter cites no common-law definition of "consent" that supports her theory. And the FCC, relying in part on legislative history, has ruled that "persons 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"—no words about "automated calls" are necessary. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8679 ¶ 31 (1992).

Balschmiter counters that three authorities support her new theory: (i) *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008) ("2008 FCC Order"); (ii) *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804 (2d Cir. 2014) (per curiam); and (iii) *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089 (N.D. Ill. Sept. 4, 2012). Pet. 15-17. Her reliance on those authorities is misplaced.

a. The 2008 FCC Order and *Nigro* do not support Balschmiter's theory. Instead, both authorities concern a regulatory example of certain circumstances that will be "deemed" to satisfy the consent requirement. The FCC Order concerned cell-phone numbers included on a credit application; it held that "prior express consent is deemed to be granted only if [1] the wireless number was provided by the consumer to the creditor, and that [2] such number was provided during the transaction that resulted in the debt owed." 2008 FCC Order ¶ 10. Balschmiter tries to extract from that specific context a rule that governs *all* debt collection calls. Pet. 16. The absurdity of that position is illustrated by its application to this case: Balschmiter contends that her own explicit statement of consent to be called somehow does not count. Even if the FCC Order did purport to cover all debt-collection calls, it is far more open-textured than Balschmiter's reading suggests. Op. 18-27. Moreover,

Balschmiter's proffered limitations are hidden in one sentence in the Order; the decretal language does not repeat them. 2008 FCC Order ¶¶ 1, 17. The FCC, like Congress, is presumed not to "hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation marks omitted).

In any event, the point remains that the FCC Order merely defines a specific instance that is "deemed" to be prior express consent. As such, it says nothing about the general rule. In particular, it does not say that, to give prior express consent, one must specifically consent to automated calls about another person's debt. Thus, the FCC Order does not support Balschmiter's new theory.

Nigro just interprets the FCC Order and thus is no more relevant. The *Nigro* plaintiff gave the power company his phone number to help disconnect his mother-in-law's electricity. 769 F.3d at 805. The question, therefore, was whether he would be "deemed" to have given consent within the meaning of the FCC Order. See *id.* at 806. The court's answer ("no") thus sheds light on the "deemed" exception defined in the FCC Order, but not on the statutory definition of "prior express consent."

b. Balschmiter's lone remaining authority is *Thrasher-Lyon*, an unpublished district court case that she did not cite below. We know of no other case that has defined "prior express consent" to require consent to automated calls. See 2012 WL 3835089 at *2-*3. The Fifth and Ninth Circuits have implicitly rejected such a requirement. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949, 955 (9th Cir. 2009) (clicking "Yes" to "receive promotions" constituted prior express consent); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 323 (5th Cir. 2008) (receipt of

numbers on website or at trade shows could constitute prior express consent). So have at least two district courts in this Circuit. *Jamison*, 290 F.R.D. at 107 (customer giving preferred contact information could constitute prior express consent); *G.M. Sign, Inc. v. Brink's Mfg. Co.*, No. 09 C 5528, 2011 WL 248511, at *1-2 (N.D. Ill. Jan. 25, 2011) (expressing interest in information and supplying number could constitute prior express consent). And still other district courts have expressly rejected *Thrasher-Lyon*'s holding. *Hill v. Homeward Residential, Inc.*, No. 2:13-CV-388, 2014 WL 4105580, at *5 (S.D. Ohio Aug. 19, 2014); *Reed v. Morgan Drexen, Inc.*, No. 13-61440-CIV, 2014 WL 2616906, at *7 (S.D. Fla. Apr. 4, 2014); *Aderhold v. Car2go N.A., LLC*, No. C13-489RAJ, 2014 WL 794802, at *8 & n.5 (W.D. Wash. Feb. 27, 2014). Thus, *Thrasher-Lyon* hardly refutes the district court's holding.

3. Even were Balschmiter's new consent theory correct, it would not satisfy the predominance requirement

Balschmiter's new theory would require reviewing call transcripts to determine whether each caller specifically gave consent to automated calls about another person's debt. Such laborious and necessarily individualized review would "overwhelm the questions common to the class," such as whether TDAF used an automatic telephone dialing system, which could be easily resolved. See *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). Thus, even if she did not forfeit her argument—and even if her argument were valid—predominance still would not exist.[7]

[7] Balschmiter claims that TDAF has yet to adduce evidence on Balschmiter's new theory (see Pet. 17), but she never raised it below, and she bears the burden of showing predominance. Balschmiter also appears to argue that affirmative defenses are irrelevant to the

C. The district court did not abuse its discretion in denying certification of a Rule 23(c)(4) "issues class"

"When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). As the district court correctly concluded, it is not appropriate to certify an "issues class" here.

The "first" step is to "identify the issues potentially appropriate for certification." *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (cited at Pet. 19). Balschmiter's argument founders here because she has (again) switched theories. Below, she sought certification "to address the circumstances, if any, under which a non-customer may give prior express consent under the TCPA." Class Cert. Brief 28. But she now claims to know the answer—non-customers must expressly consent to automated calls about another's debts. Pet. 5, 15-17. So Balschmiter now seeks certification about something else: "to determine whether TDAF committed a prima facie violation of the TCPA." Pet. 19. The district court did not abuse its discretion not certifying *that* "issues class"; Balschmiter never asked it to do so.

Besides, the district court did not stray from this Court's law by following the Fifth Circuit. See *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 314 (S.D. Ill. 2007); Manual for Complex Litigation (Fourth) § 21.24 n.839 (2004). In particular, in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir.

predominance inquiry. Pet. 18. But she cites only cases discussing numerosity, not predominance. See *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir. 2014) (quoting *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014)). The district court therefore rejected this argument. Op. 43. Numerous other courts have rejected Balschmiter's position. *E.g.*, *Gene & Gene*, 541 F.3d at 327; *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000).

2012), this Court did not reject the Fifth Circuit's approach, as that case did not concern Rule 23(c)(4). The district court thus correctly held that the issues class failed because it lacked predominance and ascertainability. Op. 14-15.

D. Balschmiter's Rule 23(b)(2) argument has nothing to do with the district court's holding

Courts should not certify class actions seeking money damages, like this one, under Rule 23(b)(2) unless "the monetary relief is . . . incidental to the injunctive or declaratory relief." *Wal-Mart*, 131 S. Ct. at 2557. The district court held that this rule barred certification under Rule 23(b)(2). Op. 14. Balschmiter does not respond to that holding (indeed, she does not even cite *Wal-Mart*). Pet. 19-20. Instead, she complains that "the District Court felt that it was without the power to certify a class to prevent TDAF from robocalling non-customers *in the future* because such an order would also have the consequence of mandating TDAF to pay damages to those it had harmed *in the past*." Pet. 20. But, if the district court "felt" that, it did not say so; it cited the rule announced in *Wal-Mart* and followed it. Review on this basis is therefore inappropriate.

CONCLUSION

For the foregoing reasons, the Court should deny the petition or summarily affirm the district court's denial of certification.[8]

[8] TDAF respectfully requests that, in the event this Court does not deny the petition or summarily affirm, it should order full briefing. The truncated format of a Rule 23(f) proceeding cannot fully explore the sweeping change that Balschmiter's position would work in TCPA and class-certification jurisprudence. TDAF expects that ACA International and the American Bankers Association will seek leave to file briefs *amici curiae* explaining (among other things) the widespread consequences that would flow from reversing the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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