PUBLIC - REDCATED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANGEL BAKOV and JULIE HERRERA, individually and on behalf of all others similarly situated, *Plaintiffs,* v. CONSOLIDATED WORLD TRAVEL, INC. d/b/a HOLIDAY CRUISE LINE, a Florida corporation, *Defendant.*	:	Case No. 1:15-cv-02980 Hon. Harry D. Leinenweber Hon. Susan E. Cox
KINAYA HEWLETT, on Behalf of Herself and all Others Similarly Situated, *Plaintiff,* v. CONSOLIDATED WORLD TRAVEL, INC. d/b/a HOLIDAY CRUISE LINE, *Defendant.*	:	Case No. 1:17-cv-00973 Hon. Harry D. Leinenweber

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Defendant's primary argument against certification, appearing in virtually every section of its brief, is that it does not believe Plaintiffs' proposed method of class member identification—use of a reverse lookup service to determine the identities of the users of the 928,023 unique phone numbers whose calls were transferred from VVT to Defendant's call centers, coupled with publication notice and self-identification through affidavit—is sufficient or reliable. Defendant's Opposition To Plaintiffs' Motion For Class Certification ("Br.") at 2, 3, 8, 9, 15–20. But Defendant completely ignores the Seventh Circuit's holding in *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015), which rejected the Third Circuit's "heightened ascertainability requirement" that a plaintiff must demonstrate that "there is a 'reliable and administratively feasible' way to identify all who fall within the class definition." *Id*. at 657–58. Instead, the Seventh Circuit explained that whether a class is ascertainable depends on "the adequacy of the class definition itself," not "whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Id.* at 659. Absent from Defendant's brief is a single argument that the actual class definition is overbroad.

Defendant is also factually wrong. As detailed herein, Plaintiffs' proposed methods mirror those that were approved by Judge Kennelly and successfully implemented in *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 247 (N.D. Ill. 2014), as well as numerous other courts. Defendant's attempts to avoid liability by pointing to an absence of records, which is a result of its own inadequate record-keeping, must be firmly rejected.

Defendant's other arguments are equally meritless. Despite firm evidence that its agent, VVT, called millions of class members using the same prerecorded voice technology, Defendant argues against commonality by concocting scenarios it believes disrupt the Court's ability to resolve this case on a classwide basis. Defendant goes as far to suggest that some agents may have

gone rogue and exclusively used their own voices on calls rather than prerecorded audio, despite evidence that they were prohibited from doing so. Br. at 11. Or maybe, Defendant guesses, people could have told their friends to call inbound to VVT to inquire about Defendant's so-called "free cruise," *id.* at 16, despite that consumers were specifically told that the offer was "by invitation only," Ex. 3 (Poole Tr. 127:15–128:1). This conjecture lacks any evidentiary basis and is explicitly controverted by evidence in this case.

When stripped of Defendant's smokescreens, the simplicity of this case become clear. The only question that needs to be answered is whether the technology used by Defendant constitutes a prerecorded voice in violation of the TCPA. Resolution of this single question will determine Defendant's liability as to all class members.

II. ARGUMENT

A. The Court Has Personal Jurisdiction Over Defendant

Defendant argues, for the first time in this three-and-a-half-year-old action, that "the Court is precluded from certifying a nationwide class because the Court lacks personal jurisdiction over CWT to do so." Br. at 5 (citing *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773 (2017)). That is wrong. First, any personal jurisdiction arguments Defendant may have been able to assert were waived when it explicitly submitted itself to the jurisdiction of this Court in its motion to dismiss: "**Defendant HCL does not challenge the Court's personal jurisdiction over it**." ECF No. 46 at 7 n.1 (emphasis added).[1] If this were not enough, Defendant further waived this argument when it stipulated to transfer Ms. Hewlett's putative nationwide class action to this Court, and by completing fact and expert discovery in this case before raising its jurisdiction arguments.

[1] Although Defendant Consolidated World Travel, Inc. is routinely referred to as "CWT" in filings to the Court, the entity was referred to as "HCL" in its motion to dismiss.

First, Defendant waived its personal jurisdiction argument when it did not raise it in its responsive pleading. Federal Rule of Civil Procedure 12(h)(1)(B) is clear: a party waives any defense to personal jurisdiction by failing to raise it in a motion to dismiss, or include it in its responsive pleading. There is no ambiguity in the law on this point. *See, e.g., Am. Health & Res. Ctr., LTD v. Promologics, Inc.*, No. 16-cv-9281, 2018 WL 3474444, at *3 (N.D. Ill. July 19, 2018) ("[D]efendants must assert personal jurisdiction challenges in their first responsive pleading, or else waive them."). Here, Defendant failed to challenge the Court's personal jurisdiction over it in its Rule 12 response in this Court, and actually made an *explicit acknowledgment* that it was submitting to the jurisdiction of the Court, as cited above. ECF No. 46 at 7 n.1. Moreover, Defendant cannot argue that this defense was not available to it at the time it filed its motion to dismiss. *See Am. Health & Res. Ctr.*, 2018 WL 3474444, at *3 ("[I]t is not clear that pre-*Bristol-Myers* authority precluded Defendants from raising their personal jurisdiction challenge when they filed their first responsive pleadings . . . meaning Defendants should not be excused for failing to do so.").

After submitting itself to the jurisdiction of this Court in its motion to dismiss Plaintiffs Bakov and Herrera's complaint, Defendant did so again when it stipulated to transfer Plaintiff Hewlett's putative nationwide class action to this Court from the Eastern District of California. *See* ECF No. 103-1. In fact, Defendant strenuously argued that this stipulation constituted consent for this action to proceed in this Court in the context of a motion to compel Ms. Hewlett to appear for a deposition in Chicago. *See* ECF No. 103 at 4 ("No one forced Ms. Hewlett to choose to take her action to Chicago—the transfer was stipulated and not made over her objection. In consenting to bring her case here and consolidate it for all purposes . . . Ms. Hewlett should have known that she would be subject to deposition in Chicago, just as she must know that she will have to appear

in Chicago, Illinois at some point in this action, certainly for trial."). But Defendant's arguments go both ways. In signing the stipulation, Defendant knew it would "have to appear in Chicago . . . for trial" to defend against Ms. Hewlett's nationwide class allegations.

Defendant also continued to litigate the merits of this case over the last three-and-a-half years by completing all fact and expert discovery, including several discovery motions and depositions, without ever providing any indication that it would make any personal jurisdiction arguments. This conduct also indicates that Defendant waived any personal jurisdiction arguments. *See Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (holding that defendants, who "fully participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction" and "participated in lengthy discovery, filed various motions and opposed a number of motions," had waived their personal jurisdiction objections by conduct).

Moreover, there is no basis for the Court to excuse Defendant's forfeiture of its personal jurisdiction defense, as it did in *American Health*. 2018 WL 3474444, at *3 ("[T]hough the Defendants forfeited their personal-jurisdiction challenge by failing to raise it earlier, the Court will excuse the forfeiture."). Whereas the Court's *American Health* decision was decided before any document production had even taken place in that case, Defendants have litigated this action to the completion of fact and expert discovery, and forced the Court to make several substantive rulings, both on its motion to dismiss and on several discovery disputes, before even raising this argument. Similarly, there is no indication that Defendant affirmatively submitted to the jurisdiction of the Court in *American Health*, as it did here by explicitly noting that it did not challenge the Court's jurisdiction in its motion to dismiss, and in signing a stipulation to transfer Ms. Hewlett's nationwide putative class action to this Court.

The Seventh Circuit has explained that the ultimate consideration for whether a defendant has waived its objection to personal jurisdiction is whether the "defendant . . . g[ave] [the] plaintiff a reasonable expectation that it w[ould] defend the suit on the merits or . . . cause[d] the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010). That is precisely what happened here. Granting this request will have caused all the work performed to date, both by the Court and the litigants, to have been wasted and it will have to be repeated in another court. This would be a miscarriage of justice, and it should be accordingly rejected.[2]

B. The Class Definition Was Never Changed

Defendant argues that "Plaintiffs impermissibly expand the class definition" by including consumers who received calls from Defendant on landline telephones in addition to those who received the calls on their cell phones. That is incorrect. Ms. Hewlett's First Amended Complaint clearly includes in the proposed class all persons who received calls "on his or her cellular telephone or residential telephone line." ECF No. 94-2 at ¶ 20. In absence of an Order from the Court directing the Plaintiffs to file a consolidated pleading, this is still Ms. Hewlett's operative pleading. Defendant has been on notice that Ms. Hewlett intended to include landlines in her class

[2] Plaintiffs are mindful that the Court has expressed its opinion that *Bristol-Myers Squibb Co.* is applicable to class actions. *See Am. Health & Res. Ctr.*, 2018 WL 3474444, at *2; *DeBernadis v. NBTY, Inc.*, No. 17-cv-6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018). Still, Plaintiffs respectfully request, if only for completeness of the record, that the Court reconsider this position and join the numerous courts in holding that *Bristol-Myers Squibb Co.* is inapplicable to class actions. *See, e.g., Haj v. Pfizer Inc.*, No. 17-cv-6730, 2018 WL 3707561, at *4 (N.D. Ill. Aug. 8, 2018); *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 127 (D.D.C. 2018); *accord, e.g., Sanchez v. Launch Tech. Workforce Sols*., LLC, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018); *Feller v. Transam. Life Ins. Co.*, No. 16-cv-01378, 2017 WL 6496803, at *17 (C.D. Cal. Dec. 11, 2017); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017).

definition since she filed her initial complaint two and a half years ago in April 2016. Moreover, Defendant does not even attempt to argue that it was prejudiced in any way, or that it changed its litigation strategy based on a belief that the class was limited to cell phone users.

This argument is also legally baseless. The Seventh Circuit has made clear that complaints do not even require class definitions in the first place, and amendment to the pleadings is not required to ensure that a proposed class definition mirrors the one from the pleading:

> A complaint must contain three things: a statement of subject-matter jurisdiction, a claim for relief, and a demand for a remedy. Fed. R. Civ. P. 8(a). Class definitions are not on that list. Instead the obligation to define the class falls on the judge's shoulders under Fed. R. Civ. P. 23(c)(1)(B). *See Kasalo v. Harris & Harris*, Ltd., 656 F.3d 557, 563 (7th Cir. 2011). The judge may ask for the parties' help, but motions practice and a decision under Rule 23 do not require the plaintiff to amend the complaint.

Chapman v. First Index, Inc., 796 F.3d 783, 785 (7th Cir. 2015). As such, even if Ms. Hewlett had not including landline phones in her complaint (she did), amendment would still be unnecessary.

Defendant's citations on this point are not to the contrary. Defendant cites *G.M. Sign, Inc. v. Brink Mfg. Co.*, No. 09-cv-5528, 2011 WL 248511, at *4 (N.D. Ill. Jan. 25, 2011). This decision predates *Chapman*, and to the extent it holds that amendment of a complaint is necessary to modify a class definition at the certification stage, it is no longer good law. The other two decisions cited by Defendant actually *support* Plaintiffs' position. *See Griffith v. ContextMedia, Inc.*, No. 16-cv-2900, 2018 WL 372147, at *2 (N.D. Ill. Jan. 11, 2018) ("[T]he law of this circuit does not mandate denial of certification on the principle that plaintiff must stick to the definition proposed in her complaint."); *Chapman v. Wagener Equities, Inc.*, No. 09-cv-07299, 2012 WL 6214597, at *5–6 (N.D. Ill. Dec. 13, 2012) ("[M]odifications [to the class definition] can be made at any time prior to final judgment, but are often contemplated by the court on a motion for class certification").

C. Numerosity Is Satisfied

Defendant argues that numerosity cannot be shown. That is incorrect. "There is no magic number of claims that make a case sufficiently numerous for class action purposes, but a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23's purposes." *Burrow v. Sybaris Clubs Int'l, Inc.*, No. 13-cv-2342, 2015 WL 1887930, at *6 (N.D. Ill. Apr. 24, 2015) (internal quotations omitted). Here, as already noted in Plaintiffs' moving brief, Plaintiffs have identified 928,023 unique phone numbers whose calls were transferred from VVT to Defendant's call centers, as tallied by Mr. Weir in his declaration. *See* ECF No. 165 at 3.

Defendant challenges this by making several arguments. First, Defendant argues that Mr. Weir did not provide it with a physical "list" of the phone numbers. Br. at 8. But no "list" was ever necessary. Mr. Weir tallied the phone numbers appearing in third-party call records produced in this case. These phone records, which were produced to Defendant, were themselves the "list" of numbers, which Mr. Weir counted. If Defendant, or the Court, wants to see the numbers, all they need to do is look at these records. And even a cursory look at any single record shows that the number of telephone numbers listed exceed forty by orders of magnitude.

Defendant also suggests that the calls reflected in these records may have been inbound, rather than outbound calls. That is wrong. The testimony in this case uniformly shows that VVT was using these numbers to make outbound calls. *See* Ex. 1 (Vogel Tr. 35:21–22) ("VVT made outbound calls to generate transfers to Holiday Cruises"); Ex. 2 (Albright Tr. 26:9–11) ("Q: Do you know that the agents working for VVT made outbound calls to market this vacation package? Do you understand that? A: Yes."); Ex. 3 (Poole Tr. 68:7–8) ("VVT is a company, I believe, based out of India that was making outbound calls."). That is also what the declaration of VVT's owner explicitly stated. *See* Ex. 6 (4/28/15 Malla Declaration) ("[redacted]"). Defendant's corporate

representative also testified that the calls transferred to its call centers through the relevant point-to numbers started as outbound calls by VVT:

> Q: And how about calls that were transferred from Virtual Voice Technologies?
>
> A: Yeah, I mentioned earlier—that was the outbound call initiated by the other company and transferred to us, right.

Ex. 3 (Poole Tr. 54:24–55:1); *see also id.* (Tr. 54:14–17) ("We have the outbound program that we're discussing today, which was a outbound call initiated by VVT, customers interested transferred to Holiday Cruise Line."). And the point-to numbers used to gather these records came *solely* from this outbound call program. *See id.* (Tr. 56:17–22) ("Q. So calls being transferred from VVT were sent to different phone numbers than the numbers that were given directly to consumers on the radio and the mail and those other mediums, correct? A. That is correct.").

Although it is possible that in some cases, class members may have called VVT back after they were first contacted by VVT, they would *still* have needed to first receive an incoming call from VVT to even become aware of the number to call back, indicating that they are in fact class members. Defendant speculates that the numbers tallied "includes an indistinguishable amount of people who did not answer a call, but instead missed or ignored the call . . . and then themselves placed a telephone call to VVT. Br. at 9. But this is a made-up scenario—Defendant cannot point to a single instance out of the 928,023 identified class members where this occurred.

"A finding of numerosity may be supported by common sense assumptions." *In re Gen. Instr. Corp. Sec. Litig.*, No. 96-cv-1129, 1999 WL 1072507, at *2 (N.D. Ill. Nov. 19, 1999). In addition to the 928,023 unique phone numbers identified that were transferred to Defendant's call centers, the evidence in this case also shows that VVT used more than 13,000 different phone numbers to "make its outbound calls." ECF No. 184 (Exhibit 5 to Plaintiffs' opposition to the motion to exclude Mr. Weir) (the "point to" numbers); *see also* Ex. 3 (Poole Tr. 205:10–14 ("Q.

And these . . . numbers . . . were the numbers that VVT was using to make its outbound calls; is that correct? A. That's what I asked him to send to me, so yes."). Even if we accept Defendants' hypothetical for the sake of argument and allow that some class members called VVT back after missing a call, common sense tells us that there were at least 40 instances (representing 0.0043% of the 928,023 numbers identified), and more likely hundreds of thousands that did not involve a hypothetical customer call back.

Finally, Defendant argues that Plaintiffs cannot show numerosity if the Court limits the class to Illinois residents. Br. at 8. That is wrong. There were calls to 39,969 unique phone numbers with Illinois area codes. *See* Ex. 5 at ¶ 3 (Weir Declaration). Defendant argues that some of these numbers may have belonged to former residents who moved away, but this argument goes both ways. People with area codes from other states undoubtedly moved to Illinois. Moreover, this number is supported by analyzing the population of Illinois as a percentage of the U.S. population. The population of Illinois is approximately 3.9% of the U.S. population.[3] And 3.9% of the 928,023 identified numbers equals approximately 36,200 phone numbers, which is very close to the number determined by Mr. Weir (39,969). Against this backdrop, it defies common sense to argue that calls to Illinois residents numbered less than forty.

D. Commonality Is Satisfied

As noted in Plaintiffs' moving brief, Defendant used the same technology and played the same prerecorded prompts on all its calls to class members. *See* ECF No. 165 at Part III.A. Defendant disputes this by pointing to testimony by Mr. Vogel that VVT agents could "unmute" their microphones on the calls and speak with their own voices "[i]f a complex question was asked

[3] The population of Illinois is 12,802,023 according to the U.S. Census. *See* https://www.census.gov/quickfacts/il. The population of the U.S. is 325,719,178 according to the U.S. census. https://www.census.gov/quickfacts/fact/table/US/PST045217.

that was not covered in the 40 or so prompts." Ex. 1 (Vogel Tr. 94:25–95:1). But that is completely irrelevant. Defendant violated the TCPA when the prerecorded voice was played at the *beginning* of the call and there is nothing in the text of the TCPA, the implementing regulations, or case law cited by Defendant that allows for an exception to liability just because a non-prerecorded voice may have been used at some later point in the conversation.

Defendant even goes as far as to speculate that there could have been calls on which no prerecorded voice was played at all, by saying that "[a]gents had to 'choose' to respond to a person who answered by clicking on one of the audio prompts." Br. at 11. That is wrong. VVT's agents were not permitted to improvise. They were required to stick to the script Defendant gave them. *See* Ex. 3 (Poole Tr. 84:11–16)("Q. And VVT was not allowed to improvise, they were not allowed to say anything on the phone that Holiday Cruise Line didn't already approve in writing; is that correct? A. Correct."). And their instructions were clear. They were to play the first prerecorded prompt when the consumer picks up the phone. *See* Ex. 1 (Vogel Tr. 75:17–20) ("When the person answers, you hit the first recording which is the hello greeting, and then you go down to the required prompts."). In fact, VVT's agents were *required* to play certain prerecorded prompts, otherwise they could not transfer the call to Defendant's call agents (a prerequisite for VVT to be compensated for the call). *See* Ex. 2 (Albright Tr. 53:6–9) ("Q. So there's certain prompts they have to go through for each call before they're allowed to transfer? A. Yes.").

Moreover, there is no evidence whatsoever of any VVT agent performing his job incorrectly (to his own financial detriment) by not using any prompts at all. Defendant's speculation here is insufficient to defeat commonality. *See Karpilovsky v. All Web Leads, Inc.*, No. 17-cv-1307, 2018 WL 3108884, at *5 (N.D. Ill. June 25, 2018) (finding that "[m]ere speculation" was insufficient to defeat commonality and predominance); *see also Johnson v. Yahoo!, Inc.*, No.

14-cv-2028, 2016 WL 25711, at *7 (N.D. Ill. Jan. 4, 2016) ("While it is plaintiff's burden to meet the predominance test, opposition to predominance based on theory, not evidence, is not a weighty objection.") (internal quotations omitted).

Defendant also argues that individualized questions exist as to whether class members were called by VVT agents who were "making multiple calls at once." Br. at 12. That is also wrong. Defendant's expert Ken Sponsler erroneously opined that prerecorded voice messages delivered one at a time by a live agent do not violate the TCPA, but failed to discover that many VVT agents were making multiple calls at the same time. That mistake of fact requires excluding his opinion testimony as argued in Plaintiffs' motion directed at Mr. Sponsler. However, focusing on their burden under the law in this case, Plaintiffs only need to show that VVT called class members using a "prerecorded voice." *See, e.g.,* 47 U.S.C. § 227(b). While the fact that Defendant's agents frequently made multiple calls at once is further evidence of the nuisance caused by these calls, the TCPA by no means requires it. And Defendant cites no authority or other basis for its contention that this is necessary to trigger TCPA liability.

E. Typicality Is Satisfied

Defendant argues that typicality is not satisfied. Br. at 14. But it supports this argument by playing fast and loose with the evidence in this case. For example, Defendant argues that "Herrera may not even be a member of the class because the sole call she alleges she answered . . . was not from a number used by VVT during the campaign." Br. at 14. This is referring to an incoming call Ms. Herrera testified she received at 12:59 a.m. ET on May 4, 2015 (11:59 p.m. CT on May 3, 2015). *See* ECF No. 165-30 at ¶ 6 (Exhibit 30 to Plaintiffs' opening class brief) (Herrera Decl.). But Defendant fails to mention that its vendor sent an email to Defendant confirming that VVT placed an outbound call to Ms. Herrera's phone number on that very same date, May 4, 2015. ECF No. 165-33 (Exhibit 33 to Plaintiffs' opening class brief) (email noting that in 2015 outbound calls

were placed to Ms. Herrera's phone on 4/24, 4/27, and 5/4). Defendant's own records produced in discovery corroborate Ms. Herrera's testimony.[4]

Defendant also argues that Mr. Bakov's interactions with VVT may have occurred on inbound calls rather than outbound. Br. at 14. That is incorrect. Mr. Bakov has submitted his phone bills showing connected incoming calls from VVT with durations of 2 minutes and 1 minute. ECF No. 165-29 at Exhibit A (Exhibit 29 to Plaintiffs' opening class brief) (Bakov Decl.). And the first thing VVT did on every call as soon as consumers answered was deliver a prerecorded message. *See* Ex. 1 (Vogel Tr. 93:17–18) ("When the person answers, you hit the first recording"). Moreover, the prerecorded prompts Mr. Bakov testified he heard were only used in outbound calls. *See* Ex. 2 (Albright Tr. 64:12–14) ("Q. Can you tell me what the voice assistance recordings are for? A. Those are the outbound calls.").

Similarly, Defendant seizes on testimony from Ms. Hewlett that she got into a fight with one of its agents after her repeated requests for it to stop calling were ignored. Br. at 14. But Defendant ignores Ms. Hewlett's clear testimony that she was first played the very same prerecorded message from "Jennifer at Holiday Cruise Line" long before this fight occurred. ECF No. 165-28 (Exhibit 28 to Plaintiffs' opening class brief) (Hewlett Tr. 16:25–17:4) ("Q. Okay. Tell me about that first call. A. It was a recorded—I didn't think it was a recorded line at first. She says 'Hello, my name is Jennifer. Can you hear me okay? And I'm talking to her like, 'Well, yeah."). The fact that she later got into a fight with one of Defendant's live operators does not undo

[4] Defendant also argues that Ms. Herrera's claim is invalid because the audio played on her call sounded "garbled" to her when she was woken from her sleep at midnight from one of its unsolicited calls. Br. at 10. That argument is meritless. The evidence in this case clearly establishes that an audio prompt was uniformly played immediately after a call is connected. *See e.g.,* Ex. 1 (Vogel Tr. 75:17–20) ("When the person answers, you hit the first recording which is the hello greeting, and then you go down to the required prompts."). Defendant does not and cannot provide any authority for its suggestion that the prerecorded audio must be clearly decipherable to state a claim under the TCPA.

Defendant's earlier TCPA violations when it called her using prerecorded voice in the first instance.

Finally, Defendant argues that Ms. Hewlett "did not have the telephone number ending in 3717 in 2016." Br. at 14 n.8. To be clear, Defendant does not contest that it called that number in 2016—that has been verified by, among other things, T-Mobile records subpoenaed by Defendant showing phone calls from VVT in March 2016. *See* ECF No. 165-31 at Exhibit B (Exhibit 31 to Plaintiffs' opening class brief) (Hewlett Decl.). Nor does Defendant dispute that Ms. Hewlett held this phone number at some point. Rather, Defendant argues that she switched her number prior to that time based on deposition testimony in which Ms. Hewlett misremembered the date she switched numbers. Br. at 14. But Defendant is wrong. The Court need not rely on Ms. Hewlett's say-so to reach the conclusion that Ms. Hewlett was the user of that number at the time it was called by Defendant. Rather, it is readily apparent from two forms of documentary evidence. First, Ms. Hewlett filed a complaint about Defendant's harassing phone calls on her phone's Metro-Block-It app, which reported the complaint coming from her 3717 number in March 2016. *See* ECF No. 165-31 at Exhibit A (Hewlett Decl.) (stating that the documents produced came from "complaints submitted by phone number (***) ***-3717"). Second, the T-Mobile phone records show eight phone calls with Ms. Hewlett's aunt's phone number in March 2016. *Id.* at Exhibit B. Ms. Hewlett explained that "[t]hese records refreshed my recollection that the phone number in fact belonged to me during that time period." *Id.* at ¶ 5.

Defendant insists that this was a "sham declaration." Br. at 14. But it provides no explanation why. These documentary records were both produced by uninterested third parties in response to subpoenas Defendant issued during discovery in this case. And surely Defendant cannot believe that Ms. Hewlett's number was reassigned to someone else that regularly spoke

with Ms. Hewlett's aunt by phone. The records unequivocally show that Ms. Hewlett was the user for the 3717 phone number during the relevant time period.

F. Ascertainability Is Satisfied

Defendant makes a series of seven arguments that the class is not ascertainable. Br. at 15–18. But not a single one of the arguments actually addresses the proposed class definition. Rather, they uniformly focus on Defendant's contention that Plaintiffs' proposed method for class member identification is purportedly deficient. That is improper. Whether a class is ascertainable depends on "the adequacy of the class definition itself," not "whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015). This inquiry does not require the Plaintiffs to demonstrate that "there is a 'reliable and administratively feasible' way to identify all who fall within the class definition." *Id.* at 657–58. Therefore, Defendant's arguments, which have nothing to do with the adequacy of the class definition, and everything to do with the purported difficulties in identifying members of the class, are legally untenable, as detailed below.

1. Defendant's Challenges To Plaintiffs' Proposed Method Of Identifying Class Members Are Factually And Legally Baseless

Defendant argues that "when dealing with a list of telephone numbers and no other identifying information, there is no accurate, reliable, and non-individualized way to identify to whom a wireless number belonged at the point in time when the call was made." Br. at 16. This is factually wrong for the reasons already detailed in Plaintiffs' *Daubert* opposition briefs. The method Plaintiffs have proposed to identify class members is the gold standard that has been repeatedly accepted by courts in this district and across the nation. *See Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 247 (N.D. Ill. 2014) (approving use of this exact methodology using "the records of third-party phone carriers and third-party database providers" by Peters-

Stasiweicz's then-current company for class member identification in another TCPA case); *Reyes v. BCA Fin. Svcs., Inc.*, No. 16-cv-24077, 2018 WL 3145807, at *13 (S.D. Fla. June 26, 2018) (approving use of this methodology upon finding that it "employed generally reliable methodologies which entail, *inter alia*, performance of detailed statistical analysis and utilization of LexisNexis data that has been independently verified by [Peters-Stasiweicz's] company."); *Shamblin v. Obama for Am.*, No. 13-cv-2428, 2015 WL 1909765 (M.D. Fla. Apr. 27, 2015) (same); *Krakauer v. Dish Network, L.L.C.*, 311 F.R.D. 384, 391 (N.D.N.C. 2015) (approving Peters-Stasiweicz's company's use of "Lexis data to obtain the names and addresses of most persons associated with these numbers during the class period."); *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-cv-6314, 2017 WL 1806583, at *4 (N.D. Cal. May 5, 2017) (approving Peters-Stasiweicz's company's "use of Lexis Nexis" to identify class members); *West v. CA Svc. Bureau*, 323 F.R.D. 295, 304 (N.D. Cal. Dec. 11, 2017) (approving Peters-Stasiweicz's company's use of "Lexis Nexis' reverse lookup service" to identify class members). Defendant argues that this method does not work, but it has been used successfully in TCPA cases time and time again.

More importantly, this argument is legally insufficient to defeat class certification, and in any event, has nothing to do with the ascertainability requirement in this circuit. *See Toney v. Quality Resources Inc.*, 323 F.R.D. 567, 582 (N.D. Ill. 2018) ("Defendants argue that Toney fails to show her class is ascertainable because she does not demonstrate how it is possible to match the cell phone numbers from Quality's outgoing call logs to the person who actually received Quality's calls. This argument misapprehends the law of the Seventh Circuit, which imposes no such burden to establish ascertainability.") (citing *Mullins*, 795 F.3d at 657-58).

Moreover, as already noted in Plaintiffs' moving brief, the Seventh Circuit has already expressly endorsed the practice of allowing class members to self-identify using affidavits, if other

means prove impracticable. *See Hughes v. Kore of Ind. Enter., Inc.,* 731 F.3d 672, 676-77 (7th Cir. 2013) ("When reasonable effort would not suffice to identify the class members, notice by publication, imperfect though it is, may be substituted."); *see also Mullins,* 795 F.3d at 672 (courts "should not decline certification merely because the plaintiffs proposed method for identifying class members relies on affidavits").

A similar situation arose in the case of *Salam v. Lifewatch, Inc.*, No. 13-cv-9305, 2016 WL 8905321, at *2 (N.D. Ill. Sep. 6, 2016) before Judge Norgle. Like this case, the defendant in *Salam* argued that, "because it enlisted third-party telemarketers to conduct the calls to potential clients it [wa]s unable to provide any potential members of the proposed class because third party vendors conducted all telemarketing operations, and as a result the class [wa]s unascertainable." *Id.* However, Judge Norgle correctly held that argument was "without merit" because "Defendant's customers are capable of identifying themselves as the recipients of telemarketing calls . . . through telephone records or affidavits where necessary." *Id.* The same is true here. Class members should be permitted to self-identify, where necessary.

Judge Norgle also correctly noted that "denying class certification because Defendant is unable to provide [a] list of potential class members would encourage defendant not to keep records, shielding themselves from liability." *Id.; see also Mullins*, 795 F.3d at 668 (explaining that denying class certification based on difficulties in identifying class members "effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions."). The same is true in this case. Defendant should not be permitted to escape liability merely because it failed to keep records of the people it paid VVT to call.

Finally, the Seventh Circuit has also stated that "a district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement

or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation." *Id.* at 665. Here, Defendant's challenges are hypothetical at best, given that the identification process has not yet been performed. There is therefore no reason to deny certification at this point. If Defendant's tales of doom ultimately come to pass (which they will not), there is nothing preventing the Court from reconsidering the issue at that time.

2. Any Inbound Calls To VVT Came From Consumers Who Were Already Contacted By VVT

Defendant also argues that Plaintiffs cannot "distinguish between those class members who answered a telephone call from VVT versus those who called inbound to VVT." Br. at 16. Here too, this has nothing to do with purported overbreadth of the class. In fact, Defendant itself acknowledges that "[t]he proposed class definition includes only [people who received calls]." Br. at 16. Simply put, if someone did not answer a call from VVT, they are not a class member. That is an objective criterion—either they answered incoming calls or they did not.

Rather, Defendant is impermissibly challenging Plaintiffs' proposed methods of class member identification in the guise of an overbreadth argument, which runs counter to the directives of the Seventh Circuit in *Mullins*. Regardless, Defendant's argument is factually and legally wrong. Defendant's Rule 30(b)(6) witness testified that the numbers used by VVT were not published in its advertisements—the only way consumers could have gotten the numbers was if VVT called them first. *See* Ex. 3 (Poole Tr. 56:17–22) ("Q. Okay. So calls being transferred from VVT were sent to different phone numbers than the numbers that were given directly to consumers on the radio and the mail and those other mediums, correct? A. That is correct.").

VVT suggests that people might have called VVT without first receiving a call from them "if a friend told them about the free cruise they just obtained." Br. at 16. But people who received

Defendant's "free cruise" were specifically told that "this free cruise offer is by invitation only and is not available to the general public." *See* Ex. 3 (Poole Tr. 127:15–128:1). So it is unlikely anyone gave the number to a friend after they were told it was "by invitation only." Defendant also claims that Plaintiff Herrera's call was transferred to its call center "only after she called VVT." Br. at 17. But it neglects to mention that Defendant's own emails reflect that she received multiple calls from VVT before that date. ECF No. 165-33 (Exhibit 33 to Plaintiffs' opening class brief) (email noting that in 2015 outbound calls were placed to Ms. Herrera's phone on 4/24, 4/27, and 5/4).

Finally, here too, class members can simply be asked to certify that they received and answered the call from "Jennifer with Holiday Cruise Line." This is a simple answer to a simple problem that has already been approved by the Seventh Circuit, as discussed above.

3. The Reverse Append Process Provides An Address History For Individuals As Of A Given Time

Next, Defendant argues that Plaintiffs cannot establish that class members "were residents of Illinois at the time" they received the phone call. Again, if the class is limited to Illinois residents (which it should not be) then that will be part of the class definition too. This is also an objective determination—either they were or were not residents of Illinois when they received the calls. This too therefore has nothing to do with ascertainability, and should not be grounds for denial of class certification. Moreover, Plaintiffs' expert witness testified that "[t]he historical reverse append process does provide an address history for individuals as of a given time." Ex. 4 (Peters-Stasiweicz Tr. 51:23–25). Therefore, it would be quite simple to establish whether consumers were residents of Illinois at the time they received the calls. Finally, class members could be asked to certify, or provide other proof (such as utility bills), that they were Illinois residents as of the date they received the calls.

4. Class Members Can Certify That They Answered The Calls

Finally, Defendant argues that certain calls could have been answered by people other than the owners of the telephones. Again, this does not suggest that the class definition is overbroad because it is explicitly limited to persons who answered the calls. Here too, class members can certify that they answered the calls, if necessary. Defendant's remaining arguments regarding ascertainability are rehashed from its commonality section. They are addressed earlier in Part II.D.

G. Manageability Is Satisfied

Defendant's brief argues that "individualized issues will overwhelm the proceedings." Br. at 18-19. However, this section of Defendant's brief merely rehashed the same arguments it already made in the commonality portion of its brief. These arguments are meritless for the reasons set forth earlier in Part II.D.

H. Superiority Is Satisfied

Defendant's sole argument regarding superiority is yet another attack on Plaintiffs' proposed method of class member identification. Here, Defendant argues that class members should not be permitted to self-identify using affidavits because "the absence of objective records that could be used to corroborate the contents of such affidavits . . . militates against a finding of superiority." Br. at 20. That argument is frivolous. The Seventh Circuit has been clear on this point: "courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits." *Mullins*, 795 F.3d at 672. The Seventh Circuit was also clear that this directive applies even in the absence of corroborating evidence. *See id.* ("We assume for purposes of this discussion that Direct Digital will have no records for a large number of retail customers. We also assume that many consumers of Instaflex are unlikely to have kept their receipts[.]").

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for class certification.

Date: September 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION was filed electronically with the Clerk of the Court using the CM/ECF system this 19th day of September 2018 and served electronically on all counsel of record.

/s/ Katrina Carroll
Katrina Carroll