UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3931

CITY SELECT AUTO SALES, INC., a New Jersey Corporation, individually and as the representative of a class of similarly situated persons,

Plaintiff-Appellant,

v.

BMW BANK OF NORTH AMERICA, INC., BMW FINANCIAL SERVICES, NA, LLC, and CREDITSMARTS CORP.,

Defendants-Appellees.

Appeal from the United States District Court for the
District of New Jersey
No. 13-4595
The Honorable Noel L. Hillman, presiding

APPELLANT'S BRIEF

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 13-cv-3931

CITY SELECT AUTO SALES, INC., a New Jersey corporation, individually and as the representative of a class of similarly-situated persons,

v.

BMW BANK OF NORTH AMERICA, INC., BMW FINANCIAL SERVICES NA, LLC., CREDITSMARTS CORP., and JOHN DOES 1-12.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, CITY SELECT AUTO SALES, INC. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

None

/s/ Jonathan B. Piper
(Signature of Counsel or Party)

Dated: 3/21/2016

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PLAINTIFF-APPELLANT'S BRIEF

Plaintiff-Appellant City Select Auto Sales, Inc. ("Plaintiff") submits the following brief on appeal.

JURISDICTIONAL STATEMENT

Plaintiff commenced this action in the district court on July 30, 2013. ECF 1 Page ID# 1.[1] Plaintiff alleged *inter alia* claims under the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, arising from the transmissions of fax advertisements to Plaintiff and a class of similarly-situated persons by Defendants BMW Bank of North America, Inc., BMW Financial Services, NA, LLC (collectively "BMW"), and Creditsmarts Corporation ("Creditsmarts"). ECF 1, Page ID 1-5.[2] In *Mims v. Arrow Fin. Servs., LLC*, __ U.S. __, 132 S. Ct. 740 (2012), the

[1] Plaintiff cites to the electronic court file in the district court by reference to the document number as (ECF ___) and where applicable the page number as "Page ID__." References to pages of the Appendix are abbreviated, "App __" followed by a parenthetical description of the document referenced.

[2] Plaintiff alleges the Defendants' fax ads violated the TCPA because they were sent without "express invitation or permission" as required by 47 U.S.C. § 227(a)(5), (b)(1)(C), and because they did not have an opt-out notice in the form required by 47 U.S.C. § 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).

United States Supreme Court held that federal district courts have original subject matter jurisdiction over claims arising under the TCPA.

Plaintiff filed an amended motion for class certification on January 15, 2015. ECF 65. The district court denied Plaintiff's motion for class certification on September 29, 2015. App054-App055 (Order Denying Class Certification).

On October 13, 2015, Plaintiff filed a timely petition for review of denial of class certification under Federal Rule of Civil Procedure 23(f). App001-App020 (Petition for Review). The Court granted Plaintiff's petition on December 15, 2015. App056-Appp057 (Order Granting Petition). Plaintiff filed the order as a notice of appeal on December 16, 2015. ECF 106.

The Court has appellate jurisdiction under 28 U.S.C. § 1292(e) because this is an interlocutory appeal pursuant to a Rule (Fed. R. Civ. P. 23(f)) prescribed by the Supreme Court under 28 U.S.C. § 2072, and the Court has granted Plaintiff permission to appeal as required by the Rule.

STATEMENT OF THE ISSUES

1. In this TCPA "junk fax" case, where defendants allegedly sent over 20,000 unsolicited faxes in express violation of a federal statute, where the universe of individuals and companies from which the intended recipients were drawn is known, but where one defendant destroyed the documents which would have identified the exact recipients, and where plaintiff is willing to provide notice to that universe of individuals and companies to determine who received the faxes, should the District Court have refused to certify the class on ascertainability grounds, thus immunizing defendants from real liability for their unlawful acts?

2. Should this Court's "ascertainability" requirement, which has now been expressly rejected by two other circuits and even by Judges of this Court, be reconsidered?

RELATED CASES AND PROCEEDINGS

Plaintiff is not aware of any case or proceeding that has been before this Court previously or that is currently before this Court or about to be presented to this Court or any other court or agency, state or federal, that is in anyway related to this case.

STATEMENT OF THE CASE

I. Relevant Facts.

A. The BMW Defendants are in the business of financing auto loans.

"Up2drive" is a "direct to consumer auto lending … division of [BMW] Bank" of North America, Inc. ECF 65-3, Page ID 1009; ECF 65-4, Page ID 1094. BMW Financial Services, NA, LLC employs the personnel who run up2drive. ECF 65-3, Page ID 1007; ECF 65-4, Page ID 1094. [3]

B. Defendant Creditsmarts markets lenders to auto dealerships using its proprietary database of 18,000 dealerships.

Creditsmarts operates a "[w]eb driven" "indirect business-business lending tree model" that connects independent auto dealers to lenders offering financing for customers purchasing cars. ECF 65-5, Page ID

[3] Defendants BMW Financial Services, NA, LLC and BMW Bank of North America, Inc. are referred to collectively as "BMW."

1312-1313. Creditsmarts' dealer customers are able to submit a short auto loan application online for their retail car buyers. *Id.* at 1268, 1303. The application is then forwarded to lenders that have agreed to receive applications through Creditsmarts. *Id.* at 1316. The service is all online and self-executing on Creditsmarts' website. *Id.* at 1282, 1302. Creditsmarts also provides some regulatory compliance software to its users. *Id.* at 1259, 1296, 1302.

Over the past ten years using telemarketing firms to make cold calls to all the independent auto dealerships in the country, Creditsmarts has compiled a database that now totals a little over 18,000 currently active auto dealerships. ECF 65-5, Page ID 1289-1290, 1295, 1308-1309.[4] This database includes fax numbers for some of the dealerships. ECF 65-8, Page ID 1495,1532-1537. The database includes the date the dealership was first added, and the date the database entry for that dealer was last updated. ECF 70-3, Page ID 1901, 1906, 1932.

[4] A total of 31,000 auto dealerships have been registered into Creditsmarts' database but 12-13,000 have also been removed because they have gone out of business. ECF 65-5, Page ID 1289-1290. The database was copied and preserved in February 2014. ECF 100, Page ID 3138, n.4.

C. BMW hired Creditsmarts to market is up2drive auto lending business.

BMW entered into a "marketing partnership" with Creditsmarts to "promote up2drive services on [BMW's] behalf." ECF 65-3, Page ID 1018, 1026. BMW shared proprietary information including the up2drive logo, marks, advertising images, and xml data criteria. ECF 65-5, Page ID 1272, 1338. BMW also authorized Creditsmarts to promote up2drive on the Creditsmarts website, and helped Creditsmarts to create an online advertisement. ECF 65-4, Page ID 1118, 1198. This marketing arrangement and relationship continues to date. ECF 65-3, Page ID 1024; ECF 65-5, Page ID 1275.

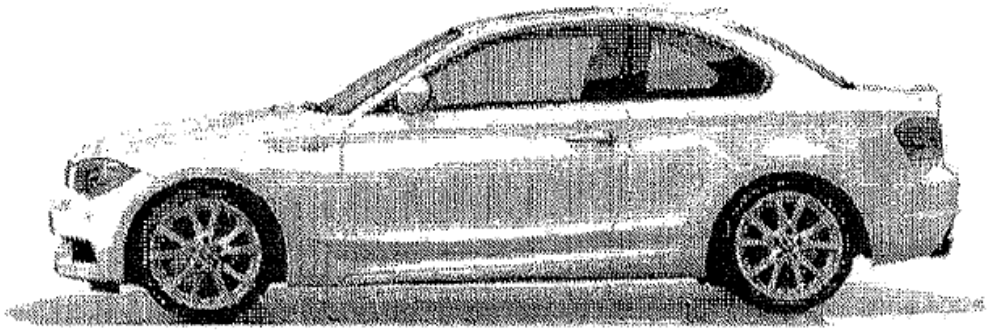
D. Creditsmarts hired Westfax to broadcast 20,989 fax ads on behalf of BMW and up2drive to the dealerships in its database.

Creditsmarts regularly used fax broadcaster Westfax to fax promotional "program updates" to the fax numbers in its dealership database. ECF 65-5, Page ID 1259-1260. "A program update would be guidelines, max miles, loan to value, things that are – that an autodealership needs to know when discussing finance options with their customers." ECF 65-5, Page ID 1259. "Program updates" were faxed to Creditsmarts' database of "autodealerships that have

registered to receive information regarding finance programs and compliance." *Id.*

To broadcast its "program updates," Creditsmarts uploaded the image it wanted to fax and the fax numbers to the Westfax website. ECF 65-6, Page ID 1371; ECF 65-8, Page ID 1489. Creditsmarts did not use any source other than its dealership database to generate fax target lists for its "program updates." *Id.* at 1493. Creditsmarts further explained, "The recipients of each separate fax transmission are separately chosen from the subscribers in the most current version of the live database depending upon the nature, extent, location and/or subject matter of the facsimile." ECF 65-6, Page ID 1368-1369.

To promote BMW and up2drive as part of its "marketing partnership," Creditsmarts created the following BMW up2drive fax ad as a "program update" to fax to the dealerships in its database:



BMW Bank of North America **up2drive**

Attention All Independents !!

UpToDrive is looking for

your **BUSINESS !!**

- 110% of (KBB) Retail value
- 2006 and newer vehicles
- Up to 90,000 miles

Call us at **888-345-0918**

JOIN NOW

"To be removed from this list, please call 1-800-915-2571 ext 4041D or Fax this document back to 888-343-9903. Please be sure to include the number to be removed. Thank you"

ECF 65-5, Page ID 1319. Creditsmarts used an "up2drive" logo for the BMW up2drive fax ad that was identical to the one on its website for up2drive, which BMW had approved. ECF 65-5, Page ID 1319, 1338.

The owner of Creditsmarts testified repeatedly and unequivocally that the former office manager Alex Gomez was responsible for creating and faxing "program updates," and Mr. Gomez created and broadcasted the BMW up2drive fax ad as a "program update." ECF 65-5, Page ID 1259-1260, 1280, 1290. But Mr. Gomez denied ever updating any customer by fax or even knowing what a "program update" was. ECF 65-8, Page ID 1489 ("Honestly, I don't recall doing such a thing."), 1493. He also could not recall anything about the BMW up2drive fax ad, including to whom it was faxed. ECF 65-8, Page ID 1487, 1489-1490, 1493, 1496. Mr. Gomez, did, however, state that the BMW up2drive fax ad looked like a "program update," and up2drive was a Creditsmarts "partner." ECF 65-8, Page ID 1488.

Creditsmarts broadcast the BMW up2drive fax ad in November and December 2012. ECF 65-8, Page ID 1488-1489, 1511-1515; ECF 65-7, Page ID 1428, 1430, 1434, 1458-1461. Westfax's and Creditsmarts

records show a total of 20,989 targets were successfully sent the BMW up2drive fax ad as follows:

5,480 successful faxes on November 29, 2012
5,107 successful faxes on December 4, 2012
10,402 successful faxes on December 27, 2012

ECF 65-5, Page ID 1261, 1320, 1511, 1513, 1515; ECF 65-8, 1512, 1542, 1547. Creditsmarts' employees would be fired if they kept any copies of any fax numbers from its dealership database, so they created a temporary file to upload to Westfax that would be destroyed immediately after it was uploaded. ECF 65-5, Page ID 1288. Westfax similarly set up its business so it does not retain or save copies of the fax numbers targeted by its customers. ECF 65-7, Page ID 1435, 1451-1452.

E. BMW knew about the fax ads promoting up2drive and BMW and did not object.

BMW learned that Creditsmarts had broadcast the BMW up2drive fax ad on December 10, 2012. ECF 65-9 Page ID 1555-1557, 1565, 1567. Jaime Magpuri, a BMW sales representative, was shown the fax by an auto dealership customer he was visiting. ECF 65-9, Page ID 1555. Mr. Magpuri sent an internal email about it to Pawan Murthy, the head of up2drive. *Id.* at 1556-1558, 1566-1567. The email was also cc'd to Chip

Strollo, another BMW employee, who was Mr. Magpuri's superior. *Id.*

The email stated:

> "Hi Pawan,
> "I ran into the attached flyer at one of my IUCDs [independent used car dealers]. I called the number and it goes to a company called Credit Smart. They appear to be some sort of 'middle man' between lenders and customers/dealer. Is U2D [up2drive] working with them?"

Id. at 1566.

Mr. Murthy responded to Mr. Magpuri later that day with an email that he also cc'd to up2drive executive Jake Thompson:

> "Hi Jaime – yes we are working with creditsmarts. They're trying to develop a network of independents who have been providing us some good business. Of course, if they're an alphera[5] dealers, we pay the standard flat fee.
> "Jake was the one who worked on this agreement (cc'd here).
> "Let us know if you have any questions.
> P"

Id.

Neither Mr. Magpuri, Mr. Thompson, nor Mr. Murthy believed that the BMW Fax was improper. *Id.* at 1559-1560; ECF 65-3, Page ID 1021,

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[5] Alphera is a division of BMW Financial Services, that also make auto loans, but in contrast to up2drive which makes loans directly to the consumer, it takes assignment from loans originated by the dealership. ECF 65-4, Page ID 1097. To some extent Alphera is, therefore, in competition with up2drive. *Id.*

ECF 65-4, Page ID 1096-1098. They took no steps to investigate the fax. *Id.* They did not contact anyone internally at BMW to discuss the fax, or whether it violated BMW's relationship with Creditsmarts or violated the law. *Id.* BMW did not contact Creditsmarts to assert that there was a material breach of any contract by Creditsmarts at that time and did not instruct Creditsmarts to cease sending faxes advertising BMW and up2drive. ECF 65-3, Page ID 1013. BMW has not terminated its agreements with Creditsmarts because of its broadcast of faxes on behalf of BMW and up2drive. *Id.* at 1024; ECF 65-5, Page ID 1275. Up2drive has continued to receive applications through Creditsmarts and has continued to approve loans from Creditsmarts. *Id.* Up2drive has never expressed that it did not want to receive applications that may have resulted from the BMW Fax. *Id.*

F. Plaintiff received the BMW up2drive fax ad on December 27, 2012.

Plaintiff received one of the BMW up2drive fax ads sent by Creditsmarts on December 27, 2012. ECF 65-10, Page ID 1574-1575, 1604. Plaintiff received the BMW Fax at Plaintiff's fax number that was included in the Creditsmarts customer database. *Id.* Plaintiff did not consent to receive faxes from BMW or Creditsmarts. *Id.* at 1578.

Plaintiff has no business relationship with either BMW or Creditsmarts. *Id.* at 1570-1571, 1576, 1578. Plaintiff has never submitted any loan application through Creditsmarts. *Id.* at 1576-15777, 1578.

II. Procedural History.

Plaintiff moved for class certification, proposing the following class definition:

> All auto dealerships that were included in the Creditsmarts database on or before December 27, 2012, with fax numbers identified in the database who were sent one or more telephone facsimile messages between November 20, 2012 and January 1, 2013, that advertised the commercial availability of property, goods or services offered by "BMW Bank of North America.

ECF 65, Page ID 973.

On September 29, 2015, the District Court denied Plaintiff's motion for class certification, finding that Plaintiff's proposed class was not ascertainable. App053 (Opinion). Having resolved the motion on the issue of ascertainability, the District Court declined to consider the remaining requirements for class certification. App044 (Opinion).

III. Ruling Presented for Review.

"IT IS on this 29th day of September 2015, ORDERED that the motion [Doc. No. 65] filed by Plaintiff, City Select Auto Sales, Inc., for

class certification be, and the same hereby is, DENIED." App054 (Order).

SUMMARY OF ARGUMENT

The district court erred when it denied class certification on the basis that the proposed class was insufficiently ascertainable.

This case involves over 20,000 "junk fax" advertisements sent to fax numbers of auto dealerships drawn from Creditsmarts' customer database containing about 20,000 entries. Although Creditsmarts deleted the lists of the numbers to which the faxes were sent, the existence of the database from which the fax numbers were drawn makes it administratively feasible to ascertain class membership through the submission of claim forms.

In finding the class not ascertainable, the district court misapplied this Court's "ascertainability" precedent, and erroneously construed that precedent to mean that a class is not certifiable unless a defendants' records or public records are sufficient to establish class members' identity exactly. Such a rule—which certainly has no basis in this Court's precedent—would inevitably render class certification impossible in a majority of consumer cases.

Although Plaintiff submits that the class proposed here is ascertainable under existing Circuit precedent, this appeal also provides the Court an opportunity to revisit that precedent. This Circuit's "ascertainability" requirement has been rejected by two other Courts of Appeals, and seriously criticized by judges on this Court. Plaintiff respectfully submits that the "ascertainability" requirement is not only unnecessary to protect parties or putative class members, but also overly confusing for the courts to apply. It should be overruled.

ARGUMENT

I. The Standard and Scope of Review.

The appellate court "review[s] a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161 (3d Cir. 2015), *as amended* (Apr. 28, 2015) (citing *Grandalski v. Quest Diagnostics Inc.,* 767 F.3d 175, 179 (3d Cir. 2014) (quoting *Hayes v. Wal–Mart Stores, Inc.,* 725 F.3d 349, 354 (3d Cir. 2013) (internal quotation marks omitted)). The appellate court reviews de novo a legal

standard applied by a district court. *Id.* (citing *Carrera,* 727 F.3d at 305).

II. The District Court Applied the Wrong Legal Standard to Find the Class Was Not Ascertainable, and Its Order Denying Class Certification Should Be Reversed.

The district court held Plaintiff could not show the class was "ascertainable" because it could not prove records exist that will precisely identify "every" individual class member. App041, 42 n.7 (Opinion). The district court's holding was wrong and should be reversed because it misconstrued the legal test for "ascertainability." Ascertainability does not, as the district court held, require the ability to precisely identify "every" class member. It only requires an "administratively feasible mechanism for determining whether putative class members fall within the class definition" without resort to "extensive and individualized fact-finding or 'mini-trials.'" *Byrd*, 784 F.3d 154, 163. Here Plaintiff showed there was a database of approximately 20,000 dealerships that included all potential class members, and Creditsmarts used only this database to send the 20,989 fax ads at issue. Moreover, Creditsmarts did not deny that it sent the BMW up2drive fax ads to all the dealerships in the database and only

claimed it could not recall and had destroyed all records. This was sufficient to satisfy "ascertainability," and the district court's order denying class certification should, therefore, be reversed.

A.The Third Circuit's heightened "ascertainability" test.

Although Rule 23 never mentions "ascertainability" as a class certification criterion, the Third Circuit established it as an "implied" preliminary requirement in *Marcus v. BMW of North America, Inc.*, 687 F.3d 583, 593-594 (3d Cir. 2012). *Byrd,* 784 F.3d at 162 n.5. Four cases since *Marcus* have further addressed the issue. *Byrd,* 784 F.3d 154; *Grandalski v. Quest Diagnostics, Inc.*, 767 F.3d 175 (3d Cir. 2014); *Carrera v. Bayer Corp.,* 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.,* 725 F.3d 349 (3d Cir. 2013). The test was most recently iterated in *Byrd* as follows:

> The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is "defined with reference to objective criteria"; and (2) there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 355 (citing *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 593–94 (3d Cir. 2012)). The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that "class members *can* be identified." *Carrera,* 727 F.3d at 308 n. 2 (emphasis added). This preliminary analysis dovetails with, but is separate from, Rule 23(c)(1)(B)'s

> requirement that the class-certification order include "(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.,* 453 F.3d 179, 187–88 (3d Cir. 2006).

784 F.3d at 163.

The first part of the test is neither controversial nor confusing, but the second part has been described as a novel "heightened" ascertainability requirement that is inconsistent with prior Rule 23 precedent and the law in other circuits. *See, e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015) *cert. denied,* No. 15-549, 2016 WL 763259 (U.S. Feb. 29, 2016) ("We decline to follow this path and will stick with our settled law.") *see also Byrd,* 784 F.3d at 161 n.4 (collecting cases and comparing and contrasting the law of the various circuits). Similarly, *Byrd* conceded that *Marcus, Hayes, Carrera*, and *Grandalski* have lacked precision in defining the second part of the test, and "[n]ot surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification." *Byrd*, 784 F.3d at 162.

Byrd set out to clarify the "lack of precision," but the present case

illustrates the difficulty in doing so. On the one hand, *Byrd* says there is no "records requirement." *Id.* at 164. On the other hand, *Byrd* says that a plaintiff cannot rely on class member "affidavits alone." *Id.* at 170. The question then becomes when can class member affidavits be used as part of "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."

In *Byrd*, the plaintiff sued defendants for leasing computers on which they had secretly placed spyware. The defendants' records identified all of the lessees, but the class proposed by plaintiff also included "household members" of the lessees. 784 F.3d at 159-160. *Byrd* held the district court erred by refusing to consider class member affidavits to identify "household members" because they could be verified by reference to the known addresses of the lessees in defendants' records and verified by public records. 784 F.3d at 171.

In *Marcus,* the district court certified a class of all persons who had purchased BMW's run flat tires, experienced a flat, and had the flat replaced. 687 F.3d at 588. The Court reversed because the record presented below did not provide for an "administratively feasible"

method for identifying class members. *Id.* at 594. *Marcus* explained the plaintiff had failed to show how it could identify: (1) vehicles BMW sent to dealerships for sale with run flat tires installed, (2) vehicles where dealerships had not replaced run flat tires before sale, (3) owners of vehicles who had experienced a failure of a run flat tire, and (4) owners of vehicles who had replaced failed run flat tries. *Id.* at 593-594. The Court also stated, "We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so." *Id.* at 594. The Court did not, however, hold that class certification was necessarily impossible, and it remanded for further proceedings to give the plaintiff a second chance to show the class could be ascertained. *Id.*

In *Hayes*, the district court certified a class of persons who had bought items marked "as is" from Sam's Club and also purchased a warranty that did not in fact cover certain "as is" items. 725 F.3d at 352. Sam's Club did not keep track of items purchased "as-is," and some, but not all, "as-is" items were covered by the warranties purchased. 725 F.3d at 351. In addition, as the named plaintiff had experienced, Sam's Club sometimes provided a refund of the warranty's cost or honored the

warranty even when it was sold with an "as-is" item that was not supposed to be covered. *Id.* at 353.

The only evidence in the record that could potentially identify class members were Sam's Club's records showing 3,500 price override sales. *Id.* at 355. Items sold "as-is" required a price override, but so did a variety of other sales, and Sam's Club did not keep track of the reason for price overrides. *Id.* Despite the lack of record evidence, the court remanded to give the plaintiff a chance to "offer some reliable and administratively feasible alternative that would permit the court to determine: (1) whether a Sam's Club member purchased a Service Plan for an as-is item, (2) whether the as-is item was a 'last one' item or otherwise came with a full manufacturer's warranty, and (3) whether the member nonetheless received service on an as-is item or a refund of the cost of the Service Plan." *Id.* at 356.

In *Carrera*, the plaintiff alleged Bayer's claims that its One-A-Day WeightSmart pills had "metabolism enhancing effects" were false. 727 F.3d at 304. The district court certified a class of Florida purchasers of the pills. *Id.* Bayer did not sell the pills directly to the public and had no records of the consumers who bought the pills. *Id.* Bayer's records did

show, however, that it sold a total of $14 million worth in Florida. *Id.* at 309-310. The *Bayer* plaintiff argued the class could be ascertained by reference to on-line sales records, and sales at Florida CVS stores where the consumer used a rewards card. *Id.* at 308-309. There was no evidence, however, that either source of information could identify purchasers of the pills. *Id.*

The plaintiff also argued that an expert could use a "screening model" to analyze affidavits submitted by class members to insure their reliability. *Id.* at 311. The screening model was based on class action settlement claims processing, however, and was not "specific to the facts of" the claims against Bayer. *Id.* at 311. The Court vacated the class certification order but remanded to allow plaintiff "the opportunity to submit a screening model specific to th[e] case" to "prove the model will be reliable and … allow Bayer to challenge the affidavits." *Id.*

Significantly, *Marcus, Carrera*, and *Hayes* did not grant or deny class certification. All three remanded for further proceedings. In addition, *Hayes* expressly left open the possibility that the plaintiff could on remand develop a "screening model" to enable ascertainment of class members by their submission of affidavits. In contrast, *Byrd*

affirmed class certification, so its holding illustrates facts sufficient to satisfy the second prong of ascertainability test, but it does not provide an example of facts that are insufficient and in light of its distance from the facts in *Marcus*, *Carrera*, and *Hayes*, it should not be so construed.

B. The district court incorrectly construed *Byrd* to establish the minimum factual record necessary to satisfy the second prong of ascertainability.

> The district court below held, "[T]here is no evidence that the BMW fax was sent to every customer who had a fax number in the database … [and] Plaintiff here has provided no method for determining which of the remaining customers would have been sent the BMW fax." App041 (Opinion). Notably, there was no evidence the fax was not sent to everybody either. Creditsmarts simply did not recall whether it was sent to all dealerships in its database, and both Creditsmarts and Westfax employed business practices that intentionally destroyed their records immediately after the faxes were sent.

The district court concluded that this inability to precisely identify the "remaining customers," if any, precluded the use of class member affidavits as a source of identification because there is no way of "verifying by reference to the database that the dealership was, in fact, sent the fax." App042, n.7 (Opinion). By the district court's reasoning a class can never be ascertained and certified unless every single class member is capable of being identified from documentary records. But

this is incompatible with the holdings and results in *Marcus*, *Hayes*, *Carrera* and *Byrd*.

First, if the district court's formulation of the ascertainability standard were correct there would have been no reason to remand *Marcus*, *Hayes*, or *Carrera*. In *Carrera*, for example, there was no suggestion that it would be possible to ever identify every Florida purchaser of the pills by reference to objective documentary records, but the case was still remanded to allow the plaintiff to propose a model for screening class member affidavits. 727 F.3d at 311. To be sure, the court expressed skepticism about the viability of such a model, but it did not rule out the possibility, so long as the plaintiff could prove a basis for its reliability that would be subject to challenge. *Id. Marcus* and *Hayes* are no different, as the facts of those cases also show there was no possibility of actual documentary evidence that could specifically identify every class member. *Marcus*, 687 F.3d at 594; *Hayes*, 725 F.3d at 356.

Second, while the *Byrd* class was more easily ascertained than the one in this case, *Byrd* never suggests it was at the lower threshold of the "ascertainability" requirement. But this is, in fact, how the district

court applied it because the district court required precise identification from Creditsmarts' records of specific fax numbers to which it sent the fax ads. App042, n.7 (Opinion). If the district court's view were correct, it should have been expressed somewhere in the text of the *Byrd* decision, but *Byrd* actually stated, "There is no records requirement." 784 F.3d at 164. Furthermore, *Byrd* noted that *Marcus*, *Hayes*, and *Carrera* had caused "confusion," and "[n]ot surprisingly" encouraged an "increasing frequency" in the use of the "ascertainability requirement in order to defeat class certification." *Id.* at 161-162. *Byrd* also noted the "ascertainability is narrow" and "defendants … must be exacting in their analysis." *Id.* at 165. These statements, as well as the concurrence by Judge Rendell, strongly support the view that *Byrd* did not purport to hold the facts of that case were the minimum necessary to show an ascertainable class. *Byrd* simply affirmed its facts required reversal of the district court's finding that the class was not ascertainable.

Marcus and *Hayes* involved class members within a finite and known universe of potential members, but whose identities were subject to multiple, unascertainable variables. In *Marcus*, it was new BMW purchasers, but only a tiny unknowable fraction of these purchasers

might have bought a car with run flat tires, experienced a flat, and had it repaired. Similarly, in *Hayes* it was 3,500 people who had made price override purchases at Sam's Club, but only a tiny unknowable fraction of these would have been for an "as-is" item, not covered by a warranty, but where the customer purchased a warranty, and then Sam's Club did not provide a refund or repair upon request.

Unlike *Marcus* and *Hayes*, *Carrera* considered a class with no ascertainable universe of potential class members. In *Carrera*, the total amount of money paid by the class members was known, but there was no data whatsoever as to who might have bought the pills in Florida during the relevant time period.

Byrd involved a finite universe of class members and a single variable. The universe was 895 known lessees of the defendant's spyware infested computers, and the single variable was the place of residence at the relevant time of other "household members."

Like *Byrd*, and unlike *Marcus* and *Carrera*, the present case involves a finite universe of class members. Also like *Byrd*, and unlike Hayes, this case involves a single variable within its finite universe. But, in contrast to *Hayes*, the finite universe here closely aligns with a single

variable rather than poorly aligns with a multitude. The facts of this case are thus far closer to *Byrd* than they are to *Marcus, Carrera*, or *Hayes.*

There are approximately 20,000 auto dealerships in Creditsmarts' database, and that is about the number of fax ads it sent. The Creditsmarts owner testified he did not know that all "Creditsmart's customers" were targeted for the BMW up2drive fax ad, but he also testified to a pattern of thoroughly marketing his business nationwide. ECF 65-5, Page ID 1260, 1295 "("I paid a telemarketing firm to speak with every dealership in the country.") And the evidence of whether Creditsmarts sent the fax to all of database members was equivocal, not negative, as the district court assumed. App041, n.7 (Opinion).

If the four cases are viewed as a spectrum, this case falls somewhere very close to *Byrd* and far past *Marcus*, *Carrera*, and *Hayes.* The district court viewed the type of documentary corroboration in *Byrd* as the minimum necessary to verify class member identity by affidavits, and this was a legal error because *Byrd* does not so hold; nor are *Marcus*, *Carrera*, and *Hayes* consistent with such a view. Because the

district court applied the wrong legal standard its denial of class certification should be reversed.

C. The Court should rule the class is ascertainable.

The record in this case establishes an ascertainable class because it will be administratively feasible to identify class members by soliciting identification as recipients of the BMW up2drive from the dealerships in the Creditsmarts database.

Marcus set forth three purposes served by the second prong of its ascertainability requirement. The first is to eliminate "serious administrative burdens" by insisting on "easy identification of class members." 687 F.3d at 593. The second is to protect absent class members by facilitating notice to those class members. *Id.* The third is to protect the rights of defendants by assuring that the persons bound by a final judgment can be identified. *Id. See also Carrera,* 727 F.3d at 307. All three can be satisfied here because the Creditsmarts database so closely aligns with class membership.

The district court agreed that Plaintiff's proposed method of ascertaining class membership "is not based only on the 'say so' of the prospective class members, in that the Creditsmarts database may

provide an additional layer of verification." App039 (Opinion). The district court also noted that the database can establish which dealership entries existed at the time of the faxing, and those entries in the database that included no fax number can be eliminated from the class. *Id.* Nevertheless, the district court ruled that narrowing down the potential universe of class members by reference to the database was not enough, without proof of whether all dealerships were sent the faxes or, if not all, precisely which ones were sent the fax. The district court's ruling is contrary to all three rationales for the *Marcus* ascertainability test.

First, it simply will not be a "serious administrative burden" to send notice to all members of the database and invite these potential class members to verify receipt of the BMW up2drive fax ads. The universe of potential class members is capable of "easy identification" and notice needs to be sent to them in any event, so there will be no added cost. The only burden will be that borne by the class members because they must take the time to identify themselves as recipients of the fax ads, but this burden will fall on them and not the court or the defendant.

Second, there is no risk that class members will be harmed by a

failure to be able to provide them with the best notice practicable. The database includes the names, addresses, and fax numbers of the class members. ECF 65-8. Page ID 1532-1535. In addition, while the record shows that a few class members may have gone out of business and been deleted from the database between the time of the last fax and the preservation of the database by this litigation, it also shows the number is small. App041, n.6 (Opinion). And, in any event, as *Byrd* holds some underinclusiveness does not require denial of class certification. 784 F.3d at 167.

Third, the district court's decision was not necessary to protect the rights of Defendants by "ensuring that those bound by the final judgment are clearly identifiable." *Marcus*, 687 F.3d at 593. *Carrera* described this concern as ensuring the "defendant must be able to challenge the proof used to demonstrate class membership." 727 F.3d at 307. This would appear to have been the district court's greatest concern but, if so, it was misplaced.

Creditsmarts was free to show that it did not send the BMW up2drive fax ads to all dealerships in the database. It did not do so. It merely said it did not know for sure that it did not. But its marketing

practices and the similarity in the number of dealership in its database and the number of faxes sent suggest that it did. In addition, Plaintiff only received the ad once, and it makes sense to send an ad to a different dealership, rather than re-sending the same ad to the same dealerships again. Defendants were "able to challenge" Plaintiff's reliance on the Creditsmarts' database to "demonstrate class membership," but they only produced equivocal evidence to show any significant lack of alignment between the database entries and the class members. *Carrera*, 727 F.3d at 307.

Any unfairness to Defendants is also diminished in this case because the Federal Communication Commission has noted that senders of faxes have an obligation to demonstrate compliance with the TCPA, including proof of prior express consent from recipients to whom they send fax ads. The FCC, thus, "strongly suggest[s] that senders take steps to promptly document that they received such permission." 21 F.C.C.R. 3787, 3812 (Apr. 6, 2006). While there is no regulation specifically requiring fax lists, Creditsmarts' policy of intentionally deleting such lists as soon as they are used weighs against any sense of unfairness to Creditsmarts in allowing class certification where

Creditsmarts now refuses to admit or deny whether it sent the ads to every dealer in its database. There is also no unfairness to BMW because it knew Creditsmarts sent the fax to dealerships on its behalf and did nothing to stop Creditsmarts from sending more fax ads on its behalf and made no effort to ascertain how many or to whom Creditsmarts was sending them.

Finally, one of the most important purposes of class actions is to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). This purpose would be thwarted if the district court's stringent documentary records requirement for ascertainability were affirmed. By demanding precise documentary identification, a class would only be ascertainable in the rare cases where the defendant kept exact records or public records existed to make all class member affidavits 100% verifiable by such sources. Such a standard would only rarely be met in cases with small individual stakes, and this would leave the victims of lower value violations with no practical remedy.

The record in this case supports ascertainability and the Court

should rule Plaintiff has satisfied the ascertainability standard and remand for consideration of the other class certification criteria.[6]

III. Because this Court's Heightened Ascertainability Requirement Has Now Been Rejected by Two Other Circuits and by Judges on This Court, this Court Should Reconsider that Requirement.

This case also presents an opportunity for the Court to review the novel second prong of this Court's ascertainability requirement in light of its rejection by two other Circuits. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). Furthermore, judges in the Third Circuit have expressed disapproval of *Carrera*. *See Carrera v. Bayer Corp.*, 2014 WL 3887938, at **1-3 (3d Cir. May 2, 2014) (Ambro, J. dissenting); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172-77 (3d Cir. 2015) (Rendell, J. concurring).

In *Mullins*, the defendant urged the Seventh Circuit to adopt *Carrera* and reverse class certification where the only available method to

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[6] The district court did not address the Rule 23 class certification criteria because it denied class certification abased solely on ascertainability. App044 (Opinion). Because the District Court has yet to conduct a rigorous analysis of the Rule 23 requirements, the Court should "decline to address these issues in the first instance" on appeal. *Byrd*, 784 F.3d at 169.

identify class members was through affidavits. 795 F.3d at 662. The Seventh Circuit declined to do so, and held that "[t]he Third Circuit's approach in *Carrera,* which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23." *Id.* The Court also held that reliance on class member affidavits to satisfy Rule 23 may be sufficient to establish class membership, and that "courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits." *Id.* at 672.

In *Rikos*, the defendant argued, based on *Carrera*, that the class was not ascertainable because there was no way to identify class members. 799 F.3d at 524-25. The Sixth Circuit rejected the defendant's argument, expressly declining to adopt *Carrera*, stating that it "see[s] no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts." *Id.* at 525 (citing *Mullins*, 795 F.3d at 662.)[7]

[7] The First Circuit has found that a class is sufficiently ascertainable if affidavits may be used to establish injury in cases, such as this one, where "consumer testimony would be sufficient to establish injury in an individual suit." *In re Nexium Antitrust Litig.,* 777 F.3d 9, 21 (1st Cir. 2015). The Eleventh Circuit in an unpublished decision followed

Four Third Circuit judges have also expressed their disagreement with the *Carrera* majority's ascertainability requirement. In his dissent from the denial of an *en banc* rehearing in *Carrera*, Judge Ambro joined by Judges McKee, Rendell and Fuentes, stated that "*Carrera* goes too far," and that, as a result of *Carrera,* "some wrongs will go unrighted because the wrongdoers successfully gamed the system." 2014 WL 3887938, at *1. Similarly, in her concurring opinion in *Byrd*, Judge Rendell argued that it was time to "do away" with *Carrera's* heightened ascertainability requirement. 784 F.3d at 172. Judge Rendell noted that "[i]t is up to the judge overseeing the class action to decide what she will accept as proof," and that "[t]he rigorous application of the ascertainability requirement translates into impunity for corporate defendants who have harmed large numbers of consumers in relatively modest increments." *Id.* at **13-14.

Carrera, but left open the possibility that self-identification could be a sufficient means to establish ascertainability if it were "administratively feasible." *Karhu v. Vital Pharmaceuticals, Inc.,* 621 Fed.Appx. 945 (11th Cir. 2015).

Given that *Carrera*'s ascertainability requirement has been rejected by two other Circuits, and is controversial in this Court as well, this appeal provides an excellent opportunity to reconsider its wisdom.

CONCLUSION

For the foregoing reasons, the district court's denial of class certification on the grounds that the class is not ascertainable should be reversed, the Court should find the class is ascertainable and it should remand the case for further proceedings.

Dated: March 21, 2016.

Respectfully submitted,

CITY SELECT AUTO SALES, INC.,
a New Jersey Corporation,
individually and as the
representative of a class of
similarly situated persons,

By: /s/ Jonathan B. Piper

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CERTIFICATE OF COMPLIANCE

The undersigned certifies:

(a) Philip A. Bock, Jonathan B. Piper and Alan C. Milstein whose names appear on this brief are members of the bar of this court;

(b) this brief complies with the type-volume limitation of Fed. R. App. P. 32 (a) (7) (B) because this brief contains 7,198 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B); and

(c) this brief complies with the typeface requirements of Fed. R. App. P. 32 (a) (5) and the type style requirements of Fed. R. App. P. 32 (a) (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century type style.

(d) all parties of record are Filing Users and, as required by 3d Cir. L.A.R. 113.4, this brief and appendix has been served electronically by the Notice of Docket Activity;

(e) prior to filing, the electronic file containing this brief was scanned using the virus scanning software named Trend Micro Security Agent, version 19.0.2166, and no virus was detected; and

(f) the text of the electronic file of this brief is identical to the text of the papers copies of this brief.

/s/ Jonathan B. Piper

Attorney for Plaintiff-Appellant City Select Auto Sales Inc.

Dated: March 21, 2016

United States Court of Appeals for the Third Circuit

No. 15-3931

CITY SELECT AUTO SALES, INC., a New Jersey Corporation, individually and as the representative of a class of similarly situated persons,

Plaintiff-Appellant,

v.

BMW BANK OF NORTH AMERICA, INC., BMW FINANCIAL SERVICES, NA, LLC, and CREDITSMARTS CORP.,

Defendants-Appellees.

Appeal from the United States District Court for the
District of New Jersey
No. 13-4595
The Honorable Noel L. Hillman, presiding

APPELLANT'S APPENDIX Volume 1 of 1 (Pages App001- App057)

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No. 15-8098

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CITY SELECT AUTO SALES, INC., a New Jersey Corporation, individually and as the representative of a class of similarly situated persons,

Petitioner-Plaintiff,

v.

BMW BANK OF NORTH AMERICA INC., *et al.*,

Defendant-Respondents.

Appeal from the United States District Court for the
District of New Jersey
No. 13-4595
The Honorable Noel L. Hillman,

PLAINTIFF'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

D.C. No. 13-cv-4595

CITY SELECT AUTO SALES, INC., a New Jersey corporation, individually and as the representative of a class of similarly-situated persons,

v.

BMW BANK OF NORTH AMERICA, INC., BMW FINANCIAL SERVICES NA, LLC., CREDITSMARTS CORP., and JOHN DOES 1-12.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, CITY SELECT AUTO SALES, INC. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

None

(Signature of Counsel or Party)

Dated: 10/12/2015

PETITION FOR PERMISSION TO APPEAL

I. STATEMENT OF FACTS.

This is a case about over 20,000 faxes sent in November and December 2012 advertising an internet auto loan service, up2drive. All of the faxes were sent to entities in a database maintained by Defendant Creditsmarts.

Creditsmarts is an "internet based lending tree business model" for "small independent auto dealers." (D.E. 65-5 at 226:10-229:7.) Creditsmarts' dealer customers are able to submit a short auto loan application online for their retail car buyers. (*Id.* at 49:15-21, 189:14-191:25.) The application is then forwarded to auto lenders that have agreed to receive applications through Creditsmarts. (*Id.* at 243:25-244:17.) The service is all online and self-executing on Creditsmarts' website. (*Id.* at 107:3-10, 187:17-188:12.) Creditsmarts also provides some regulatory compliance software to its customers. (*Id.* at 16:10-13; 161:15-162:4, 164:13-20, 186:4-6.)

In the Spring of 2012, Creditsmarts entered into a marketing agreement with up2Drive, which is an auto lending division of BMW Bank of North America ("BMW Bank" or the "Bank"). Up2Drive is run by the Bank's administrative affiliate, BMW Financial Services NA, LLC ("BMSFS" and collectively with the Bank, "BMW"). (D.E. 65-3 at 16:7-17:14.) The two BMWFS employees who are mainly responsible for managing the up2drive program are Pawan Murthy and Jake Thompson. (D.E. 65-4 at 9:11-22, 13:22-14:3, 14:19-16:13; D.E.65-3 at 16:20-17:14.)

The purpose of the up2drive/Creditsmarts marketing agreement was to promote the up2drive program to Creditsmarts customers. (*Id.* at 51:9-15, 82:18-83:8.) BMW shared proprietary information including the up2drive logo, marks, advertising images, and xml data criteria. (D.E. 65-5 at 65:8-68:14, Dep. Ex. 14.) BMW also authorized Creditsmarts to promote up2drive on the Creditsmarts website, and helped Creditsmarts to create an online advertisement. (D.E. 65-4 at 107:15-21, Dep. Ex. 14.)

On three occasions in late 2012, Creditsmarts used a fax broadcaster named Westfax, Inc. ("Westfax") to broadcast an advertisement for up2drive over 20,000 times. (D.E.65-7 at 25:14-23, 28:19-29:18; 42:20-43:10, Dep. Ex. 2, 3, 4; D.E. 65-8 at Dep. Ex. 6.) The contents of the BMW Fax are essentially the same as the contents of the webpage on the Creditsmarts website for up2drive, which up2drive had approved. (*See* D.E. 65-5 at Dep. Ex. 1, 14.)

The BMW faxes were sent to auto dealerships in the Creditsmarts database at the end of 2012. In response to document requests, Creditsmarts admitted, "The recipients of each separate fax transmission are separately chosen from the subscribers in the most current version of the live database depending upon the nature, extent, location and/or subject matter of the facsimile." (D.E. 65-6 at 22-23.) Creditsmarts witnesses also confirmed that the faxes would have been sent to fax numbers drawn from the database. (D.E. 65-8 at 24:5-20; 38:23-39:5; D.E.65-5 at 18:24-19:1; 53: 24-54:5; 218: 3-11.)

No Creditsmarts client gave express permission to receive faxes advertising up2drive. Moreover, the "opt out" notice on the BMW Fax is deficient and non-compliant with federal law and regulations.

Westfax's and Creditsmarts' business records show that the BMW Fax was sent on the following dates with following numbers of successful transmissions (and charges for faxing):

Nov. 29, 2012	5,480 successful faxes	$219.20
Dec. 4, 2012	5,107 successful faxes	$204.28
Dec. 27, 2012	10,402 successful faxes	$416.08

(D.E. 65-8 at Dep. Ex. 6.)

Creditsmarts provided Westfax the list of fax numbers to which the broadcast was sent. (D.E. 65-8 at 23:1-10, 24:14-20, 48:21-49:21.) These fax numbers came from Creditsmarts' client database composed of 20,000 to 30,000 auto dealerships. (D.E. 65-5 at 136:5-138.) These include Creditsmarts' current and former customers. (*Id.* at 136:5-138:8.) The database fields for the customers, including names, addresses and fax numbers, are the same for all customers in the database. (D.E. 65-8 at 46:19-49:15.)

Creditsmarts and Westfax destroyed, or elected not to receive, records identifying the recipients to whom the BMW Fax was sent. (D.E. 65-5 at 217:25-218:2, 219:2-5; D.E. 65-7 at 112:22-113:5.)

On or before December 10, 2012, BMW became aware of the BMW Fax. (D.E. 65-9 at 5:10-17, 7:9-11:13, 13:17-25, 15:9-11, Dep. Ex. 1, 2.) A BMW sales

representative saw the fax and sent an internal email to Pawan Murthy, the head of up2drive. (*Id.* at 11:20-12:1, 14:18-18:15, Dep. Ex. 2.) The email was cc'd to Chip Strollo, another BMWFS employee, who was Mr. Magpuri's superior. (*Id.*) The email stated:

> "Hi Pawan,
> "I ran into the attached flyer at one of my IUCDs [independent used car dealers]. I called the number and it goes to a company called Credit Smart. They appear to be some sort of 'middle man' between lenders and customers/dealer. Is U2D working with them?" (*Id.* at Dep. Ex. 2.)

Mr. Murthy responded to Mr. Magpuri later that day with an email that he also cc'd to up2drive executive Jake Thompson:

> "Hi Jaime – yes we are working with creditsmarts. They're trying to develop a network of independents who have been providing us some good business. Of course, if they're an alphera dealers, we pay the standard flat fee.
> "Jake was the one who worked on this agreement (cc'd here).
> "Let us know if you have any questions.
> P" (*Id.* at Dep. Ex. 2.)

Neither Mr. Magpuri nor Mr. Thompson believed that the BMW Fax was improper. (*Id.* at 19:23-20:16, 24:23-25:9. They took no steps to investigate the fax. (*Id.* at 21:16-29:4; D.E. 65-3 at 19:3-7.) They did not contact anyone internally at BMWFS to discuss the fax, or whether it violated BMWFS' relationship with Creditsmarts or violated the law. (*Id.*) BMWFS did not assert that there was a material breach of any contract by Creditsmarts at that time. (D.E. 65-3 at 30:8-13.) BMWFS has not terminated its agreements with Creditsmarts because of the fax advertising on up2drive's behalf. (*Id.* at 75:24-76:24; D.E. 65-5 at 79:17-25.) Up2drive has continued to receive applications through Creditsmarts and has

continued to approve loans from Creditsmarts. (*Id.*) Up2drive has never expressed that it did not want to receive applications that may have resulted from the BMW Fax. (*Id.*)

The BMW Fax contained the logo of up2drive that up2drive had provided for use in marketing the program. (D.E. 65-5 at Dep. Ex. 1.) The fax actually did appear to have been sent by BMW to the people who received it. (*Id.*) Not even the two up2drive executives who saw the fax believed it was unauthorized. (D.E. 65-3 at 23:9-27:3, 64:21-65:4.)

One recipient of the BMW Fax was the named plaintiff, City Select Auto Sales, Inc. ("City Select"). City Select is an auto dealership with its main location in Burlington, New Jersey. (D.E. 65-10 at 5:1-13.) City Select received the BMW Fax at the City Select fax number that was included in the Creditsmarts customer database. (*Id.* at 25:30:31, Dep. Ex. 2.) City Select did not consent to receive faxes from BMW or Creditsmarts. (*Id.* at 38:16-18.) City Select has no business relationship with either BMW or Creditsmarts. (*Id.* at 9:23-10:2, 33:22-24, 41:23-43:12.) City Select did not submit any loan applications through Creditsmarts. (*Id.* at 33:22-41:14.)

Plaintiff moved for class certification, proposing the following class definition:

> All auto dealerships that were included in the Creditsmarts database on or before December 27, 2012, with fax numbers identified in the database who were sent one or more telephone facsimile messages between November 20, 2012 and January 1, 2013, that

advertised the commercial availability of property, goods or services offered by "BMW Bank of North America."

On September 29, 2015, the District Court denied Plaintiff's motion for class certification, finding that Plaintiff's proposed class was not ascertainable. (D.E. 100.) Based on its determination that the class was not ascertainable under Third Circuit precedent, the District Court declined to consider the remaining requirements for class certification. (D.E. 100 at 24.)

II. THE QUESTIONS PRESENTED.

This appeal presents the following questions:

1. In this TCPA "junk fax" case, where defendant allegedly sent over 20,000 unsolicited faxes in express violation of a federal statute, where the universe of individuals and companies from which the intended recipients were drawn is known, but where one defendant destroyed the documents which would have identified the exact recipients, and where plaintiff is willing to provide notice to that universe of individuals and companies to determine who received the faxes, should the District Court have refused to certify the class on ascertainability grounds, thus immunizing defendants from real liability for their unlawful acts?
2. Should this Court's "ascertainability" requirement, which has now been expressly rejected by two other circuits and even by Judges of this Court, be reconsidered?

III. THE RELIEF SOUGHT.

The order below should be vacated and the case remanded for reconsideration of class certification in light of a clarification of the law on ascertainability.

IV. REASONS WHY THE APPEAL SHOULD BE ALLOWED.

I. The Class is Sufficiently Ascertainable Because Membership in the Class Is Limited to Persons Within the Database That was the Source of all the Fax Numbers to Which the Junk Faxes Were Sent.

In a series of decisions, this Court has articulated a requirement that classes are not certifiable under Fed. R. Civ. P. 23(b)(3) unless the class is "ascertainable." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 n.5 (3rd Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–08 (3d Cir.2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354–56 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–94 (3d Cir.2012). Although "ascertainability" is not explicitly required in Rule 23, the Court has found it to be "implied" as a preliminary requirement. *Byrd*, 784 F.3d at 162 n.5.

Marcus explained that the ascertainability requirement serves three policy goals. First is to eliminate "serious administrative burdens" by insisting on "easy identification of class members." 687 F.3d at 593. Second is to protect absent class members by facilitating notice to those class members. *Id.* Third is to protect the rights of defendants by assuring that the persons bound by a final judgment can be

identified. *Id. See also Carrera*, 727 F.3d at 307.

When considering a plaintiff's proposed mechanism for ascertaining the class, the Third Circuit has cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so[,]" by, for example, "having potential class members submit affidavits" that they meet the class definition. *Marcus,* 687 F.3d at 594. Without "further indicia of reliability," permitting such a method would essentially force defendants "to accept as true absent persons' declarations that they are members of the class," raising "serious due process implications." *Id.* A "petition for class certification will founder if the *only* proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding." *Hayes,* 725 F.3d at 356 (emphasis added).

In this case, over 20,000 faxes were sent by Creditsmarts through its fax broadcaster to fax numbers drawn from Creditsmarts' database. At that time, there were about 18,000 active entries in the database. Although Creditsmarts created the lists of fax numbers for the fax broadcasts, both Creditsmarts and its broadcaster deleted the lists once the faxes were sent. However, in February 2014, less than fourteen months after the faxing, Creditsmarts preserved a copy of the database from which the fax numbers were drawn.

In the District Court, Plaintiff argued that the identities of class members could be ascertained through a combination of claim forms or affidavits and the existence of the database. Plaintiff contended that the fact that a claimants'

information was included in the database from which fax numbers were taken at the time of the faxing would provide sufficient objective indicia to corroborate their claim. Moreover, the fax broadcaster's invoices establish the total number of faxes sent at 20,989.

The District Court found that Plaintiff's proposed method of ascertaining class membership "is not based only on the 'say so' of the prospective class members, in that the Creditsmarts database may provide an additional layer of verification." (D.E. 100 at 19.) As the Court noted, "it appears there is documentary evidence of the potential universe of class members." (D.E. 100 at 21.) The Court further noted that the database entries in the preserved copy of the database would establish which entries existed at the time of the faxing. *Id.* The Court also acknowledged that those entries in the database that included no fax number could be eliminated from the class. (*Id.*) The ability to narrow down the potential universe of class members distinguishes *Carrera.* There, the issue was whether customers had purchased a particular weightloss supplement. Unlike here, there were no objective records to establish a universe of potential class members. 727 F.3d at 304.

Because the objective information would narrow the potential class membership down to those auto dealerships in the database as of late 2012 that had fax numbers, the only remaining issue would be whether the entities within that narrow universe actually received the fax. Plaintiff argued that as to that issue, the answer could be verified by a simple claim form.

The District Court rejected that approach, however, because it was not established whether "the BMW fax was sent to every customer who had a fax number in the database during the relevant time period." (D.E. 100 at 21.) The Court concluded that to show ascertainability, the fact that a fax was actually sent to a particular fax number in the database also needed to be proved by objective documentation other than claim forms. Because the database did not supply that final piece of information, the Court found that the class was not ascertainable. (D.E. 100 at 21.)

The only piece of information on which a claim form would be needed in this case is whether the class member was sent the fax. That is a much narrower factual issue than the issues subject to "say-so" verification in earlier Third Circuit cases finding a lack of ascertainability. For example, in *Marcus,* there were three fact issues on which verification was needed: (1) whether a purchased car was fitted with run-flat tires, (2) whether a customer had changed the tires, and (3) whether the customer had experienced a flat. 687 F.3d at 593-94. Similarly, in *Hayes,* the class members would need to verify (1) that they had purchased extended warranties and "as-is" products, and also that (2) the products were not covered by the manufacturer's warranty, or (3) were "last one" items.

Hence, no Third Circuit precedent supports the District Court's conclusions that each and every aspect of class membership must be proved based on documentation. Rather, *Carrera* found the class unascertainable because there was *no* documentation of class membership, and *Marcus* and *Hayes* found the classes

unascertainable because multiple elements of the proposed definitions were not documented. Here, in contrast, not only is there a database establishing a narrow universe of potential class members, but there is only one issue—actual sending of the fax—that is undocumented.

Moreover, as the Court acknowledged, the Federal Communication Commission, with responsibility for implementing the TCPA, has noted that senders of faxes have an obligation to demonstrate compliance with the TCPA, including prior consent to receive the faxes, and that the FCC "strongly suggest[s] that senders take steps to promptly document that they received such permission." 21 F.C.C.R. 3787, 3812 (Apr. 6, 2006). While there is no regulation specifically requiring fax lists, the fact that Creditsmarts had such a list and failed to maintain it weighs equitably against denying class certification merely because that list no longer exists.

Plaintiff's proposed method of establishing class membership is consistent with the purposes of the "ascertainability" requirement. Because all the potential class members are included in the preserved database, notice to all class members will be possible, and all class members will have an opportunity to opt out of the class. As a result, a judgment would be binding on all class members, and Defendants would be protected from future litigation because they would be able to establish that any future claimant received notice and is bound by the judgment. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) ("Unlike the defendants in *Phillips* and *Carrera*, Dow has not identified any reason to believe

that the judgment here would fail to bind all class members.)" A method of notifying class members and obtaining claim forms self-identifying class members who received the fax would be administratively feasible. *See Karhu v. Vital Pharmaceuticals, Inc.*, 2015 WL 3560722 (11th Cir. 2015) (self-identification of class members by affidavit may be sufficient if it is administratively feasible). Defendants have not made any showing that they would be able to come forward to challenge the self-identifying testimony of any class member. Accordingly, there is no risk of "mini-trials" once class members who are in the Creditsmarts database step forward asserting under oath that they received the fax.

For all these reasons, class members may readily be identified through a claims process or by affidavit with reference to objective criteria in the Creditsmarts database, which establishes objectively those (1) auto dealerships that (2) were included in the database (3) on or before December 27, 2012, (4) with fax numbers identified in the database. This Court should accept this appeal and clarify that a class is ascertainable if sufficient objective information exists to narrow the universe of potential class members to an extent that only limited information depends on the "say so" of class members, particularly where the complete list of class members was in a defendant's possession but deleted or destroyed. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (use of consumer affidavits to establish which class members suffered injury permissible in class action).

II. Given That This Court's Ascertainability Requirement Has Now Been Rejected by Two Other Circuits and by Judges on This Court, This Court Should Reconsider That Requirement.

This case also presents an opportunity for the Court to review the ascertainability requirement in light of its rejection by two other Circuits. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). Furthermore, judges in the Third Circuit have expressed disapproval of *Carrera*. *See Carrera v. Bayer Corp.*, 2014 WL 3887938, at **1-3 (3d Cir. May 2, 2014) (Ambro, J. dissenting); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172-77 (3d Cir. 2015) (Rendell, J. concurring).

In *Mullins*, the defendant urged the Seventh Circuit to adopt *Carrera* and reverse class certification where the only available method to identify class members was through affidavits. 795 F.3d at 662. The Seventh Circuit declined to do so, and held that "[t]he Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23." *Id.* The Court also held that reliance on class member affidavits to satisfy Rule 23 may be sufficient to establish class membership, and that "courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits." *Id.* at 672.

In *Rikos*, the defendant argued, based on *Carrera*, that the class was not ascertainable because there was no way to identify class members. 799 F.3d at 524-

25. The Sixth Circuit rejected the defendant's argument, expressly declining to adopt *Carrera*, stating that it "see[s] no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts." *Id.* at 525 (citing *Mullins*, 795 F.3d at 662.)[1]

Two Third Circuit judges have also expressed their disagreement with the *Carrera* majority's ascertainability requirement. In his dissent from the denial of an *en banc* rehearing in *Carrera*, Judge Ambro stated that he "believe[s] instead that *Carrera* goes too far," and that, as a result of *Carrera*, "some wrongs will go unrighted because the wrongdoers successfully gamed the system." 2014 WL 3887938, at *1. Similarly, in her concurring opinion in *Byrd*, Judge Rendell argued that it was time to "do away" with *Carrera's* heightened ascertainability requirement. 784 F.3d at 172. Judge Rendell noted that "[i]t is up to the judge overseeing the class action to decide what she will accept as proof," and that "[t]he rigorous application of the ascertainability requirement translates into impunity for corporate defendants who have harmed large numbers of consumers in relatively modest increments." *Id.* at **13-14.

Given that *Carrera*'s ascertainability requirement has been rejected by two other Circuits, and is controversial in this Court as well, this appeal provides an excellent opportunity to reconsider its wisdom.

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[1] The First Circuit has found that a class is sufficiently ascertainable if affidavits may be used to establish injury in cases, such as this one, where "consumer testimony would be sufficient to establish injury in an individual suit." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015). The Eleventh Circuit followed *Carrera* but left open the possibility that self-identification could be a sufficient means to establish ascertainability if it were "administratively feasible." *Karhu v. Vital Pharmaceuticals, Inc.*, 2015 WL 3560722 (11th Cir. 2015).

V. ORDERS ATTACHED.

1. Opinion (D.E. 100) dated September 29, 2015.

2. Order (D.E. 101) dated September 29, 2015.

VI. CONCLUSION.

For all the foregoing reasons, the Court should grant this Petition for Permission to Appeal, order plenary briefing on the appeal, vacate the denial of class certification, and remand for further proceedings on the motion for class certification.

Respectfully submitted,

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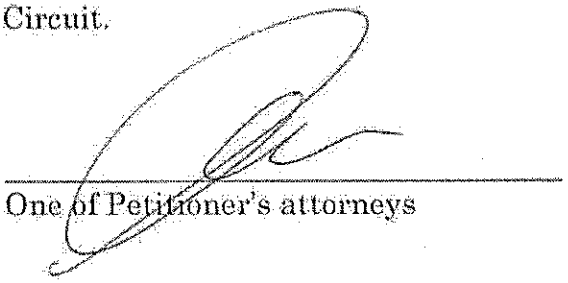
CERTIFICATION

Pursuant to LAR 28.3(d), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.



One of Petitioner's attorneys

CERTIFICATE OF SERVICE

I certify that, on October 13, 2015, I caused copies of the foregoing petition to be served on the parties listed below by depositing them in the U.S. mail at 134 N. La Salle St., Chicago, IL, with proper postage prepaid and addressed as follows:

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CITY SELECT AUTO SALES, INC., a New Jersey corporation, individually and as the representative of a class of similarly situated persons,

Plaintiff,

v.

BMW BANK OF NORTH AMERICA INC., et al.,

Defendants.

Civil No. 13-4595 (NLH/JS)

OPINION

APPEARANCES:

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HILLMAN, District Judge:

In this putative class action for claims concerning an alleged "junk fax," presently before the Court are Plaintiff's motion for class certification and a motion by Defendants BMW Bank of North America, Inc. and BMW Financial Services NA, LLC (hereafter, "BMW Defendants") for summary judgment. Associated with these motions are two motions by Plaintiff for leave to cite supplemental authority, and a motion by Plaintiff to strike a submission filed by Defendant Creditsmarts Corp. (hereafter, "Creditsmarts") joining in the BMW Defendants' summary judgment motion.[1]

The Court has considered the submissions of the parties and decides this matter pursuant to Fed. R. Civ. P. 78. For the reasons that follow, Plaintiff's motion for class certification will be denied, Plaintiff's motions for leave to cite supplemental authority will be granted, the BMW Defendants' summary judgment motion will be denied, and Plaintiff's motion to strike Creditsmarts' submission will be granted.

I. BACKGROUND

On December 27, 2012, Plaintiff, City Select Auto Sales, Inc., received an unsolicited telephone facsimile on its fax

[1] Creditsmarts does not seek summary judgment on its behalf, but only to present further evidence in support of the BMW Defendants' motion.

machine. Plaintiff alleges that the fax was an advertisement for the goods, products or services of the BMW Defendants and Creditsmarts. Based on this fax, Plaintiff filed a two-count complaint alleging a violation of the Telephone Consumer Protection Act (hereafter, "TCPA"), 47 U.S.C. § 227, and common law conversion. Plaintiff and the BMW Defendants thereafter stipulated to dismissal of the conversion count, but such count remains pending as to Creditsmarts.

Defendant BMW Bank of North America, Inc. (hereafter, "BMW Bank") offers direct automotive financing through "up2drive," a division of BMW Bank that provides direct loans to consumers. Up2drive is an auto lending division of BMW Bank, but Defendant BMW Financial Services NA, LLC (hereafter, "BMW FS") is the service provider for up2drive.

Creditsmarts is an internet-based "indirect business-to-business lending tree model." According to Creditsmarts' website,[2] an independent automobile dealer inputs customer information into a Creditsmarts database, and the information is forwarded to various lenders who have agreed to receive applications through Creditsmarts. Those lenders then approve loans for the customers, which approval is forwarded back to the automobile dealers. Through this model, lenders have access to

[2] www.creditsmarts.com/products.asp

more applicants, and dealers are able to sell more cars when their customers can more quickly and readily obtain automobile loans.

BMW FS entered into two agreements with Creditsmarts: a Master Professional Services Agreement (hereafter, "MPSA"), and an up2drive/Vendor Marketing Agreement (hereafter, "Marketing Agreement"). Pursuant to the terms of the MPSA, Creditsmarts was to provide "either professional consulting services and/or employment agency services," which services were to be described in separate "Statement of Work" agreements that would be incorporated into the MPSA.

The Marketing Agreement is governed by the MPSA and incorporates the terms and conditions of the MPSA. The Marketing Agreement states that up2drive "desires to provide conditional approvals to qualified customers, to offer loans or other various consumer loan products to approved customers," and to perform other duties defined in the contract. In addition, the Marketing Agreement states that Creditsmarts "offers potential borrowers the opportunity to complete a simple application form" so that credit information may be provided to lenders, and "desires to match qualified customers with the appropriate lender by evaluating whose credit profile passes the minimum credit parameters established by up2drive[.]"

The Marketing Agreement defined Creditsmarts' responsibilities as follows:

> 1) [Creditsmarts] will establish electronic systems to permit customers to communicate with up2drive through mutually agreed secure lines of communication.
>
> 2) [Creditsmarts] will process all application forms using the minimum credit parameters established by up2drive and the information obtained . . . from the application form including the customer's credit history, that will provide sufficient data to determine whether the customer may qualify for any loan programs offered from by [sic] up2drive.

Notwithstanding the terms of the Marketing Agreement, Pawan Murthy, the general manager of online business for BMW FS, who signed the Marketing Agreement, testified that Creditsmarts was primarily hired to conduct advertising for up2drive. He described the relationship with Creditsmarts as a "marketing partnership" which "allows [up2drive's] services to be presented to the customers that CreditSmarts" has. According to Murthy, pursuant to the Marketing Agreement, Creditsmarts was to "promote up2drive services on behalf of" the BMW Defendants.

On three occasions in late 2012, Creditsmarts -- through a fax broadcaster named Westfax, Inc. (hereafter, "Westfax") -- broadcast a fax that contained the up2drive logo and identified BMW Bank of North America (hereafter, the "BMW fax"). Invoices from Westfax to Creditsmarts indicate that 5,480 BMW faxes were sent on November 29, 2012, 5,107 BMW faxes were sent on December

3, 2012, and 10,402 BMW faxes were sent on December 27, 2012. Plaintiff was the recipient of the December 27, 2012 fax. The BMW Defendants and Creditsmarts contend that the BMW Defendants neither requested the creation of the fax nor authorized transmission of the fax at issue in this case.[3]

To send a fax through Westfax, Creditsmarts would upload the image to be faxed as well as a list of fax numbers. The fax numbers were culled from Creditsmarts' customer database, which included various fields including customers' contact information, a "creation date" establishing when the business was added to the database, a field showing when the customer record was last updated, and a fax number if one had been provided by the customer.

The list of fax numbers that was provided to Westfax by Creditsmarts in connection with the BMW fax was never preserved. Westfax routinely discards its copies of such lists and no longer has access to the list of fax numbers provided by Creditsmarts. Creditsmarts has a policy of maintaining the list

[3] According to Defendants, Creditsmarts was required under the MPSA to obtain prior written approval from the BMW Defendants before using either of the BMW Defendants' names, trademarks or service marks "in any advertisement or publication." Because the BMW fax contained the up2drive logo and the name of BMW Bank, Defendants contend that Creditsmarts required the BMW Defendants' approval before sending the fax.

of fax numbers as a temporary file until such list is uploaded to the Westfax portal, at which time the list is deleted.

Although there is no record of the customers to whom the BMW fax was sent, Plaintiff asserts that such list can be re-created from Creditsmarts' database because the database includes the potential universe of fax recipients. The database, however, was not preserved as of December 2012 and is routinely updated. Nonetheless, Creditsmarts' database was preserved as of February 2014, and Plaintiff represents that recipients of the BMW fax can be identified from the 2014 version of the database by ascertaining those customers who were added to the database before December 2012 and who had fax numbers listed in the database.[4]

[4] Plaintiff does not currently have the February 2014 version of the database. This document was subject to a motion to compel discovery which was denied by Magistrate Judge Schneider in an oral opinion and confirmed by text order dated February 20, 2015. Plaintiff has produced an example of the information contained in the database, and the absence of the database in the record does not affect the Court's decision on class certification. As noted by the Third Circuit, a plaintiff does not have to identify all class members at class certification; "instead, a plaintiff need only show that 'class members can be identified.'" Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) (internal citation omitted). If, hypothetically, recipients of the BMW fax could be ascertained from the Creditsmarts database, the Court would not require the database at this time as we need not identify each fax recipient for purposes of class certification.

II. JURISDICTION

The Court has jurisdiction over Plaintiff's federal claim under 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiff's state law claim under 28 U.S.C. § 1367.

III. STANDARD FOR CLASS CERTIFICATION

A. Rule 23

In order to qualify for class certification under Federal Rule of Civil Procedure 23, a plaintiff must satisfy the four elements set forth in Rule 23(a), as well as the requirements of one of the three subsections in Rule 23(b). Wal-Mart Stores, Inc. v. Dukes, , --- U.S. ---, 131 S. Ct. 2541, 2548-49, 180 L. Ed. 2d 374 (2011). Rule 23(a) contains the prerequisites for a class, providing that class certification is proper if:

> (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). "[Class] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" Hayes v.

Wal-Mart Stores, Inc., 725 F.3d 349, 353-54 (3d Cir. 2013) (quoting Dukes, 131 S. Ct. at 2551).

Once a plaintiff satisfies all four prerequisites under Rule 23(a), Rule 23(b) then identifies the types of class actions that can be brought. Plaintiffs in this case seek certification pursuant to Rule 23(b)(3), which provides that a class may be certified if "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." Fed. R. Civ. P. 23(b)(3). 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 party moving for class certification bears the burden of demonstrating that the requirements of Rule 23 are met by a preponderance of the evidence. Hayes, 725 F.3d at 354; see also Comcast Corp. v. Behrend, --- U.S. ---, 133 S. Ct. 1426, 1432,

185 L. Ed. 2d 515 (2013)("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23.")(internal citations omitted). "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008). "'Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met.'" Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) (quoting Hydrogen Peroxide, 552 F.3d at 309).

B. Ascertainability of the Class

Before turning to the express requirements of Rule 23, courts must address the ascertainability of a class as a "preliminary" or "implied" requirement of class certification when a class action is brought under Rule 23(b)(3). Byrd v. Aaron's Inc., 784 F.3d 154, 162 n.5 (3d Cir. 2015); Carrera, 727 F.3d at 305 (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591 (3d Cir. 2012)). "Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on

objective criteria." Marcus, 687 F.3d at 592-93 (citations omitted). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." Id. at 593.

The Third Circuit, in Carrera, explained that the ascertainability requirement serves several important objectives. "First, at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class." Carrera, 727 F.3d at 307. "Second, it ensures that a defendant's rights are protected by the class action mechanism." Id. "Third, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action." Id. "If a class cannot be ascertained in an economical and 'administratively feasible' manner, significant benefits of a class action are lost." Id. (citing Marcus, 687 F.3d at 593-94).

In recent years the Third Circuit has emphasized the importance of ascertainability with respect to classes certified under Rule 23(b)(3). In Marcus, the claim was that Bridgestone "run-flat tires" were defective because they were highly susceptible to flats, could not be repaired but only replaced, and were expensive. Marcus, 687 F.3d at 588. The district court certified a class of current and former owners and lessees

of BMW vehicles equipped with the run-flat tires whose tires had gone flat and been replaced. Id. at 590. On appeal, the Third Circuit noted BMW's arguments that it did not have records of which cars were fitted with run-flat tires, that some customers may have changed tires without BMW's knowledge, and that BMW would not have known which customers experienced flat tires. Id. at 593-94. The Third Circuit rejected the idea that having vehicle owners "submit affidavits that their [run-flat tires] have gone flat and been replaced" would be sufficient for ascertaining class membership because it would be based only on "potential class members' say so." Id. at 594. "Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." Id.

In Carrera, the Third Circuit, relying on Marcus, vacated the certification of a class defined as all consumers who bought WeightSmart, a dietary supplement, in Florida. 727 F.3d at 304. The plaintiff had alleged on behalf of a putative class that the defendant, Bayer, falsely claimed the supplement enhanced metabolism, but the plaintiff could not satisfy the ascertainability standard because class members were unlikely to have documentary proof of purchase, such as packaging or receipts, and Bayer had no list of purchasers because it did not sell directly to consumers. Id. The plaintiff suggested that

class members could submit affidavits attesting to their purchase of the supplement, and also proposed a mechanism for screening the affidavits to identify potentially fraudulent claims, but the Third Circuit concluded that the plaintiff had not demonstrated ascertainability. Id. at 308, 311.

In so finding, the Third Circuit stated that the "method of determining whether someone is in the class must be 'administratively feasible.'" 727 F.3d at 307. "'Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry.'" Id. at 307-08 (internal citation omitted). The Third Circuit further stated that "to satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." 727 F.3d at 308.

In Hayes, the Third Circuit again vacated the certification of a class of consumers. In Hayes, Sam's Club offered extended warranties for various items in the store, which warranties did not cover "as-is" items unless such items still had their manufacturer's original warranties, were "last one" items that were sealed and brand-new, or were display items. 725 F.3d at

352.[5] The district court certified a class of consumers who purchased extended warranties to cover "as-is" products, but excluded from the class those consumers whose "as-is" products were covered by the manufacturer's warranty or were "last one" items. Id. at 353.

The Third Circuit found that the plaintiff failed to demonstrate the ascertainability of the class. Even though the defendant failed to keep records of who purchased "as-is" items, which hindered the plaintiff's ability to bring a class action, the Third Circuit emphasized that the plaintiff nonetheless must demonstrate that the requirements of Rule 23 are met. Id. at 356. The Third Circuit stated that a plaintiff does not meet his burden of showing by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class when "the only proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding." Id.

In Byrd, the plaintiffs entered into a lease agreement to rent a laptop computer from the defendant, a franchisee of Aaron's, Inc., and subsequently learned that the defendant,

[5] Items could be designated "as-is" for a number of reasons, including (1) display items, which were removed from their packaging to show to members; (2) items which were purchased and then returned; (3) items that were "last one" products that Sam's Club wanted to clear out; or (4) items that were damaged in-Club. Hayes, 725 F.3d at 325.

without the plaintiffs' knowledge, had installed spyware that collected screenshots, keystrokes, and webcam images from the computer and its users. Byrd, 784 F.3d at 159. The plaintiffs brought a class action complaint alleging violations of and conspiracy to violate the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2511, as well as common law invasion of privacy and aiding and abetting. Id. The plaintiffs sought to certify classes of persons who leased or purchased computers from Aaron's, Inc. or an Aaron's, Inc. franchisee, and their household members, on whose computers spyware was installed and activated without consent. Id.

The Third Circuit in Byrd provided a thorough explanation of the ascertainability requirement. Although the district court had concluded that the proposed classes were not ascertainable, the Third Circuit reversed for a number of reasons, including that the lower court misstated and applied the wrong law governing ascertainability by conflating class definition standards with the ascertainability requirement. Id. at 165-66. The Third Circuit in Byrd concluded that the proposed classes consisting of "owners" and "lessees" were ascertainable because there were "objective records" that could "readily identify" the class members, because Aaron's records revealed the computers upon which the spyware was activated and the identity of the customer who leased or purchased each

computer. Id. at 169. Furthermore, although the class definitions also included "household members" of the lessees and owners of laptop computers, the Third Circuit found that such household members were ascertainable because they could submit a form attesting to their status in the putative class, and the forms could then be reconciled against the already-known addresses of owners and lessees as well as additional public records. Id. at 170.

IV. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where the Court is satisfied that "'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' . . . demonstrate the absence of a genuine issue of material fact" and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing Fed. R. Civ. P. 56).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. Id. "In considering a motion for summary judgment, a district court may

not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004)(citing Anderson, 477 U.S. at 255, 106 S. Ct. 2505).

Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S. Ct. 2548 ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."); see also Singletary v. Pa. Dept. of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001) ("Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof.")(citing Celotex, 477 U.S. at 325, 106 S. Ct. 2548).

Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts

showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S. Ct. 2548. A "party opposing summary judgment 'may not rest upon the mere allegations or denials of the . . . pleading[s.]'" Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001). For "the non-moving party[ ] to prevail, [that party] must 'make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Cooper v. Sniezek, 418 F. App'x 56, 58 (3d Cir. 2011) (citing Celotex, 477 U.S. at 322, 106 S. Ct. 2548). Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. Anderson, 477 U.S. at 257, 106 S. Ct. 2505.

V. DISCUSSION

A. Class Certification

Plaintiff seeks certification of the following class:

> All auto dealerships that were included in the Creditsmarts database on or before December 27, 2012, with fax numbers identified in the database who were sent one or more telephone facsimile messages between November 20, 2012 and January 1, 2013, that advertised the commercial availability of property, goods or services offered by "BMW Bank of North America."

Because Plaintiff seeks to certify a class pursuant to Fed. R. Civ. P. 23(b)(3), the Court first considers the ascertainability of the class. Indeed, ascertainability is the

main point upon which Defendants' opposition is based. The record is clear that the BMW Defendants, Creditsmarts, and Westfax did not maintain a list of individuals or entities that were contacted by fax. The invoices from Westfax show only the total number of faxes sent on various dates, but do not reflect the individual fax numbers to which the faxes were sent. Plaintiff contends, nevertheless, that the class is ascertainable because if an auto dealership claims to have received the fax, and that claimant is an auto dealership in Creditsmarts' database, then class membership is based not on only the dealership's "say so" but also on the corroborating fact that the dealership is within the universe of database entries from which the fax list was constructed.

The Court finds that Plaintiff fails to demonstrate that the class is ascertainable. The Court notes that Plaintiff's proposed method of ascertaining the class is not based only on the "say so" of the prospective class members, in that the Creditsmarts database may provide an additional layer of verification. However, after carefully considering the Third Circuit case law, the Court cannot conclude that Plaintiff has met its burden of demonstrating that the class is ascertainable.

As discussed above, in Hayes, the Third Circuit considered the ascertainability of a class of consumers who purchased from Sam's Clubs in the State of New Jersey a Sam's Club Service Plan

to cover "as-is" products. When a customer purchased an "as-is" product, the cashier had to perform a manual price override. Price overrides were also performed for other reasons, such as matching a competitor's price or adjusting the price to a sale price. While Sam's Club had a record of all 3,500 purchases with price overrides, which would have included all of the customers who purchased "as-is" products, there was no way to determine "how many of the 3,500 price-override transactions that took place during the class period were for as-is items." Hayes, 725 F.3d at 355. Thus, although the potential universe of customers was known to Walmart, the Third Circuit found that the class was not ascertainable.

Similarly, in Marcus, the plaintiff sought to certify a class of owners and lessees of BMW vehicles equipped with run-flat tires whose tires had gone flat and been replaced. While there was a possibility that records could be produced to identify the original owners and lessees of BMW vehicles factory-equipped with run-flat tires which were initially purchased or leased from New Jersey dealerships, there was no way of knowing which cars left the lots with run-flat tires because the tires could have been replaced by dealers in the interim, and there was also no way of knowing which cars' tires had gone flat and been replaced once they left the dealership.

In this case, similar to the facts of Hayes and Marcus, it appears there is documentary evidence of the potential universe of class members. It is clear from the record that the list of recipients of the BMW fax was generated from the Creditsmarts database, and although the database was not preserved until February 2014, it appears that the parties can determine from the database those customers that were also on the list in December 2012.[6] From this subset of customers, the parties can eliminate those customers who could not have been sent the fax because no fax number was contained in the database. However, there is no evidence that the BMW fax was sent to every customer who had a fax number in the database during the relevant time period. Plaintiff here has provided no method for determining which of the remaining customers would have been sent the BMW fax. Much like Hayes and Marcus, even though Plaintiff may be able to identify the potential universe of fax recipients, there

[6] The Court recognizes that the database preserved as of 2014 is not identical to the database as of December 2012, and some auto dealerships who may claim they received the BMW fax may be erroneously excluded from the class because they were removed from the database at some point between December 2012 and February 2014. As the Third Circuit noted in Byrd, however, a putative class need not "include all individuals who may have been harmed by a particular defendant[.]" Byrd, 784 F.3d at 167. "Individuals who are injured by a defendant but are excluded from a class are simply not bound by the outcome of that particular action." Id.

is no objective way of determining which customers were actually sent the BMW fax.[7]

In so finding, the Court recognizes Plaintiff's argument that Defendants had the burden of establishing their compliance with the TCPA and that each person to whom a fax is sent gave prior permission. In the authority upon which Plaintiff relies -- In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 -- the FCC notes that a sender of facsimiles has the obligation of demonstrating that it

[7] Plaintiff argues that the facts of this case are more akin to Byrd because claimants can be verified by cross-reference to objective records, i.e. the Creditsmarts database. The Court disagrees. In Byrd, the defendants' records revealed the computers upon which the spyware was activated, as well as the full identity of the customer who leased or purchased each of those computers. Here, by contrast, the Creditsmarts database does not reveal those customers to whom the BMW fax was sent. If an auto dealership claims that it received the BMW fax, there is no way of verifying by reference to the database that the dealership was, in fact, sent the fax. Plaintiff's reliance on Clark v. Bally's Park Place, Inc., 298 F.R.D. 188 (D.N.J. 2014), is similarly misplaced. Clark involved a class of employees who were required to attend "Buzz Sessions" before their shifts but were not paid for their time attending such sessions. Although the defendants did not maintain records of those employees who participated in the Buzz Sessions, the district court concluded that the class was ascertainable. The defendants could identify those employees who worked a "Buzz Session eligible shift" through the use of employment records, and could assume that such employees actually attended the Buzz Sessions because attendance was mandatory. Here, by contrast, there is no evidence that every customer in the Creditsmarts database who had a fax number was sent the BMW fax. Consequently, unlike Clark, the Court cannot assume that everyone in the database as of December 2012 with a fax number would have actually been sent the BMW fax.

complied with the rules, including that it had the recipient's prior express invitation or permission, and "strongly suggest[s] that senders take steps to promptly document that they received such permission." 21 F.C.C.R. 3787, 3812 (Apr. 6, 2006). The FCC does not, however, expressly require a sender of faxes to maintain written records of each recipient to whom a fax is sent. Therefore, contrary to Plaintiff's assertion, Defendants did not have an obligation to preserve a "master list" of recipients of the BMW fax.

To be sure, when a defendant does not have an obligation to maintain records, its lack of records and business practices makes it more difficult for a plaintiff to ascertain the members of an otherwise objectively verifiable low-value class, which may cause class members to suffer. See Carrera v. Bayer Corp., No. 12-2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting). The Superior Court of New Jersey, Appellate Division has explained that "[a]llowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies . . . is not in harmony with the principles governing class actions." Daniels v. Hollister Co., 440 N.J. Super. 359, 369, 113 A.3d 796 (N.J. Super. Ct. App. Div. 2015). Several courts have criticized the Third Circuit as imposing too high of a burden on plaintiffs. See, e.g., Rikos v. Procter & Gamble Co., --- F.3d ----, 2015 WL

4978712, at *22 (6th Cir. Aug. 20, 2015); Mullins v. Direct Digital LLC, --- F.3d ----, 2015 WL 4546159, at *6 (7th Cir. July 28, 2015);[8] Langendorf v. Skinnygirl Cocktails, LLC, 306 F.R.D. 574, 579 (N.D. Ill. 2014); McCrary v. Elations Co., LLC, No. EDCV 13-00242, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014). Nonetheless, the decisions in Marcus, Hayes, Carrera, and Byrd are precedential opinions, and the standards set forth therein must be followed by this Court. These cases make clear that a defendant's lack of records does not alleviate a plaintiff's burden of demonstrating that a class can be certified. See Hayes, 725 F.3d at 356 ("the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements.").

Having found that Plaintiff fails to demonstrate that the class is ascertainable, which is a prerequisite to class certification under Rule 23, the Court need not address the remaining Rule 23 requirements. Plaintiff's motion for class certification will be denied.

[8] Plaintiff filed motions for leave to cite supplemental authority as to the Rikos and Mullins cases. The Court has considered the Sixth Circuit's decision in Rikos, as well as the Seventh Circuit's decision in Mullins, and Plaintiff's motion will therefore be granted. However, neither Rikos nor Mullins is not binding on this Court, and the Court continues to apply Third Circuit precedent in deciding Plaintiff's motion for class certification.

B. Summary Judgment

Count I of the complaint, which is the only count remaining against the BMW Defendants, alleges that the BMW Defendants violated the TCPA. The TCPA provides in relevant part as follows:

> It shall be unlawful for any person . . . to use any telephone facsimile machine . . . to send, to a telephone facsimile machine, an unsolicited advertisement, unless . . . the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D).

47 U.S.C. § 227(b)(1)(C)(iii). "[T]he statute is silent as to who should be classified as a sender of unsolicited fax advertisements. The statute, thus, fails to identify whether, for purposes of section 227(b)(1)(C), the sender is the advertiser, a fax broadcasting service hired by the advertiser, the common carrier whose network is used to send the fax, or whether multiple individuals or entities are 'senders.'" Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1256 (11th Cir. 2015). The Federal Communications Commission (hereafter, "FCC"), in turn, has defined "sender" as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 CFR § 64.1200(f)(10). The language of the TCPA and the FCC's accompanying definition of "sender" together

establish that under the TCPA, direct liability attaches to the entity on whose behalf an unsolicited facsimile is sent or whose goods or services are promoted in such facsimile.

The BMW Defendants move for summary judgment on the ground that they are not the "sender" of the BMW fax, thereby exculpating them from liability under the TCPA. According to the BMW Defendants, the undisputed evidence demonstrates that Creditsmarts composed the BMW fax and caused such fax to be transmitted to Creditsmarts' customers, without the knowledge or consent of the BMW Defendants.[9] The BMW Defendants assert that Creditsmarts was not authorized to conduct facsimile marketing on behalf of the BMW Defendants and did not obtain consent from the BMW Defendants to advertise their products or services in the BMW fax. The BMW Defendants thus contend that they did not use a fax machine to send an unsolicited advertisement as required under the TCPA. Furthermore, the BMW Defendants argue

[9] This, too, is the crux of Creditsmarts' submission joining in the BMW Defendants' motion for summary judgment. The Court, however, does not consider Creditsmarts' submission because it fails to provide Plaintiffs an opportunity to respond. While the Court recognizes that Creditsmarts is not moving for summary judgment, it is attempting to inject evidence into the record in support of the BMW Defendants' summary judgment motion without providing Plaintiff a means of responding to such evidence in accordance with Local Civil Rule 56.1. Furthermore, as noted by Plaintiff, Creditsmarts' brief was filed the same day that Plaintiff's opposition brief was due, thereby depriving Plaintiff of the opportunity to address the evidence cited in Creditsmarts' submission. Accordingly, Plaintiff's motion to strike the submission will be granted.

that they cannot be held vicariously liable for the acts of Creditsmarts because Creditsmarts was an independent contractor, there was no actual or apparent authority for Creditsmarts' actions, and the BMW Defendants did not ratify the actions by Creditsmarts.

In response, Plaintiff asserts that the BMW Defendants are directly liable for sending the BMW fax. It is undisputed that Westfax sent the BMW fax at the direction of Creditsmarts, and the BMW Defendants did not actually send the fax or cause the fax to be sent. It also appears undisputed that the BMW Defendants never specifically requested that the BMW fax be created or sent. Plaintiff argues that the BMW Defendants are nonetheless liable under the TCPA because the fax was sent "on behalf of" the BMW Defendants and, in any event, advertised the BMW Defendants' goods or services.

As noted above, the FCC regulation defining a "sender" appears to prescribe "two parallel, and often blended, theories of 'sender' liability[.]" City Select Auto Sales, Inc. v. David Randall Associates, Inc., --- F. Supp. 3d ----, 2015 WL 1421539, at *12 (D.N.J. Mar. 27, 2015) (citing 47 C.F.R. § 64.1200(f)(10)). The first theory of liability "applies to 'the person or entity' on 'whose behalf' a third party transmits an unsolicited facsimile advertisement[.]" Id. The other theory of liability "applies to the person or entity 'whose goods or

services are advertised or promoted in the unsolicited advertisement.'" Id.

The BMW Defendants argue that despite the language of the FCC regulation, the TCPA cannot impose liability upon an entity solely because its goods or services are promoted in an unsolicited advertisement, particularly when there is no evidence that the entity authorized the creation of the facsimile. In support, the BMW Defendants cite Cin-Q Auto., Inc. v. Buccaneers Ltd. P'ship, No. 8:13-cv-01592, 2014 WL 7224943, at *6 (M.D. Fla. Dec. 17, 2014). As stated in Cin-Q Auto, "[t]o conclude that an individual or entity is per se a 'sender' under the TCPA merely because their 'goods or services' appear as advertised in the faxes at issue . . . would give rise to, what the parties have labeled, sabotage liability." Id. An entity could be subjected to liability if an individual, unbeknownst to the organization and without directive from the organization, began promoting the goods or services of the entity. Id. The court found that "[u]niversal liability for complete inaction was not contemplated by Congress in passing the TCPA and does not appear to have been contemplated by the FCC in crafting and interpreting its regulations." Id. The court thus held that a plaintiff in a TCPA case must prove that the unauthorized faxes were sent on behalf of the defendant, and

an action or inaction that sets the causal chain in motion must, in some way, be attributable to the defendant. Id.

Even the FCC has indicated that the relevant requirement is that an unauthorized fax was sent "on behalf of" the defendant. Specifically, the FCC has noted: "We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message." In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 21 F.C.C.R. at 3808.

While the rationale of Cin-Q Auto is persuasive, the Court at this time need not decide whether the BMW Defendants can be liable for a fax that merely promoted their goods or services, because the Court concludes that there is a sufficient dispute of fact as to whether the BMW fax was sent "on behalf of" the BMW Defendants. While it is clear that the BMW Defendants did not specifically request or authorize the fax at issue to be created or sent, a reasonable jury could conclude that Creditsmarts was acting "on behalf of" the BMW Defendants based on the course of dealings between the parties. The written Marketing Agreement between the parties seemingly limits the duties of Creditsmarts to matching qualified customers with

up2drive, but there is evidence in the record that Creditsmarts also engaged in marketing efforts on behalf of the BMW Defendants.

Murthy, the general manager of online business for BMW FS who signed the Marketing Agreement, testified that Creditsmarts was primarily hired to conduct advertising for up2drive. He described the relationship with Creditsmarts as a "marketing partnership" which "allows [up2drive's] services to be presented to the customers that CreditSmarts" has. Similarly, Ryan, the president of CreditSmarts, testified that no one other than he "was authorized to speak to BMW of Up2Drive personnel regarding any marketing items[,]" but in so stating Ryan confirmed that Creditsmarts and the BMW Defendants had some form of marketing arrangement. Indeed, the agreement between the parties is even titled a "Marketing Agreement."

Furthermore, Creditsmarts created an e-mail that Ryan sent to certain dealers that promoted up2drive -- stating that up2drive is "looking for your BUSINESS" -- and contained the up2drive logo that had been provided by the BMW Defendants. It also appears that Ryan advised a BMW FS employee, Jake Thomson, of Creditsmarts' e-mail marketing effort, having stated in a September 21, 2012 e-mail that he was "trying to figure out how we can promote the Up2drive product by encouraging the email address to be completed on the apps at a great level."

Moreover, once the BMW Defendants learned of the BMW fax, they did not take immediate action to ensure that no further solicitations went out on behalf of the BMW Defendants. When Murthy was provided a copy of the fax and questioned about it on December 10, 2012, he merely responded that the BMW Defendants were working with Creditsmarts, which was "trying to develop a network of independents who have been providing us some good business." He did not at that time discuss the fax with anyone, and could not recall doing any investigation with respect to the fax. In fact, despite learning of the fax on December 10, 2012, it does not appear that the BMW Defendants raised the issue of the fax with Creditsmarts until August 8, 2013. In this regard, Thomson, on behalf of BMW FS, testified that he never told Creditsmarts that it was not authorized to use fax advertisements to promote the up2drive services. It thus appears that the BMW Defendants did not express disapproval of the BMW fax, did not advise Creditsmarts that it was in breach of the written agreements, and took no action to ensure that Creditsmarts did not send any further faxes.[10]

[10] In fact, more than 10,000 faxes were sent on December 27, 2012 -- more than two weeks after the BMW Defendants learned about the fax on December 10, 2012. Thus, it is possible that the BMW Defendants could have prevented the additional unauthorized transmission of thousands of faxes had they confronted Creditsmarts about the fax when they learned of it. Instead, they failed to reprimand Creditsmarts for violating the written agreements of the parties and took no steps to ensure

Based on the foregoing evidence, a trier of fact could reasonably determine that Creditsmarts was authorized to engage in marketing efforts on behalf of the BMW Defendants. Although it seems clear that the BMW Defendants did not specifically authorize the creation and mailing of the fax at issue in this case, there is sufficient evidence that Creditsmarts exercised some discretion in deciding how to solicit business on behalf of the BMW Defendants. The Court recognizes that the terms of the written agreements between the parties required approval by the BMW Defendants to use logos or marks, and representatives of the BMW Defendants profess ignorance as to certain marketing efforts undertaken by Creditsmarts. Nevertheless, once the BMW Defendants learned of such marketing efforts, there is no evidence that they confronted Creditsmarts or attempted to ensure future compliance with the terms of the written agreements. Under these circumstances, the Court finds a sufficient question of fact remains as to whether Creditsmarts sent the BMW fax "on behalf of" the BMW Defendants. The BMW Defendants' motion for summary judgment will therefore be denied.

Creditsmarts' future compliance with the terms of such agreements. A trier of fact could conclude from the BMW Defendants' acquiescence that the BMW Defendants approved of the actions taken by Creditsmarts on their behalf.

VI. CONCLUSION

For the reasons set forth above, Plaintiff's motion for class certification will be denied as Plaintiff fails to demonstrate that the class is ascertainable as required under Third Circuit precedent. Plaintiff's motions for leave to cite supplemental authority in connection with their class certification motion will be granted. The BMW Defendants' motion for summary judgment will be denied. Plaintiff's motion to strike Creditsmarts' submission joining in the BMW Defendants' summary judgment motion will be granted.

An Order consistent with this Opinion will be entered.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

Date: September 29, 2015

At Camden, New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CITY SELECT AUTO SALES, INC., a New Jersey corporation, individually and as the representative of a class of similarly situated persons,

Plaintiff,

v.

BMW BANK OF NORTH AMERICA INC., et al.,

Defendants.

Civil No. 13-4595 (NLH/JS)

ORDER

For the reasons set forth in the Opinion entered on this date,

IT IS on this 29th day of September 2015,

ORDERED that the motion [Doc. No. 65] filed by Plaintiff, City Select Auto Sales, Inc., for class certification be, and the same hereby is, DENIED; and it is further

ORDERED that the motion [Doc. No. 66] for summary judgment filed by Defendants BMW Bank of North America, Inc. and BMW Financial Services NA, LLC be, and the same hereby is, DENIED; and it is further

ORDERED that the motions [Doc. Nos. 89, 95] for leave to cite supplemental authority be, and the same hereby are, GRANTED; and it is further

ORDERED that the motion [Doc. No. 81] of Plaintiff to strike a submission by Defendant Creditsmarts Corp. (hereafter, "Creditsmarts") be, and the same hereby is, GRANTED; and it is further

ORDERED that Creditsmarts' "Joinder in and Agreement with the BMW Defendants' Motion for Summary Judgment" be, and the same hereby is, STRICKEN.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 27, 2015
BCO-009

No. 15-8098

CITY SELECT AUTO SALES INC,
a New Jersey Corporation, individually and as
the representative of a class similarly situated persons,
Petitioner

v.

BMW BANK OF NORTH AMERICA, INC;
BMW FINANCIAL SERVICES NA, LLC;
CREDITSMARTS CORP, JOHN DOES 1-12;
Respondents

(D.N.J. No. 1-13-cv-04595)

Present: FUENTES, KRAUSE and SCIRICA, Circuit Judges

1. Petition by Petitioner for Leave to Appeal Pursuant to Fed. R. Civ. P. 23(f);

2. Response by Respondent Creditsmarts Corp In Opposition to Petitioner for Leave to Appeal Pursuant to Fed. R. Civ. P. 23(f);

3. Response by Respondent BMW Financial Services LLC and BMW of North America In Opposition to Petitioner for Leave to Appeal Pursuant to Fed. R. Civ. P. 23(f).

Respectfully,
Clerk/pdb

ORDER

The foregoing petition for leave to appeal is granted.

Within 10 days from the date of this order, petitioner is directed to pay the applicable filing and docketing fee in the United States District Court for the District of New Jersey. Petitioner will provide notice to the Clerk of this Court that the filing and docketing fee has been paid. Once notified, the Clerk is directed to transfer the matter to the general docket as an appeal.

A briefing schedule will be issued at the appropriate time. The current panel will consider the merits of the appeal as a special panel once briefing has been completed.

By the Court,

s/ Julio M. Fuentes
Circuit Judge

Dated: December 1, 2015
PDB/cc: All Counsel of Record

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk