No. 13-90016

In the United States Court of Appeals for the Eleventh Circuit

STEPHEN M. MANNO
on behalf of himself and all others similarly situated,
Plaintiffs-Respondents,

v.

HEALTHCARE REVENUE RECOVERY GROUP, LLC d/b/a ACCOUNT RESOLUTION SERVICES and INPHYNET SOUTH BROWARD, INC.
Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Southern District of Florida

ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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July 17, 2013

CERTIFICATE OF INTERESTED PERSONS

Eleventh Circuit Rule 26.1-1 states that the certificate of interested persons contained in an answer to a petition must include only persons and entities that were omitted from the certificate contained in the petition. Counsel hereby certify that the certificate of interested persons contained in the defendant's petition is complete, with the exception of the additional counsel for the respondents, Deepak Gupta and Jonathan E. Taylor, both of Gupta Beck PLLC in Washington, DC.

/s/ Deepak Gupta
Deepak Gupta

ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Because interlocutory appeals under Federal Rule of Civil Procedure 23(f) are "inherently disruptive, time-consuming, and expensive," they are "generally disfavored" in this Circuit. *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000). This Court's practice is to use "restraint in accepting Rule 23(f) petitions," doing so only upon a showing of a truly "compelling need for resolution of the legal issue sooner rather than later." *Id.* at 1274. To discourage the "flood of Rule 23(f) petitions" that would otherwise ensue, this Court "should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review." *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)). In short, "review of a class certification order should be an avenue of last resort." *Shin v. Cobb Cnty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001).

The petition here comes nowhere close to demonstrating a "compelling need" for review. Perhaps acting on the belief that the quantity of arguments can make up for their lack of quality, the petitioners take a scattershot approach, setting out a laundry list of complaints about the decision below—the bulk of which were thoroughly addressed in the district court's certification order, the order denying reconsideration, or both. The petitioners confidently assert that the effect of the

decision below will be to sound their corporate death knells, but they provide nothing—no evidence or details of any kind—to back up that prediction. Nor do they identify any alleged defects in the class-certification decision itself. Some of the petitioners' grievances concern the routine application of Rule 23 to the facts in ways that are well supported by precedent on which the district court relied—precedent that the petition never bothers to address, let alone counter. Others are really about the underlying merits of the case, and therefore fall outside of this Court's Rule 23(f) jurisdiction, which "is limited to the class certification issue." *Franze v. Equitable Assurance*, 296 F.3d 1250, 1252 (11th Cir. 2002). None is worthy of this Court's limited resources.

And because the petitioners here have sought review "only as it pertains to" one of two certified classes (Pet. 3), this is the rare case in which a Rule 23(f) appeal cannot possibly avoid the necessity of ongoing class-action litigation in the district court. Given that procedural posture, the better course is to await a final judgment.

BACKGROUND

1. The Telephone Consumer Protection Act. When Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991, it was particularly concerned with the use of "automatic telephone dialing system[s],' or "autodialers," which can store and automatically call long lists of phone numbers. 47 U.S.C. § 227(a)(2). Since that time, the number of cell phones in use by

consumers has exploded. While "[a]n automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012). Because most people have no way to stop unwanted calls on their own, Congress found that "[b]anning such automated or prerecorded telephone calls … is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." 47 U.S.C. § 227 note § 2(12). The TCPA thus prohibits the use of autodialers in calls to cell phones unless those calls are "made with the prior express consent of the called party." *Id.* § 227(b)(1)(A).

2. The Fair Debt Collection Practices Act. In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"—practices that Congress determined "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). As relevant here, the FDCPA prohibits debt collectors from failing to disclose that any communication to a consumer is from a debt collector, *id.* § 1692e(11), and, more specifically, from placing telephone calls without meaningful disclosure of the caller's identity, *id.* § 1692e(6).

3. The Facts. Plaintiff Stephen Manno was treated in the emergency room of Memorial Hospital Pembroke by an attending physician of Inphynet, the

hospital's agent. During the admissions process, Manno gave the hospital a cell-phone number but did not expressly consent to use of that number for debt-collection purposes. Later, Manno's medical bill—like all unpaid Inphynet bills—was referred for collection to Healthcare Revenue Recovery Group. Following its standard practice, Healthcare Revenue called Manno on his cell-phone number, used an autodialer to place the call, and left a prerecorded voicemail message in which the company failed to identify itself as a debt collector.

Manno sued both Healthcare Revenue and Inphynet under the TCPA and FDCPA and sought class certification as to both claims. The defendants argued that certification should be denied for lack of standing, as well as for a variety of reasons under Rule 23.

4. The Class-Certification Order. The district court rejected those arguments and certified both classes. On standing, the court explained that "[t]he FDCPA and TCPA are consumer protection statutes that confer on plaintiffs the right to be free from certain harassing and privacy-invading conduct" and "authorize an award of damages whenever a violation occurs." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 2013 WL 1283881, at *3 (S.D. Fla. 2013). The court thus held that Manno has standing.

On Rule 23, the court first held that Rule 23(a)'s requirements have been met: The class is "sufficiently large" (contrary to the defendants' assertion). *Id.* at

*6. There are "questions of law or fact common" to both classes—the FDCPA class, because "prior knowledge is not relevant," nor is the fact that Manno "alleges only one violative call"; the TCPA class, because "the way in which the discovery was performed . . . weeded out those individuals who may have consented to be called" (that is, beyond "tendering a phone number to an admissions clerk at the time of medical care," an issue on which "all class members will prevail or lose together"). *Id.* at *7-*8. Manno's claims are typical of the claims of both classes. *Id.* at *9. And he and his counsel will adequately protect the classes' interests. *Id.* at *10-*11.

The Court then held that Rule 23(b) has also been satisfied. Common questions will predominate over individual issues in the FDCPA class action because "the Court will not have to engage in individualized inquiries about potential variations in the content of the calls" given how the class is defined. *Id.* at *12. Common questions will also predominate in the TCPA class action because "any persons who may have been subject to an individualized consent defense were excluded during numerosity discovery." *Id.* Finally, the court held that a class action would be superior to many individual suits, and rejected the defendants' arguments that (1) their potential liability in a class action will be "enormous" and (2) damages calculations will be individualized. *Id.* at *13-*16. The district court therefore certified the classes.

5. The Order Denying Reconsideration. In the defendants' subsequent motion for reconsideration, they "re-emphasized their core arguments" against certification, "while also continually raising new issues and arguments." *Id.* at *17. The district rejected their arguments—both old and new—and stated: "The Defendants may not present arguments, lose, and then say, 'wait, actually, here's another reason why class certification is improper.' The parties' arguments should not be moving targets, like clay pigeons, that the Court is forced to repeatedly chase after and shoot down." *Id.*

After the district court denied the motion for reconsideration, the defendants filed their petition under Federal Rule of Civil Procedure 23(f). Their petition explicitly seeks "interlocutory review of the Order *only as it pertains to certification of the TCPA Class*." Pet. 3 (emphasis added).

ARGUMENT

I. Petitioners Offer Nothing But Speculation To Support Their Claim That The District Court's Ruling Is A "Death Knell."

The petitioners first assert that their potential liability will be "enormous" and disproportionate, and might therefore cause their "dissolution." Pet. 1 (capitalization omitted). To be sure, the possibility that a class certification decision may be a "death knell" for a party is an important factor that may warrant immediate review. But true death-knell appeals are few and far between. "[E]ven ordinary class certification decisions by their very nature radically reshape a lawsuit

and significantly alter the risk-benefit calculation of the parties, leading to claims of irreparable harm." *Prado-Steiman*, 221 F.3d at 1274. For that reason, death-knell appeals "should be limited to those cases where the district court's ruling, as a practical matter, effectively prevents the petitioner from pursuing the litigation," as when a defendant rationally "feel[s] irresistible pressure to settle." *Id.* Only a "small" number of decisions "truly warrant[] immediate review on this basis." *Id.*

Speculation and hyperbole about the effect of a class-certification decision are not enough. To show that an appeal is warranted, the petitioner must offer solid proof of "the size of the putative class and any *record evidence* regarding the financial resources of the defendant." *Id.* at 1274. An appeal is inappropriate where, "[o]ther than mere assertions, [the petitioner] makes no showing that it will be unduly pressured to settle because of the class's certification." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002) (rejecting appeal where petitioner "failed to submit any evidence that the damages claimed would force a company of its size to settle without relation to the merits"); *see also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("Rule 23(f) gives appellate courts discretion to entertain appeals in 'death knell' cases—though we must be wary lest the mind hear a bell that is not tolling.").

The petitioners make no attempt to meet their burden. They never substantiate their hyperbole with anything more than speculation. They provide

this Court with no details about the companies' net worth, the size of the class, or the estimate of potential liability. They do not even claim that they face pressure to settle. To the contrary, they say just the opposite: They suggest doubt about the "the existence of other similarly situated debtors" and assert that "a class action settlement is *highly unlikely*." Pet. 6 (emphasis added). If that is so, then petitioners' real fear is not that they will "feel irresistible pressure to settle," *Prado-Steiman*, 221 F.3d at 1274, but rather that they will lose on the merits.

Petitioners' failure to substantiate their predictions is even more striking because the district court rejected them for precisely that reason: "Based on the present record," the district court found "that it would be imprudent, premature, and speculative to deny certification on the mere possibility that damages may be huge." *Manno*, 2013 WL 1283881, at *15. Moreover, damages are capped in FDCPA class actions; they may not "exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2)(B). And while the TCPA lacks a parallel cap, the petitioners "have not identified a single case under the TCPA where a federal court denied certification because the prospect" of a large or disproportionate damages award. *Manno*, 2013 WL 1283881, at *15. Because TCPA damages increase in proportion to the class size, as Congress intended, they are unlikely to be disproportionate. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 719 (9th Cir. 2010). To be sure, the Due Process Clause of the

Constitution sets limits on excessive and disproportionate liability. So "[a]n award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006). "Reducing recoveries by forcing everyone to litigate independently—so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims—has little to recommend it." *Id.* That is especially so where, as here, the district court has indicated that it is "prepared to taper any damage award that runs afoul of due process." *Manno*, 2013 WL 1283881, at *15.

II. Petitioners Identify No Errors Below, Let Alone The "Substantial Weaknesses" Demanded By This Court's Precedent.

This Court's precedent next directs the Court to consider "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion." *Prado-Steiman*, 221 F.3d at 1274 (emphasis in original). That demanding standard is satisfied when it is clear that this Court will "inevitably reverse[]" the district court—for example, "when the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent." *Id.* at 1274-75. By contrast, because class certification typically requires the "application of broad and flexible legal standards to unique and complex sets of facts," "merely demonstrating that the district court's ruling is questionable generally will be insufficient to support a Rule 23(f) petition."

Id. Here, the petitioners identify five issues or sub-issues on which they disagree with the district court. None of these issues even arguably involves the sort of asserted legal error that can independently justify an appeal.

A. The district court sensibly and appropriately excluded from the class those consumers with individualized consent issues.

Petitioners first complain (at 7-11) about the district court's decision to exclude from the class those consumers who had prior communications with Healthcare Revenue and therefore may have given Healthcare Revenue their prior express consent to be called. As the district court explained: "Obviously, if the putative class members did not communicate with HRGG before HRGG called them, there is no way those class members could have provided consent to HRGG." *Id.* at 8. This "membership exclusion," petitioners argue, is wrong because it "implies" that express consent could have been provided only to Healthcare Revenue and not to the creditor or some other person. Pet. 7.

Petitioners offer no authority whatsoever for the proposition that *excluding* consumers with individualized issues is somehow improper. To the contrary, courts are *obligated* to "narrowly tailor the class definition to avoid the need for any substantive individualized inquiry." *Mayo v. UBS Real Estate Sec., Inc.*, 2011 WL 1136438 (W.D. Mo. 2011). And the exclusion of one subset of consumers in no way precludes the petitioners from raising defenses with respect to those who

remain in the class. Indeed, one suspects that if the district court had *not* made this exclusion, the petitioners would be here complaining that the failure to do so rendered the class certification deficient.

At bottom, petitioners' argument is a thinly disguised attempt to smuggle in their objections to the district court's summary-judgment ruling concerning consent in a different case, *Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 WL 1899616 (S.D. Fla. 2013). But this Court's Rule 23(f) jurisdiction does not extend to such matters. And the class-certification ruling in this case does not rest, even implicitly, on conclusions about the merits of petitioners' consent defense. As the district court explained, although the petitioners "contend that the mere act of tendering a phone number to an admissions clerk at the time of medical care constitutes consent *per se*, this argument, *whatever its validity*, does not defeat commonality." *Manno*, 2013 WL 1283881, at *8 (emphasis added). That is because the argument itself is "subject to a common resolution. Whether the provision of a phone number on admissions paperwork equates to express consent is a question common to all class members, because all class members filled out paperwork at the time of treatment. On this defense, all class members will prevail or lose together, making this another common issue to the class." *Id.*; *see also id.* at *19 ("While this is not the place to adjudicate the merits of Defendants' consent argument, the point is that it does not defeat class certification. The uniform consent argument, based on the

hospital admissions paperwork, is subject to classwide resolution, as all putative class members filled out the same paperwork.").

This is not to say, of course, that the class members are guaranteed to prevail on this particular question. But whether they win or lose, they will do so together. Rule 23 requires no more. As Judge Easterbrook has put it, "Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010).

B. Ascertaining class membership will be a ministerial task.

Petitioners next make an argument (at 11-12) that they did not make below, either in their class-certification motion or their motion for reconsideration: They say that membership in the class can never be ascertained because it "will depend on individualized evidence" of such issues as the numbers called and whether they are cell-phone numbers. The answer to this newfound objection turns on whether the district judge and the magistrate judge who supervised discovery matters were correct that the petitioners' records are capable of answering these questions. As the district court explained: "The Defendants were able to comply with the Magistrate Judge's directives and identify the accounts where HRRG's records showed that the called party did not communicate in any way with HRRG prior to HRRG's automated call. Going the extra step and providing the Plaintiff with names and contact details of such individuals does not strike the Court as unduly

burdensome." *Manno*, 2013 WL 1283881, at *19. And petitioners appear to acknowledge that a "third party 'scrub'" can be used to identify which numbers are cell-phone numbers. Pet. 12 n.7. In any event, such case-management issues are firmly within the district court's discretion and may be adjusted as facts develop on the ground, demonstrating the truth of this Court's observation that "class certification determinations are so fluid and fact-sensitive that district courts should be encouraged rather than discouraged from reassessing whether the prerequisites of Rule 23 exist." *Prado-Steiman*, 221 F.3d at 1273-74.

C. The named plaintiff's decision not to pursue individualized remedies does not create a conflict of interest.

Petitioners argue that the plaintiff is an inadequate class representative, and has an "undeniable conflict of interest" with the class, because he is not seeking additional damages based on willful violations of the TCPA—an issue that would be difficult to prove on a classwide basis. Pet. 13. Aside from general statements about the need for class representatives to avoid conflicts of interest, however, the petitioners tellingly do not cite any authority supporting their argument. That is not surprising. As many courts have held, and as the district court explained below, "the named plaintiff is not rendered inadequate just because he elects to pursue some remedies, but not others, so long as putative class members are given adequate notice and opportunity to opt out." *Manno,* 2013 WL 1283881, at *20 (citing six cases on point, none discussed in the petition). Petitioners simply do not

respond to this point. Moreover, because proof of many kinds of remedies is impossible on a classwide basis, a contrary rule "would make consumer class actions impossible." *Murray*, 434 F.3d at 952. "Refusing to certify a class because the plaintiff decides not to make the sort of person-specific arguments that render class treatment infeasible would throw away the benefits of consolidated treatment." *Id.*

D. The plaintiff has statutory standing.

Continuing their series of undeveloped drive-by arguments, petitioners next assert (without authority) that the named plaintiff is an inadequate representative because he lacks "statutory standing" to bring his TCPA claim. Pet. 14-15. But as the district court explained, the TCPA's standing provision is "quite broad" and allows any "person or entity" injured by a violation of the statute—not just the "called party"—to seek redress. *Manno*, 2013 WL 1283881, at *4; *accord Swope v. Credit Mngmt., LP*, 2013 WL 607830, at *2 (E.D. Mo. 2013); *Tang v. William W. Siegel & Assocs.*,, 791 F. Supp. 2d 622, 625 (N.D. Ill. 2011); *Kane v. Nat'l Action Fin. Servs., Inc.*, 2011 WL 6018403, at *7 (E.D. Mich. 2011). Moreover, the petitioners do not dispute that the named plaintiffs was the regular carrier and user of the cell phone in question, and they do not deny that he was the intended recipient of their calls. "Numerous courts that have considered this issue have held a party to be a 'called party' if the defendant intended to call the individual's number, and that individual

was the regular user and carrier of the phone." *Swope*, 2013 WL 607830, at *3; *see also Page*, 2012 WL 6913593, at *4–*5.

E. Petitioners' predominance argument merely restates their flawed arguments on standing and consent.

Finally, petitioners restate their previous arguments, arguing that individualized issues of "statutory standing and prior express consent … preclude a finding of predominance." Pet. 15. That assertion fails for the same reasons as the arguments addressed above—because there is no merit to petitioners' contention that standing and consent create individualized issues in this case.

III. The Only "Unsettled Legal Issue" Petitioners Identify Does Not Justify Review, And Would Be Outside This Court's Rule 23(f) Jurisdiction In Any Event.

It is true that one important factor bearing on the appropriateness of a Rule 23(f) appeal is "whether the appeal will permit the resolution of an unsettled legal issue that is 'important to the particular litigation as well as important in itself.'" *Prado-Steiman*, 221 F.3d at 1275 (quoting *Mowbray*, 208 F.3d at 294). Petitioners recite this standard, but the only "unsettled legal issue" that they are able to identify is a question that will be addressed on the merits—namely, whether the petitioners had the plaintiffs' prior express consent to place autodialer calls to their cell phones. That issue has nothing to do with "the requirements of Rule 23 or the mechanics of certifying a class." *Id.* Indeed, this Court lacks jurisdiction to even consider the issue in an appeal under Rule 23(f). *See De Leon-Granados v. Eller & Sons*

Tree, Inc., 497 F.3d 1213, 1218 n.1 (11th Cir. 2007) ("The jurisdiction granted by Rule 23(f) does not extend to this [ruling]" on a question separate from class certification); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1264 (11th Cir. 2009) ("[O]ur jurisdiction is limited to review of the district court's class certification decision, and therefore, we do not address … T-Mobile's motion for summary judgment."). Here, to permit review based on the prior-consent issue would be particularly strange because the district court in this case has not yet reached the question.

IV. Interlocutory Review Is Especially Unwarranted Because There Is Little Left to Litigate Below and Because Class Litigation Is Inevitable.

Finally, petitioners cannot substantiate their claim that an appeal will "avoid potentially needless expenditure of time and resources." Pet. 18 (capitalization omitted). The only thing left to do in this case is decide the parties' pending motions for summary judgment. Given the district court's decision on related questions in *Mais*, 2013 WL 1899616, the remaining litigation is unlikely to consume much additional time or resources. And here, unlike in most class action cases in which interlocutory review is sought, an appeal will not avoid the necessity of class-action litigation in the district court on remand because petitioners have sought review "only as it pertains to certification" of one of the two classes. Pet. 3.

On the other side of the scale, as this Court has emphasized, "interlocutory appeals are inherently 'disruptive, time-consuming, and expensive.'" *Prado-Steiman*, 221 F.3d at 1276. They "increase[] the workload of the appellate courts, to the detriment of litigants and judges," "require the appellate courts to consider issues that may be rendered moot," and "undermine the district court's ability to manage the action." *Id.* Where, as here, the petitioners have presented no serious legal issues worthy of this Court's discretionary review, the better course is to await an appeal from a final judgment in the case.

CONCLUSION

The petition for permission to appeal should be denied.

Respectfully submitted,

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July 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2013, I electronically filed the foregoing answer with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
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