NO. 17–90020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DIRECTV, LLC,
individually and as successor through merger to DIRECTV, Inc.,

Defendant/Petitioner.

v.

SEBASTIAN CORDOBA,
individually and on behalf of all others similarly situated,

Plaintiff/Respondent,

Petition for Permission to Appeal from an Order of the U.S. District Court for the Northern District of Georgia

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV P. 23(f)

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Counsel for the Chamber of Commerce of the United States

Dated: August 2, 2017

Cordoba v. DIRECTV, No. 17-90020

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, proposed *Amicus Curiae* the Chamber of Commerce of the United States submits this Corporate Disclosure Statement and Certificate of Interested Persons, identifying the following individuals and entities with an interest in this case within the meaning of those Rules:

AT&T, Inc., a publicly traded company (NYSE:T), of which no entity or person owns more than 10% of its shares;

AT&T Services, Inc., counsel for Defendant/Petitioner;

Boyle, Michael J., Jr., counsel for Plaintiff/Respondent;

Chamber of Commerce of the United States, a non-profit membership organization with no parent company and no publicly-traded stock, proposed *amicus curiae*;

Conger, Ava, counsel for Defendant/Petitioner;

Cordoba, Sebastian, Plaintiff/Respondent;

Cuthbertson, Douglas I., counsel for Plaintiff/Respondent;

DIRECTV Group Holdings, LLC, a subsidiary of AT&T, Inc., a publicly traded company (NYSE:T);

DIRECTV Group, Inc., wholly owned by Greenlady Corp. and DIRECTV Group Holdings, LLC;

DIRECTV Holdings LLC, wholly owned by The DIRECTV Group, Inc.;

DIRECTV, LLC, wholly owned by DIRECTV Holdings LLC, Defendant/Petitioner;

DTV Entertainment, Inc., wholly owned by DIRECTV Group Holdings, LLC;

Germann, Hans J., counsel for Defendant/Petitioner;

Greenlady Corp., wholly owned by DTV Entertainment, Inc.;

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McAlister, Merritt E., counsel for proposed *amicus curiae*;

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Steinmetz, Kyle J., counsel for Defendant/Respondent;

Todd, Kate Comerford, counsel for proposed *amicus curiae*;

U.S. Chamber Litigation Center, counsel for proposed *amicus curiae*;

Wade, Nicole Jennings, counsel for Plaintiff/Respondent;

Wilkins, Matthew M., counsel for Plaintiff/Respondent;

Wilson, Matthew R., counsel for Plaintiff/Respondent;

Wood, L. Lin P.C., counsel for Plaintiff/Respondent;

Wood, L. Lin, counsel for Plaintiff/Respondent; and

Yaklin, Stephen A., counsel for Plaintiff/Respondent.

/s/ Merritt E. McAlister
Counsel for Chamber of Commerce of the United States

MOTION FOR LEAVE
TO PARTICIPATE AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America respectfully moves for leave to file the attached *amicus curiae* brief in support of Defendant-Respondent DIRECTV, LLC's petition for leave to appeal a class certification decision under Federal Rule of Civil Procedure 23(f).

1. Courts routinely permit non-parties to file amicus curiae briefs in support of petitions for permission to appeal class-certification orders pursuant to Federal Rule of Civil Procedure 23(f). *See Brown, et al. v. Electrolux Home Prods., Inc. d/b/a/ Frigidaire*, No. 15-11455 (11th Cir.) (multiple amicus briefs filed in support of Rule 23(f) petition, including amicus brief by the Chamber); *see also, e.g.*, *Reyes v. NetDeposit, LLC*, No. 13-8086 (3d Cir. Nov. 1, 2013) (granting opposed motions to file amicus briefs in support of Rule 23(f) petition); *In re ComScore, Inc.*, No. 13-8007 (7th Cir. May 28, 2013) (granting leave to file amicus brief in support of Rule 23(f) petition despite opposition); *see also In re High-Tech Emp. Antitrust Litig.*, No. 13-80223 (9th Cir. Jan. 14, 2014) (granting leave to file Rule 23(f) amicus brief to which all parties consented). Motions for leave to file amicus curiae briefs are

often granted in recognition that they may helpful to the Court in understanding the importance of the issues involved and determining whether the requirements for Rule 23(f) are satisfied.

2. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

3. Many of the Chamber's members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified.

4. The Chamber is especially concerned with protecting a class defendant's due process rights in the administration of Rule 23. Aggregate treatment may not deprive the class-action defendant of its fundamental due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

5. The Petition filed in this case implicates one of those most frequently litigated defenses: standing. The Chamber participated as an *amicus curiae* in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and emphasized that, if the Ninth Circuit's decision there had been allowed to stand, it would have further eroded the minimum requirements for standing under Article III of the Constitution. That erosion is of grave concern to the nation's businesses because alleged technical violations of regulatory statutes can often relate to large numbers of people without causing anyone to suffer actual injury. When individuals are allowed to seek damages despite having suffered no concrete injury, businesses find themselves trapped in abusive litigation over allegations of harmless technical violations, burdening the courts and diverting resources from more productive uses.

5. The Petition also explores an important ascertainability issue: whether it is permissible to shift the burden of *disproving* class membership to the defendant when the defendant does not possess business records that would identify class membership. Reaffirming the ascertainability principle—*i.e.*, that class certification is inappropriate unless *the plaintiff* can demonstrate a reliable and

administratively feasible method for identifying who falls within the class of individuals with a claim against the defendant—is critically important to Chamber members.

6. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Chamber certifies that no party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than the Chamber, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

7. The Chamber's brief is timely because it is filed within seven days of the July 26, 2017 filing of DIRECTV's Rule 23(f) Petition. Fed. R. App. P. 29(e). The brief complies with Federal Rule of Appellate Procedure 29(d), because it is no more than half the maximum length of 5,200 words authorized for DIRECTV's petition. *See* Fed. R. App. P. 5(c)(1).

6. Counsel for DIRECTV consents to the filing of this *amicus* brief; counsel for Plaintiff-Respondent Sebastian Cordoba does not.

* * *

Given their substantial interest in this case, the Chamber of Commerce of the United States of America respectfully moves for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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Counsel for Chamber of Commerce of the United States

August 2, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(g), I certify that this motion complies with the length limitations set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 770 words, as counted by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 27(a)(2)(B).

I further certify that this motion was filed in electronic format through the Court's CM/ECF system on the 2nd day of August, 2017.

/s/ Merritt E. McAlister

Counsel for the Chamber of Commerce of the United States

CERTIFICATE OF SERVICE

I certify that on August 2, 2017, I served the foregoing Motion for Leave upon all counsel of record by and through the Court's CM/ECF system.

/s/ Merritt E. McAlister
Counsel for Chamber of Commerce of the United States

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/s/ Merritt E. McAlister
Counsel for the Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

Rules

Other Authority

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for class certification. This is one of those cases.

[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF ISSUES

1. Whether a recipient of a telemarketing call who did not request to be placed on the caller's internal "do not call" list has standing under Article III to maintain a claim that the caller failed to institute appropriate internal "do not call" list procedures.

2. Whether, in finding the predominance and ascertainability criteria for class certification satisfied, the district court improperly created a new legal rule placing the burden on DIRECTV to prove that calls were *not* made for telemarketing purposes.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Federal Rule of Civil Procedure 23 was designed to accommodate both administrative efficiencies and due process. In appropriate cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted). But aggregate treatment may not deprive a defendant of its fundamental due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

Accordingly, Rule 23 does not permit class certification when a defendant's defenses—including as to unnamed plaintiffs that are purportedly members of the class—will result in individualized issues overwhelming common ones. In that circumstance, individualized adjudication of those defenses would destroy the efficiencies that class actions are meant to foster, while classwide adjudication would deprive defendants of their due process right to litigate available defenses.

The district court's class certification decision is part of an alarming trend in which courts ignore individualized issues, thereby

depriving defendants of a meaningful ability to present available defenses. Not only did the court certify a no-injury class action, but it also improperly shifted the burden to the defendant to disprove class membership. In any individual action under "do not call" provision of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, the plaintiff must establish the constitutional requirements for Article III standing and demonstrate that a telephone call was placed for impermissible marketing purposes. The district court certified a class action in which neither of these critical elements can be proven on a classwide basis.

ARGUMENT AND CITATIONS OF AUTHORITY

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and to justify a departure from that ordinary rule, the class-action plaintiff bears the burden of showing that classwide adjudication is appropriate. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotations omitted). Moreover, Rule 23(b) assures that any efficiencies gained from litigating a case as a class action cannot override defendants' due-process rights. *See Lindsey*, 405 U.S. at 66. "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Courts thus avoid reading Rule 23 in a manner that would deprive a defendant of its right "to litigate its . . . defenses to individual claims," and require instead that both claims *and defenses* be amenable to classwide adjudication before a class may proceed under Rule 23. *See Dukes*, 564 U.S. at 367.

One such defense is that the plaintiff has no claim at all because he or she was never injured by the defendant's allegedly unlawful

conduct and is therefore not a member of the proposed class. *See Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established"). There is no doubt that, if this case were brought as a series of individual actions, each plaintiff would have to offer evidence that she was injured because she received an impermissible telephone call. Two issues would be core to that inquiry: (1) whether the plaintiff suffered a real-world harm as a result of receiving that telephone call; and (2) whether DIRECTV (or its alleged agent) made the telephone call for a permissible purpose (such as to set up installation). The same is necessarily true in a class action, which is merely a procedural device "ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), that "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Indeed, to apply a different rule in a class action would violate the Rules Enabling Act, which provides that procedural rules such as Rule 23 "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The district court certified a no-injury class action that exposes DIRECTV to approximately $79.2 million in liability on claims where it is not administratively possible to prove that each of the unnamed plaintiffs suffered concrete injury. The court also shifted the burden to DIRECTV to disprove class membership—simply because the DIRECTV retailer's records made it difficult for Plaintiff to find a workable method for identifying the purpose of a particular telephone call and thus who is and is not a class member. By ignoring a host of individual issues that should have defeated class treatment, the district court ignored DIRECTV's due process rights and the Rules Enabling Act. This misapplication of Rule 23 invites abusive litigation and warrants immediate review.

A. The District Court's Misapplication of *Spokeo* Invites Improper No-Injury Class Actions.

The district court certified a no-injury class action that deprived the defendant of its ability to present a meaningful standing defense. The Supreme Court's *Spokeo* decision confirmed that "bare procedural violations, divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Nevertheless, courts—like the one below—have

continued to certify no-injury class actions at a concerning rate.

If ever a putative class action under the TCPA should fail for want of standing, it is this one. After *Spokeo*, some courts have continued to find standing for TCPA claims based on calls for which the statute requires advance consent. *See* Ezra Church et al., *The Meaning of Spokeo, 365 Days and 430 Decisions Later*, LAW360 (May 15, 2017), available at goo.gl/k4j94R (collecting cases); *see also Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 81 F.3d 1245, 1251 (11th Cr. 2015) (finding standing where the plaintiff received unwanted faxes, thereby depriving the plaintiff of the use of its fax machine temporarily). But those cases justified standing on the rationale that the intrusions alleged caused real harm, including the temporary deprivation of a fax machine or a telephone, or the imposition of text-message charges, and that the intrusion resulted from the claimed violation—the making of a call in violation of the statute's prior consent requirement. *See* Church, at 4-5 & notes.

Whatever the merits of those decisions, this case is different. Plaintiff contends that he can prevail on a classwide basis even without proof of any unsolicited or unwanted contact as to more than 15,000

putative class members. Plaintiff alleges only that DIRECTV's retailer should not have made calls where it did not have appropriate procedures in place to create an internal "do not call" list. Doc. 96 at 7 (citing 47 C.F.R. § 64.1200(d)). He does not allege that any member of the internal procedures class attempted to place his or her name on such a list. Without such an allegation, Plaintiff cannot show that class members suffered concrete harm from the statutory violation: if they did not ask to be placed on the do not call list, they cannot claim that the calls they received resulted from the failure to maintain such a list. Without the ability to tie the calls to the violation, Plaintiff is left with a bare statutory violation—the failure to maintain a list—and no concrete harm.

As pleaded, Plaintiff has brought a nationwide class action in which large numbers of putative class members were likely never injured and, therefore, cannot satisfy the basic requirements of Article III. At the very least, establishing otherwise would require individualized litigation as to the harm each class member suffered.

The district court's failure to enforce standing requirements is part of a broader problem of courts' failing to enforce proper limitations

on class actions. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so."). As long as lower courts fail to enforce Article III's injury-in-fact requirements, the class-action bar will continue to respond by pursuing abusive class actions. The jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement—removes critical constraints on class certification. If plaintiffs can recover damages simply by proving the defendant's abstract violation of a legal duty, regardless of that violation's widely varying or entirely absent effects on individual class members, then commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) collapse into a single inquiry, for which the answer is automatic. Such cursory review cannot safeguard a defendant's due-process right "to present every available defense." *Lindsey*, 405 U.S. at 66.

B. The District Court's Certification Decision Impermissibly Shifts the Burden of Proof to the Defendant.

Exacerbating the problems created by the district court's misapplication of *Spokeo*, the court shifted the burden to DIRECTV to

disprove class membership. To fall within the class definition under either class, unnamed class members must have received a call for an improper (*i.e.*, a marketing) purpose. *See* Doc. 96 at 30 (recognizing that the TCPA does not proscribe calls made for "non-sales purposes"). The court impermissibly presumed that critical element of class membership across both proposed classes because neither DIRECTV nor its retailer maintained business records detailing the purpose of each call. But neither had any freestanding obligation to do so—either as a matter of general principles or under the TCPA. *See* Pet. 18. Nor do they have any such burden under Rule 23. Instead, it is the *plaintiff's* burden to demonstrate a workable method for determining class membership. That burden rests firmly on the named class representatives' shoulders because class-action litigation is the exception—not the norm. *Dukes*, 564 U.S. at 348.

The court's analysis betrays a fundamental misunderstanding of how the commonality and predominance requirements are reflected in the concept of "ascertainability." There is only one way, consistent with Rule 23 and due process, to ensure that class-action defendants have the opportunity to challenge each plaintiff's claim of injury. District

courts must assure that, at the class certification stage, named plaintiffs offer a reliable and administratively feasible mechanism for *determining* whether putative class members fall within the class definition (*i.e.*, that they were injured by the challenged conduct). *See Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947-48 (11th Cir. 2015); *see also Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). Here, unnamed class members who received calls for non-sales purposes could not have suffered any injury (whether sufficiently concrete or not), and thus do not fall within the class definition. *See* 47 C.F.R. § 64.1200(f)(12), (14).

By requiring the plaintiff to come forward with a workable and testable method for identifying absent class members, ascertainability assures that the class mechanism does not override a defendant's due-process right to "test the reliability of the evidence submitted to prove class membership." *Carrera*, 727 F.3d at 307. Likewise, ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

Although some have criticized this requirement as a "heightened" and "freestanding" add-on to the textual requirements of Rule 23, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015), the ascertainability requirement in fact flows directly from Rule 23(b)(3)'s predominance and superiority requirements.

Common issues of law and fact cannot predominate over individualized issues when individualized assessments of the very existence of a claim overwhelm common questions. Ascertainability is thus nothing more than a specific application of predominance that focuses on the injury element of the plaintiffs' claim, *i.e.*, whether each plaintiff was in fact subject to the allegedly unlawful practice. It ensures that the most basic question in class litigation—have the class members suffered an injury?—is capable of generating a "common *answer*[]." *Dukes*, 564 U.S. at 350 (quotations omitted).

Ascertainability also gives effect to Rule 23's superiority requirement. A class action is not the superior method of adjudication when deciding whether each plaintiff has a claim *at all* unavoidably requires individualized mini-trials. *See In re Rail Freight Fuel Surcharge Antitrust Litg.*, 725 F.3d 244, 253 (D.C. Cir. 2013) ("When a

case turns on individualized proof of injury, separate trials are in order.").

Defendants have no freestanding or independent obligation under Rule 23 or otherwise to make the job of identifying class members easier for the named class representative. Instead, it is the plaintiff's burden to identify a workable method for identifying who has, and who does not have, a claim—without enduring the very mini-trials that class adjudication is supposed to avoid. That DIRECTV's retailer did not maintain records specifying the purpose of each call does not let Plaintiff off the hook. The retailer had no legal obligation to keep such records, and the presumption the district court applied improperly shifted the burden to DIRECTV to disprove class membership on an individual basis. Such individual determinations are not a workable, classwide method for determining who has a claim. District courts should not sacrifice a defendant's due-process rights to solve a plaintiff's ascertainability problem.

CONCLUSION

For these reasons, the Court should grant DIRECTV's Petition and reverse the district court's class certification decision.

Respectfully submitted,

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