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The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

***ACA International v. FCC,* D.C. Cir. No. 15-1211, Mar. 16, 2018.**

The Bullet Point: Among other things, The Telephone Consumer Protection Act (TCPA) regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, and unsolicited faxes. The TCPA has ramifications for almost every consumer-focused industry. As more entities use phone applications to conduct business and contact customers, the scope of the TCPA seems limitless. With recent

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multimillion-dollar class actions and settlements by companies in almost every industry, combined with unsettled law and guidance, the upward trend of new TCPA lawsuits will continue.

In this seminal decision, the D.C. Court of Appeals vacated parts of the Federal Communications Commission's (FCC) 2015 TCPA interpretations, expelling the FCC's interpretation of an automatic telephone dialing system (ATDS) and its approach to reassigned numbers and upholding the provisions of the 2015 Order regarding revocation of consent and the healthcare exemption, with important caveats. All in all, the opinion is the first step in returning the TCPA to its intended scope and providing meaningful opportunities for businesses to comply without fear of litigation. While the opinion is helpful, many questions remain, including what the FCC may do next.

McGlinchey Stafford recently issued **a more detailed client alert on the ruling in *ACA International*, its scope, and what it means for businesses moving forward**.

***U.S. Home Ownership, LLC v. Young*, 2d Dist. Montgomery No. 27382, 2018-Ohio-1059.**

This appeal challenged a mortgage lender's compliance with all conditions precedent required by the loan documents prior to foreclosure. In support of its request for judgment, the lender provided affidavits from a managing member who attested that according to its business records, it had sent written notice of default to the borrower and that a "duplicate" of that notice was attached to the affidavit. A second affidavit indicated that the notice was sent via first class mail and in support, referenced an affidavit filed in a different lawsuit. The trial court found this evidence sufficient to establish compliance with conditions precedent, and the defendant appealed.

On appeal, the Second Appellate District reversed, finding that the text of the affidavits called into question that affiant's personal knowledge to attest to the lender's compliance with all conditions precedent. It reversed and remanded the decision as a result.

The Bullet Point: For an affiant to authenticate a business record under Evid.R. 803(6), he "must demonstrate that: (1) the record was prepared by an employee of the business who had a duty to report the information; (2) [he has] personal knowledge of the event or transaction reported; (3) the record was prepared at or near the time of the event or transaction"; and (4) the business created such records as a regular practice. If "particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of [the corresponding] facts, then * * * something more than a conclusory averment that the affiant [actually] has [personal] knowledge of the facts [is] required." Not only should an affidavit outline an affiant's duties and job descriptions to establish how he or she has the requisite

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personal knowledge to attest to a business record, but the actual business record should be attached to the affidavit and attested to as a "true and accurate copy." As so many disputes center on the interpretation of business records, perfecting the evidentiary foundation is critical, especially when seeking a ruling via motion as opposed to the a full trial. The required affidavits provide the Court with necessary confidence to trust that the business records are what the parties say they are.

***Green Tree Servicing LLC v. Asterino-Starcher,* 10th Dist. Franklin No. 17AP-273, 2018-Ohio-977.**

This appeal involved a challenge by a junior lienholder to a senior lienholder's standing to foreclose. In this case, the homeowners did not contest the foreclosure, only a junior lienholder did. It questioned whether the plaintiff was a party entitled to enforce the promissory note and whether it was properly assigned the mortgage. Eventually, the trial court found for the plaintiff on the grounds that a junior lienholder lacks standing to contest the ability of a senior lienholder to foreclose, and the junior lienholder appealed.

On appeal, the Tenth Appellate District affirmed the trial court's decision. In so ruling, however, the court distinguished between a challenge to the note and a challenge to a mortgage, finding that a junior lienholder can challenge the validity of a mortgage.

The Bullet Point: Disputes among lienholders are common. This is because Ohio adheres to the "first in time, first in right" mantra. That is, the lien, mortgage, or interest that is recorded first has priority over subsequent recorded interests. In this case, the court noted that "there is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged property. Thus, the junior lienholders are truly strangers to the action on a note, which could proceed without them. They have no standing to challenge the plaintiff creditor's standing and, here, cannot assert a defense to the note obligation that the obligor herself has failed to raise." Conversely, like a borrower, a junior lienholder is also a stranger to an assignment of mortgage, but, like a borrower, a junior lienholder has a right to be sued only by a party with standing to do so.

***Inventiv Health Comms, Inc. v. Rodden*, 5th Dist. No. 17 CAE 09 0066, 2018-Ohio-945.**

This case involved a challenge to a forum selection clause contained in an employment agreement. The defendant, a resident of North Carolina, had worked for a subsidiary of plaintiff as an administrative assistant. Plaintiff is a business is located in Ohio, whereas the subsidiary is in North Carolina. The defendant eventually signed an

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acknowledgement attached to the company's code of ethics, which contained a forum selection clause indicating that suit must be brought in Ohio. She signed a noncompete clause at the same time. A few years later, defendant and others left their jobs for a competitor. The subsidiary then filed suit in Ohio, alleging this violated the noncompete agreement. Defendant moved to dismiss for improper forum and the trial court granted the motion.

On appeal, the Fifth Appellate District affirmed, finding that the trial court properly found the forum selection clause to be unenforceable because it was overreaching and would inconvenience the parties.

The Bullet Point: A party can consent to personal jurisdiction in a forum, waiving his or her due process rights in the interim. In Ohio, it is well settled law that "[a]bsent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust."

Forum selection clauses can be very important to the overall contract negotiations as they determine who gets "home court advantage" in any legal proceeding. More often than not, it is the "larger" party to a contract which demands such advantage. In determining whether the selected forum is reasonable, Ohio courts consider the following factors: (1) which law controls the contractual dispute; (2) the residency of the parties; (3) where the contract was executed; (4) where the witnesses and parties to the litigation are located; and (5) whether the forum clause's designated location is inconvenient to the parties. However, rather than attempt these arguments after the fact, if the proposed forum is truly objectionable, parties should attempt to alleviate such concerns through negotiations.

***Blain's Folding Service, Inc. v. Cincinnati Ins. Co.*, 8th Dist. Cuyahoga No. 105913, 2018-Ohio-959.**

This lawsuit stemmed from an automobile accident that damaged a building owned by plaintiff. Plaintiff hired a construction company to repair the building. It eventually filed suit against the construction company for breach of contract. The construction company argued that the plaintiff could not recover future profits because the contract violated the statute of frauds. The trial court agreed and plaintiff appealed.

On appeal, the Eighth Appellate District affirmed, but on different grounds, finding that the statute of frauds defense had been waived but that the construction company established that the future lost profits of plaintiff were merely speculative and could not be recovered.

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The Bullet Point: As explained in **an earlier Bullet Point**, the statute of frauds states that no action can be brought upon an agreement that is not to be performed within one year unless the agreement is reduced to writing. "[T]he statute of frauds bars a party from enforcing an oral agreement falling within the statute." Nonetheless, the statute of frauds defense can be waived and, as a result, a non-party to a contract cannot avail itself to the affirmative defense of statute of frauds in that situation.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2016 Decided March 16, 2018

No. 15-1211

ACA INTERNATIONAL, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

CAVALRY PORTFOLIO SERVICES, LLC, ET AL.,
INTERVENORS

Consolidated with 15-1218, 15-1244, 15-1290, 15-1304,
15-1306, 15-1311, 15-1313, 15-1314, 15-1440, 15-1441

On Petitions for Review of an Order of
the Federal Communications Commission

Shay Dvoretzky argued the cause for petitioners ACA International, et al. With him on the joint briefs were *Helgi C. Walker*, *Monica S. Desai*, *Amy L. Brown*, *Jonathan Jacob Nadler*, *Christopher J. Wright*, *Jennifer P. Bagg*, *Elizabeth Austin Bonner*, *Robert A. Long*, *Yaron Dori*, *Brian Melendez*, *Tonia Ouellette Klausner*, *Keith E. Eggleton*, *Kate Comerford*

Todd, *Steven P. Lehotsky*, and *Warren Postman*. *Lindsay S. See* entered an appearance.

Charles R. Messer, pro se, was on the brief for *amicus curiae* Charles R. Messer in support of ACA International's petition.

Paul Werner argued the cause for petitioner Rite Aid Hdqtrs. Corp. With him on the briefs was *Brian Weimer*.

Thomas C. Mugavero, *Steven A. Augustino*, *Jonathan E. Paikin*, *Jonathan G. Cedarbaum*, *Blaine C. Kimrey*, and *Bryan K. Clark* were on the joint briefs for intervenors MRS BPO LLC, et al. in support of petitioners.

Don L. Bell, *II* was on the brief for *amicus curiae* The National Association of Chain Drug Stores, Inc. in support of petitioner Rite Aid Hdqtrs. Corp.

H. Russell Frisby, *Jr.*, *Harvey L. Reiter*, *Aryeh Fishman*, *Michael Murray*, and *Jay Morrison* were on the brief for *amici curiae* American Gas Association, et al. in support of petitioners.

Charles H. Kennedy was on the brief for *amici curiae* The American Bankers Association, Credit Union National Association and The Independent Community Bankers of America in support of petitioners.

Andrew B. Clubok, *Susan E. Engel*, and *Devin S. Anderson* were on the brief for *amicus curiae* The Internet Association in support of petitioners.

Joseph R. Palmore and *Seth W. Lloyd* were on the brief for *amici curiae* Retail Litigation Center, Inc., National Retail

Federation, and National Restaurant Association in support of petitioners.

Bryan N. Tramont and *Russell P. Hanser* were on the brief for *amicus curiae* CTIA-The Wireless Association in support of petitioners.

Eric J. Troutman was on the brief for *amici curiae* American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Bankers Association in support of petitioners. *Jan T. Chilton* and *Kerry W. Frarnich* entered appearances.

Amy M. Gallegos was on the brief for *amicus curiae* Communication Innovators in support of petitioners.

Scott M. Noveck, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *William J. Baer*, Assistant Attorney General, U.S. Department of Justice, *Kristen C. Limarzi*, *Steven J. Mintz*, Attorneys, *Jonathan B. Sallet*, General Counsel, Federal Communications Commission, *David M. Gossett*, Deputy General Counsel, and *Jacob M. Lewis*, Associate General Counsel.

Craig L. Briskin and *Julie Nepveu* were on the brief for *amici curiae* National Consumer Law Center, et al. in support of the Federal Communications Commission 2015 Omnibus Declaratory Ruling and Order.

Marc Rotenberg and *Alan Butler* were on the brief for *amici curiae* Electronic Privacy Information Center (EPIC) and Six Consumer Privacy Organizations in support of respondents.

Before: SRINIVASAN and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: Unwanted robocalls are an all-too-familiar phenomenon. For years, consumers have complained to the Federal Communications Commission about automated telemarketing calls and text messages that they did not seek and cannot seem to stop.

Congress sought to address consumers' concerns with undesired robocalls in the Telephone Consumer Protection Act of 1991. The TCPA generally prohibits the use of certain kinds of automated dialing equipment to call wireless telephone numbers absent advance consent. The Act vests the Commission with authority to implement those restrictions.

In this case, a number of regulated entities seek review of a 2015 order in which the Commission sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls. The challenges encompass four issues addressed by the agency's order: (i) which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls; (ii) when a caller obtains a party's consent, does a call nonetheless violate the Act if, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent; (iii) how may a consenting party revoke her consent; and (iv) did the Commission too narrowly fashion an exemption from the TCPA's consent requirement for certain healthcare-related calls.

We uphold the Commission's approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller. We also sustain the scope of the agency's exemption for time-sensitive healthcare calls.

We set aside, however, the Commission's effort to clarify the types of calling equipment that fall within the TCPA's restrictions. The Commission's understanding would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute. We also vacate the agency's approach to calls made to a phone number previously assigned to a person who had given consent but since reassigned to another (nonconsenting) person. The Commission concluded that calls in that situation violate the TCPA, apart from a one-call safe harbor, regardless of whether the caller has any awareness of the reassignment. We determine that the agency's one-call safe harbor, at least as defended in the order, is arbitrary and capricious.

We therefore grant the petitions for review in part and deny them in part.

I.

The federal government's efforts to combat unwanted robocalls have spanned nearly three decades, involving two federal agencies and a number of congressional enactments. In the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101 *et seq.*, Congress empowered the Federal Trade Commission to regulate the telemarketing industry. The FTC's measures include a general bar against calling any telephone number on the "do-

not-call registry" without consent or an established business relationship. 16 C.F.R. § 310.4(b)(1)(iii)(B); *see* 15 U.S.C. § 6151(a). This case does not concern the FTC's initiatives.

This case instead concerns the Federal Communications Commission's efforts to combat unwanted robocalls pursuant to its authority under the TCPA. Some of the Commission's restrictions on telemarketing calls mirror measures established by the FTC. *Compare* 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.4(c), *with* 47 C.F.R. § 64.1200(c). But the agencies' initiatives also differ in various respects. Of relevance here, only the TCPA specifically restricts the use of an "automatic telephone dialing system" to make calls. 47 U.S.C. § 227(b)(1)(A). Petitioners challenge the Commission's interpretation and implementation of various TCPA provisions pertaining to automated dialing equipment.

A.

Congress enacted the TCPA in 1991 based on findings that the "use of the telephone to market goods and services to the home and other businesses" had become "pervasive due to the increased use of cost-effective telemarketing techniques." 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394. "Many consumers," Congress determined, "are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." *Id.* § 2(6)-(7).

The TCPA restricts calls both "to any residential telephone line" and to "any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii), (B). This case solely concerns the latter restrictions on telephone calls to wireless numbers.

Congress, in that regard, made it "unlawful . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service," "unless such call is made solely to collect a debt owed to or guaranteed by the United States." *Id.* § 227(b)(1)(A)(iii). The statute defines an "automatic telephone dialing system" (ATDS, or autodialer) as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1).

In short, the TCPA generally makes it unlawful to call a cell phone using an ATDS. And an ATDS is equipment with the "capacity" to perform each of two enumerated functions: (i) storing or producing telephone numbers "using a random or sequential number generator" and (ii) dialing those numbers. The general prohibition on autodialer calls to wireless numbers is subject to three exceptions. The central exception for purposes of this case is for calls made with "prior express consent." There are also exceptions for emergency calls and calls made to collect government debts.

The TCPA vests the Commission with responsibility to promulgate regulations implementing the Act's requirements. *Id.* § 227(b)(2). The Act also grants the Commission specific authority to fashion exemptions from the general prohibition on autodialer calls to wireless numbers, where the calls are "not charged to the called party." *Id.* § 227(b)(2)(C). As Congress explained, the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy." *Id.* § 227 note, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394, 2395.

Since the TCPA's enactment, the FCC has issued a series of rulemakings and declaratory rulings addressing the Act's reach. In 2003, for instance, the agency concluded that the statute's restrictions on "mak[ing] any call" using an ATDS encompass the sending of text messages. *See* In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2003 Order), 18 FCC Rcd. 14,014, 14,115 ¶ 165 (2003).

The Act contains a private right of action permitting aggrieved parties to recover at least $500 in damages for each call made (or text message sent) in violation of the statute, and up to treble damages for each "willful[] or knowing[]" violation. 47 U.S.C. § 227(b)(3). There is no cap on the amount of recoverable damages. The Commission has noted a surge in TCPA lawsuits (including class actions) in recent years, likely attributable in part to the "skyrocketing growth of mobile phones." In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2015 Declaratory Ruling), 30 FCC Rcd. 7961, 7970 ¶¶ 6-7 (2015).

B.

In a Declaratory Ruling and Order issued in 2015, the Commission (with two Commissioners dissenting) addressed 21 separate petitions for rulemaking or requests for clarification. In this court, petitioners and intervenors seek review of four aspects of the Commission's order.

First, the Commission sought to clarify which devices for making calls qualify as an ATDS—i.e., equipment that "has the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," and "to dial such numbers." 47 U.S.C. § 227(a)(1). With regard

to whether equipment has the "capacity" to perform the enumerated functions, the Commission declined to define a device's "capacity" in a manner confined to its "present capacity." Instead, the agency construed a device's "capacity" to encompass its "potential functionalities" with modifications such as software changes. 2015 Declaratory Ruling, 30 FCC Rcd. at 7974 ¶ 16.

The Commission also addressed the precise functions that a device must have the capacity to perform for it to be considered an ATDS. The Commission reaffirmed prior orders deciding that "predictive dialers"—equipment that can dial automatically from a given list of telephone numbers using algorithms to predict "when a sales agent will be available"—qualify as autodialers. *Id.* at 7972 ¶ 10 & n.39. The Commission further explained that a "basic function[]" of an autodialer is to "dial numbers without human intervention." *Id.* at 7975 ¶ 17. At the same time, the Commission also declined to "clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id.* at 7976 ¶ 20.

Second, the Commission spoke to whether, and when, a caller violates the TCPA by calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge. The Act specifically permits autodialer calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). If the "called party" for those purposes refers to the *intended* recipient of a call or message, a caller would face no liability when using an ATDS to call a number believed to belong to a consenting party, even if the number in fact has been reassigned to another person who has not consented.

The Commission, though, determined that the term "called party" refers not to "the intended recipient of a call" but instead to "the current subscriber" (i.e., the current, nonconsenting holder of a reassigned number rather than a consenting party who previously held the number). 2015 Declaratory Ruling, 30 FCC Rcd. at 7999 ¶ 72. But the Commission did not hold a caller strictly liable when unaware that the consenting party's number has been reassigned to another person. Instead, the agency allowed one—and only one—liability-free, post-reassignment call for callers who lack "knowledge of [the] reassignment" and possess "a reasonable basis to believe that they have valid consent." *Id.* at 8000 ¶ 72.

Third, the Commission clarified the ways in which a consenting party can revoke her consent to receive autodialer calls. The Commission decided that callers may not unilaterally designate the acceptable means of revocation. It also declined to prescribe its own set of mandatory revocation procedures. Rather, it concluded that "a called party may revoke consent at any time and through any reasonable means"—whether orally or in writing—"that clearly expresses a desire not to receive further messages." *Id.* at 7989-90 ¶ 47; *id*. at 7996 ¶ 63.

Fourth, and finally, the Commission exempted from the autodialer provision's consent requirement certain calls to wireless numbers "for which there is exigency and that have a healthcare treatment purpose." *Id.* at 8031 ¶ 146. It declined, however, to give the exemption the reach desired by certain parties that are in the business of healthcare-related marketing calls.

We will take up the challenges to those four aspects of the Commission's 2015 ruling in the same order.

II.

Under the Administrative Procedure Act, we assess whether the Commission's challenged actions in its 2015 order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We review the lawfulness of the Commission's interpretations of the TCPA using the two-step *Chevron* framework. That inquiry calls for examining whether "Congress has directly spoken to the precise question at issue," and, if not, whether "the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

To be lawful, the Commission's challenged actions must also satisfy the Administrative Procedure Act's requirement that they not be arbitrary or capricious. Arbitrary-and-capricious review includes assuring that the agency "engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Review of agency action for arbitrariness and capriciousness sometimes entails essentially the same inquiry as review of an agency's exercise of statutory interpretation under *Chevron*'s second step. *See id.* at 52 n.7; *Agape Church, Inc. v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013).

Applying those standards to petitioners' four sets of challenges to the Commission's 2015 Declaratory Ruling, we set aside the Commission's explanation of which devices qualify as an ATDS, as well as its understanding of when a caller violates the Act by calling a wireless number previously held by a consenting party but reassigned to a person who has not given consent. We sustain, however, the Commission's ruling that a party can revoke consent through any reasonable means clearly expressing a desire to receive no further calls or

texts, and we also uphold the scope of the Commission's exemption for time-sensitive, healthcare-related calls.

A.

We first consider the Commission's effort to clarify which sorts of calling equipment qualify as an ATDS so as to fall subject to the general prohibition against making calls using such a device without consent. The statute defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1). That definition naturally raises two questions: (i) when does a device have the "capacity" to perform the two enumerated functions; and (ii) what precisely are those functions? We conclude that the Commission's approach to those two questions cannot be sustained, at least given the Commission's unchallenged assumption that a call made with a device having the capacity to function as an autodialer can violate the statute even if autodialer features are not used to make the call.

1.

a. In addressing what it means for equipment to have the "capacity" to perform the autodialer functions enumerated in the statute, the Commission rejected the arguments of various parties that a device's capacity must be measured solely by reference to its "present capacity" or its "current configuration" without any modification. 2015 Declaratory Ruling, 30 FCC Rcd. at 7974 ¶ 16. The Commission instead determined that the "capacity" of calling equipment "includes its potential functionalities" or "future possibility," not just its "present ability." *Id.* at 7974 ¶ 16; *id*. at 7975 ¶ 20.

The Commission reasoned that the "functional capacity of software-controlled equipment is designed to be flexible, both in terms of features that can be activated or de-activated and in terms of features that can be added to the equipment's overall functionality through software changes or updates." *Id.* at 7974 ¶ 16 n.63. And the Commission found support for its "potential functionalities" approach in dictionary definitions of the term "capacity," one of which is "the potential or suitability for holding, storing, or accommodating." *Id.* at 7975 ¶ 19 (quoting *Capacity*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/capacity (as visited May 18, 2015)).

In challenging the Commission's approach, petitioners argue that the term "capacity" in the statutory definition of an ATDS can refer only to a device's "present ability," i.e., its current and unmodified state, not its "potential ability" taking into account possible upgrades or modifications. It is far from clear, though, that labels such as "present" ability versus "potential" ability should carry dispositive weight in assessing the meaning of the statutory term "capacity." After all, even under the ostensibly narrower, "present ability" interpretation advanced by petitioners, a device that "presently" (and generally) operates as a traditional telephone would still be considered have the "capacity" to function as an ATDS if it could assume the requisite features merely upon touching a button on the equipment to switch it into autodialer mode. Virtually any understanding of "capacity" thus contemplates some future functioning state, along with some modifying act to bring that state about.

Consequently, the question whether equipment has the "capacity" to perform the functions of an ATDS ultimately turns less on labels such as "present" and "potential" and more on considerations such as how much is required to

enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment? And depending on the answer, what kinds (and how broad a swath) of telephone equipment might then be deemed to qualify as an ATDS subject to the general bar against making any calls without prior express consent?

b. Here, the Commission adopted an expansive interpretation of "capacity" having the apparent effect of embracing any and all smartphones: the device routinely used by the vast majority of citizens to make calls and send messages (and for many people, the sole phone equipment they own). It is undisputed that essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS. The Commission in its ruling did not question the observation of a dissenting Commissioner that "[i]t's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers." 2015 Declaratory Ruling, 30 FCC Rcd. at 8075 (Comm'r Pai, dissenting). The Commission itself noted that "[d]ialing options" are now "available via smartphone apps" that enable "[c]alling and texting consumers *en masse*." *Id.* at 7970 ¶ 7.

The Commission's ruling concluded that app downloads and other software additions of that variety—and the enhanced functionality they bring about—are appropriately considered to be within a device's "capacity." The ruling states that equipment's "functional capacity" includes "features that can be added . . . through software changes or updates." *Id.* at 7974 ¶ 16 n.63. As a result, "a piece of equipment can possess the requisite 'capacity' to satisfy the statutory definition of an 'autodialer' even if, for example, it

requires the addition of software to actually perform the functions described in the definition." *Id.* at 7975 ¶ 18. The Commission reinforced the point in an example set forth in its brief in this case: "If I ask whether the Firefox browser has the 'capacity' to play Flash videos, it would be natural for you to answer 'Yes, if you download the Flash plug-in'—and it would be incorrect for you to answer 'No.'" FCC Br. 29.

If a device's "capacity" includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones, under the Commission's approach, meet the statutory definition of an autodialer. The Commission's ruling does not deny that conclusion.

To the contrary, a number of parties specifically argued to the agency "that a broad interpretation of 'capacity' could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such numbers through the use of an app or other software." 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 21. Rather than resist that contention, the Commission assumed its correctness, responding that, even if smartphones qualify as autodialers, it was unclear to the Commission that the "typical use of smartphones" would be "likely" to give rise to "unwanted calls" of a kind producing "legal action." *Id.* at 7977 ¶ 21. A dissenting Commissioner read that portion of the Commission's order to "acknowledge[] that smartphones are swept in under its reading," such that "each and every smartphone . . . is an automatic telephone dialing system." *Id.* at 8075 & n.576 (Comm'r Pai, dissenting). The Commission did not disagree or suggest otherwise.

c. If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep. Recall that the statute generally bars the use of an ATDS to make any call (or send any text message) without prior express consent, and tags each violation with a minimum $500 penalty in damages for each individual recipient of each prohibited call or message. The reach of the statute becomes especially pronounced upon recognizing that, under the Commission's approach, an uninvited call or message from a smartphone violates the statute even if autodialer features were not used to make the call or send the message. *Id.* at 7976 ¶ 19 n.70. We explore that interpretive issue in greater depth below (*infra* § II.A.3); but for now, it suffices to appreciate the Commission's understanding that, as long as equipment has the "capacity" to function as an autodialer—as is true of every smartphone under the agency's view—*any* uninvited call or message from the device is a statutory violation.

Imagine, for instance, that a person wishes to send an invitation for a social gathering to a person she recently met for the first time. If she lacks prior express consent to send the invitation, and if she obtains the acquaintance's cell phone number from a mutual friend, she ostensibly commits a violation of federal law by calling or sending a text message from her smartphone to extend the invitation. *See* 2015 Declaratory Ruling, 30 FCC Rcd. at 8076 (Comm'r Pai, dissenting). And if she sends a group message inviting ten people to the gathering, again without securing prior express consent from any of the recipients, she not only would have infringed the TCPA ten distinct times but would also face a minimum damages recovery against her of $5,000.

Those sorts of anomalous outcomes are bottomed in an unreasonable, and impermissible, interpretation of the

statute's reach. The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent.

A "significant majority of American adults" owned a smartphone even by 2013. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). And as of the end of 2016, nearly 80% of American adults had become smartphone owners. *See 10 Facts About Smartphones as the iPhone Turns 10*, Pew Research Ctr., June 28, 2017, http://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones (last visited Dec. 18, 2017). That figure will only continue to grow, and increasingly, individuals own no phone equipment other than a smartphone. *See id.*; *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2017*, Nat'l Ctr. for Health Statistics 1 (Dec. 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

It is untenable to construe the term "capacity" in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.

In that regard, it is notable that Congress, in its findings setting forth the basis for the statute, found that some "30,000 businesses actively telemarket goods and services to business

and residential customers" and "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day." 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(2)-(3), 105 Stat. 2394, 2394. Those sorts of predicate congressional findings can shed substantial light on the intended reach of a statute. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484-87 (1999).

Of course, there is no expectation that a statute's reach necessarily will precisely match Congress's findings about a problem it aims to address, and Congress might well fashion a statute's operative provisions with built-in flexibility to accommodate expansion of the concerns animating the legislation over time. But a several-fold gulf between congressional findings and a statute's suggested reach can call into doubt the permissibility of the interpretation in consideration.

That is what happened in *Sutton*. There, the Supreme Court rejected an interpretation of the term "disability" in the Americans with Disabilities Act that would have treated some 160 million persons as disabled in the face of congressional findings contemplating the population of disabled persons as numbering only 43 million. *See id.*; *id.* at 494-95 (Ginsburg, J., concurring). (After *Sutton*, Congress amended the statutory findings and the statute to allow for an expansive application. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554.)

Here, as in *Sutton*, the Commission's expansive understanding of "capacity" in the TCPA is incompatible with a statute grounded in concerns about hundreds of thousands of "solicitors" making "telemarketing" calls on behalf of tens of thousands of "businesses." The Commission's interpretation would extend a law originally aimed to deal with hundreds of

thousands of telemarketers into one constraining hundreds of millions of everyday callers.

The Commission's capacious understanding of a device's "capacity" lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework. As we have explained, "even if the [statute] does not foreclose the Commission's interpretation, the interpretation [can] fall[] outside the bounds of reasonableness" at *Chevron*'s second step. *Goldstein v. SEC*, 451 F.3d 873, 880-81 (D.C. Cir. 2006). That is because an "agency['s] construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority." *Id.* (quoting *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003)).

In *Aid Ass'n*, for example, we examined Postal Service regulations that excluded nonprofit organizations' use of certain reduced postage rates. We found the regulations to be incompatible with congressional intent. The regulations, we said, "constitute an impermissible construction of the statute under *Chevron* Step Two because the interpretation is utterly unreasonable in the breadth of its regulatory exclusion." 321 F.3d at 1178.

In this case, similarly, the Commission's interpretation of the term "capacity" in the statutory definition of an ATDS is "utterly unreasonable in the breadth of its regulatory [in]clusion." *Id.* Nothing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans.

The Commission suggested in its ruling that, unless "capacity" reached so broadly, "little or no modern dialing equipment would fit the statutory definition." 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 20. But Congress need not be presumed to have intended the term "automatic telephone dialing system" to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a "paging service" or "specialized mobile radio service," 47 U.S.C. § 227(b)(1)(A)(iii), yet those terms have largely ceased to have practical significance.

In any event, the Commission retains a measure of authority under the TCPA to fashion exemptions to the restrictions on use of autodialers to call wireless numbers. *Id.* § 227(b)(2)(C). The agency presumably could, if needed, fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.

d. In its briefing before our court, the Commission now submits that its order in fact did not reach a definitive resolution on whether smartphones qualify as autodialers. As we have explained, however, a straightforward reading of the Commission's ruling invites the conclusion that all smartphones are autodialers: the ruling explained that a number of parties specifically raised the issue; and it responded, not by disputing the parties' concerns that smartphones would be covered by the statutory definition under the agency's approach, but instead by accepting that conclusion and then questioning whether uninvited calls in fact would be made and lawsuits in fact would be brought.

It is highly difficult to read the Commission's ruling to leave uncertain whether the statutory definition applies to smartphones. And any uncertainty on that score would have left affected parties without concrete guidance even though several of them specifically raised the issue with the agency, and even though the issue carries significant implications—including the possibility of committing federal law violations and incurring substantial liability in damages—for smartphone owners.

At any rate, even assuming the Commission's ruling could be conceived to leave room for concluding that smartphones do not qualify as autodialers, that result itself would be unreasonable and impermissible. The Commission's order, in that event, would not constitute reasoned decisionmaking and thus would not satisfy APA arbitrary-and-capricious review. *See United States Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 754 (D.C. Cir. 2015).

Administrative action is "arbitrary and capricious [if] it fails to articulate a comprehensible standard" for assessing the applicability of a statutory category. *Id.* at 753. If a "purported standard is indiscriminate and offers no meaningful guidance" to affected parties, it will fail "the requirement of reasoned decisionmaking." *Id.* at 754. That will be the case if an agency cannot satisfactorily explain why a challenged standard embraces one potential application but leaves out another, seemingly similar one. *See id.* at 754-55.

That would be precisely the situation here if, as the Commission now contends in its briefing before us, its order in fact left open the possibility that smartphones fail to meet the statutory definition of an ATDS. In the same briefing, the Commission, as noted, simultaneously maintained that the

Firefox browser has the "capacity" to play Flash videos because the Flash plug-in can be downloaded. Precisely the same logic seemingly should compel concluding that smartphones have the "capacity" to function as autodialers because apps carrying the requisite features can be downloaded. If the Commission believes smartphones nonetheless do not meet the definition of an autodialer, there is no explanation of "this differential treatment of seemingly like cases." *Id.* at 755 (internal quotation marks omitted).

The Commission did say in its order that "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition." 2015 Declaratory Ruling, 30 FCC Rcd. at 7975 ¶ 18. But that ostensible limitation affords no ground for distinguishing between a smartphone and the Firefox browser. In light of the ease of downloading an app to a smartphone, there is no evident basis for concluding that the Firefox browser has more than a mere "theoretical potential" to play Flash videos by downloading a plug-in, but a smartphone nonetheless has only a "theoretical potential" to function as an autodialer by downloading an app.

The point is fortified by the sole example of a mere "theoretical potential" set forth by the Commission in its order. That example involves a traditional rotary-dial phone (which by now is approaching obsolescence): the Commission observed that "it might be theoretically possible to modify a rotary-dial telephone to such an extreme that it would satisfy the definition of 'autodialer,' but such a possibility is too attenuated . . . to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer." *Id.* A rotary phone has no relevant similarity to a smartphone. To the contrary, whereas a smartphone and the Firefox browser substantially resemble one another in their amenability to an

upgrade via the addition of software, they substantially differ in that regard from a rotary-dial phone, which has no such capability.

In the end, then, the Commission's order cannot reasonably be understood to support the conclusion that smartphones fall outside the TCPA's autodialer definition: any such reading would compel concluding that the agency's ruling fails arbitrary-and-capricious review. The more straightforward understanding of the Commission's ruling is that all smartphones qualify as autodialers because they have the inherent "capacity" to gain ATDS functionality by downloading an app. That interpretation of the statute, for all the reasons explained, is an unreasonably, and impermissibly, expansive one.

2.

Recall that the statutory definition of an ATDS raises two sets of questions: (i) when does a device have the "capacity" to perform the functions of an autodialer enumerated by the statute?; and (ii) what precisely is the content of those functions? The impermissibility of the Commission's interpretation of the term "capacity" in the autodialer definition is compounded by inadequacies in the agency's explanation of the requisite features. Having addressed the first issue, we now turn to the second one.

a. As a threshold matter, the Commission maintains that the court lacks jurisdiction to entertain petitioners' challenge concerning the functions a device must be able to perform. The agency reasons that the issue was resolved in prior agency orders—specifically, declaratory rulings in 2003 and 2008 concluding that the statutory definition of an ATDS includes "predictive dialers," dialing equipment that can make

use of algorithms to "assist[] telemarketers in predicting when a sales agent will be available to take calls." 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10 n.39; *see also* In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2008 Declaratory Ruling), 23 FCC Rcd. 559 (2008); 2003 Order, 18 FCC Rcd. 14,014. According to the Commission, because there was no timely appeal from those previous orders, it is too late now to raise a challenge by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones. We disagree.

While the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review. The agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform. Petitioners covered their bases by filing petitions for both a declaratory ruling and a rulemaking concerning that issue and related ones. *See, e.g.*, Prof'l Ass'n for Customer Engagement, Inc. Pet. 3-4; ACA Int'l Pet. 6; GroupMe, Inc. Pet. 3; Glide Talk, Ltd. Pet. 13. In response, the Commission issued a declaratory ruling that purported to "provid[e] clarification on the definition of 'autodialer,'" and denied the petitions for rulemaking on the issue. 2015 Declaratory Ruling, 30 FCC Rcd. at 8039 ¶ 165 & n.552. The ruling is thus reviewable on both grounds. *See* 5 U.S.C. § 554(e); *Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007).

b. The statutory definition says that a device constitutes an ATDS if it has the capacity to perform both of two enumerated functions: "to store or produce telephone numbers to be called, using a random or sequential number generator"; and "to dial such numbers." 47 U.S.C. § 227(a)(1)(A)-(B). The role of the phrase, "using a random or sequential number generator," has generated substantial

questions over the years. The Commission has sought to address those questions in previous orders and did so again in the 2015 Declaratory Ruling we consider here.

The Commission's most recent effort falls short of reasoned decisionmaking in "offer[ing] no meaningful guidance" to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions. *Postal Regulatory Comm'n*, 785 F.3d at 754. A basic question raised by the statutory definition is whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue.

In certain respects, the order conveys that equipment needs to have the ability to generate random or sequential numbers that it can then dial. The order twice states that, to "meet[] the TCPA's definition of 'autodialer,'" the equipment in question must have the capacity to "dial random or sequential numbers." 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10; *see also id.* at 7974 ¶ 15. And it is clear from context that the order treats the ability to "dial random or sequential numbers" as the ability to *generate* and then dial "random or sequential numbers."

To see why, it is helpful to understand that the ruling distinguishes between use of equipment to "dial random or sequential numbers" and use of equipment to "call[] a set list of consumers." *Id.* at 7972 ¶ 10. Anytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence. As a result, the ruling's reference to "dialing random or sequential numbers" cannot simply mean dialing from a set

list of numbers in random or other sequential order: if that were so, there would be no difference between "dialing random or sequential numbers" and "dialing a set list of numbers," even though the ruling draws a divide between the two. *See id.* at 7973 ¶¶ 13, 14. It follows that the ruling's reference to "dialing random or sequential numbers" means generating those numbers and then dialing them.

The Commission's prior declaratory rulings reinforce that understanding. In its 2003 ruling addressing predictive dialers, the Commission observed that, "[i]n the past, telemarketers may have used dialing equipment to *create and dial* 10-digit telephone numbers arbitrarily." 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132 (emphasis added). But the industry had "progressed to the point where" it had become "far more cost effective" instead to "us[e] lists of numbers." *Id.* Again, the Commission suggested it saw a difference between calling from a list of numbers, on one hand, and "creating and dialing" a random or arbitrary list of numbers, on the other hand. Or as the Commission has elsewhere said, numbers that are "randomly or sequentially generated" differ from numbers that "come from a calling list." In re Implementation of the Middle Class Tax Relief and Job Creation Act of 2012, 27 FCC Rcd. 13,615, 13,629 ¶ 29 (2012) (quoted in 2015 Declaratory Ruling, 30 FCC Rcd. at 8077 (Comm'r Pai, dissenting)).

While the 2015 ruling indicates in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, it also suggests a competing view: that equipment can meet the statutory definition even if it lacks that capacity. The Commission reaffirmed its 2003 ruling insofar as that order had found predictive dialers to qualify as ATDSs. 2015 Declaratory Ruling, 30 FCC Rcd. at 7972-73 ¶¶ 12-14. And

in the 2003 order, the Commission had made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS. 2003 Order, 18 FCC Rcd. at 14,091 ¶ 131 n.432; *id*. at 14,093 ¶ 133. By reaffirming that conclusion in its 2015 ruling, the Commission supported the notion that a device can be considered an autodialer even if it has no capacity itself to generate random or sequential numbers (and instead can only dial from an externally supplied set of numbers). The 2015 ruling correspondingly expresses that "predictive dialers" can differ from other "dialers that utilize random or sequential numbers instead of a list of numbers." 2015 Declaratory Ruling, 30 FCC Rcd. at 7973 ¶ 14.

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.

The choice between the interpretations is not without practical significance. Petitioners and various amici describe calling equipment that they wish to use to call set lists of cellular numbers without any generation of random or sequential numbers. *See* ACA Int'l Reply Br. 21; Am. Bankers Ass'n Amicus Br. 29-30. And at least some predictive dialers, as explained, have no capacity to generate random or sequential numbers.

The uncertainty in the 2015 ruling, moreover, does not stop with the question of whether a device must be able to generate random or sequential numbers to meet the statutory definition. The ruling is also unclear about whether certain other referenced capabilities are necessary for a dialer to qualify as an ATDS.

For instance, the ruling states that the "basic function" of an autodialer is the ability to "dial numbers without human intervention." 2015 Declaratory Ruling, 30 FCC Rcd. at 7973 ¶ 14; *id.* at 7975 ¶ 17. Prior orders had said the same. 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132; 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 13. That makes sense given that "auto" in autodialer—or, equivalently, "automatic" in "automatic telephone dialing system," 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.

But the Commission nevertheless declined a request to "clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 20. According to the Commission, then, the "basic function" of an autodialer is to dial numbers without human intervention, but a device might still qualify as an autodialer even if it cannot dial numbers without human intervention. Those side-by-side propositions are difficult to square.

The Commission further said that another "basic function[]" of an ATDS is to "dial thousands of numbers in a short period of time." *Id.* at 7975 ¶ 17. But the ruling imparts no additional guidance concerning whether that is a necessary condition, a sufficient condition, a relevant condition even if neither necessary nor sufficient, or something else. Nor does it indicate what would qualify as a "short period of time."

Again, affected parties are left in a significant fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls.

In short, the Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking. The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the "capacity" to perform the necessary functions. We must therefore set aside the Commission's treatment of those matters.

3.

We briefly note an additional statutory provision affecting the scope of the TCPA's restrictions on autodialer calls to cell numbers—a provision we ultimately have no occasion to examine because of the way the case has been presented to us. Two TCPA provisions work together to establish the reach of the general prohibition against making autodialer calls without prior consent. The first provision, as we have seen, defines the equipment—viz., "automatic telephone dialing system"—subject to the statutory prohibition. 47 U.S.C. § 227(a)(1). The second provision then incorporates that definition in setting out the scope of the prohibition: "It shall be unlawful for any person . . . to *make any call* (other than a call made for emergency purposes or made with the prior express consent of the called party) *using any automatic telephone dialing system* . . . to any telephone number assigned to a . . . cellular telephone service[.]" *Id.* § 227(b)(1)(A)(iii) (emphases added).

Petitioners have confined their challenge to the Commission's understanding of the first of those provisions, the statutory definition of an autodialer, and our analysis has been focused on that issue. Petitioners have raised no challenge to the Commission's understanding of the second provision—i.e., to the agency's interpretation of what it means to "make any call using any" ATDS. In particular, in the case of a device having the "capacity" both to perform the autodialer functions set out in the statutory definition and to perform as a traditional phone, does the bar against "making any call using" an ATDS apply only to calls made using the equipment's ATDS functionality? Or does the bar apply to all calls made with a device having that "capacity," even ones made without any use of the equipment's autodialer capabilities? Or does the bar apply to calls made using certain autodialer functions, even if not all of them?

The Commission's ruling endorsed a broad understanding under which the statute prohibits any calls made from a device with the capacity to function as an autodialer, regardless of whether autodialer features are used to make a call. 2015 Declaratory Ruling, 30 FCC Rcd. at 7975 ¶ 19 n.70. A dissenting commissioner, by contrast, read the pertinent statutory phrase, "make any call," to mean "that the equipment must, in fact, be used *as an autodialer* to make the calls" before a TCPA violation can be found. *Id.* at 8088 (Comm'r O'Rielly, dissenting in part and approving in part).

The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of "capacity" in the autodialer definition. Even if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and

used to make calls. Under the dissent's understanding of the phrase, "make any call," then, everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.

Petitioners, however, raise no challenge to the Commission's understanding of the statutory words, "make any call using" an ATDS, and the parties therefore have not presented arguments on the issue in their briefing before us. Our consistent practice in such a situation is to decline to address (much less resolve) the issue. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 697 (D.C. Cir. 2016). We "sit to resolve only legal questions presented and argued by the parties." *Id.* (internal quotation marks omitted). We nonetheless note the issue in light of its potential interplay with the distinct challenges petitioners do raise. The agency could choose to revisit the issue in a future rulemaking or declaratory order, and a party might then raise the issue on judicial review.

B.

We now turn to the Commission's treatment of circumstances in which a consenting party's cell number has been reassigned to another person. While there is no consensus about the exact numbers of reassignments, there is no dispute that millions of wireless numbers are reassigned each year. In the event of a reassignment, the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else from whom consent has not been obtained.

Does a call or message in that situation violate the statutory bar against making autodialer calls without prior consent? The Commission's answer is yes, apart from a one-call, post-reassignment safe harbor. We set aside the Commission's interpretation on the ground that the one-call safe harbor is arbitrary and capricious.

1.

The pertinent statutory language generally renders it unlawful "to make any call (other than a call made for emergency purposes or made with the *prior express consent of the called party*) using any automatic telephone dialing equipment or prerecorded voice." 47 U.S.C. § 227(b)(1)(A) (emphasis added). The Commission, in its ruling, initially addressed who is properly considered the "called party" when a consenting party's number is reassigned to another person: does "called party" refer to the person the caller expected to reach (whose consent had previously been obtained), or does it refer to the person actually reached, the wireless number's present-day subscriber after reassignment (whose consent has not been obtained)?

The Commission adopted the latter interpretation. 30 FCC Rcd. at 7999-8001 ¶¶ 72-73. The result is that the reassignment of a wireless number extinguishes any consent given by the number's previous holder and exposes the caller to liability for reaching a party who has not given consent. An alternative approach, the Commission reasoned, would "effectively require consumers to opt out of such calls when the TCPA clearly requires the opposite—that consumers opt in before they can be contacted." *Id.* at 8004 ¶ 80.

The agency also refused to "place any affirmative obligation" on new subscribers to inform callers that a

wireless number now belongs to someone else. *Id.* at 8011 ¶ 95. The ruling thus expressly contemplates that a new subscriber could "purposefully and unreasonably" refrain from informing a good-faith caller about a number's reassignment "in order to accrue statutory penalties." *Id.* (formatting modified). In that regard, the Commission described a reported case in which the new, post-reassignment subscriber waited to initiate a lawsuit until after having received almost 900 text alerts that were intended for the previous subscriber. *Id.* at 8011 ¶ 94 & n.324.

The Commission acknowledged that even the most careful caller, after employing all reasonably available tools to learn about reassignments, "may nevertheless not learn of reassignment before placing a call to a new subscriber." *Id.* at 8009 ¶ 88. The Commission observed that it nonetheless "could have interpreted the TCPA to impose a traditional strict liability standard on the caller: *i.e.*, a 'zero call' approach under which no allowance would have been given for the robocaller to learn of the reassignment." *Id.* at 8009 ¶ 90 n.312. But the Commission declined to interpret the statute "to require a result that severe." *Id.* Rather, the Commission read the statute to "anticipate[] the caller's ability to rely on prior express consent," which the Commission interpreted "to mean reasonable reliance." *Id.* (internal quotation marks omitted).

The Commission effectuated its "reasonable reliance" approach by enabling a caller who lacks knowledge of a reassignment "to avoid liability for the first call to a wireless number following reassignment." *Id.* at 8009 ¶ 89. For that first call, the caller can continue to rely on the consent given by the "previous subscriber." *Id.* at 8003 ¶ 78. The Commission did "not presume that a single call to a reassigned number will always be sufficient for callers to gain

actual knowledge of the reassignment." *Id.* at 8009 ¶ 90 n.312. But it believed that "[o]ne call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber." *Id.* at 8009 ¶ 90.

2.

In challenging the Commission's resolution, petitioners first contend that the statutory reference to the consent of the "called party" refers to the expected recipient of a call or message, not the actual recipient. When a wireless number is reassigned without the caller's awareness, petitioners' interpretation would mean that a caller would avoid liability for a post-reassignment call because the "called party"—the former owner of the number—had given consent. In petitioners' view, the Commission's contrary interpretation of "called party" to refer to the new (post-reassignment) subscriber is foreclosed by the statute. We disagree.

Another court of appeals has examined the meaning of the term "called party" in the same statutory provision, 47 U.S.C. § 227(b)(1)(A), and in the same situation of a reassigned wireless number formerly belonging to a consenting party. *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012). The Seventh Circuit explained that the phrase "called party" appears throughout the broader statutory section, 47 U.S.C. § 227, a total of seven times. 679 F.3d at 640. Four of those instances "unmistakably denote the current subscriber," not the previous, pre-reassignment subscriber. *Id.* Of the three remaining instances, "one denotes whoever answers the call (usually the [current] subscriber)," and the other two are unclear. *Id.* By contrast, the court observed, the "phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be

for equating 'called party' with 'intended recipient of the call'?" *Id.* For those and other reasons, the court concluded "that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made," not the previous subscriber who had given consent. *Id.* at 643; *see also Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1250-52 (11th Cir. 2014).

We find the Seventh Circuit's analysis persuasive insofar as it supports concluding that the Commission was not *compelled* to interpret "called party" in § 227(b)(1)(A) to mean the "intended recipient" rather than the current subscriber. The Commission thus could permissibly interpret "called party" in that provision to refer to the current subscriber.

3.

Petitioners next argue that the Commission's one-call safe harbor is arbitrary. On this score, we agree with petitioners.

When a caller is unaware that a consenting party's wireless number has been reassigned, the Commission chose to allow the caller to make one (and only one) post-reassignment call without incurring liability. For that one call, the Commission understood the statutory term "prior express consent" to refer to the consent given by the previous subscriber. 30 FCC Rcd. at 8001 ¶ 73 & n.265; *id.* at 8003 ¶ 78.

The Commission allowed for that one liability-free call, rather than impose "a traditional strict liability standard," because it interpreted a caller's ability under the statute to rely on a recipient's "prior express consent" to "mean reasonable

reliance." *Id*. at 8009 ¶ 90 n.312. And when a caller has no knowledge of a reassignment, the Commission understandably viewed the caller's continued reliance on the prior subscriber's consent to be "reasonable."

Elsewhere in the Declaratory Ruling, the Commission echoed the same "reasonable reliance" understanding of the statute's approval of calls based on "prior express consent." The ruling accepts that a caller can rely on consent given by a wireless number's "customary user" ("such as a close relative on a subscriber's family calling plan"), rather than by the subscriber herself. *Id*. at 8001 ¶ 75. That is because the "caller in this situation cannot reasonably be expected to divine that the consenting person is not the subscriber." *Id*. at 8001-02 ¶ 75. The Commission reiterated in that regard that, in "construing the term 'prior express consent' in section 227(b)(1)(A), we consider the caller's reasonableness in relying on consent." *Id.* at 8001 ¶ 75.

The Commission thus consistently adopted a "reasonable reliance" approach when interpreting the TCPA's approval of calls based on "prior express consent," including as the justification for allowing a one-call safe harbor when a consenting party's number is reassigned. The Commission, though, gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call? The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment).

The Commission outlined a number of measures callers could undertake "that, over time, may permit them to learn of reassigned numbers." *Id.* at 8007 ¶ 86. But the Commission acknowledged that callers "may nevertheless not learn of reassignment before placing a call to a new subscriber," and that the first post-reassignment call likewise might give no reason to suspect a reassignment. *Id.* at 8009 ¶¶ 88, 90 n.312. In that event, a caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call.

To be sure, the Commission stated that it found "no basis in the statute or the record before [it] to conclude that callers can reasonably rely on prior express consent beyond one call to reassigned numbers." *Id.* at 8009-10 ¶ 90 n.312. But the Commission did not elaborate on—or otherwise support—its conclusory observation to that effect. And the statement is hard to square with the Commission's concession that the first call may give no notice of a reassignment, or with the Commission's disavowal of any expectation that a caller should "divine from the called consumer's mere silence the current status of a telephone number." *Id.* (brackets omitted). In that light, no cognizable conception of "reasonable reliance" supports the Commission's blanket, one-call-only allowance.

At times, the Commission indicated that its one-call safe harbor intends to give callers additional "opportunity" to find out about a possible reassignment. *E.g.*, *id.* at 8009 ¶ 89; *id.* at 8010 ¶ 91. There is no indication, though, that the interest in giving callers such an opportunity is independent of the interest in giving effect to a caller's reasonable reliance. After all, a caller also has an opportunity to learn of a reassignment *before* the first call. The reason to allow even one, liability-free, post-reassignment call—the reason the

Commission cared about affording an opportunity to learn about reassignment at all—is in order to give effect to a caller's reasonable reliance on the previous subscriber's consent.

Indeed, the Commission's one-call safe harbor applies "over an unlimited period of time." *Id.* at 8000 ¶ 72 n.257. If the goal were simply to provide an expanded opportunity to learn about a reassignment, the Commission presumably would have allowed for a given period of time. It declined to do so, *id.* at 8009 ¶ 89, opting instead to permit a single call regardless of whether it occurs within minutes or months of a reassignment.

For substantially the same reasons, the Commission's one-call-only approach cannot be salvaged by its suggestion that callers rather than new subscribers should bear the risk when calls are made (or messages are sent) to a reassigned number. *Id.* at 8009-10 ¶ 90 n.312. That consideration would equally support a zero-call, strict-liability rule. But the Commission specifically declined to adopt "a result that severe." *Id.* Having instead embraced an interpretation of the statutory phrase "prior express consent" grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.

The Seventh Circuit's decision in *Soppet*, discussed earlier, is not to the contrary. There, the court assumed that "any consent previously given . . . lapses when [a] [c]ell [n]umber is reassigned." 679 F.3d at 641. The court, though, did not have before it an agency interpretation under which the previous subscriber's consent does *not* lapse with reassignment: the premise of the Commission's one-call safe

harbor is that a caller can continue to rely on the previous subscriber's consent. The question we face is, why should that necessarily stop with a single call? *Soppet* does not speak to that question, and so does not cast doubt on our conclusion that the Commission failed to give it a satisfactory answer.

Finally, the Commission's failure in that regard requires setting aside not only its allowance of a one-call safe harbor, but also its treatment of reassigned numbers more generally. When we invalidate a specific aspect of an agency's action, we leave related components of the agency's action standing only if "we can say without any 'substantial doubt' that the agency would have adopted the severed portion on its own." *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017) (per curiam) (internal quotation marks omitted).

Here, we have no such assurance. If we were to excise the Commission's one-call safe harbor alone, that would leave in place the Commission's interpretation that "called party" refers to the new subscriber. And that in turn would mean that a caller is strictly liable for *all* calls made to the reassigned number, even if she has no knowledge of the reassignment.

We cannot be certain that the agency would have adopted that rule in the first instance. Significantly, the Commission said that it "could have interpreted the TCPA to impose a traditional strict liability standard," i.e., "a 'zero call' approach." 30 FCC Rcd. at 8009 ¶ 90 n.312. But the agency declined to "require a result that severe," opting instead for a one-call safe harbor. *Id.* We cannot say without any substantial doubt that the agency would have embraced the "severe" implications of a pure, strict-liability regime even in the absence of any safe harbor. As a result, we must set aside

the Commission's treatment of reassigned numbers as a whole.

Notably, the Commission is already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor. The Commission recently sought comment on potential methods for "requir[ing] service providers to report information about number reassignments for the purposes of reducing unwanted robocalls." In re Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry, 32 FCC Rcd. 6007, 6010 ¶ 9 (2017). Most of its proposals envision creating a comprehensive repository of information about reassigned wireless numbers. *See id.* at 6012-13 ¶¶ 15-19. The Commission is also considering whether to provide a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information. *See id.* at 6012 ¶ 14. Those proposals would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission's principle of reasonable reliance.

C.

It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent. *See* 2015 Declaratory Ruling, 30 FCC Rcd. at 7996 ¶ 62. The statute, however, does not elaborate on the processes by which consumers may validly do so. The Commission sought to resolve the matter in its Declaratory Ruling.

The Commission had been petitioned to clarify that callers can unilaterally prescribe the exclusive means for consumers to revoke their consent. It explicitly denied that

request. Allowing "callers to designate the exclusive means of revocation," the Commission believed, could "materially impair" the "right of revocation." *Id.* at 7997 ¶ 66.

The Commission instead concluded that "a called party may revoke consent at any time and through any reasonable means"—orally or in writing—"that clearly expresses a desire not to receive further messages." *Id.* at 7989-90 ¶ 47; *id*. at 7996 ¶ 63. In assessing whether a revocation request meets the "reasonable means" standard, the Commission said it would consider "the totality of the facts and circumstances." *Id.* at 7996 ¶ 64 n.233. One relevant factor is "whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens." *Id.* Another consideration is "whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request . . . in that circumstance." *Id.*

Petitioners challenge the Commission's treatment of revocations on various grounds, none of which we find persuasive. Petitioners' chief objection is that the Commission's approach is arbitrary and capricious in eschewing the establishment of standardized revocation procedures in favor of an unduly uncertain, any-reasonable-means standard. Without the certainty of standardized procedures, petitioners fear, they will be able to ward off TCPA liability only by "tak[ing] exorbitant precautions." ACA Int'l Br. 57.

We think petitioners' concerns are overstated. The Commission's ruling absolves callers of any responsibility to adopt systems that would entail "undue burdens" or would be "overly burdensome to implement." 30 FCC Rcd. at 7996 ¶ 64 & n.233. In light of that assurance, callers would have no need to train every retail employee on the finer points of

revocation. And callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods. If recipients are afforded such options, any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable. The selection of an unconventional method of seeking revocation might also betray the absence of any "reasonable expectation" by the consumer that she could "effectively communicate" a revocation request in the chosen fashion. *Id.*

Petitioners observe that the Commission's ruling itself dictates particular opt-out mechanisms for certain types of time-sensitive banking- and healthcare-related calls that the Commission exempted from the TCPA's consumer consent requirements. *Id.* at 8028 ¶ 138; *id.* at 8032 ¶ 147. If the Commission prescribed specific opt-out methods for those types of calls, petitioners ask, then why not similarly set out standardized means of revocation for all calls?

The Commission was not required to treat the two situations in a parallel manner. For the banking- and healthcare-related calls, the Commission found that the communications were sufficiently important to warrant an exemption from the otherwise-applicable obligation to obtain prior consent. *Id.* at 8023 ¶ 125. As a result, the default rule for those calls is that they should be *allowed* (without regard to consent), such that the availability of an opt-out can be conditioned on adhering to specific procedures. By contrast, the default rule for *non*-exempted calls is that they are *disallowed* (absent consent), such that the availability of an opt-out naturally could be broader. In that context, the Commission could reasonably elect to enable consumers to revoke their consent without having to adhere to specific procedures.

Finally, petitioners object to the Declaratory Ruling insofar as it might preclude callers and consumers from contractually agreeing to revocation mechanisms. The Commission correctly concedes, however, that the ruling "did not address whether contracting parties can select a particular revocation procedure by mutual agreement." FCC Br. 64 n.16. The ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures.

D.

The last set of challenges before us, brought by petitioner Rite Aid, concerns the scope of the Commission's exemption of certain healthcare-related calls from the TCPA's prior-consent requirement for calls to wireless numbers. The Commission is statutorily authorized to exempt from that requirement "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C).

The Commission was petitioned to exempt from the consent requirement "certain non-telemarketing, healthcare calls" alleged to "provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions." 2015 Declaratory Ruling, 30 FCC Rcd. at 8030 ¶ 143. The agency acknowledged the "exigency and public interest" in various types of healthcare-related calls, including ones "regarding post-discharge follow-up intended to prevent readmission, or prescription notifications." *Id.* at 8031 ¶ 146. But it was "concerned that these policy arguments are not

true" for other types of healthcare calls. *Id.* Specifically, the Commission "fail[ed] to see the same exigency and public interest in calls regarding account communications and payment notifications." *Id.*

Consequently, the Commission granted the requested exemption but "restrict[ed] it to calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions." *Id.* The exemption would not cover calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content." *Id.*

Petitioner Rite Aid challenges the Commission's exemption for select healthcare-related calls on the grounds that it conflicts with another federal statute (the Health Insurance Portability and Accountability Act, or HIPAA) and is arbitrary and capricious. Rite Aid's arguments misunderstand the relevant statutory terrain, and we reject them.

1.

At the outset, we must satisfy ourselves that we have jurisdiction to entertain Rite Aid's challenge. Rite Aid has been styled a petitioner here, but it did not formally petition the Commission in the proceedings before the agency. The petition granted by the Commission in part was filed by the American Association of Healthcare Administrative Management (the Association). Rite Aid expressed "support"

for the Association's petition for a declaratory ruling and exemption, and it also asked the Commission to "address certain additional issues." Comments of Rite Aid, Joint App'x 850. But it participated only by commenting on the Association's petition rather than filing one of its own. As a result, with respect to relief that only Rite Aid sought, the Commission "decline[d] to fully address th[at] request for clarification . . . raised in a comment to a pending Petition." 2015 Declaratory Ruling, 30 FCC Rcd. at 8028-29 ¶ 141 n.471. The Association did not appeal the FCC's partial denial of its requested exemption. Instead, Rite Aid has petitioned the court to review that denial.

Direct review of final FCC orders is governed by the Hobbs Act, under which "[a]ny party aggrieved by [a] final order" of the Commission may petition for review of that order. 28 U.S.C. § 2344. We have consistently held that the phrase "party aggrieved" requires that petitioners have been parties to the underlying agency proceedings, not simply parties to the present suit who are aggrieved in a constitutional (Article III) sense. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). The question here is whether commenting on a petition in agency proceedings that resulted in a declaratory ruling suffices to confer "party aggrieved" status on a litigant whose position the agency rejected.

We find it does. For agency proceedings that do not require intervention as a prerequisite to participation, our decisions have recognized that "party aggrieved" means a party who has "made a full presentation of views to the agency." *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1193 (D.C. Cir. 1987). Rite Aid fulfilled that requirement. Just as "submitting comments" confers "party aggrieved" status in the context of a rulemaking (assuming an adverse outcome), *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory*

Comm'n, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991), one who comments on another's petition for a rulemaking or declaratory ruling has "present[ed] its view to the agency [so as] to qualify as a 'party,'" *S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 588 (D.C. Cir. 1995)—at least insofar as the issues appealed were also taken up by the petitioner below (as they were here). Rite Aid afforded the Commission an opportunity to consider its position on the Association's exemption request. We therefore proceed to the substance of Rite Aid's challenge.

2.

Rite Aid contends that, "[b]y restricting otherwise permissible HIPAA communications," the Declaratory Ruling "conflicts with another federal law." Rite Aid Br. 12 (quoting *NextWave Pers. Commc'ns, Inc. v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001)). It essentially argues that *any* partial exemption of healthcare-related communications would have been unlawful, because HIPAA—the exclusive source of federal law on the disclosure of protected health information—operates of its own force to supersede any TCPA prohibition on healthcare calls. Rite-Aid is incorrect. There is no obstacle to complying with both the TCPA and HIPAA; "[t]he two statutes provide separate protections." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1125 (11th Cir. 2014).

Under HIPAA regulations, covered entities and their business associates presumptively "may not use or disclose protected health information." 45 C.F.R. § 164.502(a). But they *are* generally permitted to use or disclose that information "for treatment, payment, or health care operations." *Id.* § 164.506(a). Rite Aid complains that the partial exemption granted in the Declaratory Ruling conflicts

with HIPAA because it stops short of exempting billing- and account-related communications—i.e., ones "for . . . payment." *Id.* But all that § 164.506(a)'s exclusion does is to carve out an exception to civil and criminal liability for using or disclosing protected health information. *See* 42 U.S.C. §§ 1320d-5, 1320d-6. It says nothing about the Commission's authority to exempt (or refrain from exempting) certain kinds of calls from the TCPA's consent requirement.

In confining the use of its exemption authority, the Commission did not restrict communications that HIPAA requires be permitted to flow freely. It simply declined to make certain exchanges even less burdensome than they would have been by default. If Rite Aid were correct, healthcare providers could use ATDS equipment to bombard nonconsenting wireless users with calls and texts concerning outstanding charges without incurring TCPA liability. Nothing in HIPAA commands such a result, and we see no basis to interpret it to frustrate the TCPA in that way.

3.

Finally, Rite Aid contends that the Declaratory Ruling's exemption for certain healthcare calls is arbitrary and capricious. Neither of its suggested grounds is persuasive.

a. Rite Aid first argues that the Commission failed to explain its purported departure from its earlier practice of exempting HIPAA-protected communications. In addition to its restrictions on calls to wireless numbers, the TCPA also forbids the use of an ATDS "to initiate any telephone call to any *residential* telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party," unless one of three

exceptions applies. 47 U.S.C. § 227(b)(1)(B) (emphasis added).

In a 2012 Order, the Commission exempted from that consent requirement "prerecorded health care-related calls to residential lines, which are already regulated by" HIPAA. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2012 Order), 27 FCC Rcd. 1830, 1837 ¶ 18 (2012). Some parts of the Order suggested that its exemption reached no further than the one granted in 2015's Declaratory Ruling for calls to wireless numbers. Exempted calls were described as "promot[ing] important communications . . . such as prescription refills and immunization reminders," *id.* at 1855 ¶ 63 n.192, and "concern[ing] consumers' health, not the purchase of a good or service," *id.* at 1856 ¶ 63 n.195. But the Order elsewhere characterized its exemption as covering "*all* prerecorded health care-related calls to residential lines *that are subject to HIPAA*." *Id.* at 1852 ¶ 57 (emphases added).

The 2012 Order's exemption was codified in 47 C.F.R. § 64.1200(a)(3)(v). That regulation did not use the phrase "health care-related call[]," but instead referred to "'health care' message . . . [as] defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103." 47 C.F.R. § 64.1200(a)(3)(v). Likewise, § 160.103 does not mention the term "health care message." But it does define "health care" as "care, services, or supplies related to the health of an individual." 45 C.F.R. § 160.103. That term includes, among many other things, "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription." *Id.* A "'health care' message" is presumably a message pertaining to any of the topics that "health care" is defined to include. We assume for present purposes that some calls concerning the "[s]ale . . . of a drug . . . in accordance with a prescription" would relate to

"billing," which the 2015 Declaratory Ruling did not exempt from the consent requirement.

Rite Aid is therefore correct that, in one sense, the 2012 exemption swept more broadly than the 2015 version. We also accept that the 2012 Order cited a number of "technology-agnostic justifications" for exempting all prerecorded healthcare-related calls subject to HIPAA and made to residential lines. Rite Aid Br. 5. For example, the Commission believed that such calls "ensure continued customer access to health care-related information" and would not lead to "coercive or abusive" interactions. 2012 Order, 27 FCC Rcd. at 1853-54 ¶¶ 59-60.

The relevant question is whether the Commission acted arbitrarily and capriciously in affording a narrower exemption for healthcare-related calls made to *wireless* numbers. We find that it did not. Even if one might hypothesize "important reasons for treating residential and wireless telephone lines the same," Rite Aid Br. 9, the TCPA itself presupposes the contrary—that calls to residential and wireless numbers warrant differential treatment.

Unlike with the autodialer restrictions on calls to wireless numbers, callers are free to use ATDS equipment to dial residential lines as long as no "artificial or prerecorded voice" is used. 47 U.S.C. § 227(b)(1)(B). The statute itself contemplates that calls to wireless numbers "tread [more] heavily upon . . . consumer privacy interests." 2012 Order, 27 FCC Rcd. at 1855 ¶ 63. That concern directly informed the 2015 exemption's scope: the Commission concluded that messages "not critical to a called party's healthcare . . . do not justify setting aside a consumer's privacy interests." 2015 Declaratory Ruling, 30 FCC Rcd. at 8031 ¶ 146.

In short, there is nothing inherently contradictory about easing restrictions on certain kinds of calls to landlines, but not to cellular phones. And Rite Aid fails to mention another variable that confounds direct comparisons between the two exemptions. As codified, the 2012 exemption applies only to calls that "us[e] an artificial or prerecorded voice to deliver a message," 47 C.F.R. § 64.1200(a)(3); the Declaratory Ruling's exemption is not so limited. We therefore reject Rite Aid's first arbitrary-and-capricious challenge.

b. Lastly, Rite Aid argues that the Commission acted arbitrarily by failing to recognize that *all* healthcare-related calls satisfy the TCPA's "emergency purposes" exception to the consent requirement. As used in the Act, "[t]he term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). But Rite Aid identifies no calls satisfying that exception that were not already subject to the 2015 exemption. It would be implausible to conclude that calls concerning "telemarking, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content" are made for "emergency purposes." 2015 Declaratory Ruling, 30 FCC Rcd. at 8031 ¶ 146. Even if accounting systems are in some sense "necessary" to the continued provision of healthcare, "[t]imely delivery of these types of messages is not *critical*" to that goal. *Id.* (emphasis added).

In marked contrast, the Commission recently exempted calls concerning certain time-sensitive risks to students' health and safety in the school setting. That list of scenarios included "weather closures, fire, . . . threats," "dangerous persons, health risks (e.g., toxic spills), and unexcused absences." In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd.

9054, 9061 ¶ 17, 9063 ¶ 21 (2016). In declining a request to interpret the emergency-purposes exception far more expansively, we are guided by its role in the statutory scheme. Consumers may find themselves wholly unable to stave off calls satisfying the exception. That is because, by definition, such calls fall outside the TCPA's consent framework; callers can make them even if recipients are known to object. Advertisements, solicitations, and post-treatment financial communications do not arise from the sorts of "emergencies" that would justify suspending the TCPA's consent regime.

The Commission was empowered to draw the distinction it did, and it adequately explained its reasons for doing so. We therefore reject Rite Aid's arbitrary-and-capricious challenge.

* * * * *

For the foregoing reasons, we grant in part and deny in part the petitions for review.

So ordered.

[Cite as **U.S. Home Ownership, L.L.C. v. Collin L. Young**, 2018-Ohio-1059.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

U.S. HOME OWNERSHIP, LLC	:	
Plaintiff-Appellee	:	Appellate Case No. 27382
v.	:	Trial Court Case No. 2015-CV-2823
COLLIN L. YOUNG, et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 23rd day of March, 2018.

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TUCKER, J.

{¶ 1} Defendant-appellant, Collin L. Young, appeals from the trial court's decision of November 16, 2016, granting summary judgment in favor of Plaintiff-appellee, U.S. Home Ownership, LLC ("USHO"). Young argues, in three assignments of error, that the trial court incorrectly concluded that USHO met its burden under Civ.R. 56(C) to demonstrate the absence of any genuine issues of material fact. We find that USHO did not meet its burden, and therefore, we reverse.

I. Facts and Procedural History

{¶ 2} Young executed a promissory note on or about October 17, 2005 (the "Note") made payable to Intervale Mortgage Corporation in the principal amount of $138,000.00. Am. Compl., Ex. A. On or about the same date, Young executed a mortgage (the "Mortgage") on the real property located at 1200 Latchwood Avenue in Dayton (the "Property") to secure his repayment of the Note. *Id.* at Ex. B. Afterward, Intervale Mortgage Corporation assigned the Mortgage to the Bank of New York Trust Company, N.A.; the Bank of New York Trust Company, N.A. assigned the Mortgage to Residential Funding Company, LLC; and Residential Funding Company, LLC assigned the Mortgage to CSH Fund IV, LLC. *See id.* CSH Fund IV, LLC also took possession of the Note.[1] *See id.* at Ex. A.

{¶ 3} On October 1, 2012, CSH Fund IV, LLC commenced a foreclosure

[1] The series of endorsements and allonges appears to indicate that Intervale Mortgage Corporation transferred the Note to Decision One Mortgage Company LLC, Ltd.; Decision One Mortgage Company LLC, Ltd. transferred the Note to Residential Funding Company, LLC; Residential Funding Company, LLC transferred the Note to the Bank of New York Trust Company, N.A.; the Bank of New York Trust Company, N.A. transferred the Note back to Residential Funding Company, LLC; and Residential Funding Company, LLC then transferred the Note to CSH Fund IV, LLC. *See* Am. Compl., Ex. A.

proceeding against Young in Montgomery County Court of Common Pleas Case No. 2012 CV 07043. The case was dismissed pursuant to Civ.R. 41(A) on September 10, 2013. Subsequently, CSH Fund IV, LLC transferred the Mortgage and the Note to Capital Income and Growth Fund, LLC, which in turn, transferred the Mortgage and the Note to USHO. *See* Am. Compl., Exs. A-B.

{¶ 4} USHO filed its own complaint in foreclosure against Young on May 28, 2015. On USHO's motion, the trial court entered summary judgment in its favor in a decision entered on November 16, 2016 (the "Decision").

II. Analysis

{¶ 5} Young challenges the trial court's entry of summary judgment in favor of USHO. Because appellate review of summary judgment rulings is de novo, we apply the standard set forth in Civ.R. 56(C), pursuant to which summary judgment "shall be rendered forthwith" when: (1) "there is no genuine issue as to any material fact"; (2) "the moving party is entitled to judgment as a matter of law"; and (3) construing the evidence most strongly in favor of the non-moving party, "reasonable minds" could not conclude otherwise. *See also Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24; *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The movant initially bears the burden of showing that no genuine issues of material fact exist. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988).

{¶ 6} In order to meet this burden, the movant may rely only on those portions of the record properly before the court under Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant thus provides the court with

evidence that no genuine issues of material fact exist, then the non-moving party bears the reciprocal burden, as stated in Civ.R. 56(E), to establish specific facts showing genuine issues to be tried. *Id.* at 293. The non-moving party "may not rest upon the mere allegations or denials of [the] pleading[s], but must set forth specific facts showing there is [at least one] genuine issue for trial" to satisfy its reciprocal burden. *Chaney v. Clark County Agric. Soc.*, 90 Ohio App. 3d 421, 424, 629 N.E.2d 513 (2d Dist.1993), citing Civ.R. 56(E), and *Jackson v. Alert Fire & Safety Equip.*, 58 Ohio St.3d 48, 51, 567 N.E.2d 1027 (1991). Whether a fact is "material" depends on the substantive law of the claim being litigated. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 (1993).

{¶ 7} Young bases his three assignments of error on the premise that the trial court incorrectly concluded that this case presents no genuine issues of material fact. To prevail on a motion for summary judgment in a foreclosure action, the plaintiff must prove: " '(1) [it] is the holder of the note and [the] mortgage, or is a party entitled to enforce [them]; (2) if the [plaintiff] is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due.' " *JP Morgan Chase Bank, N.A. v. Massey*, 2d Dist. Montgomery No. 25459, 2013-Ohio-5620, ¶ 20, quoting *Wright-Patt Credit Union, Inc. v. Byington*, 6th Dist. Erie No. E-12-002, 2013-Ohio-3963, ¶ 10. According to Young, the record establishes the existence of genuine disputes of fact concerning USHO's satisfaction of the conditions precedent to its right to initiate foreclosure proceedings, its entitlement to enforce the Note and the Mortgage, and the amount of unpaid principal and

interest it seeks to recover. These are material facts under substantive foreclosure law.

{¶ 8} For his first assignment of error, Young contends that:

> THE TRIAL COURT'S RULING IN THE FINAL AND APPEALABLE DECISION AND ENTRY SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND THE ACCOMPANYING DECREE OF FORECLOSURE, FILED ON NOVEMBER 16, 2016, WHEREIN THE COURT FOUND THAT THE PLAINTIFF HAD MET ALL CONDITIONS PRECEDENT, WAS CONTRARY TO LAW AS THERE WERE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT THE HOMEOWNER WAS PROPERLY SERVED WITH NOTICE OF DEFAULT, AND THUS IN REGARDS TO PLAINTIFF'S STANDING.

{¶ 9} In the Decision, the trial court held that USHO "complied with all conditions precedent" to its right to initiate foreclosure proceedings "by mailing the requisite notice [of default] by first-class mail as required by the [N]ote." Decision 27. Young argues that the trial court erred because: (1) neither the notice dated April 4, 2012, nor the notice dated February 5, 2014, has been properly authenticated; (2) the notice dated February 5, 2014 does not comply with the relevant terms of the Mortgage; and (3) the notice dated April 4, 2012 was issued on behalf of one of USHO's predecessors in anticipation of a previous foreclosure action (Case No. 2012 CV 07043) that has since been dismissed, effectively nullifying it. *See* Appellant's Br. 3-7.

{¶ 10} Regarding Young's first argument, USHO submitted two affidavits in support of its motion for summary judgment, both of which were executed by Darryl Fry, USHO's managing member. Pl.'s Aff. of Status of Account ¶ 1, Mar. 10, 2016

[hereinafter *First Affidavit*]; Pl.'s Supplemental Aff. of Status of Account ¶ 1, Oct. 11, 2016 [hereinafter *Second Affidavit*]. In the First Affidavit, Fry avers that "[a]ccording to [USHO]'s business records, a written notice of default was sent to Collin L. Young in accordance with the terms of the [N]ote and [the] [M]ortgage," and that a "duplicate, true and accurate copy of the notice" is attached. First Aff. ¶ 9. Fry offers no other description of the attached document itself, though Exhibit "D" consists of at least one page of the notice of default dated February 5, 2014. *See id.* at Ex. D. In the Second Affidavit, Fry avers that "[a]ccording to [USHO]'s business records, a [n]otice of [d]efault was sent [to] Collin L. Young by first class mail." Second Aff. ¶ 5. Fry supports this averment with "a duplicate, true and accurate copy of the [a]ffidavit of Dawn Kernicky," which was filed by CSH Fund IV, LLC in Case No. 2012 CV 07043; a "duplicate true and accurate copy of the notice of default" attached to Kernicky's affidavit; and "a copy of its first class mail envelop[e]." *Id.*

{¶ 11} For an affiant to authenticate a business record under Evid.R. 803(6), he "must demonstrate that: (1) the record was prepared by an employee of the business who had a duty to report the information; (2) [he has] personal knowledge of the event or transaction reported; (3) the record was prepared at or near the time of the event or transaction"; and (4) the business created such records as a regular practice. *State v. Richardson*, 2016-Ohio-8081, 75 N.E.3d 831, ¶ 39 (2d Dist.), citing *State v. Hall*, 2d Dist. Montgomery No. 19074, 2003-Ohio-2824, ¶ 34. By this standard, Fry would not seem to have the requisite personal knowledge to authenticate Kernicky's affidavit or the attached exhibits, though the affidavit itself has been notarized and is therefore self-authenticating under Evid.R. 902(1). Second Aff. ¶ 5 and Ex. A. With respect to the

First Affidavit, however, we find that Fry has failed to demonstrate sufficient personal knowledge to authenticate Exhibit D.

{¶ 12} If "particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of [the corresponding] facts, then * * * something more than a conclusory averment that the affiant [actually] has [personal] knowledge of the facts [is] required." *Merchants Nat'l Bank v. Leslie*, 2d Dist. Clark No. 3072, 1994 WL 12433, *2 (Jan. 21, 1994); *see also U.S. Bank, N.A. v. Duvall*, 8th Dist. Cuyahoga No. 102156, 2015-Ohio-2275, ¶ 19, citing *Leslie*, 1994 WL 12433. In Paragraph 9 of the First Affidavit, Fry avers that "a written notice of default was sent to Collin L. Young in accordance with the terms of the [N]ote and [the] [M]ortgage," and he describes the attached Exhibit D as "a duplicate, true and accurate copy of the notice." First Aff. ¶ 9.

{¶ 13} A comparison of Fry's averment in Paragraph 9 with the single page appearing in Exhibit D calls Fry's personal knowledge of the document into question.[2] Fry fails to specify even as much as the date on which the document was purportedly sent to Young, nor does he provide any other description of the document, such as a reference to the identity of the attorney or law firm responsible for sending it. *Id.* Fry's assertion, furthermore, that the document accords "with the terms of the [N]ote and [the] [M]ortgage" is inaccurate. Paragraph 22 of the Mortgage requires that a notice of default advise Young of his "right to assert in [a] foreclosure proceeding the non-existence of a default or any other defense * * * to acceleration and foreclosure" and list "a date, not

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[2] Construing the words of his affidavit literally, Fry never squarely avers that he saw Exhibit D as part of his "review[] [of] certain business files, documents and other business records." *See* First Aff. ¶ 1 and 9. He did, on the other hand, aver unequivocally that he reviewed the copies of the Mortgage, the Note and the Modification Agreement. *Id.* at ¶ 8.

[fewer] than 30 days from the date the notice is given" by which "the default must be cured." Am. Compl., Ex. B. The text of Exhibit D includes no advice concerning Young's right to assert the non-existence of default or other defenses in a foreclosure proceeding, and the document, dated February 5, 2014, specifies a cure-by date of March 6, 2014—only 29 days later. *See* First Aff. ¶ 9 and Ex. D. Additionally, the document itself, written on a law firm's letterhead, appears to be an incomplete copy inasmuch as contrary to prevailing custom, it bears no signature; ordinarily, a law firm's correspondence is signed by one or more of the firm's agents, associates, employees or partners. *Id.* at Ex. D.

{¶ 14} We hold that Fry lacks personal knowledge sufficient to authenticate the notice of default dated April 4, 2012. Further, we hold that Fry has failed to demonstrate that he has personal knowledge sufficient to authenticate the notice of default dated February 5, 2014. Our holding that Fry has failed to authenticate Exhibit D to the First Affidavit essentially renders Young's second argument moot, though as noted above, the text of Exhibit D does not satisfy the requirements of Paragraph 22 of the Mortgage.

{¶ 15} Regarding Young's third argument, the notice of default dated April 4, 2012 was issued by "RoundPoint Mortgage Servicing Corporation as servicer for CSH Fund IV, LLC," one of USHO's predecessors in interest. Second Aff. ¶ 5 and Exs. A-B. Paragraph 22 of the Mortgage requires that the "[l]ender give notice to [the] [b]orrower prior to acceleration." (Emphasis added.) Am. Compl., Ex. B. Likewise, Subparagraph 7(C) of the Note indicates that upon the borrower's failure to pay as agreed, "the [n]ote [h]older may send [the borrower] a written notice" of default. (Emphasis added.) *Id.* at Ex. A. On its face, then, the notice of April 4, 2012 does not

satisfy the conditions precedent to USHO's right to initiate a foreclosure action because Paragraph 22 of the Mortgage requires that notice of default be sent by the "[l]ender," and Subparagraph 7(C) of the Note requires that notice of default be sent by the "[n]ote [h]older." *Id.* at Exs. A-B. At the time USHO filed its complaint against Young, CSH Fund IV, LLC was no longer the mortgagee or the holder of the Note, meaning that USHO did not, itself or through an agent, fulfill the notice requirements set forth in the Mortgage and the Note by way of the notice sent to Young on April 4, 2012.[3] *See Wells Fargo Bank v. Sowell*, 2015-Ohio-5134, 53 N.E.3d 969, ¶ 23-28 (8th Dist.); *Wells Fargo Bank v. Watson*, 2015-Ohio-2599, 41 N.E.3d 79, ¶ 72-73 (11th Dist.).

{¶ 16} Moreover, we are persuaded by case law suggesting that when a mortgagee issues a notice of default, commences a foreclosure action and then dismisses the action, the mortgagee (or its successor in interest) must send a new notice of default if it wishes to commence a second action against the mortgagor. *See*, *e.g.*, *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938, 950-952 (Fla. 3d Dist. Ct. App.2016); *Granados v. Nadel*, 104 A.3d 921, 935, 220 Md.App. 482 (Md. Ct. Spec. App.2014); *compare with Bank of New York Mellon v. Walker*, 2017-Ohio-535, 78 N.E.3d 930, ¶ 11-17 (8th Dist.) (considering a roughly similar question for purposes of the statute of limitations). This requirement seems all the more justified in cases like the instant

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[3] A defective notice of default can theoretically satisfy a mortgagee's obligation to notify the mortgagor in advance of filing a complaint in foreclosure. *U.S. Bank, N.A. v. Green Meadow SWS L.L.C.*, 2014-Ohio-738, 9 N.E.3d 433, ¶ 26-28 (5th Dist.) (finding that a technically inaccurate or imprecise notice of default provides "constructive notice * * * sufficient to provide proper notice" to a mortgagor). The notice of April 4, 2012, however, is not technically inaccurate or imprecise; it originated from a party who no longer had any interest in the underlying instruments or standing to prosecute a foreclosure action against Young.

matter, where the Mortgage and the Note were transferred twice after CSH Fund IV, LLC dismissed its foreclosure action against Young, and the intervening party in interest, Capital Income and Growth Fund, LLC, chose not to initiate a foreclosure action of its own.

{¶ 17} The notice of February 5, 2014, although purportedly sent by USHO, has not been properly authenticated. In the absence of a properly authenticated exhibit showing that USHO itself complied with the notice requirements established by the terms of the Mortgage and the Note, we hold that USHO has failed to demonstrate the absence of any genuine dispute of fact concerning its satisfaction of conditions precedent. Consequently, Young's first assignment of error is sustained.

{¶ 18} For his second assignment of error, Young contends that:

> THE TRIAL COURT'S RULING IN THE FINAL AND APPEALABLE DECISION AND ENTRY SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND THE ACCOMPANYING DECREE OF FORECLOSURE, FILED ON NOVEMBER 16, 2016, WHEREIN THE TRIAL COURT FOUND THAT THE CHAIN OF ASSIGNMENTS AND TRANSFERS SHOWED THAT THE PLAINTIFF WAS THE REAL PARTY IN INTEREST, WAS CONTRARY TO LAW AS THERE WERE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT THE PLAINTIFF WAS THE TRUE OWNER OF THE NOTE AND MORTGAGE.

{¶ 19} Young argues that USHO has failed to demonstrate that it has possession of the Note and the Mortgage. Appellant's Br. 8. The exhibits attached to USHO's amended complaint refute this argument.

{¶ 20} Exhibit A to the amended complaint is a copy of a promissory note executed by Young on or about October 17, 2005 and made payable to Intervale Mortgage Corporation in the principal amount of $138,000.00, and in his own affidavit, Young avers that on "October 17, 2005, [he] executed a [n]ote * * * in favor of Intervale Mortgage Corporation for the purchase of [his] home." Am. Compl., Ex. A; Aff. of Collin Young ¶ 3, May 6, 2016. Through a series of endorsements and allonges, Intervale Mortgage Corporation transferred the Note to Decision One Mortgage Company LLC, Ltd.; Decision One Mortgage Company LLC, Ltd. transferred the Note to Residential Funding Company, LLC; Residential Funding Company, LLC transferred the Note to the Bank of New York Trust Company, N.A.; the Bank of New York Trust Company, N.A. transferred the Note back to Residential Funding Company, LLC; Residential Funding Company, LLC transferred the Note to CSH Fund IV, LLC; CSH Fund IV, LLC transferred the Note to Capital Income and Growth Fund, LLC; and Capital Income and Growth Fund, LLC transferred the Note to USHO. Am. Compl., Ex. A. Thus, we conclude that USHO has established that it is the holder of the Note.

{¶ 21} Exhibit B to the amended complaint is a notarized copy of a mortgage executed by Young on October 17, 2005 with respect to the real property located at 1200 Latchwood Avenue in Dayton. Am. Compl., Ex. B; Young Aff. ¶ 3. Because the Mortgage is notarized, it is self-authenticating. Evid.R. 902(1).

{¶ 22} In a series of assignments, Intervale Mortgage Corporation assigned the Mortgage to the Bank of New York Trust Company, N.A.; the Bank of New York Trust Company, N.A. assigned the Mortgage to Residential Funding Company, LLC; Residential Funding Company, LLC assigned the Mortgage to CSH Fund IV, LLC; CSH

Fund IV, LLC assigned the Mortgage to Capital Income and Growth Fund, LLC; and Capital Income and Growth Fund, LLC assigned the Mortgage to USHO. Am. Compl., Ex. B. The last assignment, which refers to the Note, was recorded on December 30, 2013, indicating that USHO took possession of the Mortgage and the Note before it filed its complaint against Young. *Id.*; *see also U.S. Bank, N.A. v. Rex Station Ltd.*, 2d Dist. Montgomery No. 26019, 2014-Ohio-1857, ¶ 20-22 (holding that cross-references among an assignment of mortgage, a mortgage and a note are "sufficient to raise a rebuttable presumption of [the assignor's] intent to convey both the mortgage and the note" to the assignee, even if the assignment lacks " 'an express transfer of the note' "), quoting *Fed. Home Loan Mortgage Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶ 36. As a result, we find that USHO has established that it had possession of the Mortgage and the Note at the time it filed its complaint, that it presently has possession of the Mortgage and the Note, and it thus has standing to pursue the instant action in foreclosure. Young's second assignment of error is overruled.

{¶ 23} For his last assignment of error, Young contends that:

> THE TRIAL COURT'S RULING IN THE FINAL AND APPEALABLE DECISION AND ENTRY SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND THE ACCOMPANYING DECREE OF FORECLOSURE, FILED ON NOVEMBER 16, 2016, WHEREIN THE TRIAL COURT FOUND THAT THE PLAINTFF HAD PROVEN THE AMOUNT OF PRINCIPLE AND INTEREST DUE, WAS CONTRARY TO LAW AS THERE WERE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT THE HOMEOWNER HAD SIGNED THE LOST

MODIFICATION AGREEMENT WHICH CHANGED THE AMOUNT DUE.

{¶ 24} USHO's claim for damages implicates a loan modification agreement allegedly executed by Young on or about December 16, 2008 (the "Modification Agreement"). First Aff. ¶ 8 and Ex. C. In Exhibit C to the First Affidavit, USHO provides an unexecuted copy of the Modification Agreement along with the affidavit of John Paredes, an "asset manager" in its employ, who avers that the Modification Agreement "increased the original principal amount of the [N]ote * * * from $138,000.00 to $167,844.49 and lowered the original adjustable interest rate from 8.99% to a fixed rate for five years of 3.5%." USHO provided Paredes's affidavit because "[a]fter a thorough and diligent manual search of the hard copy collateral file pertaining to [Young's] loan[,] the original [copy of the Modification Agreement] was not located." *Id.* Young denies that he executed the agreement. Young Aff. ¶ 5-10.

{¶ 25} R.C. 1303.38(A) states that a "person not in possession of an instrument is entitled to enforce" it only if: (1) the "person * * * was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred"; (2) the "loss of possession was not the result of a transfer by the person or a lawful seizure;" and (3) the person "cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." USHO acquired the Mortgage and the Note on or about December 30, 2013, roughly five years after the Modification Agreement was allegedly executed. Am. Compl., Ex. B.

{¶ 26} As a threshold matter, we conclude that the trial court erred in its decision to strike Paragraphs 6 through 10 of Young's affidavit.[4] Decision 23. The trial court made this ruling in reliance on Evid.R. 408, which states that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount," and that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Yet, the "rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations" or "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing [sic] a contention of undue delay, or proving an effort to obstruct a criminal investigation." *Id.* Given that USHO is itself relying on the Modification Agreement, which apparently was at least proposed to Young during the course of settlement or compromise negotiations, Young should be allowed to offer evidence contesting USHO's allegation that he executed the agreement.

{¶ 27} Applying R.C. 1303.38 to the Modification Agreement, we find that USHO has failed to demonstrate the absence of any genuine dispute of fact on the material question of whether USHO was entitled to enforce the agreement at the time possession of the original was lost, or had obtained possession of the agreement from "a person who was entitled to enforce [it] when loss of possession occurred." Fry and Paredes cannot have personal knowledge concerning Young's alleged execution of the agreement

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[4] The trial court did not err in its decision to strike Paragraphs 11 through 15 of the affidavit.

because USHO did not acquire the Mortgage until December 30, 2013, and USHO has not provided an affidavit from "Homecomings Financial, LLC," the other party listed in the agreement. First Aff., Ex. C. Young's third assignment of error is sustained.

III. Conclusion

{¶ 28} Young's first and third assignments of error are sustained. Accordingly, we reverse the trial court's decision sustaining USHO's motion for summary judgment and remand this matter to the trial court for proceedings consistent with this opinion.

. . . .

DONOVAN, J. and FROELICH, J., concur.

Copies mailed to:

Brian S. Jackson
Worrell A. Reid
Michele Phipps
Hon. Dennis J. Langer

[Cite as *Green Tree Servicing, L.L.C. v. Asterino-Starcher*, 2018-Ohio-977.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Green Tree Servicing LLC,	:	
Plaintiff-Appellee,	:	
v.	:	No. 16AP-675 No. 17AP-273 (C.P.C. No. 14CV-8619)
Antonia Jo Asterino-Starcher et al.,	:	
Defendants-Appellees,	:	(REGULAR CALENDAR)
(Columbus and Central Ohio Children's Chorus Foundation,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on March 15, 2018

On brief: *Cooke Demers, LLC, David J. Demers, Adam J. Bennett,* and *Michelle Polly-Murphy,* for appellee Green Tree Servicing LLC. **Argued:** *Adam J. Bennett.*

On brief: *Brunner Quinn,* and *Rick Brunner,* for appellant. **Argued:** *Rick Brunner.*

APPEALS from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Columbus and Central Ohio Children's Chorus Foundation ("CCF"), appeals from a judgment of the Franklin County Court of Common Pleas ordering foreclosure and sale of a property in favor of plaintiff-appellee, Green Tree Servicing LLC ("Green Tree"). The debtors and property owners are defendants-appellees, Antonia Jo Asterino-Starcher ("Asterino-Starcher") and James Edward Starcher

("Starcher") (collectively, "the Starchers"), who have not appeared in the present appeal. CCF participates in the foreclosure action as a junior lienholder and contests the trial court's finding that Green Tree holds the senior lien on the property.

I. GENERAL FACTS AND PROCEDURAL HISTORY

{¶ 2} Green Tree commenced this action with a complaint in foreclosure naming as defendants the Starchers and several other entities with an interest in the subject property: CCF, the Third Federal Savings and Loan Association of Cleveland ("Third Federal"), the United States of America, the State of Ohio Department of Taxation, the Columbus School for Girls ("CSG"), and the Franklin County Treasurer. CCF became a party defendant because it previously obtained a judgment against the Starchers in the Franklin County Municipal Court for unpaid choir fees, punitive damages, attorney fees, and costs in a total amount of $10,826.07 in April 2014 and recorded the judgment as a lien on the subject property.

{¶ 3} The complaint alleged Green Tree was in possession of a note executed by Asterino-Starcher on September 19, 2006 in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for America's Wholesale Lender, and the note was in default. The complaint further alleged Green Tree was the owner and holder of a mortgage executed by the Starchers as security for the note and filed October 16, 2006. The complaint further alleged a modification agreement to modify the mortgage was filed on October 25, 2012 and later assigned to Green Tree. The complaint noted that the other defendants have or potentially could claim an interest in the property, Starcher by right of dower or curtesy, the Franklin County Treasurer by a statutory tax lien for real property taxes, and the others by means of various recorded judgment liens.

{¶ 4} The complaint prayed for judgment on the note in the amount of $273,239.91 with interest, foreclosure and sale of the property, and lien priority over all named defendants except for the Franklin County Treasurer.

{¶ 5} Green Tree voluntarily dismissed Third Federal on August 29, 2014, noting that the mortgage lien held by Third Federal had been released. CSG filed an answer on September 16, 2014, stating that it had recorded its judgment lien in 2012 for unpaid tuition. CCF filed an answer on September 30, 2014, adding counterclaims against Green Tree for declaratory judgment and violations of the Fair Debt Collection Practices Act

("FDCPA") and a cross-claim for foreclosure against the Starchers. Green Tree filed an answer to CCF's counterclaims on October 6, 2014. The Franklin County Treasurer answered on October 9, 2014 and asserted his superior statutory lien. Although not expressly named as a defendant in CCF's cross-claim, CSG filed an answer thereto on October 14, 2014, to assert the superiority of its 2012 lien as against CCF's 2014 lien. The Starchers filed an answer to Green Tree's complaint and CCF's cross-claim on December 10, 2014. The United States of America did not plead until March 17, 2015.

{¶ 6} The general course of litigation that ensued—specifics will be developed in connection with the assignments of error as needed—was that the Starchers did not actively oppose Green Tree's pursuit of foreclosure but that CCF, alone among the junior lienholders, vigorously attempted to attack the validity and priority of Green Tree's lien by pointing to alleged deficiencies in the recordation and execution of the original note, mortgage documents, and subsequent assignments. As CCF sought to oppose Green Tree's pursuit of senior lien status, CCF attempted discovery and brought motions to compel. These were denied by the trial court on the basis that CCF did not have standing to question any aspect of the mortgage and note transactions between the Starchers, Green Tree, and Green Tree's predecessors in interest. CCF also encountered a lack of cooperation from the Starchers in pursuing discovery on CCF's cross-claim against them. Unlike the discovery disputes with Green Tree, this culminated in an eventual award of sanctions in favor of CCF against the Starchers.

{¶ 7} Green Tree moved for summary judgment against Asterino-Starcher on the note and the Starchers on the mortgage on November 12, 2014. The motion did not address CCF's counterclaims. The trial court granted summary judgment and issued its first judgment decree in foreclosure on July 29, 2015. The judgment did not rule on the validity or priority of the liens held by some defendants, specifying only that "[t]he balance of the sale proceeds, if any, shall be paid by the Sheriff to the Clerk of this Court to await further orders of this Court." (July 29, 2015 Decision at 4.)

{¶ 8} Both CCF and the Starchers appealed from the July 29, 2015 judgment. This court dismissed the Starchers' appeal for failure to prosecute. *Green Tree Servicing, LLC v. Asterino-Starcher,* 10th Dist. No. 15AP-791 (June 1, 2016) (Journal Entry of Dismissal). We then dismissed CCF's appeal for lack of a final, appealable order because the trial court's

July 29, 2015 judgment did not fully prioritize all liens and named defendants. *Green Tree Servicing, LLC v. Columbus & Cent. Ohio Children's Chorus Found.*, 10th Dist. No. 15AP-802, 2016-Ohio-3426. The matter thus returned to the trial court.

{¶ 9} On July 17, 2016, the trial court rendered a decision ruling on various pending motions after remand. The court again determined that Green Tree was entitled to judgment as a matter of law against Asterino-Starcher on the note and foreclosure on the mortgage. The trial court also granted Green Tree's motion for default judgment against the United States of America. The trial court denied CCF's motion to compel Green Tree to furnish a representative to sit for depositions and denied CCF's Civ.R. 56(F) motion for additional discovery in opposition to summary judgment. In contrast, the court granted CCF's motion to compel discovery and for sanctions against the Starchers.

{¶ 10} The trial court entered two further judgment entries in the matter, both on July 28, 2016. One generally stated the trial court's intent to adopt an entry previously submitted by Green Tree but to omit Civ.R. 54(B) language that Green Tree had proposed. The other constituted the final foreclosure decree. It restated the judgment expressed in the July 29, 2015 judgment in favor of Green Tree against Asterino-Starcher, adding a complete prioritization of costs and all liens from known junior lienholders except for the Ohio tax judgment liens. The court ranked these as (1) the clerk of court, for the costs of the action; (2) the Franklin County Treasurer; (3) Green Tree; (4) the United States of America; (5) CSG; and (6) CCF.

{¶ 11} Neither July 28, 2016 entry contains Civ.R. 54(B) "no just reason for delay" language. Because of the still pending motion for fees sought by CCF against the Starchers, the July 28, 2016 orders were not final and appealable. That fee claim went forward, and on September 19, 2016, after a hearing before a magistrate, the court adopted the magistrate's decision and entered judgment in favor of CCF against the Starchers awarding attorney fees in the amount of $4,443.75. That order resolved the last claims in the action and rendered final all preceding orders of the trial court, leading to this appeal.

{¶ 12} On September 23, 2016, CCF filed a notice of appeal referring to the trial court's July 28 and September 19, 2016 orders, commencing the present appeal No. 16AP-675. Immediately thereafter, this court received a suggestion of bankruptcy and stayed the matter, as did the trial court. On April 17, 2017, the trial court granted Green Tree's motion

to reinstate the matter to the active docket and move forward with the judicial sale of the property because the Starchers' bankruptcy matter was resolved. CCF then filed another notice of appeal on April 19, 2017, commencing the present appeal No. 17AP-273. This notice references both the trial court's April 17, 2017 reinstatement order and the trial court's "March 30, 2017 Amended Judgment Decree in Foreclosure," despite the fact that the trial court did not issue any order on that date other than a praecipe to the clerk initiating sale proceedings.

{¶ 13} On April 21, 2017, this court activated both appellate cases based on termination of bankruptcy proceedings and consolidated the two appeals. During the pendency of briefing and proceedings before this court, the trial court granted CCF's motion to stay the judicial sale, conditioned on posting a supersedeas bond. The record discloses that CCF did not post bond. The sheriff's sale took place and resulted in a confirmation order from the trial court on June 27, 2017 and a further confirmation of judgment and order of distribution on July 10, 2017. The sale price did not satisfy the combined liens of the Franklin County Treasurer and Green Tree, leaving no excess to disburse to the junior lienholders.

{¶ 14} As a preliminary matter, we dispose of CCF's appeal No. 17AP-273. This notice of appeal is taken from a reactivation order, which is not a final, appealable order, and the appeal is otherwise entirely duplicative of the preceding appeal No. 16AP-675. No separate issues were raised in connection with this appeal, and the dismissal is without impact on our consideration of the issues that were properly raised in appeal No. 16AP-675.

{¶ 15} Another preliminary issue requires us to sua sponte consider whether the completed judicial sale of the subject property and subsequent distribution of proceeds have rendered the matter moot and deprived this court of jurisdiction. Past precedent of this court establishes that the matter is not moot and recent statutory amendments make that conclusion all the more clear.

{¶ 16} This court has consistently held that an intervening judicial sale of the subject property does not moot a pending appeal from the underlying judgment of foreclosure. *Everhome Mtge. Co. v. Baker*, 10th Dist. No. 10AP-534, 2011-Ohio-3303, *appeal not accepted*, 130 Ohio St.3d 1475, 2011-Ohio-5605. The rationale is that, even though the foreclosure sale is irrevocable under R.C. 2329.45, the trial court can still, in the event of

reversal on appeal, fashion a remedy: R.C. 2329.45 expressly provides for recovery in restitution in the event of reversal of the foreclosure judgment. Nor is the appeal mooted on grounds that the judgment has been satisfied since the satisfaction is involuntary when the appellant requests a stay but is unable to post the bond required by the stay order. *U.S. Bank Natl. Assoc. v. Mobile Assoc. Natl. Network Sys., Inc.*, 195 Ohio App.3d 699, 2011-Ohio-5284 (10th Dist.); *see also Governors Place Condominium Owners Assoc. v. Unknown Heirs*, 11th Dist. No. 2016-L-070, 2017-Ohio-885, ¶ 29-30.

{¶ 17} While not all Ohio appellate districts agreed with this position on mootness, *see, e.g., Banker's Trust Co. of California v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, recent amendments to R.C. 2329.45 seem to obviate any split in authority because those changes make even more clear that a mortgagor or junior lienholder retains a remedy in restitution even after disbursement of the proceeds from a judicial sale.[1]

{¶ 18} Reversal in the present case would result in remand to the trial court to consider the merits of an action in restitution and potential recovery from the parties receiving the proceeds of the sale. Accordingly, this appeal is not moot, and we retain jurisdiction.

II. ASSIGNMENTS OF ERROR

{¶ 19} CCF brings the following assignments of error on appeal:

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[1] Former R.C. 2329.45 provided as follows:

> If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

Effective September 28, 2016, 2016, H.B. 390 added the following language to R.C. 2329.45:

> If a judgment in satisfaction of which lands or tenements are sold is reversed on appeal, such reversal shall not defeat or affect the title of the purchaser. In such case restitution in an amount equal to the money for which such lands or tenements were sold, with interest from the day of sale, must be made by the judgment creditor. In ordering restitution, the court shall take into consideration all persons who lost an interest in the property by reason of the judgment and sale and the order of the priority of those interests.

The new language further clarifies that a mortgagor, junior lienholder, or other person with an interest in property retains a remedy after sale of the subject property, despite the irrevocable nature of a judicial sale.

> [1.] The trial court erred in denying Appellant's Unopposed Civ.R. 56(F) motion, and its motions to compel discovery while granting the Appellee-Plaintiff summary judgment on issues for which it sought summary judgment and *sua sponte* summary judgment on issues for which it did not seek summary judgment, including Appellant's answer, affirmative defenses, crossclaim and counterclaim, based upon the erroneous assumption that Appellant lacked standing to challenge the validity and priority of the recorded instruments upon which Appellee-Plaintiff sought foreclosure.
>
> [2.] The trial court erred in failing to hold additional hearings, or allow additional arguments or briefs to be presented following remand from the Court of Appeals and in permitting the foreclosure proceedings to move forward without the entry of a final appealable order.

{¶ 20} CCF's two assignments of error each address multiple issues, some of which are common to both. For ease of discussion, rather than considering the assignments of error as enumerated, we proceed on the basis the case presents three principal issues for determination: (1) whether the trial court erred in determining that CCF could not, as a junior lienholder, raise defenses and seek discovery regarding Green Tree's status as a person entitled to enforce the underlying note and as an assignee of the original mortgagee; (2) whether Green Tree presented appropriate evidence in support of summary judgment to establish that it was entitled to enforce the note, that the note was in default, that it was entitled to foreclosure, and held the senior lien on the property; and (3) whether the trial court could dismiss CCF's counterclaims and cross-claim in the absence of any motion by a party seeking judgment on those claims.

III. CCF'S STANDING TO QUESTION THE NOTE AND MORTGAGE

{¶ 21} CCF asserts that recent Ohio case law gives it the right to challenge Green Tree's standing to bring the foreclosure action and that the trial court's restrictions on discovery prevented CCF from proving Green Tree had not properly established itself as the holder of the note and mortgage. The trial court determined CCF did not have standing to invoke these defenses, which it deemed personal to the debtor. This is a question of law with respect to the standing issue and requires de novo review in this appeal from summary judgment. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29. The

attendant evidentiary rulings, to the extent they are not inescapably determined by our resolution of the standing issue, are reviewed under an abuse of discretion standard. *Branch v. Cleveland Clinic Found.*, 134 Ohio St.3d 114, 2012-Ohio-5345, ¶ 17; *Vogel v. Wells*, 57 Ohio St.3d 91, 95 (1991).

{¶ 22} In *U.S. Bank Natl. Assoc. v. George*, 10th Dist. No. 14AP-817, 2015-Ohio-4957, this court considered whether a homeowner, defending a foreclosure action as debtor and mortgagor, could raise as a defense any argument relating to the negotiation of the note and assignment of the mortgage. The homeowner argued that the plaintiff bank was not, due to a clouded and uncertain history of transfers, a person entitled to enforce the note or the holder of the mortgage. The bank successfully asserted before the trial court that the note negotiation and mortgage assignments were a contractual matter between the bank and its predecessors in interest, and the homeowner, as a stranger to those transactions, lacked privity with the contracting parties and could not question the transfers. *Id.* at ¶ 7.

{¶ 23} On appeal, we reversed and concluded the homeowner could question the state of the note because the bank's right to initiate the foreclosure action was predicated on a statutorily-defined status as a person "entitled to enforce" the note. *Id.* at ¶ 9, citing R.C. 1303.31(A). Consequently, the homeowner as a party defendant had the right to challenge the plaintiff bank's standing to bring the foreclosure action: "[T]he maker of the note or mortgage has standing to challenge their enforcement against the maker, even if not a party in privity to the particular transfer or assignment challenged." *Id.* at ¶ 27.

{¶ 24} Essentially, this defense in Ohio is based not in any contractual right but on a right to be sued only by a party with actual standing to bring the action: "A party commencing litigation must have standing to sue in order to invoke the jurisdiction of the common pleas court." *Id.* at ¶ 9, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 20. *George* and its antecedent, *Schwartzwald*, thus differ fundamentally from cases in other jurisdictions that have considered the rights of debtors to challenge an assignment. Those cases have generally overcome the privity-of-contract obstacle primarily by focusing on the obligor's right to avoid the risk of double payment on the note: "From the maker's standpoint, * * * it becomes essential to establish that the person who demands payment of a negotiable note * * * is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense

of litigation incurred to prevent duplicative satisfaction." *Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163, 168 (3rd Cir.1988). *See also Dernier v. Mtge. Network, Inc.*, 195 Vt. 113 (2013); *Jones v. Select Portfolio Servicing, Inc.*, 88 U.C.C. Rep.Serv.2d 1089 (W.D.Tenn.2016); *Kassem v. Ocwen Loan Servicing, LLC*, 704 Fed.Appx. 429 (6th Cir.2017).

{¶ 25} As pointed out by Green Tree in the present case, *George*, *Schwartzwald*, and subsequent Ohio cases addressed the rights of *debtors* who opposed foreclosure on the basis of standing. It appears a case of first impression in Ohio as to whether those cases signify that a junior lienholder has an equal right to assert the defenses that the debtor might against the lender or the lender's assigns. The specific rationale of the Ohio cases is particularly significant here because a junior lienholder obviously cannot invoke the same risk of harm from double liability on a note, and so the reasoning that underlies foreign cases is inapplicable.

{¶ 26} Accordingly, in addressing *George*, Green Tree again raises the privity issue and asserts that our holding in *George* is limited to debtors and mortgagors, that junior lienholders have no standing whatsoever to question the validity of note and mortgage presented as the senior lien, and that the lien contest inherent in a foreclosure action is limited to a simple determination of when the respective liens were recorded, followed by a routine ranking in chronological priority under R.C. 5301.23.

{¶ 27} Our first conclusion is that the position of the junior lienholder differs depending on whether it challenges the note or the mortgage. A foreclosure proceeding is a two-step process involving, first, the enforcement of a debt obligation, and, second, the creditor's right to collect against the security given by the borrower for that debt. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306; *First Knox Natl. Bank v. Peterson*, 5th Dist. No. 08CA28, 2009-Ohio-5096, ¶ 18. "In other words, '[a] mortgage may be enforced only by * * * a person who is entitled to enforce the obligation the mortgage secures.' " *George* at ¶ 10, quoting Restatement of the Law 3d, Property: Mortgages, Section 5.4(C) (1997).

{¶ 28} There is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged

property. Thus, the junior lienholders are truly strangers to the action on a note, which could proceed without them. They have no standing to challenge the plaintiff creditor's standing and, here, cannot assert a defense to the note obligation that the obligor herself has failed to raise. The trial court thus did not err in its rulings with respect to the note.

{¶ 29} While *George* ultimately turns solely on the condition of the note, similar standing arguments have been applied under Ohio law with respect to the state of the mortgage. *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed.Appx. 249, 255 (6th Cir.2014) ("[A] non-party homeowner may challenge a putative [mortgage] assignment's validity on the basis that it was not effective to pass legal title to the putative assignee.").

{¶ 30} Green Tree's reliance on privity fails to address the underlying premise in *George* and *Schwartzwald* and inappropriately discounts the posture of junior lienholders as party defendants to an action, who have a legally enforceable interest in the subject property. As a junior lienholder, CCF was no more a party to the assignments than were the Starchers but is no less a defendant. Like the borrowers themselves, junior lienholders have the right to be sued only by a party having standing to do so. Consistent with the logic of *George* and *Schwartzwald*, we hold that while a junior lienholder may not assert defenses personal to the obligor under the note and mortgage, such as a breach of terms regarding notice of default, acceleration, and the like, it has the right to contest the standing of a plaintiff asserting a senior lien, at least for the purpose of improving the priority of its own rights in the collateral.

{¶ 31} While we conclude the trial court erred in its broad statement of law regarding the non-right of a junior lienholder to contest the plaintiff's standing as holder of the mortgage, that error was without prejudicial effect in the present case and does not require reversal. The discovery sought by CCF either pursued evidence regarding defenses available only to the Starchers or was not calculated to produce evidence that would rebut the evidence submitted by Green Tree regarding standing. The court had discretion to deny CCF's motions to compel and motion for discovery pursuant to Civ.R. 56(F). As a result, the trial court did not err in declining to grant additional discovery to CCF to develop evidence on these issues and in concluding, as will be discussed in more detail below, that Green Tree had standing to bring this action.

IV. EVIDENCE ON SUMMARY JUDGMENT

{¶ 32} We next consider the sufficiency of the evidence presented in support of summary judgment. As with any summary judgment motion under Civ.R. 56, in a foreclosure action summary judgment is appropriate when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). "A plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses." *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, syllabus. On appeal, we conduct an independent review of the record and stand in the shoes of the trial court. *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 11 (10th Dist).

{¶ 33} To support a motion for summary judgment in a foreclosure action, the plaintiff must present "evidentiary quality materials" establishing that the plaintiff is the holder of the note or is a party entitled to enforce the note, that the plaintiff is the holder of the mortgage, that the debt is in default, and that all conditions precedent have been met. *Regions Bank v. Seimer*, 10th Dist. No. 13AP-542, 2014-Ohio-95, ¶ 19. The plaintiff must also establish the amount of principal and interest due. *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657, ¶ 17. In a foreclosure action, presentation of the note and mortgage documents, along with the affidavit of a loan servicing agent or employee with personal knowledge of the account, may provide sufficient evidentiary support for a summary judgment in favor of the mortgagee. *Seimer* at ¶ 19, citing *Deutsche Bank Natl. Trust Co. v. Germano*, 11th Dist. No. 2012-P-0024, 2012-Ohio-5833.

{¶ 34} CCF supported summary judgment with a copy of the note. The note is signed by Asterino-Starcher and payable to America's Wholesale Lender. There is no dispute that this is a negotiable instrument under R.C. 1303.03(A). The sole indorsement is not entirely legible on the copy in the record but clearly enough states "pay to bearer." The affidavit of Gretchen Waggener, foreclosure supervisor for Green Tree, avers that Green Tree is in possession of this note, the note was indorsed by the original payee, and the note is now made to bearer. Green Tree is therefore a person entitled to enforce the

note under R.C. 1303.31(A), being the "holder" as defined in R.C. 1301.201(B)(21)(a): "The person in possession of a negotiable instrument that is payable * * * to bearer." Waggener's affidavit avers the note is in default and gives details of non-payment by Asterino-Starcher. The affidavit sets forth the amounts currently due under the note. In sum, the evidence established Green Tree had standing to bring the action on the note and supported summary judgment thereon.

{¶ 35} With respect to the mortgage, Green Tree submitted a copy of the mortgage executed by the Starchers in favor of MERS as nominee for the lender, America's Wholesale Lender. The mortgage refers to the note by amount, parties, and date. The mortgage bears the stamp of the Franklin County Recorder dated December 15, 2006. A mortgage assignment dated August 11, 2010, assigns the mortgage to BAC Home Loans Servicing, L.P. A certificate of merger issued by the Texas Secretary of State and dated June 28, 2011, documents the merger of BAC Home Loans with Bank of America, N.A. A loan modification document prepared by Bank of America, dated December 13, 2011 and signed by Asterino-Starcher on December 21, 2011, references both the note and mortgage and increases the amount payable under both. A further assignment dated May 16, 2013, conveys the mortgage from Bank of America to Green Tree.

{¶ 36} CCF argues that this court's decision in *Mtge. Electronic Registration Sys. v. Odita*, 159 Ohio App.3d 1, 2004-Ohio-5546, ¶ 15 (10th Dist.), establishes that "a defectively executed mortgage is invalid as to a subsequent mortgagee or lienholder, even if the subsequent mortgagee/lienholder had actual knowledge of the prior defectively executed mortgage." That is an accurate statement of the holding in that case. But the predicate for application of *Odita* is the presence of a defectively executed or recorded mortgage, and CCF can point to no such defect in the original mortgage. CCF does point out that Starcher did not sign the 2011 loan modification, which bears only Asterino-Starcher's signature. The significance of this purported defect, however, is not explained. Nor does the sequence of documents submitted in support of summary judgment present a gap or defect in the chain of assignments.

{¶ 37} Moreover, any putative defect in the chain of mortgage assignments would not necessarily create a genuine issue of material fact to preclude summary judgment. " '[T]he negotiation of a note operates as an equitable assignment of the mortgage, even

though the mortgage is not assigned or delivered.' " *Deutsche Bank Natl. Trust Co. v. Cassens*, 10th Dist. No. 09AP-865, 2010-Ohio-2851, ¶ 17, quoting *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, ¶ 52 (7th Dist.); *see also U.S. Bank N.A. v. Armstrong*, 6th Dist. No. WD-12-031, 2013-Ohio-2130, ¶ 16. In other words, "[t]he physical transfer of the note endorsed in blank, which the mortgage secures, constitutes an equitable assignment of the mortgage, regardless of whether the mortgage is actually (or validly) assigned or delivered." *Najar* at ¶ 65. This results because Ohio's version of the Uniform Commercial Code incorporates the common-law doctrine of equitable assignment. *United States Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 32-33.

{¶ 38} The evidence introduced in support of summary judgment established Green Tree was the holder of the mortgage, had standing to bring the action, and was entitled to summary judgment on the note and foreclosure on the associated collateral.

V. DISMISSAL OF COUNTERCLAIMS AND CROSS-CLAIM

{¶ 39} We now turn to the final issue in this appeal: whether the trial court erred in sua sponte granting judgment on CCF's cross-claim and counterclaims when neither Green Tree nor any other party had moved for judgment on those claims. The trial court did not cite or specify the rule under which it granted dismissal, nor did the trial court give express notice to CCF it intended to dismiss the counterclaims and cross-claim when ruling on Green Tree's summary judgment motion.

{¶ 40} "The Rules of Civil Procedure neither expressly permit nor forbid courts to *sua sponte* dismiss complaints." *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108 (1995). Authorities are clear, however, that the trial court could only sua sponte dismiss the complaint under specific conditions for failure to state a claim under Civ.R. 12(B)(6) or, under even more stringent conditions, under Civ.R. 41(B).

{¶ 41} If the court sua sponte dismisses an action under Civ.R. 41(B)(1), that rule provides three specific circumstances where the court may on its own motion dismiss any claim: where the plaintiff fails to prosecute, fails to comply with the rules, or fails to comply with a court order. Sua sponte dismissal under Civ.R. 41(B)(1), however, requires notice of the court's intention to dismiss so that the party adversely affected has an opportunity to

explain or oppose the dismissal. *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128 (1995); *Tymachko v. Dept. of Mental Health*, 10th Dist. No 04AP-1285, 2005-Ohio-3454.

{¶ 42} In the present case, the trial court gave no formal notice of its intent to dismiss the cross-claim and counterclaims. There is no indication that CCF failed to prosecute those claims; to the contrary, CCF repeatedly attempted to pursue discovery in support of the counterclaims and was denied by the trial court. The trial court did not note any failure of CCF to comply with the rules or orders of the court and our review of the record reveals none. For these reasons, dismissal under Civ.R. 41(B)(1) was not appropriate.

{¶ 43} Sua sponte dismissal of a complaint under Civ.R. 12(B)(6) for failure to state a claim on which relief can be granted is also only appropriate under limited circumstances. *State ex rel. Bruggeman v. Ingraham*, 87 Ohio St.3d 230, 231 (1999). "[A] court may dismiss a complaint on its own motion pursuant to Civ.R. 12(B)(6) * * * only after the parties are given notice of the court[']s intention to dismiss and an opportunity to respond." *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 161 (1995). "However, *sua sponte* dismissal without notice is appropriate where the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." *Id.*; *see also State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313 (2000).

{¶ 44} Applying Civ.R. 12(B)(6) in the context of spontaneous dismissal, the trial court could dismiss without notice of its intention to do so only if CCF "obviously [could not] prevail on the facts alleged in the complaint" or if the complaint was frivolous. *Bruggeman* at 231. The trial court gave no indication in the present case that it considered CCF's cross-claim and counterclaims to be frivolous. We are thus left to consider whether the discernable claims in CCF's answer, cross-claim, and counterclaims retained any chance of success on the stated facts after the trial court had entered judgment in favor of Green Tree.

{¶ 45} With respect to the declaratory judgment counterclaim against Green Tree, judgment in favor of Green Tree in the foreclosure action and the prioritization of the mortgage liens effected by the court obviously preclude any entitlement to declaratory judgment in favor of CCF, and the claim could properly be dismissed under Civ.R. 12(B)(6) without notice.

{¶ 46} Likewise, the cross-claim against the Starchers, which was essentially a competing action in foreclosure, was precluded by the court's judgment granting foreclosure to Green Tree.

{¶ 47} Thus, there remained only CCF's counterclaim for Green Tree's alleged violations of the FDCPA. Without passing on the merits of this claim,[2] it is apparent from the record that success on the facts alleged in CCF's complaint is not precluded by the court's foreclosure judgment in favor of Green Tree. The trial court, therefore, erred in granting dismissal without notice on the FDCPA counterclaim brought by CCF against Green Tree. The trial court's judgment must be reversed in part and remanded for disposition of this last claim.

VI. CONCLUSION

{¶ 48} In accordance with the foregoing, appeal No. 17AP-273 is dismissed for lack of a final, appealable order. In appeal No. 16AP-675, CCF's first and second assignments of error are overruled to the extent they argue the trial court's entry of judgment of foreclosure in favor of Green Tree and prioritization of liens was erroneous. Both assignments of error are also overruled in part insofar as the trial court's dismissal of CCF's counterclaim for declaratory judgment is affirmed, and the court's dismissal of CCF's cross-claim against the Starchers is affirmed. The two assignments of error are sustained to the extent the trial court did err in sua sponte dismissing without notice CCF's counterclaim for FDCPA violations against Green Tree. The trial court's dismissal of that claim is accordingly reversed, and the matter is remanded for further proceedings.

Appeal No. 17AP-273 dismissed;
judgment reversed in part and affirmed in part in appeal No. 16AP-675;
cause remanded.

TYACK and KLATT, JJ., concur.

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[2] CCF's standing to bring this claim, while colorable, is tenuous at best, given that CCF is neither a consumer, nor the debtor, nor a natural person. *See generally Anarion Invests. LLC v. Carrington Mtge. Servs., LLC*, 794 F.3d 568 (6th Cir.2015); *Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C.*, 155 Fed.Appx. 10 (2d Cir.2005); *Valle v. Green Tree Servicing, LLC*, D.Conn. No. 3:16-cv-277 (Mar. 20, 2017).

[Cite as *Inventiv Health Communications, Inc. v. Rodden*, 2018-Ohio-945.]

woCOURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

INVENTIV HEALTH COMMUNICATIONS, INC.,	:	JUDGES:
	:	Hon. John W. Wise, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff - Appellant/ Cross-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
	:	-vs-
	:	
JENNIFER RODDEN,	:	Case No. 17 CAE 09 0066
	:	
Defendant - Appellee/ Cross- Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 17-CVH-04-0259

JUDGMENT: Affirmed in part, Reversed and Remanded in part

DATE OF JUDGMENT: March 12, 2018

APPEARANCES:

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Baldwin, J.

{¶1} Plaintiff-appellant inVentiv Health Communications, Inc. appeals from the August 18, 2017 Judgment Entry of the Delaware County Court of Common Pleas granting the Motion to Dismiss filed by defendant-appellee Jennifer Rodden. Defendant-appellee Jennifer Rodden has filed a cross-appeal.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee Jennifer Rodden, a resident of North Carolina, began working in April of 2010 as an administrative assistant for Addison Whitney, which is located in North Carolina. Addison Whitney is a wholly-owned subsidiary of appellant inVentiv Health Communications which is located in Ohio and has its principal place of business in Ohio. According to appellant, the two companies are affiliates.

{¶3} On or about April 10, 2010[1], appellee signed an "Acknowledgement and Agreement" that was attached to appellant's "Code of Ethics and Business Conduct." Such form states, in relevant part, as follows:

> I have read and I understand the foregoing inVentiv Communications, Inc. *Code of Ethics and Business Conduct* dated May 28, 2009 (the "Code") and by executing this Agreement, I hereby acknowledge my agreement to comply with those obligations and responsibilities set forth in the Code and to be bound by the Code as a condition of my continued status as a[n]…employee of …inVentiv Communications Inc. or any of its affiliates companies (collectively, the "Company") [.]

[1] The date that appellee signed the Acknowledgement and Agreement is unclear. It appears that she signed it on either April 10, 2010 or April 12, 2010. The trial court found that she had signed the agreement on April 12, 2010.

{¶4} The inVentiv Agreement specifically prohibits company representatives, including all employees of appellant and its affiliates, from disclosing confidential information, engaging in any fraud, theft or similar conduct, or engaging in any Restricted Activity in the Restricted Area for two years following termination of employment with appellant or its affiliates. The inVentiv Agreement defines “Restricted Activity” as follows:

> [S]oliciting to provide or providing advertising, public relations, branding, health outcomes, medical education, and/or any other marketing or similar services offered by the Company to any person or entity which (a) was a client of the Company at any time during the last twelve months in which the Company Representative was employed with the Company, or (b) was an Active Client Prospect of the Company (i.e. a person or entity with whom there had been contact by someone at the Company within the 90-day period immediately preceding such termination of employment) at the time of the Company Representative’s termination of employment with the Company. For purposes hereof, the term “Restricted Area” means the United State of America.

{¶5} The inVentiv Agreement also contains a forum selection clause providing that it would be governed and construed in accordance with laws of the state of Ohio. The forum selection clause further states as follows: “I hereby consent to the exclusive jurisdiction and venue of any state or federal court in Ohio to consider any claims related to the interpretation or enforcement of any provision of the Code or this Agreement or any other related claims.” Additionally, the agreement further states, in relevant part, that

"[t]his instrument and the terms of the Code constitute the entire agreement between the parties with respect to the subject matter hereof."

{¶6} Appellee, on April, 12, 2010, also signed an "Employee Confidentiality and Non-Compete Agreement" with Addison Whitney which included its subsidiaries or affiliates, including appellant. Addison Whitney's representative signed the same on April 14, 2010. Pursuant to the terms of the agreement, appellee agreed that she would not directly or indirect compete with Addison Whitney for a period of one year after termination of her employment. She further agreed that during her employment with Addison Whitney and for one year following her termination, she would not:

> Either on [her] behalf of any other person or entity, directly or indirectly (a) hire, solicit or encourage or induce any employee, director, consultant, contractor or subcontractor to leave the employ of Addison Whitney, or (b) solicit, induce, encourage or entice away or divert any person or entity which is then a customer of Addison Whitney and which was a customer of Addison Whitney during the term of Employee's employment.

{¶7} While the Addison Whitney Agreement contains a North Carolina choice of law clause, it does not contain a forum selection clause. The Addison Whitney Agreement further provides that it represented the entire agreement between appellee and Addison Whitney "with respect to the subject matter hereof, superseding all previous oral or written communications, representations, understanding or agreement relating to this subject."

{¶8} In January of 2017, appellee, who had been a Senior Project Manager for Addison Whitney since 2014, resigned from Addison Whitney and, along with five other Addison Whitney employees, contemplated forming a competing company.

{¶9} On January 30, 2017, Addison Whitney filed a complaint in North Carolina against appellee and her former co-workers. On April 14, 2017, appellant filed a complaint in Ohio against appellee, alleging that she had breached her contractual obligations to appellant and had misappropriated appellant's confidential and proprietary information. Appellant sought injunctive relief. Appellant, on the same date, filed a Motion for Temporary Restraining Order that was granted on the same day.

{¶10} Appellee, on April 26, 2017, filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted and under the doctrine of forum non conveniens. Appellant filed a memorandum in opposition to the same on May 10, 2017 and appellee filed a reply on May 17, 2017.

{¶11} The trial court, as memorialized in a Judgment Entry filed on August 18, 2017, granted the Motion to Dismiss for failure to state a claim and dismissed appellant's complaint with prejudice. The trial court found that enforcement of the Ohio forum selection clause in appellant's agreement would be unreasonable and unjust.

{¶12} Appellant now appeals from the trial court's August 18, 2017 Judgment Entry raising the following assignments of error on appeal:

{¶13} I. THE TRIAL COURT ERRED IN HOLDING THAT THE FORUM SELECTION CLAUSE IN THE PARTIES' CONTRACT WAS UNENFORCEABLE.

{¶14} II. THE TRIAL COURT ERRED IN HOLDING THAT THE CHOICE-OF-LAW PROVISION IN THE PARTIES' CONTRACT WAS UNENFORCEABLE.

{¶15} III. THE TRIAL COURT ERRED BY DISMISSING INVENTIV'S COMPLAINT WITH PREJUDICE DESPITE HOLDING ONLY THAT THE FORUM SELECTION CLAUSE IN THE PARTIES' CONTRACT WAS UNENFORCEABLE.

{¶16} Appellee has filed a cross-appeal raising the following assignments of error:

{¶17} I. THE TRIAL COURT ERRED IN HOLDING THAT INVENTIV'S CODE OF ETHICS AND BUSINESS CONDUCT AGREEMENT WAS NOT SUPERSEDED BY ADDISON WHITNEY'S EMPLOYEE CONFIDENTIALITY AND NON-COMPETE AGREEMENT.

{¶18} II. THE TRIAL COURT ERRED IN RELEASING INVENTIV'S BOND WITHOUT ALLOWING FOR A HEARING ON DAMAGES CAUSED BY A WRONGFULLY GRANTED TEMPORARY RESTRAINING ORDER.

I, II

{¶19} Appellant, in its first assignment of error, argues that the trial court erred in holding that the forum selection clause contained in the parties' agreement was unenforceable and in granting appellee's Motion to Dismiss. In its second assignment of error, appellant maintains that the trial court erred in holding that the choice of law provision in the parties' agreement was unenforceable.

{¶20} As an initial matter, we note that while appellee filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6), dismissal for lack of personal jurisdiction comes within the purview of Civ.R. 12(B)(2). A trial court's determination of whether personal jurisdiction over a party exists is a question of law, and appellate courts review questions of law under a de novo standard of review. *Information Leasing Corp. v. Jaskot,* 151 Ohio App.3d 546, 2003-Ohio-566, 784 N.E.2d 1192 (1st Dist.). Moreover, we shall assume, arguendo, for

purposes of our analysis that the trial court did not err in holding that appellant's agreement with appellee was not superseded by the agreement that appellee signed with Addison Whitney, as alleged by appellee.

{¶21} Generally, a court must undertake a two-step process in determining whether a state court has personal jurisdiction over a non-resident defendant. *Fraley v. Estate of Oeding,* 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶ 12. The court must first consider whether Ohio's long-arm statute, R.C. 2307.382, or the civil rules confer jurisdiction. *Id.* If they do, the court must then consider whether asserting jurisdiction over the non-resident defendant would deprive the defendant of the right to due process under the law, as guaranteed by the Fourteenth Amendment to the U.S. Constitution. *Id.* To satisfy due process, the defendant must maintain "certain minimum contacts with the state so that the suit does not offend traditional notions of fair play and substantial justice." *Clark v. Connor,* 82 Ohio St.3d 309, 314, 1998-Ohio-385, 695 N.E.2d 751.

{¶22} However, a person or entity may consent to personal jurisdiction, thereby waiving his her, or its due process rights. *Kennecorp Mrge. Brokers, Inc., v. Country Club Convalescent Hosp., Inc.,* 66 Ohio St.3d 173, 175–176, 610 N.E.2d 987 (1993). One way litigants may consent to personal jurisdiction of a particular court system is through a valid forum selection clause. *See Id.*

{¶23} In Ohio, it is well settled law that "[a]bsent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust." *Kennecorp Mrge. Brokers, Inc.,* syllabus. In the case sub judice, while appellant is a business entity, appellee, a former employee, is not. As noted

by the trial court, Ohio law regarding forum selection clauses in employment contracts is not as settled. See *IntraSee v. Ludwig*, 9th Dist. Lorain Nos. 10CA009916, 11CA010024, 2012-Ohio-2684. In *Zilbert v. Proficio Mortgage, Ventures, L.L.C.*, 8th Dist. No. 100299, 2014-Ohio-1838 at paragraph 32, the court stated that while it was "not advocating that a forum selection clause in an employment contract should never be enforced, or freely invalidated", it found "that the type of contract can make a difference in determining whether to uphold such a clause."

{¶24} Under Ohio law, a forum selection clause is presumptively valid, and will be enforced by the forum unless the party challenging the clause shows: (1) that the contract was the result of fraud or overreaching; (2) that enforcement would violate the strong public policy of the forum state; and (3) that enforcement under the particular circumstances of the case would result in litigation in a jurisdiction so unreasonable, difficult and inconvenient that the challenger would for all practical purposes be deprived of his day in court. *Barrett v. Picker Int'l, Inc.,* 68 Ohio App.3d 820, 824, 589 N.E .2d 1372 (8th Dist. 1990).

{¶25} Appellee never argued, and the trial court never found, that the contract was the result of fraud. Rather, appellee asserts that the contract was the result of overreaching. "Overreaching is defined as the act or an instance of taking unfair commercial advantage of another." (Internal citations omitted.) *Buckeye Check Cashing of Arizona, Inc. v. Lang,* S.D.Ohio No. 2:06–CV–792, 2007 WL 641824, *5 (Feb. 23, 2007). "The unequal bargaining power of the parties or lack of ability to negotiate over the clause cannot, in itself, support a finding of overreaching." *Id.,* citing *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

"However, overreaching may be found if the disparity in bargaining power was used to take unfair advantage." *Id.,* citing *United Rentals, Inc. v. Pruett,* 296 F.Supp.2d 220, 227 (D.Conn.2003).

{¶26} The trial court, in the case sub judice, found that appellant had engaged in overreaching. When appellee was initially hired in April of 2010, she was hired as an administrative assistant and was not, as noted by the trial court, in a position of equal bargaining power with either appellant or Addison Whitney, both commercial entities. The inVentiv Agreement and the Addison Whitney Agreement both prohibited appellee from the same conduct. Under both agreements, appellee was prohibited from using or disclosing either appellant's or Addison Whitney's confidential information and from soliciting or providing specified services to any of appellant's or Addison Whitney's clients. While Addison Whitney has filed suit against appellee in North Carolina, appellant shortly thereafter filed suit against her in Ohio under the forum selection clause for the same alleged conduct said to have breached separate agreements, forcing her to retain counsel and defend herself in two different jurisdictions. We concur with the trial court that appellant thus has been able to take unfair advantage of appellee. This factor weighs in favor of nonenforcement.

{¶27} The next issue for determination is whether or not enforcement of the forum selection clause would violate the strong public policy of the forum state. The inVentiv Agreement signed by appellee contains a forum selection clause providing that it would be governed and construed in accordance with laws of the state of Ohio and that Ohio had exclusive jurisdiction. Thus, Ohio is the forum state. "Ohio recognizes the validity of forum selection clauses, and enforcement of the clause would not violate the public policy

of Ohio. Thus, this factor does not weigh in favor of nonenforcement." *Zilbert* at paragraph 24.

{¶28} The trial court, with respect to the third part of the test set forth in the *Barrett* case, found that enforcement of the forum selection clause in the inVentiv Agreement would be unreasonable and unjust. Appellee has the burden of establishing that it would be unreasonable or unjust to enforce the forum selection clause. *Zilbert,* supra.at paragraph 25. A finding of unreasonableness or injustice must be based on more than inconvenience to the party seeking to avoid the forum selection clauses' requirements. *Id.* Thus, "mere distance, mere expense, or mere hardship to an individual litigant is insufficient to invalidate a forum selection clause". *Salehpour v. Just A Buck Licensing, Inc.,* 12th Dist. Warren No. CA2013–03–028, 2013–Ohio–4436, citing *IntraSee, Inc. v. Ludwig,* 9th Dist. Lorain Nos. 10CA009916 and 11CA010024, 2012–Ohio–2684, ¶ 20. Rather, the trial court must find that enforcement of the clause would be manifestly and gravely inconvenient to the party seeking to avoid enforcement such that it will effectively be deprived of a meaningful day in court. *Info. Leasing Corp. v. Jaskot,* 151 Ohio App.3d 546, 552, 2003–Ohio–566, 784 N.E.2d 1192 (1st Dist.).

{¶29} In determining whether the selected forum is sufficiently unreasonable, Ohio courts consider the following factors: (1) which law controls the contractual dispute; (2) the residency of the parties; (3) where the contract was executed; (4) where the witnesses and parties to the litigation are located; and (5) whether the forum clause's designated location is inconvenient to the parties. *Original Pizza Pan v. CWC Sports Group, Inc.,* 194 Ohio App.3d 50, 2011–Ohio–1684, 954 N.E.2d 1220 (8th Dist.), citing *Barrett*, supra at 85.

{¶30} The inVentiv Agreement contains a choice of law provision that provides that the agreement would be governed and construed in accordance with Ohio law. In determining whether a choice-of-law provision is enforceable, the following standard applies:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state <u>and</u> such state would be the state of the applicable law in the absence of a choice by the parties. (Emphasis added).

{¶31} *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 453 N.E.2d 683, syllabus (1983).

{¶32} Appellant, which is incorporated in Ohio and has its principal place of business in Ohio, clearly has a substantial relationship to Ohio. Thus, we must determine whether application of the law of Ohio would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties.

{¶33} We find that North Carolina has a significant interest in the issues in this case. Appellee is a resident of North Carolina, she signed the inVentiv Agreement in North Carolina, and her alleged breach of the agreement occurred in North Carolina.

{¶34} Assuming, arguendo, that North Carolina has a "greater material interest" in the issue than Ohio, we must determine whether or not application of Ohio law would be contrary to the fundamental policy of North Carolina. We concur with appellant that we must look to the substantive law of Ohio and the substantive law of North Carolina with respect to the validity of confidentiality and noncompetition agreements. See, for example, *Century Business Servs. v. Barton,* 197 Ohio App.3d 352, 2011–Ohio–5917, 967 N.E.2d 782 (8th Dist.). "[I]n North Carolina, restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *United Laboratories, Inc. v. Kuykendall,* 322 N.C. 643, 649–50, 370 S.E.2d 375, 380 (1988). Under Ohio law, restrictive covenants not to compete are reasonable if the restriction or restraint imposed is (1) no greater than that necessary for the protection of the employer, (2) does not place an undue hardship on the employee, and (3) is not injurious to the public. *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 325 N.E.2d 544, paragraphs one and two of the syllabus (1975). We find that application of the substantive law of Ohio would not violate the fundamental public policy of North Carolina and that the choice of law provision should not be disregarded.

{¶35} With respect to the other factors, we note that while appellee resides in North Carolina, appellant is incorporated in Ohio and has its principal place of business there. The contract was executed by appellee in North Carolina and many of the witnesses are located there. The five other defendants in the North Carolina case, who would be relevant witnesses in the case sub judice, all reside in North Carolina. The final

factor set forth in *Barrett r*equires this Court to determine whether or not Ohio is inconvenient to the parties. We agree with the trial court that this factor weighs heavily in favor of appellee under the unique facts of this case. In the case sub judice, appellee, who was at the time an administrative assistant, signed an agreement with appellant and also one with Addison Whitney. Both prohibited appellee from disclosing either's confidential information and prohibited appellee from soliciting clients of either. As stated by the trial court in finding that enforcement of appellant's forum selection clause would be inconvenient to the parties:

> Rodden [appellee] had no way to know whether she would be forced to defend an alleged breach in Ohio or North Carolina or whether Ohio or North Carolina law would apply. By simultaneously suing Rodden in both Ohio and North Carolina for the same alleged conduct, Rodden has been forced to retain separate counsel and conduct separate discovery in each jurisdiction. Additionally, all of Rodden's alleged acts occurred in North Carolina, and most if not all of the potential witnesses reside in North Carolina. My concerns are compounded by the fact that Rodden – hired initially as an at-will administrative assistant – held little bargaining power over the inVentiv Agreement's forum-selection clause.

{¶36} Based on the foregoing, we find that the trial court did not err in holding the forum selection and choice of law clauses to be unenforceable.

{¶37} Appellant's first and second assignments of error are, therefore, overruled.

III

{¶38} Appellant, in its third assignment of error, contends that the trial court erred in dismissing its complaint with prejudice.

{¶39} The trial court, in its August 18, 2017 Judgment Entry, found that the forum selection clause was unenforceable and that, therefore, there was no personal jurisdiction over appellee. The trial court dismissed the complaint with prejudice.

{¶40} Civ.R. 41(B)(4) clearly states that a dismissal for lack of jurisdiction is a "failure otherwise than on the merits." "A successful motion [to dismiss for lack of personal jurisdiction] will normally result in an order dismissing the action, but should not prejudice the plaintiff's action on the merits ….". *Jurko v. Jobs Europe Agency*, 43 Ohio App.2d 79, 88, 334 N.E.2d 478 (8th Dist. 1975).

{¶41} We find that the trial court erred in dismissing the complaint with prejudice.

{¶42} Appellant's third assignment of error is, therefore, sustained.

CROSS-APPEAL

I

{¶43} Appellee, in her first assignment of error in her cross-appeal, argues that the trial court erred in holding that appellant's Code of Ethics and Business Conduct Agreement was not superseded by Addison Whitney's Employee Confidentiality and Non-Compete Agreement.

{¶44} Based on our disposition of appellant's first and second assignments of error, appellee's first assignment of error is moot.

II

{¶45} Appellee, in her second assignment of error, argues that the trial court erred in releasing appellant's bond without allowing a hearing on damages caused by a wrongfully granted temporary restraining order.

{¶46} On April 14, 2017, appellant filed a Motion for Temporary Restraining Order and Preliminary Injunction. On the same date, the trial court issued a Temporary Restraining Order pending oral argument on the preliminary injunction. The trial court ordered that appellant post a bond in the amount of $20,000.00. The bond was posted on April 17, 2017. The hearing on the preliminary injunction was postponed until after the trial court ruled on appellee's Motion to Dismiss. Because the trial court, pursuant to a Judgment Entry filed on August 18, 2017, granted the Motion to Dismiss, the hearing was never held. The trial court, in its August 18, 2017 Judgment Entry, vacated the April 14, 2017 Judgment Entry and stated that appellant could withdraw its $20,000.00 bond.

{¶47} In the case sub judice, there is no indication in the record that the bond has been released or that appellee has requested a hearing to recover damages on the bond placed with the court. We concur with appellant that, therefore, such issue is not ripe. It is well established that an appellate court will not rule on questions not considered by a trial court. *Ochsmann v. Great Am. Ins. Co.,* Franklin App. No. 02AP-1265, 2003-Ohio-4679 at paragraph 21, citing *Mills-Jennings, Inc. v. Dept. of Liquor Control*, 70 Ohio St.2d 95, 99, 435 N.E.2d 407 (1982). Thus, we decline to address this argument for the first time on appeal.

{¶48} Appellee's second assignment of error is, therefore, overruled.

{¶49} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to the trial court for the limited purpose of entering a dismissal without prejudice.

By: Baldwin, J.

John Wise, P.J. and

Delaney, J. concur.

[Cite as *Blain's Folding Serv., Inc. v. Cincinnati Ins. Co.*, 2018-Ohio-959.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105913

BLAIN'S FOLDING SERVICE, INC., ET AL.

DEFENDANTS-APPELLANTS

vs.

CINCINNATI INSURANCE COMPANY, ET AL.

PLAINTIFFS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-852129

BEFORE: Stewart, J., E.A. Gallagher, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 15, 2018

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MELODY J. STEWART, J.:

{¶1} An automobile accident caused extensive damage to a building owned by plaintiff-appellant Blain's Folding Service, Inc. Blain's alleged that defendant-appellee DANE Contractors, Inc., who had been hired to perform repair and restoration, failed to install a separate, dedicated power source for a newly installed cutting machine, causing the machine to experience power surges. It brought this breach of contract and negligence action against DANE,[1] alleging that delays in installing a separate power source caused it to lose a three-year job worth $350,000 per year. DANE filed a motion for summary judgment on the grounds that Blain's could not recover future lost profits on a contract that violated the statute of frauds and that the claimed lost profits were too remote or speculative. The court granted summary judgment without opinion.

I. Statute of Frauds

{¶2} Blain's first assignment of error is that the court erred by granting summary judgment under the statute of frauds because DANE did not raise the statute of frauds as an affirmative defense in its answer to the complaint.

[1] Blain's also named The Cincinnati Insurance Company, Haywood Electric, Inc., the driver of the automobile (who died in the accident), the owner of the automobile, and ten John Does. These defendants were all dismissed from the action, leaving DANE as the sole defendant.

{¶3} The statute of frauds states that no action can be brought upon an agreement that is not to be performed within one year unless the agreement is reduced to writing. *See* R.C. 1335.05. The statute of frauds is an affirmative defense, *see* Civ.R. 8(C), that is waived if not pleaded in an answer to a responsive pleading. *See Houser v. Ohio Historical Soc.*, 62 Ohio St.2d 77, 79, 403 N.E.2d 965 (1980); *DG Indus., L.L.C. v. McClure*, 7th Dist. Mahoning Nos. 11 MA 59 and 11 MA 69, 2012-Ohio-4035, ¶ 18.

{¶4} There is no question that DANE did not list the statute of frauds as an affirmative defense in its answer to the complaint. But we agree with DANE that it had no obligation to raise the statute of frauds as an affirmative defense. "[T]he statute of frauds bars a party from enforcing an oral agreement falling within the statute." *FirstMerit Bank, N.A. v. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, 7 N.E.3d 1150, ¶ 22. In this context, "party" means a party to the contract. As a matter of common law contract, "a defense under the statute of frauds is personal to the parties to the transaction and cannot be availed of by third parties." *Texeramics v. United States*, 239 F.2d 762, 764 (5th Cir.1957).

{¶5} But these same principles mean that DANE had no standing to question the enforceability of any contract that Blain's made with a third party. The statute of frauds "is a mere defense. It is not a matter of substance." *Leibovitz v. Cent. Natl. Bank*, 75 Ohio App. 25, 29, 60 N.E.2d 727 (8th Dist.1944). And if the statute of frauds, as an affirmative defense, can be waived by the parties to a contract, a nonparty to a contract like DANE cannot avail itself of the affirmative defense to claim that a contract is unenforceable. *Legros v. Tarr*, 44 Ohio St.3d 1, 8, 540 N.E.2d 257 (1989), quoting *Bradkin v. Leverton*, 26 N.Y.2d 192, 199, 309 N.Y.S.2d 192, 257 N.E.2d 643 (1970) ("'where a third party is concerned, the Statute of Frauds provides no defense to him.'"). *See also Edwards Mfg. Co. v. Bradford Co.*, 294 F. 176, 181 (2d Cir.1923) ("the defense of the statute of frauds is personal to the contracting parties.").

{¶6} DANE cites *Bell v. Horton*, 113 Ohio App.3d 363, 680 N.E.2d 1272 (4th Dist.1996), for the proposition that a nonparty to an oral contract may raise the statute of frauds as a defense. In that case, Bell reached an oral agreement to sell unimproved property to another, who would erect a house on the premises and sell it to a third party. Bell alleged that the defendant, Whitten, made certain statements to the buyer and third party, causing them to decide not to purchase the property. Bell filed an action alleging that Whitten toritously interfered with his contractual relationship. Reviewing the elements of a tortious interference with contract claim, the Fourth District Court of Appeals found that there was no valid and enforceable contract under the statute of frauds because the agreement to sell real property had not been reduced to writing. *Id.* at 366.

{¶7} *Bell* did not address well-established law that "'it usually is held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance.'" *Harris v. Perl*, 41 N.J. 455, 461, 197 A.2d 359 (1964), quoting Prosser, *Handbook of the Law of Torts*, Section 106 (2d Ed. 1955). This is based on the idea that "the statute of frauds was enacted for the benefit of a party to the transaction and is not available to strangers who tortiously interfere with contractual or advantageous relations created by the transaction." *Geo. H. Beckmann, Inc. v. Charles H. Reid & Sons, Inc.*, 44 N.J. Super. 159, 130 A.2d 48, 52 (App.Div. 1957) (collecting cases).

{¶8} *Bell* thus failed to appreciate the difference between a contract that is unenforceable and a contract that is void. A contract that is not within the statute of frauds is not a void or illegal contract, nor is there any public policy against its performance. *See* Keeton, Dobbs, Keeton & Owen, *Prosser and Keeton on the Law of Torts*, Section 129, 932 (5th Ed.1984) ("The law of course does not object to the voluntary performance of agreements merely because it will not enforce them, and it indulges in the assumption that even unenforceable promises will be carried out if no third person interferes."). That a contract is outside the statute of frauds does not mean that it does not exist, much less that it cannot be performed by the parties. *See also* 1 Restatement of the Law 2d, Torts, Section 766, Comment f (1965) ("It is not, however, necessary that the contract be legally enforceable against the third person. A promise may be a valid and subsisting contract even though it is voidable. * * * The third person may have a defense against action on the contract that would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted to interfere improperly.").

{¶9} It follows that whether an alleged contract between Blain's and its customer, AGS Custom Graphics ("AGS"), had been reduced to writing was not a valid basis for granting summary judgment.[2] Nevertheless, there was a different, viable basis for granting summary judgment.

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[2] DANE also cites *Hodges v. Ettinger*, 127 Ohio St. 460, 467, 189 N.E. 113 (1934), for the proposition that "no distinctively legal action can be maintained upon an oral contract within the statute of frauds." That case is inapplicable because it involved a breach of contract action between

II. Speculative Damages

{¶10} Among the damages sought by Blain's were "economic losses including but not limited to loss of profits, loss of the accounts, delays in production, increase in costs to complete jobs, loss of future accounts, and loss of future contracts." In its motion for summary judgment, DANE argued that Blain's demand for lost profits was remote and speculative because there was "real doubt" that a three-year oral contract existed between Blain's and AGS. Blain's maintained that a contract did exist and that lost profits were ascertainable to a reasonable degree of certainty as shown by its expert who calculated lost profits based on the anticipated revenue to be generated from AGS's and Blain's historical profit margin.

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parties to a contract and whether the contract was unenforceable as being outside the statute of frauds — no third person was attempting to avoid liability by using the statute of frauds to claim that the contract was unenforceable.

{¶11} In general, contract damages should place the nonbreaching party in the position it would have been in had the breaching party fully performed under the contract. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 26. Lost profits are recoverable for a breach of contract, but only if (1) the profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty. *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.*, 12 Ohio St.3d 241, 243, 466 N.E.2d 883 (1984), paragraph two of the syllabus. Lost profits are remote or speculative if they cannot be demonstrated with reasonable certainty. *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 521 N.E.2d 814 (1988), syllabus.

{¶12} Viewing the facts most favorable to Blain's, *see* Civ.R. 56(C), we find that the facts do not establish the existence of a contract with AGS. Blain's maintained that the project would last three years, with the specific work to be completed in several bindery jobs over the time period. But what Blain's described as "its" project was, in fact, a project that belonged to AGS, not to Blain's. AGS pieced out several jobs to Blain's, all of which Blain's concedes were separately quoted and billed. AGS made it clear that it "did not have a three-year contract or any type of contract" with Blain's on the project. This was because AGS had made the decision, even before the events giving rise to this case, to purchase equipment that would allow it to do in-house the jobs that Blain's was performing for it. It was for this reason that AGS denied that it had any contract with Blain's, much less one that ran for three years. Blain's evidence shows only that it had the hope of bidding on AGS's business for the next three years. That hope did not establish that any contract existed between it and AGS.

{¶13} The record also does not disclose any contract between Blain's and DANE. Blain's did not attach a copy of its contract with AGS to its complaint. "When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading." Civ.R. 10(D). In fact, the complaint alleged that DANE had been hired by Cincinnati Insurance, Blain's insurer: "Defendant DANE was retained and/or recommended and/or approved by Defendant Cincinnati." Blain's manager of operations reaffirmed that Blain's did not hire DANE when he averred that "Cincinnati Insurance retained and recommended the services of Defendant DANE Contractors, Inc. ("Dane") to act as the general contractor." Affidavit of Edward Blain at ¶ 5.

{¶14} It may be that Blain's was a third-party beneficiary of DANE's contract with Cincinnati Insurance. However, it had to establish its status as a third-party beneficiary by providing evidence on that point. *Campbell Oil Co. v. Shepperson*, 7th Dist. Carroll No. 05 CA 817, 2006-Ohio-1763, ¶ 27, citing *Hill v. Sonitrol of S.W. Ohio, Inc.*, 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988). Blain's has never alleged that it was a third-party beneficiary of any contract between Cincinnati and DANE, and equally important, it has not provided any contract between Cincinnati and DANE that would establish that fact. *Id*. In any event, this issue was not raised below, so we cannot review it. *Fifth Third Bank v. Senvisky*, 8th Dist. Cuyahoga Nos. 100030 and 100571, 2014-Ohio-1233, ¶ 21, fn. 2 ("we cannot address defendants' third-party beneficiary claim or fraud allegations because they failed to raise these issues in front of the trial court.").

{¶15} Even had Blain's properly pleaded and supported its status as a party or beneficiary to a contract with DANE, we would find its claim for lost profits to be speculative.

{¶16} Blain's expert said that in the preceding 13 years, Blain's saw "approximately 31% of marginal revenues flow to profits after fixed expenses have been paid. In other words, 69% of marginal revenues, on average, are used to cover variable and mixed overhead." Assuming annual revenues of between $350,000 and $380,000, the expert concluded that Blain's would have realized profits of between $327,600 and $355,680 on business provided by AGS.

{¶17} The expert's calculations were based on Blain's general business revenues and were not specific to work done for AGS. The evidence showed that Blain's did work for other clients that differed from the specific tasks that it performed for AGS. And even if the tasks were the same, it is reasonable to think that Blain's would price jobs differently based on the individual customer. The expert's failure to render an opinion based solely on work performed for AGS meant that he rendered an opinion that was too general to meet the reasonable degree of certainty standard for proving contract damages.

{¶18} Finally, Blain's argues that regardless of whether it adequately proved lost profit with respect to AGS, it had claims for other lost business. We can summarily reject this argument because Blain's failed to offer any evidence of what those lost profits might be — its expert only gave an opinion with respect to lost profit from AGS. Since the claims based on a breach of contract only sought lost profits as damages, Blain's had to prove the loss. *Endersby v. Schneppe*, 73 Ohio App.3d 212, 216, 596 N.E.2d 1081 (3d Dist.1991).

{¶19} The same is true of Blain's negligence claim. A party opposing a motion for summary judgment may not rest on its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See* Civ.R. 56(E). As with its contract claims, Blain's offered no evidence to prove the existence of any damages resulting from DANE's alleged negligence. *Pietz v. Toledo Trust Co.*, 63 Ohio App.3d 17, 22, 577 N.E.2d 1118 (6th Dist.1989) ("Injury or damage is a necessary element of a cause of action for negligence, without which summary judgment can be granted."). We therefore conclude that the court did not err by granting summary judgment on all causes of action raised in the complaint.

{¶20} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR