UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Carol Manheim, d/b/a Plantation Plaza Therapy Center, individually, and on behalf of all other persons similarly situated, Plaintiff, v. SME Inc., USA d/b/a Superior Medical Equipment, Defendant.	Case No. 2:14-cv-02856-DCN

Plaintiff's Motion to Stay Plaintiff's Motion for Class Certification and Brief in Support Thereof

Carol Manheim, d/b/a Plantation Plaza Therapy Center, individually, and on behalf of all other persons similarly situated, moves this Court to stay Plantation Plaza Therapy Center's motion for class certification to allow Plantation Plaza Therapy Center to conduct discovery.

This case is about junk faxes, those unsolicited advertisements that some businesses send to fax machines. With limited exceptions, the Telephone Consumer Protection Act,[1] prohibits the sending of junk faxes. SME, Inc., USA d/b/a Superior Medical Equipment

[1] 47 U.S.C. § 227.

sent junk faxes to Plantation Plaza Therapy Center.[2] Before filing this lawsuit, Plantation Plaza Therapy Center's counsel wrote to Superior Medical Equipment to try to resolve its claim without litigation. Superior Medical Equipment did not respond. Thus, Plantation Plaza Therapy Center was forced to file this lawsuit to vindicate its rights.

Plantation Plaza Therapy Center seeks to pool its claims with those of others and prosecute this case as a class action because it is uneconomical for Plantation Plaza Therapy Center to litigate its claims individually.[3] It is impossible for those victimized by junk-faxing campaigns to vindicate their rights without aggregating their claims with those of others.[4] But when faced with a class-action complaint, some defendants have made offers of judgment under Federal Rule of Civil Procedure 68 to try to moot the putative class representative's claim to avoid class certification. While some courts let a plaintiff reject a Rule 68 offer of judgment for full relief and continue to seek to prosecute claims as a class action when the plaintiff has not moved for class certification before receiving the offer of judgment,[5] the Fourth Circuit has not directly addressed this

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[2] *See* Doc. 1 (Complaint at ¶¶ __–__).

[3] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (discussing that most plaintiffs "would have no realistic day in court if a class action were not available" when their individual claims are for a modest amount).

[4] *See Junk Faxes Are Illegal, So Why Are You Getting Them?*, CONSUMER REPORTS, March 2004, at 47.

[5] *E.g.*, *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (offer of judgment for full relief moots claim for class-certification purposes *only after the plaintiff has had ample time to file a class-certification motion*).

issue.[6] After being forced to go to the time, trouble, and expense of filing this lawsuit, Plantation Plaza Therapy Center is not interested in being bought off.

In *Damasco v. Clearwire Corporation*,[7] the Seventh Circuit Court of Appeals set forth a simple solution to this problem. "Class-action plaintiffs can move to certify the class at the same time that they file their complaint," said the Seventh Circuit, and "[t]he pendency of that motion protects a putative class from attempts to buy off the named plaintiffs."[8] And "[i]f the parties have yet to fully develop the facts needed for certification," the court said that "they can also ask the district court to delay its ruling to provide time for additional discovery or investigation."[9] "[T]his procedure comports with Federal Rule of Civil Procedure 23(c)(1)(A), which permits district courts to wait until 'an early practicable time' before ruling on a motion to certify a class."[10]

Upon information and belief, Superior Medical Equipment sent the same faxes advertising the commercial availability of property, goods, or services that it sent to Plantation Plaza Therapy Services to many other persons in South Carolina and throughout the United States as part of a plan to broadcast its advertisements to a large number of fax machines. Plantation Plaza Therapy Center filed a motion seeking class

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[6] *White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 459 (S.D.W. Va. 2013) (discussing Fourth Circuit precedent on this issue).

[7] 662 F.3d 891 (7th Cir. 2011)

[8] *Damasco*, 662 F.3d at 896.

[9] *Id.*

[10] *Id.*

certification at the same time it filed its complaint.[11] But to make its case for class certification with the detail required by Rule 23, Plantation Plaza Therapy Center must first conduct discovery because the evidence necessary to support its motion is wholly within the possession of the defendant or third parties that are presently unknown to Plantation Plaza Therapy Center. "To pronounce finally, prior to allowing any discovery, the non-existence of a class or set of subclasses, when their existence may depend on information wholly within defendants' ken, seems precipitate and contrary to the pragmatic spirit of Rule 23."[12] Thus, this Court should grant Plantation Plaza Therapy Center's motion to stay its motion for class certification to allow Plantation Plaza Therapy Center to conduct discovery.

Respectfully submitted, this 17th day of July 2014.

Respectfully submitted,

/s/ J. Clarke Newton

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[11] *See* Doc. 2.

[12] *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

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