IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
Civil Action No. 14-cv-850

KEITH BUNCH ASSOCIATES, LLC, a North Carolina limited liability company, individually and as the representative of a class of similarly-situated persons,	)
Plaintiff,	)
v.	)
LA-Z-BOY INCORPORATED, LA-Z-BOY GLOBAL LIMITED, Michigan corporations, HYDROPOOL INC., 2217044 ONTARIO INC., Canadian corporations, and JOHN DOES 1-10,	)
Defendants.	)

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR CLASS ACTION DETERMINATION AND POSTPONEMENT PENDING DISCOVERY

NOW COMES Plaintiff, pursuant to Local Rule 23.1(b) and Fed. R. Civ. P. 23(c)(1), and hereby submits the following Brief in Support of Motion for Class Action Determination and Postponement Pending Discovery, and states as follows in support:

Statement of Nature of Matter and Facts

On October 7, 2014, Plaintiff filed this putative class action challenging Defendants' alleged practice of sending "unsolicited advertisements" by facsimile in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C). (Doc. 1, Compl. ¶ 1). The Complaint alleges Defendants sent two such unsolicited fax advertisements to Plaintiff on May 8, 2013, and July 31, 2014. (*Id.* ¶ 12).

The Complaint also contains class allegations, alleging on information and belief that Defendants sent the same and other unsolicited fax advertisements to more than 25 other persons, making joinder of all class members impracticable. (*Id.* ¶ 16). In accordance with Local Rule 23.1(a), the Complaint alleges the "appropriate allegations claimed to justify class treatment" under Fed. R. Civ. P. 23(a) and 23(b)(3). (*Id.* ¶¶ 19–26).

Statement of Question Presented

Whether the Court should "order postponement . . . pending discovery" on a motion for class certification as authorized by Local Rule 23.1(b), where the motion is filed simultaneously with a class-action complaint in order to prevent the defendants from "picking off" the named plaintiff with an offer of individual judgment under Fed. R. Civ. P. 68 in an attempt to moot the case.

ARGUMENT

I. With No Controlling Fourth Circuit Precedent, Plaintiff Seeks to Maintain a Pending Class Certification Motion to Prevent any "Pick-Off Attempt.

The Fourth Circuit has not squarely addressed whether a motion for class certification must be pending in order to prevent a class-action defendant from mooting the entire case by offering the named plaintiff full individual relief under Rule 68. *See Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 880 F. Supp. 2d 689, 694 (D. Md. 2012) (noting absence of "controlling Fourth Circuit precedent" on whether offer made prior to motion for class certification moots the case). Two district courts in the Fourth Circuit have applied the rule adopted by the majority of Circuits and

rejected pick-off attempts prior to the filing of a motion for class certification, holding the plaintiff retained standing to move for class certification, provided it was "timely." *See Kensington*, 880 F. Supp. 2d at 695, n.2 (holding action was not moot, assuming plaintiff filed motion for class certification within reasonable time after "commencement of discovery"); *Klein v. Verizon Commc'ns, Inc.*, 920 F. Supp. 2d 670, 677 (E.D. Va. 2013) (following *Kensington* and denying motion to dismiss based on mootness following offer of judgment while no motion for class certification was pending).

Most recently, however, in *Chatman v. GC Servs., LP*, 3:14-CV-00526-CMC, 2014 WL 3474231, at *2 (D.S.C. July 16, 2014), the district court noted it was "[l]acking any contrary circuit court decision or guidance from the Fourth Circuit" and held that an "offer of judgment of complete individual relief to the named plaintiff may not moot a class action, *at least where a motion for class certification is pending at the time the offer is made*." (Emphasis added). Since the plaintiff had "filed her motion for class certification concurrently with her complaint," the court held, the motion for class certification was "pending at the time the offer of judgment was made," which "preclude[d] mootness based on the offer of judgment." *Id.* at *3. This holding is more in line with the Seventh Circuit's approach in *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011), which allowed pick-offs, but held the simple solution to the "buy off" problem is for plaintiffs to "move to certify the class at the same time that they file their complaint," since the "pendency of that motion protects a putative class from attempts to buy off the named plaintiffs."

Local Rule 23.1(b) requires that, "[w]ithin 90 days after the filing of a complaint

in a class action, unless this period is extended by court order, the plaintiff shall file a separate motion for a determination under Rule 23(c)(1), Fed.R.Civ.P., as to whether the case may be maintained as a class action." The Rule further provides that the Court "may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances." *Id.* If the Court postpones the motion to allow class discovery, the Rule states that, "[w]henever possible . . . a date will be fixed by the Court for renewal of the motion." *Id.*

Given the lack of controlling precedent, Plaintiff respectfully requests the Court "order postponement of the determination pending discovery," pursuant to Local Rule 23.1(b). Plaintiff requests the Court keep this motion "pending" until class discovery is concluded and a full briefing on class certification can then be presented. In Plaintiff's counsels' experience, denying the motion without prejudice will invite an offer of judgment from Defendants, followed by a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. In order to avoid this needless briefing, Plaintiff requests the Court postpone full briefing and a hearing on the motion until the close of class discovery as contemplated by Local Rule 23.1(b).

II. The Class Certification Elements.

A. Proposed Class Definition.

Plaintiff proposes the following class definition:

> All persons in the United States who (1) on or after four years prior to the filing of this action until the date of class certification, (2) were sent telephone facsimile messages of material advertising the commercial

availability of any property, goods, or services by or on behalf of Defendants, and (3) which did not display a proper opt-out notice.

Excluded from the Class are the Defendants, their employees and agents, and members of the Judiciary. Plaintiff reserves the right to amend the class definition upon completion of class certification discovery.

Defendants sent Plaintiff and others a standardized form advertisement. Plaintiff anticipates that the proposed class definition will change after discovery defines the precise contours of the class and the advertisements that were sent. Plaintiff requests leave to submit a brief and other evidence in support of this Motion after discovery about the class elements.

B. Numerosity.

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiff is informed and believes, and upon such information and belief avers, that the number of class members is at least 40. Individual joinder of absent class members is impracticable.

C. Commonality.

Rule 23(a)(2) also requires that there be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) "does not require that all, or even most issues be common." *Tatum v. R.J. Reynolds Tobacco Co*., 254 F.R.D. 59, 64 (M.D.N.C. 2008). The test for commonality "is not demanding, and is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members." *Id*. (quoting *Bussian v. DaimlerChrysler Corp*., 2007 WL 1752059, at *5

(M.D.N.C. June 18, 2007)). Here, the commonality test is met because the Defendants engaged in a general policy that is the focus of the litigation by faxing a single form advertisement to persons on a list generated by Defendants and/or a third party and did not obtain prior express invitation or permission to send Defendants' advertisement by fax and/or failed to include the proper opt-out notice required by federal law and regulations. *See* 47 C.F.R. § 64.1200(a)(4)(iii)–(iv).

D. Typicality.

Rule 23(a)'s third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under Rule 23(a)(3), the individual claim of a representative plaintiff must be sufficiently typical of the claims of the class as a whole. *Bussian*, 2007 WL 1752059, at *5. Typicality, like commonality, is not demanding. *Id.* Furthermore, typicality does not mean identical; typicality is met "if the plaintiff's claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members and plaintiffs' claims are based on the same legal theory." *Id*. (quoting *Rodger v. Elec. Data Sys. Corp*., 160 F.R.D. 532, 538 (E.D.N.C. 1995)). Plaintiff's claims and the other proposed class members' claims all arise from Defendant's fax campaign. Thus, all class member claims' arise from the same transaction or occurrence.

E. Adequacy of Representation.

Rule 23(a)'s final requirement is that the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Under Rule 23(a)(4), the court must ensure that the named plaintiff(s) is part of the class and

possesses the same interests and same injury as the class. *Bussian*, 2007 WL 1752059, at *5. There is no antagonism between the interests of Plaintiff and those of the other class members. Furthermore, Plaintiff's counsel are experienced lawyers and they are adequate counsel for the class.

F. Predominance.

Rule 23(b)(3) requires that common questions of law or fact predominate over individual questions. As discussed above, common legal issues predominate because the class members' claims arise under the same federal statute. Common fact issues also predominate.

G. Superiority.

Rule 23(b)(3) also requires that a class action be the superior method for adjudicating the claims. Certifying a class is the "superior" way when the "'class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997).

CONCLUSION

The proposed class meets the requirements of Rules 23(a), (b)(3), and (g). Plaintiff requests that the Court certify the class, appoint Plaintiff as the class representative, and appoint Plaintiff's attorneys as class counsel. Plaintiff respectfully requests the Court "order postponement" on the motion until after Rule 23 discovery has been completed, at which time Plaintiff will file a supplemental brief. The parties need to meet and confer and propose a discovery schedule with this Court and respectfully requests a status conference with the Court as soon as practicable to set a discovery schedule on Plaintiff's Rule 23 Motion.

Respectfully submitted, this the 7th day of October, 2014.

/s/ John F. Bloss
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record, and a copy to be personally upon Defendant along with the summons and complaint.

/s/ John F. Bloss