IN THE UNITED STATES DISTRICT C O U R T
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

LINDA KENZIK, individually and on behalf of others similarly situated,

Plaintiff,

v. Case no. 2:15-cv-00201-DCN

KILEY & KILEY, L.L.C., a Michigan Limited Liability Company and John Does 1-10

Defendants

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

NOW COMES Plaintiff, by and through her attorneys, pursuant to Fed. R. Civ. P. 23(a), (b)(3) and (g), hereby submits her Motion for Class Certification.

I. This is a "placeholder" motion to prevent any attempt by Defendant to avoid class certification by "picking off" Plaintiff's individual claims.

Plaintiff is filing this motion for class certification the same day as the Complaint and prior to any discovery in order to prevent against a "pick-off" attempt, a tactic class-action defendants routinely use to try to "moot" the case and preclude it from proceeding to a decision on class certification by offering the named plaintiff individual (but not classwide) relief. Neither the Supreme Court nor the Fourth Circuit has squarely addressed the propriety of a pick-off offer in a Rule 23 class action. *See Chatman v. GC Servs., LP*, 302 F.R.D. 136, 138 (D.S.C. 2014) (noting the lack of "guidance from the Fourth Circuit on pick-off issue). However, seven other circuit courts have addressed the issue.

Six of the seven circuits to rule on this issue do not allow pick-off attempts, either because an unaccepted offer is "a legal nullity, with no operative effect," *Diaz v. First Am. Home*

Buyers Prot. Corp., 732 F.3d 948, 954–55 (9th Cir. 2013); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 703 (11th Cir. 2014), because an unaccepted offer moots a case only after "class certification has been properly denied" on the merits, *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996), or because if the class is later certified, the certification "relates back" to the filing of the complaint, *see Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920–21 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *Stein*, 772 F.3d at 707.

The Seventh Circuit, however, allows defendants to "buy off" a named plaintiff if no motion for class certification is "pending." *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011). But the Seventh Circuit also holds 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" and then ask the district court to "delay its ruling to provide time for additional discovery or investigation." *Id.* District courts in the Fourth Circuit have allowed *Damasco* motions. *See Chatman*, 302 F.R.D. at 138 ("Lacking any contrary circuit court decision or guidance from the Fourth Circuit, this court finds that an offer of judgment will not moot a named plaintiff's claim if the offer is made while a motion to certify the class is pending.") Plaintiff respectfully requests the Court allow it to maintain a *Damasco* motion on file to prevent a pick-off attempt.

II. Plaintiff satisfies the requirements for class certification under Rule 23.

A. Proposed Class Definition.

Plaintiff proposes the following class definitions:

> All persons in the United States who, within four years prior to the filing of this action, Defendants or some person on Defendants' behalf called on their residential or cell phone line, using an artificial or prerecorded voice or device with the capacity to dial numbers without human intervention, where Defendants' did not have prior express permission or invitation from the recipient to make such call.

> All persons in the United States who, within four years prior to the filing of this action, ongoing, Defendants or some person on Defendants' behalf called at least twice in any twelve month period in order to promote Kiley & Kiley goods and/or services, where both calls were made outside a reasonable time after a request that calls to the phone number stop.
>
> All persons in the United States to whose telephone number Defendants or some person on Defendants' behalf initiated more than one call in any 12-month period within the four years prior to the filing of this action, where (1) the telephone number was registered on the National Do Not Call Registry, (2) the calls were made for the purpose of promoting Defendants' goods and/or services, and (3) Defendants' records do not contain a signed, written agreement with the person stating that the person agrees to be contacted at such number.

Defendants made calls to residential and cellular telephones of the putative class without prior express permission or invitation. Plaintiff anticipates that the proposed class definitions will change after discovery defines the precise contours of the class and the calls 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). There is no mechanical test for determining numerosity; the issue is one for the district court to be determined in light of the facts and circumstances of the case. *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978). Here, Defendant made calls to at least 40 cellular phones. Individual joinder of absent class members is impracticable.

C. Commonality.

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The common questions "must be dispositive and over-shadow other issues." *Thomas*

v. Louisiana-Pacific Corp., 246 F.R.D. 505, 513 (D. S.C. 2007) (citing *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) and *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990)). Commonality requires "little more than the presence of common questions of law and fact." *Thoma*s, 246 F.R.D. at 513. A common question is one that can be resolved for each class members in a single hearing. *Parks Automotive Group, Inc. v. General Motors Corp*., 237 F.R.D. 567, 570 (D. S.C. 2006) (citing 7A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure,* at § 1763. A question is not common if its resolution "turns on a consideration of the individual circumstances of each class member." *Id.*

Defendant engaged in standardized conduct involving a common nucleus of operative facts by making calls to residential and cellular telephones without prior express permission or invitation. This question can be resolved as to the entire class in a single hearing and, therefore, commonality is satisfied. *Parks Automotive Group,* 237 F.R.D. at 570.

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). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. *Thomas*, 246 F.R.D. at 510. The "essence" of the typicality requirement is "as goes the claim of the named plaintiff, so goes the claims of the class." *Id*. (citing *Deiter v. Microsoft Corp*., 436 F.3d 461, 466 (4th Cir. 2006). Here, Plaintiff's claims and the other proposed class members' claims all arise from Defendant's calling campaign. Thus, all class member claims' arise from the same transaction or occurrence, and typicality is thus satisfied.

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). There is no antagonism between the interests of Plaintiff and those of the other class members. 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. To satisfy the predominance requirement, plaintiff must show that the questions of common law or fact common to the members of the class predominate over any questions affecting only individual members. *Thomas*, 246 F.R.D. at 514. As discussed above, common legal issues predominate because the class members' claims arise under the same federal statute. Common fact issues also predominate because the case involves standardized form advertisements sent to multiple persons at the same time.

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 classes, appoint Plaintiff as the class representative, and appoint Plaintiff's attorneys as class counsel. Plaintiff will file its memorandum after Rule 23 discovery has been completed. The parties need to meet and confer and propose a Rule 23 discovery schedule with this Court and Plaintiff respectfully requests a status conference with the

Court as soon as practicable to set a discovery schedule on Plaintiff's Rule 23 Motion or to stay this motion, leaving it pending as needed.

Respectfully submitted:

LINDA KENZIK, individually and on behalf of all others similarly situated

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel or record and that a copy will be served upon Defendant along with the summons and complaint.

s/John G. Felder, Jr.
John G. Felder, Jr.