UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DEBORAH CLARK, individually and on behalf of all others similarly situated,

Plaintiff,

v.

FDS BANK and DEPARTMENT STORES NATIONAL BANK,

Defendant.
_____ /

Case No. 6:17-cv-00692-CEM-TBS

FDS BANK and DEPARTMENT STORES NATIONAL BANK,

Third-Party Plaintiffs,

v.

RONDA MERCER

Third-Party Defendant.
_____ /

RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES BY DEFENDANTS FDS BANK AND DEPARTMENT STORES NATIONAL BANK

COMES NOW, Defendants/Third-Party Plaintiffs FDS Bank ("FDS") and Department Stores National Bank ("DSNB") (collectively, "Defendants"), by and through their undersigned counsel and pursuant to Rules 26, 33 and 37 of the Federal Rules of Civil Procedure, and hereby respond to Plaintiff's Motion to Compel Discovery Responses from Defendants (Doc. No. 80) (the "Motion"). The Motion seeks to compel Defendants to manually search tens of millions of accounts on an individual basis to prematurely identify potential class members before any class is certified and undertake more than Herculean efforts to produce information not relevant to the actual claims and defenses of the parties to the case. The Motion should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 2018, Plaintiff filed her First Amended Class Action Complaint in the instant matter under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA") against Defendants. (Doc. No. 53.) On April 19, 2018, Plaintiff served written discovery on Defendants, to which Defendants served objections and substantive responses with production of approximately 7,500 pages of documents on May 25, 2018. On June 21, 2018, Plaintiff filed the Motion.

II. ARGUMENT

"The proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant." *Tiger v. Dynamic Sports Nutrition, LLC*, Case No. 6:15-cv-1701, 2016 WL 1408098, *1 (M.D. Fla. Apr. 11, 2016) (*citations omitted*). The Federal Rules of Civil Procedure limit the scope of discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ." Fed. R. Civ. P. 26(b)(1). "Relevancy is determined based on the 'tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action." *Tiger*, 2016 WL 1408098 at *2; Fed. R. Evid. 401; *Hankinson v. R.T.G. Furniture Corp.*, Case No. 15-81139, 2016 WL 1182768, *1 (S.D. Fla. Mar. 28, 2016). "Proportionality requires counsel and the court to consider whether relevant information is discoverable in view of the needs of the case." *Tiger*, 2016 WL 1408098 at *2 (*citations omitted*). The primary limitation of proportionality is the actual claims and defenses of the case. *Id.*; *See also Dejesus v. CIGNA Corp.*, Case No. 6:17-cv-1208, 2017 WL 6536579, *5 (M.D. Fla. Dec. 21, 2017).

a. The Putative Class Identification Discovery is Premature and Not Proportionate to the Actual Claims and Defenses of the Case.

"Courts have ordinarily refused to allow discovery of class members' identities at the pre-certification stage out of concern that plaintiffs' attorneys may be seeking such information to identify potential new clients, rather than to establish the appropriateness of certification." *Dejesus v. CIGNA Corp.*, 2017 WL 6536579 at *2 (denying motion to compel discovery of identities of putative TCPA class members); *see also Tiger*, 2016 WL 1408098 at *5 (denying motion to compel by putative class plaintiff as "a premature attempt to obtain information that is not relevant unless the Court grants class certification.") There is often little to no justification to "require compilation of the name and addresses of all members of a large class" even if such information is later determined to be discoverable, but in pre-certification stage, it is generally not discoverable. *See Dejesus*, 2017 WL 6536579 at *2. Put simply, putative class plaintiffs must establish numerosity and ascertainability of a class without the names or contact information of putative class members. *See Tiger*, 2016 WL 1408098 at *5.

Here, Plaintiff's interrogatory numbers 2 through 6 and request for production numbers 26 and 27 seek to "[i]dentify each person in the United States" that could be a putative class member. The term "[i]dentify" is defined in Plaintiff's discovery requests as "the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment."[1] Defendants objected in response raising significant concerns with privacy relating to the identification of third party financial information, overly broad discovery not proportionate to the case and that such discovery would

[1] True and correct copies of Plaintiff's First Set of Requests for Production, Interrogatories, and Requests for Admissions to Defendant, FDS Bank and Plaintiff's First Set of Requests for Production, Interrogatories, and Requests for Admissions to Defendant, Department Stores National Bank are attached hereto as Exhibits "A" and B." Plaintiff admits the discovery requests are identical except for change of parties even though DSNB placed no calls to Plaintiff. *See* Doc. No. 80 at fn. 2.

be premature prior to certification of a class (which Defendants deny should ever occur) and therefore irrelevant.[2] Specifically, Defendants objected that the discovery was "premature because the information sought would reveal class members' identities at the precertification stage" and would require an "account by account review of all accounts serviced… and as such is unduly burdensome and cost prohibitive to obtain." *Id.*

Plaintiff's Motion has "failed to show why this case should be the exception to the rule" prohibiting discovery of class identification as not relevant prior to certification. *See Dejesus*, 2017 WL 6536579 at *2; *see also Tiger*, 2016 WL 1408098 at *5. The form Motion provides string cites from various trial courts, the vast majority far outside of the Eleventh Circuit, conducting fact-specific analysis of discovery requests not at issue in this case. The Motion provides no rationale as to why this case requires identifying information prior to certification (or at any point in time) as an exception to the rule that the identity of putative class members is not relevant. It therefore cannot be gainsaid that Plaintiff seeks the identifying information – including "last known place of employment" – of the putative class members for any other reason than that elucidated in *Dejesus* and *Tiger* – "to solicit other people to join the suit as potential class representatives." *Id.*

Moreover, as further detailed in Defendants' Motion for Protective Order (Doc. No. 84) and Declaration (Doc. No. 36-1), Plaintiff's requests are unduly burdensome and not proportionate to the case as they request that Defendants manually review – account by account – the substance of all communications with third parties within four years of the Complaint. There are "tens of millions of accounts" that would need to be manually reviewed for identification (interrogatory no. 2), consent (interrogatory nos. 3 and 4 and request for production no. 26 and 27), wrong numbers (interrogatory no. 5 and request for production no. 26 and 27)

[2] *See* Doc. No. 80 at 4-7 for the entirety of each interrogatory or request and the related objections and responses.

and "all documents" evidencing consent (interrogatory no. 3). *See* Doc. No. 36-1 at ¶¶ 47-48. The "documents or other evidence" of consent would necessarily include manual review of all credit card applications and related change of term agreements, account notes, correspondence, and other communications for millions of accounts. *See* Doc. No. 36-1 at ¶¶ 33-35. As noted by the Supreme Court of the United States, "we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 363 (1978). To that end, Defendants previously supplied painstaking detail of, and are prepared to present a witness at deposition to testify on, how requests for calls to cease and calls to numbers obtained from a source other than the consumer are handled as well as the manual process needed to locate those accounts:

> a. Defendants have processes and policies in place to prevent calls to a person instructed that Defendants to stop calling and prevent calls to a cellular telephone number without permission to use an automated dialing system.
>
> b. A call after an instruction to stop calling would be a prohibited exception to the processes and policies.
>
> c. The only way to determine if an account was called after an instruction to stop calling "would be to conduct an individual search of each and every account that FDS Bank has had over the last four years."
>
> d. The search "would involve tens of millions of accounts" as "[a]ccounts move in and out of collections every day."
>
> e. "[T]his search would have to be manual."
>
> f. There is no other way to review for requests for calls to stop or how the cellular telephone number was obtained absent individual review "as the verbiage used could differ from collector to collector and would be contained in the notes section which FDS Bank is not able to search systemically."

> g. As for account notes, "the collector is trained to record the most important points of any conversation with the customer," but the notes are not transcripts of "everything that is said during a collection call."
>
> h. There are numerous reasons why a phone number would be obtained from a source other than the consumer who was called, including the transfer of a cell phone number to a new phone customer without notice to Defendants, but "FDS Bank does not maintain a list of all wrong numbers dialed" and would only be able to obtain that information through a manual "search of each and every individual account" for the substance of every call made or received by Defendants.

Id. at ¶¶ 14, 36, 41, 45-48. Even if that manual review was feasible, the discovery requests require that Defendants make the highly factually intensive determination (and, as applied, legal conclusion) as to whether or not the call recipient instructed calls to stop or provided consent respectively.[3] *See Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1278-79 (11th Cir. 2017) (in reviewing partial revocation of consent under the TCPA, finding "meaning of language is inherently contextual" and "the scope of consent, like its existence, depends heavily upon implications and the interpretation of circumstances" such that the "issue of consent is ordinarily a factual issue" upon which "reasonable minds might differ"); *see also Tillman v. Ally Financial, Inc.*, 2:16-cv-313, 2017 WL 7194275, *7 (M.D. Fla. Sept. 29, 2017) (*Tillman II*) (finding individualized inquiries and determinations on consent as grounds to deny class certification). In *Schweitzer*, the telephonic communications in a TCPA case were quoted verbatim in the record.

[3] In effect, Plaintiff has created "fail-safe" discovery that "front-ends a merit determination on the [defendants'] liability" such as requiring identification of "all persons… who were called after they requested that defendant stop calling them." *See* Interrogatory No. 4; *see also Tillman v. Ally Financial Inc.*, 2:16-cv-313, 2016 WL 6996113 (M.D. Fla. Nov. 30, 2016) (*Tillman I*); *quoting Kamar v. RadioShack Corp.*, 375 Fed.Appx. 734, 736 (9th Cir. 2010) ("The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established.") As a result, preparations for the areas of inquiry will necessarily "result in a merits-based determination on defendant's liability under the TCPA to that individual" in an attempt to "rig the certification process so that they cannot lose." *Id.*; *Alhassid v. Bank of America, N.A.*, 307 F.R.D. 684, 694 (S.D. Fla. 2015) (*citations omitted*). Such a fail-safe inquiry would create a situation in which the number of persons identified would either have a successful claim and therefore be included as a class member or be excluded from the class and therefore not bound by the judgment. *Id.*

Id. at 1278. Naturally, there was no dispute between the parties on the precise language of the alleged request for calls to cease. *Id.* However, the Eleventh Circuit reversed summary judgment in favor of the caller because "reasonable minds might differ on the inferences arising from the undisputed facts," e.g. the call recording or verbatim transcript, such that a trial would be needed to resolve whether consent was completely, partially or not revoked. *Id.*

As a result, the class identification discovery (interrogatories 2 through 6 and requests for production 26 and 27) necessarily call for Defendants to make a legal determination as to whether consent was provided, partially revoked or fully revoked under the TCPA. But, unlike *Schweitzer*, Defendants do not have the verbatim account of every nuanced conversation with every customer over the four year period requested by Plaintiff. Doc. No. 36-1 at ¶¶ 13-14. Defendants have account notes, but "everything that is said during a collection call is not reflected on the account." *Id.* There is accordingly significant likelihood of a question as to whether consent was revoked – especially noting the holding of *Schweitzer* that reasonable minds may differ on undisputed language – during what would be the impossible task of manually reviewing tens of millions of accounts. *Id.* at ¶¶ 47-48 ("The only way to determine if that had happened [consent revocation], and if so, in what accounts, would be to conduct an individual search of each and every account that FDS Bank has had over the last four years."). Plaintiff has already disputed the provision of consent for her cellular telephone number, *compare* Doc. Nos. 53 at ¶¶ 19 and 30 and 62 at ¶ 19, so there is no reason for Defendants to believe that Plaintiff will not attempt to dispute Defendants' interpretation of consent, revocation of consent and the propriety of Defendants' procurement of a customer's contact information in any number of the tens of millions of other accounts. In any event, there is no practical way for Defendants to provide the information even if the discovery requests were not premature and

improper. For these reasons, the Motion should be denied as to interrogatories 2 through 6 and requests for production 26 and 27.

b. Plaintiff's Request for "Artificial or Prerecorded Voice Call Scripts" in Interrogatory Number 7 is Not Limited to Her Case.

Discovery should "focus on the actual claims and defenses involved in the action." *Dejesus*, 2017 WL 6536579 at *5; *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 355 (11th Cir. 2012) (quoting the GAP Report). A plaintiff is not entitled to use "discovery to develop new claims or defenses that are not already identified in the pleadings." *Dejesus*, 2017 WL 6536579 at *5; *citing Builders Flooring Connection, LLC v. Brown Chambliss Architects*, No. 2:11-cv-373, 2014 WL 1765102 at *1 (M.D. Ala. May 1, 2014); *quoting* GAP Report of Advisory Committee to 2000 amendments to Rule 26.

Plaintiff here filed a single count First Amended Complaint under the TCPA only. However, interrogatory number 7 seeks "each unique artificial or prerecorded voice call script used to call any of the numbers identified." There is no justification offered in the Motion for seeking the precise language of the call scripts under the TCPA or otherwise. *See* Doc. No. 80 at 13-14. The language of the calls scripts could conceivably be relevant for review of debt collection statutes such as the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, or state law counterpart Florida Consumer Collection Practices Act, Section 559.55, *et seq.*, Florida Statutes, but those statutes are not at issue here. Plaintiff has not pled causes of action under debt collection statutes and has otherwise failed to argue the rationale as to why scripts would be relevant to this TCPA action where calls were allegedly made to Plaintiff without consent ever being provided. *See* Doc. No. 53 at ¶ 30.[4] Plaintiff was either called in violation or not, but the

[4] Plaintiff's First Amended Class Action Complaint alleges that each call of the Defendants made to the Plaintiff's cell phone was without prior express consent, a claim which Defendants deny as FDS obtained consent and DSNB did not place any calls to Plaintiff. *Compare* Doc. No. 53 at ¶ 30 and Doc. No. 62 at pp. 18-20.

content of a script does not change the analysis under the TCPA. *See* 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful… to make any call… using any automatic telephone dialing system or an artificial or prerecorded voice…"). In addition, Plaintiff seeks to require Defendants decide the legal issue of whether the call script was employed as part of an "artificial or prerecorded voice" under the TCPA by reviewing each and every call made to "tens of millions" of customers. The Motion should therefore be denied as to interrogatory number 7 as it is not limited to the claims or defenses of the case, calls for a legal conclusion on what may constitute an "artificial or prerecorded voice" and unduly burdens Defendants by requiring the manual review of each and every call to millions of customers to view what, if any, script was applicable to a call.

c. Plaintiff's Request for "Policies and Procedures" in Interrogatory Number 12 was Moot Prior to the Filing of the Motion.

Prior to the filing of the Motion, Defendants engaged in a supplemental and final production of the policies and procedures relating to calls to cellular telephones with a confirming notification to Plaintiff's counsel. Defendants likewise provided notice that "no specific documents [were] withheld with the exception of materials prepared by counsel" of record in this case and offered to prepare a privilege log if needed (noting, of course, that Plaintiff did not likely intend to seek attorney communications or work product). *See* Doc. No. 80-7 at p. 5. Any objection previously lodged by Defendants was accordingly withdrawn through the voluntary production of the policies and procedures. The Motion relating to interrogatory number 12 should accordingly be denied as moot.

d. Plaintiff's Interrogatory Number 13 Seeking Any Action Ever Taken by Defendants to Identify a Cellular Telephone Number is Compound, Duplicative and Unduly Burdensome.

Courts in this Circuit often use a "related question" test to determine whether a subpart is part of an interrogatory or is more properly considered a discrete, separate interrogatory. *See*

e.g., *Powell v. The Home Depot USA*, Case No. 07–80435–Civ, 2008 WL 2473748, at * 2 (S.D. Fla. June 16, 2008). Under the "related question" test, courts assess whether the subparts are "logically or factually subsumed within and necessarily related to the primary question." *Oliver v. Orlando*, Case No. 06–CV–1671–Orl–21DAB, 2007 WL 3232227, at * 2 (M.D. Fla. Oct. 31, 2007). "[A]n interrogatory which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory." *Border Collie Rescue, Inc. v. Ryan*, Case No. 3:04–CV–568–J32–HTS, 2005 WL 662724, at * 1 (M.D. Fla. March 15, 2005) (*internal quotations and citations omitted*).

The interrogatory number 13 seeks "any action" that has "ever" been taken by Defendants "to try to identify whether any telephone number called… was a cellular telephone." The interrogatory then continues to request the "specificity [of] what action" was undertaken, "who took the actions, any third party involved, any software used, why the actions were taken and the result of the actions." As with many of Plaintiff's discovery requests, the interrogatory is clearly compound as it calls for no less than eight forms of information that could each be a separate interrogatory under Rule 33 of the Federal Rules of Civil Procedure. In addition, the potential response could be limitless as it would include manual review of "tens of millions" of individual accounts to determine whether, on that particular account, an action was taken by Defendants to review the account phone numbers for a cellular telephone determination, the participants to any such review and the result of same. *See* Doc. No. 36-1 at ¶¶ 47-48.

Now, in conferring regarding the intent of interrogatory number 13 prior to the filing of the Motion, *see* Doc. No. 80-7 at p. 6 ("For no. 13, does this request information on scrubbing?"), Defendants ultimately learned that the information sought was limited to policies and procedures of Defendants on determining whether a number is a cellular telephone. In other

words, Plaintiff does not seek the substance of every conversation and action ever taken by Defendants regarding determining whether a number called is a cellular telephone as actually written. Defendants have produced policies and procedures on how cellular telephone numbers are handled. The Motion should accordingly be denied as to interrogatory number 13 as the interrogatory is compound and the information requested is inconsistent with the subsequent conferral of the parties on production.

e. The Interrogatory Seeking Identification of Databases and Non-Existent Data Dictionaries Improperly Combines an Interrogatory and Request for Production.

Similar to interrogatory number 13 (and most interrogatories of Plaintiff), interrogatory number 18 is unquestionably compound as it contains multiple subparts of identification and even includes a request for production of a "data dictionary" document. *See Border Collie Rescue, Inc. v. Ryan*, 2005 WL 662724 at *1 ("[A]n interrogatory which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory.") In substance, the request appears to seek identification of a database that stores "stop, do-not-call, do-not contact, wrong-person, wrong-number, and similar notifications" with an accompanying "data dictionary," but as noted in the response, no such separate database or data dictionary exists. To the extent the interrogatory seeks only the identification of the system employed by FDS to input account notes, *see* Doc. No. 36-1 at ¶ 47 ("FDS Bank does not maintain a list of all wrong numbers dialed"), FDS would be willing to provide that information noting that no such "data dictionary" exists.

f. The Document Request Seeking Contracts with Third Parties for Calls is Not Focused on the Actual Claims and Defenses Involved in the Action.

Discovery should "focus on the actual claims and defenses involved in the action." *Dejesus*, 2017 WL 6536579 at *5 (denying discovery of prior TCPA complaints in a putative

class action case under the TCPA); *citing Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 355 (11th Cir. 2012) (*further citations omitted*). Here, request for production number 12 seeks all "contacts, agreements, manuals and communications with third parties" regarding telephone dialing systems used to call customers. However, no third party vendors placed calls to Plaintiff on Defendant's behalf. *See also* Doc. No. 36-1 at pp. 4-9 (describing circumstances relating to calls to Plaintiff by FDS). As a result, the request does not "focus on the actual claims" and instead seeks information not relevant to the case prior to certification (if at all). *See Dejesus*, 2017 WL 6536579 at *5. The Motion must therefore be denied as to request for production number 12.

g. The Document Request Seeking to Search All Documents of Defendants is Limitless, Fails to Identify Proper Parameters and is Not Related to the Case.

Request for production number 25 asks that Defendants "do a search for, and provide all documents, emails or things in your possession that mention the following" various search terms. Again, the request lacks any "focus on the actual claims and defenses involved in the action" and instead evidences the most onerous potential fishing expedition. *See Dejesus*, 2017 WL 6536579 at *5. The request does not identify any limits, custodians, or even types of documents contemplated by Plaintiff as relevant. It would be difficult to fathom a document request more broad and duplicative as request for production number 25. As to proportionality specifically, the contemplated "search would have to be manual" as any information "contained in the notes section… FDS Bank is not able to search systemically." *See* Doc. No. 36-1 at p. 13. The request seeks a search of all things in Defendants' possession such that "tens of millions" of accounts would need to be search for Plaintiff's overly broad request. *Id.* And that search would be of only account notes, not all other documents and databases of Defendants. *Id.* In short, discovery

has limitations, but request for production number 25 does not. The Motion should be denied as to request for production number 25.

h. The Document Request Seeking Prior Complaints is Not Focused on the Actual Claims and Defenses Involved in the Action.

Discovery should "focus on the actual claims and defenses involved in the action." *Dejesus*, 2017 WL 6536579 at *5 (denying discovery of prior TCPA complaints in a putative class action case under the TCPA); *citing Liese*, 701 F.3d at 355 (*further citations omitted*). A plaintiff is not entitled to use "discovery to develop new claims or defenses that are not already identified in the pleadings." *Dejesus*, 2017 WL 6536579 at *5; *citing Builders Flooring Connection*, LLC, 2014 WL 1765102 at *1; *quoting* GAP Report of Advisory Committee to 2000 amendments to Rule 26.

Plaintiff here filed a single count First Amended Complaint under the TCPA only. The request for production number 39, however, incredibly seeks "[a]ll documents (irrespective of date) which constitute or reference communications between Defendants and any public or private agency that receives consumer complaints… relating to telephone calls placed to cellular telephones." As with interrogatory number 7, information possibly relevant to debt collection statutes has no relation to the case at hand. There is no justification conceivable for seeking complaints completely unrelated to this TCPA case except to abuse "discovery to develop new claims… not already identified in the pleadings." *See Dejesus*, 2017 WL 6536579 at *5. Such an area of inquiry is far beyond the scope of the actual claims and defenses in this case and, accordingly, Rule 26 of the Federal Rules of Civil Procedure. The Motion must accordingly be denied as seeking information not relevant or proportional relevant to the case.[5]

[5] Defendants understand that Plaintiff intends to seek potential for treble damages, but the Eleventh Circuit recently declined to address the issue of treble damages under the TCPA without first determining liability. *See Schweitzer*, 866 F.3d at 1280, fn. 3 ("Because this case is being remanded for trial, and there has been no determination of

III. CONCLUSION

Defendants have produced thousands and thousands of pages of documents focused on the case at hand, but Plaintiff's remaining discovery requests are not focused on the actual claims and defenses of the parties. Defendants therefore seek an order denying the Motion and providing such other relief as is just and proper.

Dated: July 5, 2018.

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liability, we decline to address Ms. Schweitzer's argument that Comenity acted knowingly or willfully in violation of the TCPA.") Of course, there has been no determination of liability here, so any discussion of treble damages is premature in that respect as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2018, a true and correct copy of the foregoing has been provided by ☐ First Class U.S. Mail Postage Prepaid: ☐ Facsimile; ☐ Hand Delivery and/or ☒ Electronic Filing to:

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