UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

Plaintiff,

v. **CASE NO.: 6:17-cv-00692-GAP-TBS**

FDS BANK
And DEPARTMENT STORES NATIONAL BANK

Defendants.

FDS BANK and DEPARTMENT STORES NATIONAL BANK,

Third-Party Plaintiffs,

v.

RONDA MERCER

Third-Party Defendant.

PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES FROM DEFENDANTS

Pursuant to Fed. R. Civ. Proc. 37(a)(3) and Local Rule 3.04, Plaintiff moves the Court to compel Defendants to respond to Interrogatories 2-7, 12-13 and 18 and Document Requests 12, 25-27 and 39, which seek critical evidence, including class data reflecting all call records and related account notes for the class period, the databases where this information is stored, information regarding similar complaints, scripts of the subject calls, and information related to any vendors Defendants' used to place the calls.

Plaintiff respectfully moves the Court to compel Defendants' to reply without further delay because the date for Plaintiff to file class certification is set for July 11, 2018.

I. RELEVANT TIMELINE

- March 13, 2018, Plaintiff filed her First Amended Class Action Complaint, substituting Defendants as parties. ECF No. 53.
- March 13, 2018, Plaintiff served written discovery requests upon Defendants. **Exhibit 1, ¶ 2**.
- Plaintiff re-served the same discovery because defense counsel (the same attorneys who represented the defendant previously named in this case) objected to service prior to the newly substituted Defendants being served with the Amended Complaint.
- May 25, 2018, Defendants submitted written responses to Plaintiff's discovery requests, which contained no class discovery responses. **Exhibit 1-A**.
- May 30, 2018, Plaintiff submitted Civ. R. 37 discovery correspondence to Defendants requesting a conferral to discuss the discovery deficiencies. **Exhibit 1-B**.
- June 5, 2018, the parties conferred regarding the discovery issues. **Exhibit 1, ¶ 6**.
- June 5, 2018, Plaintiff's counsel sent correspondence to Defendants' counsel to recap the issues discussed during the conferral. **Exhibit 1-C.**
- June 13, 2018, the parties held another conferral to discuss the discovery issues. **Exhibit 1, ¶ 8**. Following that teleconference, Plaintiff sent Defendants a recap email, which memorialized the parties' agreements and the issues resulting in an impasse. *See* **Exhibit 1-E**.
- June 15, 2018, Counsel for Defendants responded regarding their position related to the outstanding discovery issues. *See* **Exhibit 1-F.**
- July 11, 2018 is the discovery deadline and deadline to move for class certification. *See* April 30, 2018 Order; ECF No. 66.

II. LAW & ARGUMENT

A. Defendants Should be Compelled to Respond to Discovery

Defendants' responses are deficient in a myriad of ways, including the absence of any class

data. Defendants do not dispute the relevancy of the class data Plaintiff seeks. Rather, they contend that they *think* it is impossible for them to extract and produce the requested data, in part.[1] Other requests, such as evidence of former complaints against Defendants, have been withheld subject to a litany of objections, discussed below.

The disputed discovery requests are Interrogatories 2-7, 12, 13, and 18, and Document Requests 12, 25-27, and 39. Each defendant's responses to these requests are essentially identical, with the exception of Interrogatory No. 6 and Document Request No. 12, to which DSNB claims it did not place any calls to Plaintiff.[2] All written discovery requests and written responses by each Defendant are attached as **Exhibit 1-A.**

1. Class Data Related to the Calls

Interrogatories 2 – 6 and Document Requests 26-27, seek class data. Plaintiff's requests and Defendants' responses are set forth below.

> [Interrogatory] 2. Identify each person in the United States (1) whose cellular telephone number (2) a non-emergency telephone call was made to by or on behalf of Defendant (3) using substantially the same system(s) that called Plaintiff (4) during the "relevant time period."
>
> a. Also, please state the date of each call, the telephone number called, the total number of all such calls, and the total number of unique cellular telephone numbers called.
>
> b. If you contend that a full response to this interrogatory is impossible, please explain why with specificity, and provide the most complete response possible.
>
> c. Also, if you do not know and cannot determine which calls were made to cellular telephone numbers, answer this interrogatory as if the word "cellular" was omitted from it, and Plaintiff will determine which calls were made to cellular telephones.
>
> **OBJECTION: FDS objects to this interrogatory (including its subparts a-c) because it is not properly limited in scope in that it concerns any calls made to**

[1] As discussed below, Defendants concede they believe they are able to produce data related to the calls made during the class period, although they have failed to produce any such discovery yet, or even provide a date when production will be made. The point of contention, as discussed herein, is whether they can extract data identifying numbers that requested the calls stop, or numbers Defendants obtained from a source (*e.g.*, skip-trace) other than the consumer.

[2] Accordingly, for the sake of efficiency, Plaintiff has not repeated the responses for each Defendant as to the requests where the responses are identical, but for the name (FDS or DSNB). With respect to Interrogatory No. 6 and Document Request No. 12, the motion to compel is directed to FDS at this time. All questions and responses to and from each Defendant are attached in **Combined Exhibit 1-A.**

cellular telephones without regard to the purpose of such calls, Plaintiff's use of the term "same system" is vague and undefined, and seeks the disclosure of protected Personally Identifiable Information (PII) of non-parties to this action, which invades and violates those individuals' constitutional rights to privacy, including their rights to financial privacy.

FDS objects to this Interrogatory as compound. FDS further objects to this interrogatory as unreasonable, overly broad, unduly burdensome, oppressive, harassing, and appearing to be a mere fishing expedition in that Plaintiff is requesting detailed information for essentially every telephone call placed by FDS or on its behalf to its account holders with cellular telephone numbers for over a period of three and a half years, which is not proportional to the needs of this case and the burden or expense of providing such information far outweighs any likely benefit. While such information as may be pertinent to class certification issues may be appropriate on an aggregate basis (except for DSNB customers who are subject to arbitration agreements – see below), no information relating to individual putative class members (other than Plaintiff) will be provided prior to certification of a class, if that occurs, the propriety of which is denied.

FDS further objects on the grounds that, to the extent Plaintiff seeks information regarding credit card customers of DSNB, such customers have agreements with DSNB that include an arbitration provision pursuant to which either DSNB and/or the customer can elect arbitration of any dispute or claim on an individual basis such that those customers cannot be part of any class action; thus, discovery regarding such DSNB customers should not be authorized.

FDS further objects to this Interrogatory as premature because the information sought would reveal class members' identities at the precertification stage. Finally, FDS objects to this Interrogatory as it requires an account by account review of all accounts serviced by FDS, and as such is unduly burdensome and cost prohibitive to obtain.

[Interrogatory] 3. If you contend that any person responsive to Interrogatory #2 provided prior express consent to receive the phone calls, please explain with specificity the basis for such contention for each such person and identify all documents that support that contention.

OBJECTION: See objection to Interrogatory No. 2 above.

[Interrogatory] 4. Identify all persons responsive to Interrogatory #2 who were called after they requested that defendant stop calling them.

OBJECTION: See objection to Interrogatory No. 2 above.

[Interrogatory] 5. Identify all persons responsive to Interrogatory #2 who were called by Defendant and who were not the person alleged to owe the debt in question.

OBJECTION: See objection to Interrogatory No. 2 above.

[Interrogatory] 6. Identify all codes or data fields relating to a request to stop calling or cease contact, revocation or any other code indicating a call should not be made to a particular account or telephone number.

OBJECTION: FDS objects to this Interrogatory as it is improperly limited in time. Subject to and without waiving this objection, FDS states as follows:

ANSWER: The answer to this interrogatory may be obtained by examining FDS' records, and the burden of deriving that answer is substantially the same for either FDS or Plaintiff. Therefore, consistent with Rule 33(d), Federal Rules of Civil Procedure, and subject to the Stipulated Confidentiality Agreement entered in this matter on May 24, 2018, FDS refers Plaintiff to the records containing this information which are being produced simultaneously with its response to Plaintiff's First Request for Production No. 28.

26. The complete database tables showing (1) All persons in the United States (2) to whose cellular telephone number (3) FDS's placed or caused to be placed through a thirdparty a non-emergency telephone call (4) using the same dialing system(s) used to call Plaintiff or an artificial or prerecorded voice (5) within 4 years of the complaint. (6) where FDS's did not have express consent to call said cellular telephone number. If this request is impossible to satisfy, produce electronic information in CSV format sufficient to show as much of the following as possible: (a) all calls made by or on FDS's behalf, at any time during the "relevant time period", using the system used to call (407) 470-2257, (b) the telephone number to which each such call was made, (c) the phone type (e.g. cell, work, or home), (d) the script for any artificial or prerecorded message used in the call, (e) the name of the person called, (f) disposition codes for each call, (g) the date and time of each call, (h) the name and address of each person called, (i) whether the person called had previously asked that they not be called, and (j) whether the person called was not the person alleged to owe the debt in question.

OBJECTION: FDS objects to this Request (including its subparts) because it is not properly limited in scope in that it concerns any calls made to cellular telephones without regard to the purpose of such calls, Plaintiff's use of the term "same dialing system" is vague and undefined, and seeks the disclosure of protected Personally Identifiable Information (PII) of non-parties to this action, which invades and violates those individuals' constitutional rights to privacy, including their rights to financial privacy.

FDS further objects to this Request as unreasonable, overly broad, unduly burdensome, oppressive, harassing, and appearing to be a mere fishing expedition in that Plaintiff is requesting detailed information for essentially every telephone call placed by FDS or on its behalf to its account holders with cellular telephone numbers for over a period of three and a half years, which is not proportional to the needs of this case and the burden or expense of providing such

information far outweighs any likely benefit. While such information as may be pertinent to class certification issues may be appropriate on an aggregate basis (except for FDS customers who are subject to arbitration agreements – see below), no information relating to individual putative class members (other than Plaintiff) will be provided prior to certification of a class, if that occurs, the propriety of which is denied.

FDS further objects on the grounds that, to the extent Plaintiff seeks information regarding credit card customers of FDS, such customers have agreements with FDS that include an arbitration provision pursuant to which either FDS and/or the customer can elect arbitration of any dispute or claim on an individual basis such that those customers cannot be part of any class action; thus, discovery regarding such FDS customers should not be authorized.

FDS further objects to this Interrogatory as premature because the information sought would reveal class members' identities at the precertification stage. Finally, FDS objects to this Request as it requires an account by account review of all accounts serviced by FDS, and as such is unduly burdensome and cost prohibitive to obtain.

27. The complete database tables showing (1) All persons in the United States (2) to whose cellular telephone number (3) FDS's placed a non-emergency telephone call (4) using the same dialing system(s) used to call Plaintiff (5) within 4 years of the complaint (6) where FDS's did not have express consent to call said cellular telephone number and (7) the call was for a debt where FDS's was the creditor. If this request is impossible to satisfy, produce electronic information in CSV format sufficient to show as much of the following as possible: (a) all calls made by or on FDS's behalf, at any time during the "relevant time period", using the system used to call (407) 470-2257, (b) the telephone number to which each such call was made, (c) the phone type (e.g. cell, work, or home), (d) the script for any artificial or prerecorded message used in the call, (e) the name of the person called, (f) disposition codes for each call, (g) the date and time of each call, (h) the name and address of each person called, (i) whether the person called had previously asked that they not be called, and (j) whether the person called was not the person alleged to owe the debt in question.

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> **telephone numbers for over a period of three and a half years, which is not proportional t the needs of this case and the burden or expense of providing such information far outweighs any likely benefit. While such information as may be pertinent to class certification issues may be appropriate on an aggregate basis (except for FDS customers who are subject to arbitration agreements – see below), no information relating to individual putative class members (other than Plaintiff) will be provided prior to certification of a class, if that occurs, the propriety of which is denied.**
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> **FDS further objects to this Interrogatory as premature because the information sought would reveal class members' identities at the precertification stage. Finally, FDS objects to this Request as it requires an account by account review of all accounts serviced by FDS, and as such is unduly burdensome and cost prohibitive to obtain.**

To date, Defendants have not produced the class data that they concede is relevant and possible to produce. *See* **Exhibit 1-F, p. 3.** Instead they contend that they are unsure whether it is possible to obtain data for the portions of the class discovery requests seeking the identification of those individuals who instructed Defendants to stop calling, or whose number was obtained from a source other than the consumer, such as a skip-trace, as Defendants' obtained Plaintiff's number. Defendants contend while they are currently exploring the possibility of producing that information, they argue this would likely require individual account review. *See* **Exhibit 1-F, p. 3-4.** Specifically

> Defendants claim they can and likely will produce the first portion [*i.e.*, identification of the calls made used the same dialing system during the class period], but the 'after that person instructed you to stop,' Defendants contend requires individual account review to identify." *Id.* "Defendants are presently investigating if they can devise a way to produce the second portion of this topic (those persons who gave a stop instruction) … Plaintiff has proposed, and Defendants oppose, allowing Plaintiff to obtain the datatables or having their expert to formulate a method to extract the class data, at Plaintiff's expense.

Id. (Plaintiff's Recap, to which Defendants do not dispute).

Defendants entire objection is a simple foreshadowing of its response to class certification that individual issues predominate and illustrates why the class discovery should be compelled as Defendant is not allowed to withhold the very evidence it will base its defense to certification[3] on. Such tactics should not be permitted. As aptly held in the TCPA case style *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*:

> the Court cannot permit Quill on one hand to contest class certification and on the other hand deny plaintiff the discovery relevant to its position that a class should be certified. The Court suggested that if Quill agreed to give up its challenges as to commonality, numerosity, and typicality for purposes of class certification only (and instead, focus on a challenge to the adequacy of the class representative plaintiff or other Rule 23(b)(3) considerations), plaintiff may agree to forego many of its class-wide production requests at this time. The parties expended substantial effort pursuing that possibility, but in the end failed to reach agreement on any stipulations that would permit any discovery issues presented in the motion to be deferred. Without any such agreement, Quill may not deprive plaintiff of discovery related to the class while Quill continues to oppose class certification.

2013 U.S. Dist. LEXIS 136819, at *9 (N.D. Ill. Sep. 24, 2013).

The "strong policy among the federal courts is to 'allow discovery relevant to determining whether the requirements of Rule 23(a) are satisfied and whether the action is maintainable under one of the categories listed in Rule 23(b).' 5 Moore's Federal Practice - Civil § 23.85 (2010). A preemptive assessment as to whether Rule 23(a) thresholds and Rule 23(b) requirements are met, without the benefit of targeted discovery and in a contentious case such as this, would clearly be an abuse of this court's discretion." *Hughes v. Greenetrack, Inc.*, 2010 U.S. Dist. LEXIS 147784, *5 (N.D. Ala. 2010).

Courts hearing TCPA actions have routinely ordered the production of class related discovery

[3] There should be no dispute that Plaintiff is allowed class discovery. *See Herrera v. JFK Med. Ctr., L.P.*, 648 Fed. Appx. 930, 936 (11th Cir. 2016) (reversing decision to strike class allegations because "discovery is needed to determine whether common issues predominate over any individualized questions."); *Sewell v. D'Alessandro & Woodyard*, 2011 U.S. Dist. LEXIS 38664, *8-9 (M.D. Fla. Mar. 30, 2011) (granting motion to compel interrogatory asking defendant to identify class members, stating "[t]he purpose of class discovery is to determine who constitutes the members of the class."); *Dillon v. Bay City Constr. Co.*, 512 F.2d 801, 804 (5th Cir. 1975) ("the plaintiffs were entitled to discovery which would bear on the always troublesome questions of whether this was or ought to be considered a class action"); *International Woodworkers of America, etc. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981) ("it is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives.")

identifying the class members and the calls that defendants made to them. For instance, in the TCPA case styled *Martin v. Global Mktg. Research Servs.*, the Court granted a motion to compel and ordered the defendant to identify, among other things, the "names, telephone numbers, and dates called" from its database. 2015 U.S. Dist. LEXIS 140530, *12 (M.D. Fla. 2015). The Court held:

> this interrogatory is tailored to elicit information that will bear on class certification. GMRS's claim of undue burden, in its response brief, on the ground that the information requested is 'not readily available in any existing data report' is not well-taken. See Doc. No. 66, at 7 ¶ 15; cf. *Nowak v. Lexington Ins. Co.*, 2006 U.S. Dist. LEXIS 92389, 2006 WL 3613764, at *3 (S.D. Fla. June 12, 2006) (***rejecting an argument that discovery requests were unduly burdensome when they could not "be gathered in any manner except manually going through each relevant file," and declining to permit a party to "argue undue burden and be free from discovery obligations by retaining an outmoded filing system***"). The interrogatory is targeted to elicit information potentially bearing on the ascertainability, numerosity, commonality, and typicality requirements of class certification. The information may also be relevant to the proper dissemination of class notice.

Id. at 13 (Emphasis added); *see* also *id* at *16 (ruling that the Defendant's privacy concerns were "far outweighed by both Plaintiffs' need to discover the identities of these individuals or entities to pursue their claims and enforce their rights under the TCPA for the relevant class period.")

Similarly, in *Thrasher v. CMRE Fin. Servs.*, 2015 U.S. Dist. LEXIS 34965 (S.D. Cal. 2015), the court granted a motion to compel in a TCPA case seeking an "outbound call list" identifying the cell phone numbers it called and the dialing equipment used for each call. *Id.* at *3-4. The court rejected the Defendant's arguments about privacy and burden and ordered the defendant to produce its records because "the court finds that the outbound call list is reasonably calculated to identify the number and recipients of calls made during the class period, which is relevant to Rule 23 requirements." *Id.* at *4; *see* also *See Ossola v. Am. Express Co.*, 2015 U.S. Dist. LEXIS 117531, *23 (N.D. Ill. 2016) (ruling a TCPA case that "call data is relevant, and thus produced as standard practice" where the defendant is the alleged dialer.); *Golan v. Veritas Entm't, LLC*, 2016 U.S. Dist. LEXIS 138103, *6 (E.D. Mo. 2016) (TCPA case granting motion to compel "electronic list of all people

illegally called by Defendant in this matter" because "the discovery requested is needed to determine issues of typicality and commonality in class certification."); *In re Collecto, Inc.*, 2016 U.S. Dist. LEXIS 92619, *4-5 (D. Mass. 2016) (TCPA case granting motion to compel because "Collecto's response may indicate whether the plaintiffs can effectively use the call logs and FACS database to identify a universe of potential class members, which is an obvious prerequisite for any motion for class certification[.]")

Courts have ordered sucy discovery in the do not call type TCPA cases that Plaintiff brings here. For example, in *Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276 (N.D. Cal. 2015), the court sanctioned a defendant in a TCPA case for concealing "call detail records that would identify members of the class that received *wrong number calls* from debt collectors," and instead producing only "account notes from its database that provides information in an undelimited format." *Id.* at 286-287 (emphasis added). In *Breda v Cellco Partnership*, 16 –c-11512-DJC (D. Mass. September 5, 2017), a wrong number case, the court order production within ten days of "…list of calls where those called pressed 2; logs concerning those calls; and recordings, for calls from July 1, 2012 to September 1, 2017.")

Meredith v. United Collection Bureau, Inc., is particularly instructive. 319 F.R.D. 240, 243 (N.D. Ohio 2017). The *Meredith* court first held, as Plaintiff suggests here, that the querying and production of data from a database is a common discovery practice:

> Courts have long recognized that Defendant may be required under the Federal Rules to create computer programs to search an existing database for relevant information. S*ee Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) ("The law is clear that...the producing party can be required to design a computer program to extract the data from its computerized business records, subject to the Court's discretion as to the allocation of the costs of designing such a computer program.").

Id. at 243. Numerous cases are in accord. *See e.g. Apple Inc. v. Samsung Electronics Co. Ltd.*, 2013 U.S. Dist. LEXIS 116493, 2013 WL 4426512, at *2-3 (N.D. Cal. Aug. 14, 2013) ("Courts regularly

require parties to produce reports from dynamic databases, holding 'the technical burden...of creating a new dataset for the instant litigation does not excuse compelling production.'"). This is true even when the database discovery is difficult and time-consuming to produce. *See, e.g., Gonzales v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006) (allowing ESI discovery where producing party claimed it would take eight full days of engineering time to produce the data that the government sought); *Mervyn v. Atlas Van Lines. Inc.*, 2015 U.S. Dist. LEXIS 144376, 2015 WL 12826474, at *6 (N.D. Ill. Oct. 23, 2015) (requiring production even where producing party claimed it would take a week to create the script, a week to run the script, and a week to check the results). Thus, when faced with the plaintiffs' request for call data regarding wrong number calls, the *Meredith* court overruled the defendant's burden objections and ordered the defendant to extract the wrong-number call information from its database:

> Defendant must, therefore, either write the program that would produce the class data of wrong number calls and associated account notes for the class period or produce the relevant portions of its database to Plaintiff so that her expert, Jeffrey Hansen, can write the program and conduct the query himself. Should Defendant choose to write the program itself, Plaintiff must bear the reasonable cost of doing so. Should Defendant choose to give Plaintiff access to its database so that Hansen can write the program and perform the query, Defendant must provide sufficient information to Plaintiff so that Hansen can understand the database.

Meredith, 319 F.R.D. at 244. Just like the *Meredith* court instructs, Defendants should either extract the data themselves or produce the relevant portions of their database(s) to Plaintiff's expert so that he may extract the relevant data. The latter option completely moots any objection of burden. *See Ossola,* 2015 U.S. Dist. LEXIS 117531 at *29-30 ("Amex's argument would appear to be mooted by Plaintiffs' offer to conduct most of the manual review themselves if Amex were to produce the underlying data.").

Key v. Integrity Surveillance Solutions, Inc., 2015 U.S. Dist. LEXIS 163929 (E.D. Mich. 2015) is another example of a court granting substantially similar class discovery in a TCPA case and

rejected the Defendant's argument that the plaintiff should be denied discovery tailored to identify the class in light of its arguments that the class is not ascertainable. The court held:

> Integ's reliance on Balschmiter, Jamison, and Vigus is misplaced. These cases were decided following complete class discovery and their holdings have been generally disagreed with by other courts. Courts routinely certify TCPA class actions. Simply because three courts have denied class certification in TCPA cases does not warrant dismissal of this case or allow Integ to skirt its obligations to respond in full to Plaintiffs' class discovery.

Id. at *8-9. The *Key* court ordered the defendant to produce, among other things, "a report or spreadsheet containing Integ's phone records during the relevant period of time for calls made to the phone numbers belonging to Plaintiffs and similarly situated consumers." *Id.* at *10. *See* also *Lopez v. Halsted Financial Services, LLC et al*., Case No. 1:16-cv-02539 (N. D. Ill. Dec. 16, 2016), **Exhibit 2, p. 2-3** ("But at this stage of the case, Plaintiff is entitled to relevant, class-related discovery in order to support his class certification motion. And Defendants are free to use that same data to argue against the class certification motion. It will be up to the District Judge—not Halsted—to determine whether the call data supports Plaintiffs' class certification request or Defendant's contention that the proposed class is overly broad and that Plaintiff is not an appropriate class representative."); *Gilman v. ER Solutions,* 2012 U.S. Dist. LEXIS 190602 at *7 (W.D. Wash. Feb. 03, 2012) ("Class certification cannot fairly be evaluated without information on whether others received automated calls to which they did not expressly consent, and Plaintiffs have no way to gather this information aside from the discovery requests [Helloworld] opposes."); *Donnelly v. NCO Financial Sys.,* 263 F.R.D. 500, 504 (N.D. Ill. 2009) (ruling that "discovery aimed at ascertaining a potential class list is proper" and ordering Defendant to produce records of calls to class members in TCPA action); *Stemple v. QC Holdings, Inc*., 2013 U.S. Dist. LEXIS 99582 at *6 (S.D. Cal. June 17, 2013) ("A request for an outbound dial list in a TCPA action is relevant to class certification issues, such as 'the number and ascertain ability of potential class members."); *Gaines v. Law Office of Patenaude & Felix, A.P.C.,* ,

2014 U.S. Dist. LEXIS 110162 at *5 (S.D. Cal. June 12, 2014) ("the outbound dial list is relevant to the issues of numerosity and commonality under Federal Rule of Civil Procedure 23(a), and is therefore discoverable."); *Legg v. Am. Eagle Outfitters, Inc.*, 2014 U.S. Dist. LEXIS 164789, at *2 (S.D. Fla. Nov. 21, 2014) ("text messages sent …. after a "STOP" request are relevant discovery on whether a class is ascertainable and to class factors such as numerosity, typicality and commonality."); *Ung v. Universal Acceptance Corporation*, 15-cv-00127-RHK-JJK, ECF No. 38, **Exhibit 4** (Dist. Minn. March 21, 2016) (granting motion to compel production of "telephone call data," the "complete names of call recipients," and the "complete phone numbers" of the call recipients in a TCPA case); *O'Shea v. Am. Solar Solution, Inc.*, 2016 U.S. Dist. LEXIS 23420 at *8 (S.D. Cal. Feb. 18, 2016) ("these requests generally concern the total number of call recipients and the total number of phone calls made to them. [citation omitted]. This information is relevant both to class certification and to the merits of the case.").

In light of the overwhelming authorities cited above, the Court should recognize the relevance of the discovery at issue and compel Defendants to produce this information without further delay. If Defendants maintain they are unable to do so, Plaintiff should be afforded the opportunity to have her expert extract the class data.

2. Scripts Defendants used to Make the Robocalls

> [Interrogatory] 7. Identify and transcribe each unique artificial or prerecorded voice call script used to call any of the numbers identified in responsive to Interrogatory #2 by you or on your behalf during the "relevant time period".
>
> **OBJECTION: See objection to Interrogatory No. 2 above. Moreover, FDS objects to this interrogatory as it calls for legal conclusion regarding the use of an "artificial or prerecorded voice."**

Plaintiff seeks the scripts used when making the calls that form the basis of this case. Defendants current objection to production is baseless, claiming that while "there are general scripts, [their] clients are unable to determine whether any or all of the scripts were used with respect to the

putative class such that the similar objections as noted above with respect to topic nos. 5 and 6 also apply." **Exhibit 1-F, p. 5-6**. So instead of producing all of the scripts, Defendants have produced *no scripts at all*. Defendants are the creators and users of their scripts, they do not deny they are easily accessible to them, or relevant to this case. Defendants should be compelled to produce the responsive documents.

3. Policies and Procedures regarding TCPA Compliance

> [Interrogatory] 12. Identify and explain all of Defendant's policies, practices and procedures to avoid violating the Telephone Consumer Protection Act, that were in effect at any time during the "relevant time period". Please include a detailed description of each policy, practice, or procedure, the date it was first implemented, and all persons involved in its consideration, implementation and, if applicable, termination.
>
> **OBJECTION: FDS objects to this Interrogatory as compound. FDS Objects to this Interrogatory to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this interrogatory as the terms "consideration", "implementation", and "termination" are vague and undefined.**

Defendants' have produced some policy and procedure documents. But Defendants' objection creates uncertainty if additional documents responsive to this request exist. Plaintiff has requested Defendants supplement their response, produce a privilege log, or withdraw their objections to provide clarity whether they are withholding documents. These documents are clearly relevant to this case, as the Court in *Rose v. Navient Solutions* found when compelling the defendant to "use good faith and common sense to produce those policies and procedures that relate to the violations that the Plaintiff is alleging for her situation." Case No. 8:16-cv-2688-T-30TBM (M.D. Fla April 11, 2017), unpublished opinion attached as **Exhibit 4** (also requiring a "Privilege Log to account for what redactions it has made and why")

4. Ability to Identify Numbers as Cellular Numbers

> [Interrogatory] 13. State whether you have ever taken any action to try to identify whether any telephone number called by you or on your behalf was a cellular telephone

> number, at any time during the "relevant time period". If so, please identify with specificity what actions you took, who took the actions, any third party involved, any software used, why the actions were taken and the result of the actions. If you have never taken any action to try to identify whether any telephone number was a cellular telephone number, please explain why not.
>
> **OBJECTION: FDS objects to this Interrogatory as compound.**

Plaintiff seeks information about Defendants' methods to identify numbers as cellular, to which they provided no response, and simply objected that the request was "compound." Calls to cellular numbers is an element of Plaintiff's TCPA claim. Subject to the parties' conferral, it is unclear if Defendants' will supplement this request with a response. *See* **1-F, p. 6.** But it is indisputable this information is germane to Plaintiff's claims regarding unlawful calls to cellular phones and should be produced.

5. Databases Containing Critical Evidence & Definitions

> [Interrogatory] 18. Identify, by vendor, version and dates in operation, all database in which FDS's has stored data regarding: (a) calls made using the software and equipment described in response to Interrogatory #8, or (b) stop, do-not-call, do-not contact, wrong-person, wrong-number, and similar notifications. For each database, provide the data dictionary, identify each table that contains call data or information about a stop, do-no-call, do-not-contact, wrong-person, wrong number or similar notification, identify and define all codes and fields in each such table, and define the nature of the data in each field (*e.g.*, phone number called, date called, call duration, etc.).
>
> **OBJECTION: FDS objects to this Interrogatory as compound. FDS further objects to this interrogatory as overly broad, unduly burdensome, oppressive, harassing, appearing to be a mere fishing expedition, ambiguous as phrased, and the term "data discovery" is vague and undefined.**
>
> **Although not entirely clear, the information sought in this interrogatory is not proportional to the needs of this case and the burden or expense of providing such information far outweighs any likely benefit.**
>
> **FDS further objects to this interrogatory to the extent that it calls for the creation or compilation of information and data that are not ordinarily kept in FDS's normal course of business.**

Plaintiff seeks the *identity* of the databases where Defendants store data relevant to the calls that are subject to this case, and the corresponding dictionaries that explain and identify the output in tables and call data so that Plaintiff and her expert(s) can decipher the documents produced by Defendants. Defendants stand on their written objections of undue burden and expense. *Id.* Yet, Defendants fail to articulate how a response would create any sort of burden or expense upon them, let alone such a burden as to entitle them to refuse compliance with the Civil Rules. Moreover, as Defendants are refusing to produce much of the requested class data, as set forth *supra,* this information is of particular import.

Defendants' assertion this is a "mere fishing expedition" is baseless, and such contentions have been disregarded. As the *Whiteamire* Court aptly reasoned:

> Finally, we reject the proposition that, as Quill puts it, plaintiff is seeking to embark on an unwarranted "fishing expedition" (Def.'s Resp. at 5). It is part and parcel of the discovery process for parties to make discovery requests without knowing what they will get, or indeed, whether they will get anything at all. In that sense, most discovery involves an element of "fishing." Thus, to conclusorily label a discovery request as a "fishing expedition" does little to advance the discussion; the more appropriate inquiry (to continue with the fishing metaphor) is how big a pond is the requesting party allowed to fish in, and what may the requesting party fish for. In this case, the databases contain information that may be relevant – indeed, critical – to plaintiff's attempt to pursue this case on a class basis. To the extent that Quill argues that the pond in which plaintiff seeks to fish for that information is too large, that is a problem of Quill's own making by the way in which it chooses to maintain its records. It is not a basis to deny plaintiff relevant discovery – particularly when the plaintiff is willing to put its money where its mouth is, and to pay for the cost of trying to extract the relevant information from the databases.

Whiteamire Clinic, 2013 U.S. Dist. LEXIS 136819, at *19-20. Notably, the Court found objections of burden unpersuasive where the plaintiff was willing to absorb the cost. Defendants should be compelled to respond.

6. Contracts with Third-Parties Related to the Calls at Issue

> [Document Request] 12. All contracts, agreements, manuals, and communications with third parties concerning telephony and dialing telephone calls used to call cellular telephones.

OBJECTION: FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is overly broad, unduly burdensome, is not reasonably limited in time, scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

This Document Request seeks contracts, manuals or communications with any third-party vendors Defendants used to place calls to the cellular phones. Defendants stand on their written objection of undue burden, but once again fail to articulate how production of the requested information would, or even *could*, cause any undue burden. Furthermore, Defendants fail to produce *any* responsive information that they may concede is within the scope; instead they simply do not produce anything at all.

7. Documents Containing Terms Germane to this Case

[Document Request] 25. Please do a search for, and provide all documents, emails or things in your possession that mention the following specific terms:

RESPONSE:

a. "Telephone Consumer Protection Act";
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to, information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

b. "TCPA";
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to,

information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

c. "autodialer";
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to, information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

d. "auto" within 5 words of "dial"; and
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to, information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

e. "predictive dialer"
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to, information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to

the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

a. "recorded" within 5 words of "call"
OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS further objects to this Request to the extent that it seeks documents or information prepared in anticipation of litigation and/or for trial, including but not limited to, information containing the mental impressions, conclusions, opinions, and/or legal theories of attorneys and/or other representatives of FDS. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is unduly burdensome, not reasonably limited in scope, is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FDS further objects to this request as overly burdensome, vague, and ambiguous as it seeks "documents, emails or things in your possession."

As to Document Request 25, Plaintiff sets forth six narrow requests for documents that relate specifically to the claims in this case. Namely, documents containing the words: (1) "Telephone Consumer Protection Act"; (2) "TCPA"; (3) "autodialer"; (4) "auto" within 5 words of "dial"; (5) "predictive dialer" and (6) "recorded" within five words of "call." Defendants object that this information is not proportional to the needs of the litigation, but fail to articulate how production of the requested information would cause them any undue burden, or to produce any responsive information that they may concede is within the scope; instead, again, they simply produce nothing.

8. Other Similar Complaints against Defendants

[Document Request] 39. All documents (irrespective of date) which constitute or reference communications between Defendant and any public or private agency that receives consumer complaints (such as an Attorney General's office, the Federal Trade Commission, the Consumer Financial Protection Bureau, a Better Business Bureau, an online blog, or a newspaper column), relating to telephone calls placed to cellular telephones.

OBJECTION: FDS Objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privileges. FDS objects to the extent this Request for Production is not proportional to the needs of the case and because the burden or expense of the proposed discovery outweighs its likely benefit. FDS objects to this Request for production because it seeks information that is overly broad, unduly burdensome, not reasonably limited in scope, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Finally, FDS objects to this Request as improperly limited in time.

Plaintiff seeks information regarding other similar complaints, which is highly relevant to the issue of willfulness under the TCPA. *See* 47 U.S.C. §227(c)(5). Courts routinely requires defendants to respond to discovery that goes to the issue of willfulness. *Rose v. Navient Solutions,* Case No. 8:16-cv-2688-T-30TBM (M.D. Fla April 11, 2017) (compelling finding prior complaints "relevant to her claims, including her claim for damages" and "no basis to conclude these requests are unduly burdensome or beyond the scope of discovery"), unpublished opinion attached as **Exhibit 4**; *Erlich v. Comentiy Capital Bank,* Case No. 16-14534-CIV-ROSENBERG/MAYNARD (S.D. Fla. August 7, 2017) ("The Defendant shall produce records of such complaints whether made formally or informally consistent with how it receives, collects, and maintains [complaints] in the regular course of its business and recordkeeping operations. If the Defendant lacks any such database or means of recordkeeping that is accessible and searchable with a reasonable degree effort, Defendant shall make a clear explanation of such."), unpublished opinion attached as **Exhibit 5, p. 6**; *McCaskill v. Navient Solutions, Inc.,* Case No. 8:15-cv-1559-T-33TBM (M.D. Fla. Dec. 31, 2015) ("to the extent that Defendant(s) have been subject to formal written complaints or inquiries by a State of Florida or federal agency or entity during the relevant period of this suit because of their alleged violation of the TCPA, the FCCPA, or the FDCPA for collection activities of the kind at issue in this case, a copy of such complaint or inquiry shall be provided."), unpublished opinion attached as **Exhibit 6, p. 8**; *Paul v. Syndicated Office Sys.,* 2013 U.S. Dist. LEXIS 191440, at *8 (S.D. Fla. Feb. 28, 2013) ("Because the existence or lack of existence of policies concerning the TCPA may prove relevant to the Plaintiff's

claim of willfulness, the Defendant shall review its policies and procedures and produce any that apply to the TCPA."); *Medina v. Enhanced Recovery Co., Ltd. Liab. Co.*, 2017 U.S. Dist. LEXIS 186651, at *24 (S.D. Fla. Nov. 9, 2017) (Court rejected argument, as Defendants ague here, "that the request should be limited to judicial findings of TCPA violations, and should not include all consumer complaints regarding automated calls"; the Court compelled production of all requested complaint documents); *Pollock v. Northland Grp., Inc.*, 2012 U.S. Dist. LEXIS 191950, at *2 (S.D. Fla. Aug. 22, 2012) ("The Court finds that evidence of other TCPA lawsuits brought against Defendant is relevant to the issue of willfulness and, therefore, Defendant must produce a list setting forth the names and case numbers of any lawsuits alleging that Defendant violated the TCPA within the last five years. *See Anderson v. Domino's Pizza, Inc.*, 2012 U.S. Dist. LEXIS 45503, 2012 WL 1076261, *2 (W.D. Wash. March 30, 2012)(noting that a list of cases in which the defendant had been sued for violating the TCPA, "would be 'relevant to [defendant's] knowledge of the TCPA and the actions it did or did not take to ensure compliance with the statute"')(*quoting Donnelly*, 263 F.R.D. at 505); *Hunter v. Navient Solutions, LLC*, JAMS Ref No. 1460004086, (May 29, 2018) ("**Regarding prior complaints:** Respondent shall produce prior complaints by consumers or their attorneys, and complaints received from government entities, for the years 2013, 2014, 2015 and 2016."), unpublished arbitration Order attached **Exhibit 7, p.3**.

Defendants offer no authority to support their position that they have any basis to withhold this information. A response should be compelled forthwith.

III. CONCLUSION

For the foregoing reasons, Defendants' should be compelled to produce the outstanding discovery as set forth herein. To the extent Defendants maintain they are unable to extract the class data, the Court should order Defendants to permit Plaintiff's expert to do so.

Local Rule 3.01(g) Certification

Pursuant to Local Rule 3.01(g), attorney for Plaintiff hereby certifies that Plaintiff has conferred in a good faith with Defendants but has been unable to resolve the issues raised in the Motion to Compel Discovery. Defendants do not consent to the relief requested herein. If the discovery production is made by Defendants in accordance with this motion, Plaintiff will withdraw the instant motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 21, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, who will send a notice of electronic filing to all counsel of record.

s/ *Amy L. Wells*
Counsel Plaintiff DEBORAH CLARK