UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SUMMER HOLMES, on behalf of herself and all others similarly situated,

Plaintiff,

v. Case No. 3:18-cv-1193-J-39JRK

DRS PROCESSING LLC, doing business as MILLER, STARK, KLEIN & ASSOCIATES,

Defendant.

REPORT AND RECOMMENDATION[1]

This cause is before the Court on Plaintiff's Motion for Class Certification and attached Memorandum of Law in Support of Motion for Class Certification (collectively Doc. No. 17; "Motion"), filed April 1, 2019. The Motion was referred to the undersigned by the Honorable Brian J. Davis, United States District Judge. See Order (Doc. No. 16), entered January 4, 2019.[2] The Motion was served on Defendant (when Defendant was improperly named as its "doing business as" persona) via U.S. mail, see Motion at 21, and was later served with an Order notifying Defendant (as currently and properly named)

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[1] "Within 14 days after being served with a copy of [a report and recommendation on a dispositive issue], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." Id. A party's failure to serve and file specific objections to the proposed findings and recommendations alters the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. See Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Local Rule 6.02.

[2] Because of the nature of the relief requested in the Motion, entry of a Report and Recommendation, rather than entry of an Order, is appropriate. See Rule 6.01(c)(18), Local Rules, Middle District of Florida (providing that a magistrate judge may not enter an Order "permitting maintenance of a class action pursuant to Rule 23, Fed.R.Civ.P. . . . but may make recommendations to the Court concerning [the matter]").

of the Motion's existence and the Court's intention to rule on it absent Defendant appearing in the case, see Order (Doc. No. 20); Return of Service (Doc. No. 22). As explained in more detail later, Defendant has failed to appear in the case despite being properly served. The Motion is deemed unopposed. Having considered the procedural posture, the Motion, and all relevant matters, the undersigned recommends that the Motion be granted.

I. Procedural History/Background

Plaintiff Summer Holmes initiated this case on October 9, 2018 by filing a Class Action Complaint and Demand for Jury Trial (Doc. No. 1) against Defendant Miller, Stark, Klein & Associates. Through the Complaint, which alleges systematic violations of the portions of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") that prohibit autodialed calls to cellular phones (Sections 227(a)(1) and (b)(1)(A)(iii)[3]), Plaintiff sought class certification and brought two substantive counts: knowing and/or willful violations of the TCPA, for which treble damages were sought (count I); and violations of the TCPA, for which the normal statutory damages were sought (count II). Plaintiff also sought injunctive relief prohibiting conduct violating the TCPA, and attorneys' fees and costs.

When reviewing the instant Motion and representations in it about "Miller, Stark, Klein & Associates" being only a "doing business as" persona of actual company "DRS Processing, LLC," the Court identified a potential issue with the way Defendant had been named. Accordingly, an Order was entered on December 19, 2019 (Doc. No. 18), in which the Court observed:

> [I]t appears based on Plaintiff's representations that the proper defendant is "DRS Processing, LLC d/b/a Miller, Stark,

[3] See also Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2356 (2020) (finding unconstitutional the portion of the TCPA excepting "collecting government debt" from the prohibition against robocalls, but severing the government debt exception and leaving intact the general prohibition against robocalls).

> Klein & Associates." See, e.g., Cont'l Cas. Co. v. HealthPrime, Inc., No. 1:07-cv-2512-BBM, 2009 WL 10665024, at *3 (N.D. Ga. June 18, 2009) (granting a motion to amend a complaint when the plaintiffs "mistakenly named [the defendants] under their 'doing business as' names" in the operative pleading). The applicable authority suggests, in turn, that whether any final judgment would be valid and enforceable turns on whether the error in naming the defendant is a misidentification or a misnomer. See, e.g., Federated Nat'l Ins. Co., Inc. v. Loredo, No. 3:17-cv-1712-S, 2019 WL 5887399, at *8 (N.D. Tex. July 12, 2019) (discussing misidentification versus misnomer in the default judgment context). But, because this case is still pending and default judgment has not entered, the party issue should be addressed.
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> It is particularly important to address and resolve this issue now, rather than ruling on the Motion and awaiting the filing of a default judgment motion. This is because if a class is ultimately certified, the Court would want to be satisfied that the certification is against the proper party.

Order (Doc. No. 18) at 1-2. In the December 19, 2019 Order, ruling on the instant Motion was deferred, and Plaintiff was directed by January 3, 2020 to either file a motion seeking whatever relief she deemed appropriate in the circumstance, or file a memorandum explaining why no relief would be requested. Id. at 2.

Plaintiff filed a Motion for Leave to Amend (Doc. No. 19; "Motion to Amend") on January 2, 2020. In it, she sought leave to amend the Complaint to name "DRS Processing, LLC d/b/a Miller, Stark, Klein & Associates" as Defendant. Id. The undersigned entered an Order on February 7, 2020 granting the Motion to Amend, directing the Clerk to file the proposed amended complaint, and directing Plaintiff to serve the Complaint, Amended Complaint, and the February 7, 2020 Order on Defendant as soon as practicable (Doc. No. 20). Through that Order, "Defendant [was] advised that if it fail[ed] to timely respond to the Amended Complaint and a Clerk's default [was] entered,

the Court [would] proceed with deciding Plaintiff's pending Motion for Class Certification." Id. at 2.

The Clerk filed the Amended Complaint (Doc. No. 21) against DRS Processing, LLC d/b/a Miller, Stark, Klein & Associates on February 7, 2020. Similar to the Complaint, it seeks class certification and brings two substantive counts: knowing and/or willful violations of the TCPA, for which treble damages are sought (count I); and violations of the TCPA, for which the normal statutory damages are sought (count II). Plaintiff also seeks injunctive relief prohibiting conduct violating the TCPA, and attorneys' fees and costs. Id. at 13.

Defendant was served with the Complaint, the Amended Complaint, and the February 7, 2020 Order by personal delivery to its registered agent on February 11, 2020. See Proof of Service (Doc. No. 22). When Defendant failed to respond to the Amended Complaint, Plaintiff moved for a Clerk's Default (Doc. No. 23). The Clerk entered a default on March 11, 2020 (Doc. No. 24). The Motion is ripe for consideration.

II. Motion/Proposed Class

In the Motion, Plaintiff seeks class certification "to allow Plaintiff to move for final judgment by default on a classwide basis to allow a hope of recovery for all absent class members victimized by Defendant's conduct." Motion at 1. Plaintiff recognizes the case is in an "unusual, but not unprecedented, procedural posture" for seeking class relief. Id. at 3. Plaintiff also seeks appointment of herself as class representative, and of Bursor & Fisher, P.A. as class counsel. Id. at 1, 19.

The proposed class consists of:

> All persons within the United States who (a) received a non-emergency telephone call; (b) on his or her cellular telephone;

> (c) made by or on behalf of Defendant; (d) for whom Defendant had no record of prior express consent; (e) and such phone call was made with the use of an automatic telephone dialing system [("ATDS")] as defined under the TCPA; (f) at any time in the period that begins four years before the filing of the original complaint in this action to the date that class notice is disseminated.

Am. Compl. at 9 ¶35.[4] Excluded from the proposed class are Defendant, any entities in which Defendant has a controlling interest, Defendant's agents and employees, any Judge and/or Magistrate Judge to whom this action is assigned, and any member of the Judges' staffs and immediate families. Id. at 9 ¶ 36.

Plaintiff explains in the Motion how the class members have been identified. Motion at 4-5. "Plaintiff performed a reverse carrier lookup search on the number that called her," which "revealed that Peerless Network, Inc. ('Peerless') is the carrier for the number." Id. at 4 (citing Declaration of Andrew J. Obergfell (Doc. No. 17-1 at pp. 1-3; "Obergfell Decl."[5]), ¶ 6). After that, "Plaintiff . . . served a subpoena for call records from the offending number on Peerless for the class period (i.e. four years prior to the filing of

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[4] The Motion itself, filed well prior to the Amended Complaint, contains a different proposed class definition, the key difference being that it does not include a "lack of consent" component:

> All persons within the United States who (a) received a non-emergency telephone call; (b) on his or her cellular telephone; (c) made by or on behalf of Defendant; (d) where such phone call was made with the use of an [ATDS] as defined under the TCPA and/or with an artificial or prerecorded voice; (e) at any time from October 10, 2014 to the date that class notice is disseminated.

Motion at 5. Given that the Amended Complaint post-dates the Motion, and given that Plaintiff in the Motion relies on lack of consent as a basis for arguing certain Rule 23 requirements are met, the class definition set forth in the Amended Complaint is the one upon which the Court should rely. See also Yarger v. Fresh Farms, LLC, No. 2:19-CV-2767-JAR-JPO, 2020 WL 4673229, at *8-9 (D. Kan. Aug. 12, 2020) (discussing problems with a class definition that did not include a consent component and denying without prejudice a motion to certify a class in a TCPA case).

[5] The Motion refers to the Obergfell Decl. as the "Bursor Decl." See, e.g., Motion at 3, 3 n.1, 4. Mr. Obergfell is an associate at Bursor & Fisher, P.A. See Obergfell Decl. ¶ 1.

the Complaint)." Id. (citing Obergfell Decl. ¶ 6); see Obergfell Decl. at Ex. E (subpoena). In response, Plaintiff received call logs for the year 2018, showing that 2,180 calls were made from the offending number. Motion at 4 (citing Obergfell Decl. ¶ 7); see Obergfell Decl. at Ex. F (response to subpoena).

"Plaintiff then sought the full records related to Defendant (i.e. for all calls placed during the class period)," but was advised by Peerless "that it is 'a wholesale telecom company that provides services to Arbeit Software, LLC ('Arbeit'), which then provides the retail service to the end user.'" Motion at 4 (internal alterations omitted) (citing Obergfell Decl. ¶ 7); see Obergfell Decl. at Ex. F. Plaintiff subpoenaed Arbeit, which revealed an "additional 17,950 calls that Defendant made to the class members from 2018 through 2019." Motion at 4 (citing Obergfell Decl. ¶ 8); see Obergfell Decl. at Exs. G, H (subpoena and response). Arbeit "identified DRS Processing, LLC (d/b/a Miller, Stark, Klein & Associates) and its principal, Darryl Miller, as the subscriber of the offending number." Motion at 4 (citing Obergfell Decl. ¶ 8); see Obergfell Decl. at Ex. H.

Plaintiff has also retained the services of expert Anya Verkhovskaya, "the President of Class Experts Group, LLC," which "offers litigation support services with a focus on data management and data analysis, particularly in the area[s] of [TCPA], class administration and consumer class action litigation support services." Obergfell Decl. at Ex. I ("Expert Report of Anya Verkhovskaya," at 2); Motion at 4. Ms. Verkhovskaya opines it is "'possible, common and administratively feasible'" to identify from the called numbers "'which ones were wireless (cellular) numbers,' to 'identify the names and addresses that were associates with the telephone numbers at the time of the calls,' and to 'issue notice of class certification to individuals in this Action.'" Motion at 4-5 (quoting Obergfell Decl.

at ¶ 9); see Expert Report of Anya Verkhovskaya. Ms. Verkhovskaya prepared a report in this regard and will also be preparing an updated damages report as part of a forthcoming motion for default judgment.[6] Motion at 5; see Expert Report of Anya Verkhovskaya.

III. Discussion

To begin, the undersigned finds that the defaulted status of Defendant should not preclude Plaintiff from receiving class certification. See, e.g., Lap Distribs., Inc. v. Global Contact-Int'l Publ'g Corp., No. 19-6317 (RMB/KMW), 2020 WL 1616505, at *1-5 (D.N.J. Apr. 1, 2020) (certifying class against a defaulted defendant in a TCPA case); Kron v. Grand Bahama Cruise Line, LLC, 328 F.R.D. 694, 698-703 (S.D. Fla. 2018) (certifying class against a defaulted defendant in a TCPA case); Yang v. Assisted Credit Servs., Inc., No. SACV 15-2118 AG (JCGx), 2016 WL 10459417, at *5 (C.D. Cal. June 21, 2016) (certifying class against defaulted defendant under the Fair Debt Collection Practices Act and California's Rosenthal Fair Debt Collection Practices Act, noting that "[p]olicy considerations . . . favor providing . . . relief, as defendants should not be able to avoid liability for a class action lawsuit simply by refusing to defend against it"); Whitaker v. Bennett Law, PLLC, No. 13-cv-3145-L(NLS), 2014 WL 5454398, at *7 (S.D. Cal. Oct. 27, 2014) (certifying class against defaulted defendant in a TCPA case, finding that "[a] class action is the most efficient vehicle to achieve an opportunity for classwide recovery while

[6] Evidently after Ms. Verkhovskaya's initial report was prepared, on March 29, 2019, "Plaintiff received additional call logs made by Defendant from numbers other than the number that called Plaintiff." Motion at 4 n.2. These calls may be incorporated into a final report by Ms. Verkhovskaya, and they can also be addressed on a classwide basis. Id. Plaintiff will address the additional calls in a forthcoming motion for default judgment. Id.

minimizing the economic burden on [the plaintiff's] putative class and promoting judicial economy").

"The party seeking class certification has the burden of proof." Brown v. Electrolux Home Products, Inc., 817 F.3d 1225, 1233 (11th Cir. 2016) (emphasis and citation omitted). To satisfy that burden, the moving party "must affirmatively demonstrate compliance with [Rule 23, Federal Rules of Civil Procedure]." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). "[A] district court must conduct a rigorous analysis of Rule 23 prerequisites before certifying a class." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009) (citations and quotations omitted). "All else being equal, the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation." Brown, 817 F.3d at 1233 (citing Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013)).

Under Rule 23(a), a class may be certified only if the following prerequisites are met:

> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
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> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
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> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed R. Civ. P. 23(a)(1)-(4); see Wal-Mart Stores, Inc., 564 U.S. at 345.

As to numerosity, the proposed Class includes persons associated with at least 2,977 wireless telephone numbers and at least 9,493 calls. Motion at 9-10 (citing Expert Report of Anya Verkhovskaya at ¶ 41). In addition, full call records are being reviewed

and will likely reflect more calls placed during the proposed class period and more class members. Id. at 10. Accordingly, the proposed Class meets the numerosity requirement of Rule 23(a)(1).

As to the commonality requirement, all proposed Class Members share the common issue of whether prerecorded calls were made to their cellular phones by Defendant using an ATDS and/or artificial or prerecorded voice. See Motion at 10-11. Thus, the commonality requirement of Rule 23(a)(2) is met. See, e.g., Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 (11th Cir. 2009) (recognizing that "the commonality requirement demands only that there be 'questions of law or fact common to the class'") (quoting Fed. R. Civ. P. 23(a)(2)).

As to typicality, Plaintiff's claim is the same as the proposed Class Members and is alleged to derive from the same event: Defendant "using an ATDS and an artificial or pre-recorded voice to place calls to cellular telephone numbers in violation of the TCPA" without consent. Motion at 12 (citations omitted). This satisfies the typicality requirement of Rule 23(a)(3). See, e.g., Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984) (stating that a plaintiff's claim is typical of the class members' claims if they "arise from the same event or pattern or practice and are based on the same legal theory").

As to the adequacy of representation, the Court must consider two factors: (1) whether the class representative has interests antagonistic to the settlement class; and (2) whether class counsel is competent. Griffin v. Carlin, 755 F.2d 1516, 1533 (11th Cir. 1985) (citation omitted); see Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) (citation omitted) (court considers "whether any substantial

conflicts of interest exist between the representatives and the class" and "whether the representatives will adequately prosecute the action"). Here, Plaintiff's and the proposed Class's interests are aligned in that they seek redress for the same alleged harm: violation of the TCPA. Also, Rule 23(g) requires that a Court certifying a class must appoint class counsel. See Fed R. Civ. P. 23(g). Plaintiff's counsel have the qualifications and extensive experience to handle this litigation and act as class counsel. See Motion at 13-14; Obergfell Decl. at ¶ 10, Ex. J (firm resume). Thus, the requirements of Rule 23(a)(4) and (g) are met, and Plaintiff's counsel should be appointed as class counsel.

Once the four prerequisites of Rule 23(a) are met, the Court must determine whether one of the three elements of Rule 23(b) is satisfied. Here, Plaintiff asserts she meets the requirement under Rule 23(b)(3) that requires the Court to find that

> the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b)(3). Common issues of fact and law are predominate if they "ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . monetary relief." Klay v. Humana, Inc., 382 F.3d 1241, 1254-55 (11th Cir. 2004) (first alteration in original) (citation omitted), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).

Here, there are common issues and questions concerning whether Defendant had prior consent to make the telephone calls at issue and whether Defendant is liable for making the automated or artificial or prerecorded voice calls. These issues and questions directly affect the class members' ability to establish liability and to obtain relief. Moreover, a class action is superior to other methods for fairly and efficiently adjudicating

the controversy. The same statutory damages award will be sought by each member of the proposed class, with the only difference being the number of times the class member was called. See Motion at 15.

In short, the four prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3) are satisfied. In addition, the proposed definition of the class is sufficiently ascertainable (an implicit requirement of Rule 23) in that there is "an administratively feasible method by which class members can be identified." Karhu v. Vital Pharmaceuticals, Inc., 621 F. App'x 945, 950 (11th Cir. 2015); see, e.g., Motion at 17-19. Accordingly, the undersigned recommends that the proposed Class as defined above be certified, that Plaintiff be appointed the class representative, and that the firm of Bursor & Fisher, P.A. be appointed as class counsel.

IV. Conclusion

After due consideration, it is

RECOMMENDED:

1. That Plaintiff's Motion for Class Certification (Doc. No. 17) be **GRANTED**.

2. That the Court certify the following class:

> All persons within the United States who (a) received a non-emergency telephone call; (b) on his or her cellular telephone; (c) made by or on behalf of Defendant; (d) for whom Defendant had no record of prior express consent; (e) and such phone call was made with the use of an automatic telephone dialing system as defined under the TCPA; (f) at any time in the period that begins four years before the filing of the original complaint in this action to the date that class notice is disseminated.

Excluded from this definition are Defendant, any entities in which Defendant has a controlling interest, Defendant's agents and employees, any Judge and/or Magistrate Judge to whom this action is assigned, and any member of the Judges' staffs and

immediate families.

3. That the Court appoint Plaintiff as the class representative and the firm of Bursor & Fisher, P.A. as class counsel.

4. That the Court require Plaintiff to propose a plan for providing notice to the class members in accordance with Rule 23(c)(2).

RESPECTFULLY RECOMMENDED at Jacksonville, Florida on November 3, 2020.

James R. Klindt
JAMES R. KLINDT
United States Magistrate Judge

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Copies to:

Honorable Brian J. Davis
United States District Judge

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