UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-60205-CIV-DIMITROULEAS/SNOW

GINA BELLENGER, individually and
on behalf all others similarly situated,

Plaintiff,
v.

ACCOUNTS RECEIVABLE
MANAGEMENT, INC.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on the Plaintiff's Motion to Compel (ECF No. 21) and the Defendant's Motion for Protective Order (ECF No. 31), which were referred to United States Magistrate Judge Lurana S. Snow by the Honorable William P. Dimitrouleas, United States District Judge (ECF No. 9).

I. BACKGROUND

The Plaintiff filed this case on January 23, 2019, seeking damages for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), and rules promulgated thereunder. According to the Complaint, the Plaintiff and a proposed class received calls from the Defendant, Accounts Receivable Management, Inc. (ARM), that were made by use of an automatic telephone dialing system and an artificial or prerecorded voice, and such calls were made without the recipients' prior express consent. Complaint (ECF No. 1), at ¶¶ 2, 20-22. Specifically, the Plaintiff alleges that she began receiving "numerous and repeated telephone calls" in November 2018 through December 2018, some times more than once per day, even though the

Plaintiff requested many times that the calls stop. Id., at ¶¶ 16-17, 51. The Plaintiff was never a customer or debtor of the Defendant or the Defendant's clients, and the Defendant's telephone representatives "repeatedly asked for someone other than Plaintiff." Id., at ¶ 22. The Plaintiff seeks injunctive relief and damages of $500 for each negligent violation of the TCPA, and treble damages, up to $1,500, for each knowing and/or willful violation of the TCPA.

The Defendant filed its Answer and Affirmative Defenses on February 20, 2019, alleging, *inter alia*, defenses of prior express consent, and that the system it used for making the calls was not an "Automatic Telephone Dialing System" as defined in the TCPA. (ECF No. 5)

On March 13, 2019, the Court entered its scheduling Order, setting trial for February 2020, and providing a discovery cutoff of October 30, 2019. (ECF No. 9) A stipulated Protective Order was entered on May 1, 2019. (ECF No. 18)

II. DISCUSSION

A. General principles governing discovery

According to Rule 26(b)(1) of the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Relevance under Rule 26(b)(1) is construed broadly, but is not without limits. Discovery must not only be relevant to the claims and defenses in the case, but also must be proportional "to the needs of the case." Fed. R. Civ. P. 26(b)(1). The determination of what is relevant for discovery purposes

depends on the parties' claims and defenses.

An interrogatory must be answered fully and any objections must be stated with specificity. Fed. R. Civ. P. 33(b)(4); S.D. Fla. L.R. 26.1(e)(2)(A). Similarly, objections to requests for production of documents must be stated with specificity, including the reasons for the objection, and must state whether any responsive materials are being withheld on the basis of that objection and "[a]n objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2); S.D. Fla. L.R. 26.1(e)(2)(A).

The discovery respondent bears the burden of establishing a lack of relevancy or some other basis for resisting production. See, e.g., Adelman v. Boy Scouts of Am., 276 F.R.D. 681 (S.D. Fla. 2011) (noting that court could grant motion to compel "solely based on [discovery respondent's] procedurally inadequate objections"). After a properly stated objection is presented, the proponent of a motion to compel seeking to overrule the objection must prove relevance of the requested discovery. See, e.g., Diamond State Ins. Co. v. His House, Inc., No. 10-20029-CV, 2011 WL 146837 (S.D. Fla. Jan. 18, 2011) (finding that proponent of discovery had not shown relevance of requested deposition).

A motion for protective order can be entered “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Rule 26(c), Fed. R. Civ. P. Relevancy objections, standing alone, are insufficient as a basis for entry of a protective order.

Finally, the Rules of Civil Procedure shall be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.

B. Plaintiff's Motion to Compel

On May 21, 2019, the Plaintiff filed her Motion to Compel, arguing that the Defendant's discovery responses, served on April 26, 2019, were insufficient as to the Plaintiff's Requests for Production, Requests for Admission and Interrogatories. (ECF No. 21). The Motion was timely, pursuant to Local Rule 26.1(g), S.D. Fla. L.R.

According to the Plaintiff, the Defendant provided amended and supplemental responses on May 8, 2019, but did not revise its boilerplate objections and continued to fail to provide responsive documents. The Plaintiff is required to file her motion for class certification no later than September 16, 2019 (ECF No. 25), and claims that she will be unable to do so without the requested documents.

The Defendant "does not contest Plaintiff's entitlement to discovery regarding the number and ascertainability of potential class members," but argues that the Plaintiff's discovery requests are overbroad. Response (ECF No. 26), at 1. The Defendant asserts that privacy concerns are implicated in the requested production because some of its clients are healthcare providers, and also that it would be unduly burdensome if the Defendant has to manually review "the estimated 4 million accounts for evidence of written or verbal consent" or "the call history contained in each set of account notes." Id., at 3.

1. The Plaintiff's claim and the requirements for class certification

The Plaintiff's TCPA claim determines the scope of relevant discovery, pursuant to

Rule 26(b)(1). An individual may bring an action for violation of the TCPA 47 U.S.C. § 227(b)(3).[1] To state a claim under the TCPA, a plaintiff must sufficiently allege that: (1) a call was made to their phone, (2) by the use of an automatic dialing system or an artificial or prerecorded voice, and (3) without the prior express consent of the called party. Gulisano v. J.A. Cambece Law Office, PC, 15-81378-WPD, 2016 WL 7536097 (S.D. Fla. Aug. 8, 2016) (citation omitted).[2]

The Plaintiff proposes the following definition of the class: any person in the United States "who received a call from ARM from an automated telephone dialing system and/or utilizing a prerecorded voice on or after November 1, 2014, for whom ARM cannot provide evidence that the Class member provided ARM his or her cellular telephone number." Id., at ¶ 27. The Plaintiff also proposes a subclass of those "who were not the account holders at the time of the calls." Id., at ¶ 28. In her Motion to Compel, the Plaintiff describes the class as: "all persons to whom Defendant placed a call to a number assigned to a cellular telephone service, but not assigned to the intended recipient of Defendant's calls, by using an [automatic telephone dialing system]." Motion to Compel (ECF No. 27), at 3.

A party seeking class certification bears the burden of establishing each element of

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[1]Similarly, if the individual has received more than one call within any 12-month period may bring an action for violation of the statute's implementing regulations. 47 U.S.C. § 227(c)(5). The Eleventh Circuit has observed that "[t]he TCPA was enacted to address certain invasive practices related to 'unrestrictive telemarketing,' and is designed to protect consumers from receiving unwanted and intrusive telephone calls." Schweitzer v. Comenity Bank, 866 F.3d 1273, 1276 (11th Cir. 2017).

[2]The TCPA prohibits the use of an "automatic telephone dialing system" or an "artificial or prerecorded voice" to make calls to a cellular telephone number without prior express consent of the called party "unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA also similarly prohibits such calls to "any residential telephone line," 47 U.S.C. 227(b)(1)(B), but the Plaintiff's Complaint is directed to calls made to cellular numbers.

Rule 23(a), Fed. R. Civ. P. London v. Wal-Mart Stores, 340 F.3d 1246, 1253 (11th Cir. 2003) (reversing certification of class where plaintiff who was stockbroker and friend of proposed class counsel failed to establish that he was adequate representative). "Rule 23 does not set forth a mere pleading standard.... [The Plaintiff] must affirmatively demonstrate [its] compliance with the Rule." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

Rule 23(a) authorizes a member of a class of plaintiffs to sue as a representative of the class if certain requirements, "commonly referred to as numerosity, commonality, typicality, and adequacy of representation," are met. Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (internal quotation and citation omitted). Courts impose an additional requirement, implicit in Rule 23(a), that a proposed class be "adequately defined and clearly ascertainable." Little, 691 F.3d at 1304.

It is well within the Court's authority to redefine" a proposed class to bring it within the scope of Rule 23, but if a plaintiff fails to demonstrate that the proposed class is clearly ascertainable, "then class certification is properly denied." Groover v. Prisoner Transportation Servs., LLC, No. 15-cv-61902, 2018 WL 6831119 (S.D. Fla. Dec. 26, 2018) (denying class certification, even after redefining and narrowing the class definition), citing Walewski v. Zenimax Media, Inc., 502 F. App'x 857, 861 (11th Cir. 2012). This Circuit's ascertainability requirement has been described as "fairly strong." Mullins v. Direct Digital, LLC, 795 F.3d 654, 661 n.2 (7th Cir. 2015), citing Karhu v. Vital Pharms., Inc., 621 F. App'x 945 (11th Cir. 2015). In Karhu, the Eleventh Circuit held that a plaintiff "cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively

feasible." Karhu, 621 F. App'x at 948 (affirming denial of class certification where plaintiff presented only bare proposal that court could ascertain class members through defendant's sales data and also had failed to timely raise alternative method of ascertainability).[3]

The party seeking class certification "must not only 'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, ... [but] must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013). The most relevant provision of Rule 23(b)(3), for the purposes of this discussion, is the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" of the class. The Supreme Court has described the "predominance" condition in Rule 23(b)(3) as "even more demanding than Rule 23(a)," and noted that the court has a duty to "take a 'close look' at whether common questions predominate over individual ones." Comcast Corp., at 34 (citations omitted); see also, Hicks v. Client Servs., Inc., No. 07-61822-WPD, 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008) (denying certification of TCPA class for lack of commonality and failure to demonstrate predominance of issues).[4]

2. The specific requests at issue

Although the Plaintiff's introduction to her Motion to Compel refers generally to her

[3]The decision in Karhu is unpublished. Pursuant to 11th Cir. R. 36-2, unpublished opinions are not considered binding precedent, but may be cited as persuasive authority.

[4]"[I]t is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." Hicks v. Client Servs., Inc., No. 07-61822-WPD, 2008 WL 5479111 (S.D. Fla. Dec. 11, 2008), citing Klay v. Humana, Inc., 382 F.3d 1241, 1254 (11th Cir. 2004).

Requests for Production, Requests for Admissions and Interrogatories, she fails to address any specific requests in her Motion and only asks for an order "compelling Defendant to produce all documents and information regarding class-wide discovery in response to Plaintiff's Requests." Motion (ECF No. 21, at 5). It is not the Court's responsibility to sift through dozens of discovery requests and examine each response to know whether the requesting party has accepted the stated response/objection or whether the response/objection requires the Court's attention. Because the Plaintiff has failed to be precise, the Court will rely on the Defendant's Response to the Motion to Compel, which details several specific Requests for Production, and one Interrogatory.[5]

The Plaintiff's Request for Production No. 10 sought all documents "showing the telephone numbers for PERSONS who requested not to receive DIALED CALLS, including but not limited to all codes, abbreviations, designations, or other marking showing that any telephone number is a wrong number or otherwise belongs to a person who does not have a contract with YOU." Defendant's Supplemental Response to Plaintiff's First Request for Production (ECF No. 21-3). The Defendant objected that the requested information includes personal health information provided to the Defendant by a healthcare services provider and that such information cannot be disclosed without written authorization. The Court notes that a protective order already has been entered in this case that specifically envisions the use of confidential information for the purpose of "identification of potential class members." Protective Order (ECF No. 18), at ¶ 6. The Defendant has failed to cite any precedent that precludes class-related discovery, which will be conducted in

[5]In Request for Production No. 14, the Plaintiff sought "outbound dial lists" including such lists generated by any dialing system used by the Defendant, and requests that "each call and attempted call made must be included in these lists." (ECF No. 21-3) Because the Defendant subsequently reported that "it does not have any outbound dial lists" as requested, Response to Motion to Compel (ECF No. 26), at 3, the Court need not further address this Request.

this case in accord with the Protective Order, simply because some of the requested information includes personal health information. Accordingly, the Defendant's objection on this ground is overruled.

In its Response to the Motion to Compel, the Defendant also argues that the request is overbroad because it is not limited to cellular phones or "wrong parties." While the Plaintiff generally would not be entitled to discover information about calls made to landlines, as such calls are not a part of this class action, the Defendant apparently cannot segregate from its call lists those numbers that are cellular phones. In response to the Plaintiff's Interrogatory No. 5, which sought each document the Defendant contends constitutes "prior express consent" for all cellular numbers called by the Defendant via a "predictive dialer, automatic dialing system and/or any other dialing system" since January 23, 2015, the Defendant objected that the request was unduly burdensome because it would require the Defendant to "manually review each account on which it made any call over the course of a four-year period to identify the documents at issue," and because the Defendant's system "does not uniformly and reliably indicate whether a given phone number is a cell phone." Responses to Interrogatories (ECF No. 21-2).[6] The failure or inadequacy of the Defendant's system does not excuse the Defendant's compliance with its discovery obligations in this case. The Defendant's objections based on this ground are overruled.

As to the Defendant's objections based on the purported class being limited to "wrong parties" who were called, the Court notes that the Plaintiff's pleading did not define the class

[6]The Defendant also objected to Interrogatory No. 5 on the basis of overbreadth, and claimed that the requested documents are confidential, or personal health information, protected pursuant to its client services agreement and privacy laws. This objection is overruled, for the reasons stated above.

as narrowly as she does in her Motion to Compel. In her pleading, the Plaintiff defined the class as those persons "who received a call from ARM from an automated telephone dialing system and/or utilizing a prerecorded voice on or after November 1, 2014, for whom ARM cannot provide evidence that the Class member provided ARM his or her cellular telephone number," Complaint (ECF No. 1), at ¶ 27, and she proposed a subclass of those "who were not the account holders at the time of the calls," id., at ¶ 28.[7] Accordingly, the Court overrules the Defendant's objections based on the class being based exclusively on "wrong party" numbers.

Moreover, according to the Plaintiff, defense counsel "contended the data could be unreliable because their agents make manual designations for 'cell phone' and 'wrong party' codes, and therefore some of the agents could have made mistakes when notating a customer's account." Declaration of Gary M. Klinger (ECF No. 29), ¶ 6.[8] As the Defendant has not stipulated as to the ascertainability of the class, the Court overrules the Defendant's objection to providing information that might assist the Plaintiff in demonstrating that an administratively feasible system exists to ascertain the class. When faced with a similar situation, the court in Shapiro v. Dynamic Recovery Solutions, LLC, No. 18-cv-60035-BB, 2018 WL 8130559 (S.D. Fla. July 26, 2018), permitted discovery of an outgoing call list and other information relevant to the Rule 23 inquiry where a defendant refused to stipulate to ascertainability, because the "Defendant cannot have it both ways."

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[7]While the Plaintiff may face an insurmountable hurdle to establish, under Rule 23, that she can represent a class of persons who were not "wrong parties" called by the Defendant, that is a not a decision to be made by this Court at this time.

[8]The Plaintiff cited the recent decision in Knapper v. Cox Commc'ns, Inc., 329 F.R.D. 238 (D. Ariz. 2019). As observed by that court, "courts have certified TCPA cases despite the possibility that a substantial proportion of the phone numbers marked as 'wrong number' in Defendant's call records may not have actually been a wrong number." Id., at 244 (citing cases).

In Requests for Production Nos. 15 and 16, the Plaintiff sought documents "identifying or listing the telephone numbers to which [the Defendant] placed any DIALED CALL to a cellular telephone at any time on or after January 23, 2015," or documents "that record or list every DIALED CALL" made by the Defendant during that same time period, including all documents that "identify, reflect and/or evidence the number of times each such telephone number was called." (ECF No. 21-3) The Defendant objected to these requests as overbroad, because the requests were not limited to calls placed to "wrong parties," and also stated that the requested information includes personal health information; these objections are overruled, for the reasons discussed above.

The Defendant also objected that to comply with the request would be unduly burdensome because the Defendant's "system is not structured to automatically flag a telephone number that a consumer has indicated as cellular or to automatically scrub telephone numbers for possible cellular telephones" and, thus, the Defendant "cannot reliably identify telephone numbers that were assigned to a cellular telephone at the time ARM placed the call(s)." (ECF No. 21-3). In its Response to the Motion to Compel, the Defendant argues that "ARM would still need to manually review the estimated 4 million accounts for evidence of written or verbal consent." Response (ECF No. 26), at 3. According to the Defendant, "[i]t would seem more appropriate for the parties to revisit the issue of consent if and when Plaintiff establishes a list of proposed class members." Id.

The Defendant's objections based on its unwillingness to produce information for each class member before the proposed class has been certified are overruled. The Defendant did not move to bifurcate discovery in this case and the type of discovery sought is within the bounds

of Rule 26(b)(1). Outbound call lists are relevant to prove the merits of a TCPA claim, and also to establish the numerosity and commonality requirements of Rule 23. See, e.g., Medina v. Enhanced Recovery Company, LLC, No. 15-14342-CIV-MARTINEZ/MAYNARD, 2017 WL 5196093 (S.D. Fla. Nov. 9, 2017). In addition, the Plaintiff argues that she will "undertake [the] burden" of reviewing the list of millions of accounts. Reply (ECF No. 27), at 4.

Requests for Production Nos. 17 and 18 sought documents listing every person who received a call since January 23, 2015, and who informed the Defendant that: 1) the person did not wish to be called, or 2) that the Defendant had called a wrong number, or 3) that the person did not have a contract with the Defendant, and also a list of every call made to any person after they had provided one of the three responses above. The Defendant objected that the request was overbroad because it is not limited to cellular phones and also includes people outside the proposed class because those who did not wish to be called or who did not have a contract with the Defendant are not "wrong parties." For the reasons stated above, the Defendant's objections as to the cellular phone designation and the "wrong parties" are overruled.

The Defendant also argues that Requests Nos. 17 and 18 are overbroad because they seek information that has no bearing on whether the Defendant had prior express consent to make the calls, but the Defendant cites no precedent for such a determination. The Court overrules the Defendant's objection because if the Defendant intends to pursue its defense that it had the prior express consent of those called, then it must produce the evidence on which it will rely. "[A]t this stage of the proceeding, [the Defendant] must produce whatever evidence of prior express consent it will use to rebut [the Plaintiff's] attempt to establish predominance under Federal Rule of Civil Procedure 23(b)(3) so the issue can fully be litigated during the class certification phase of this

case." See, e.g., Medina v. Enhanced Recovery Company, LLC, No. 15-14342-CIV-MARTINEZ/MAYNARD, 2017 WL 5196093, *8 (S.D. Fla. Nov. 9, 2017).

In summary, the Defendant's objections addressed above each are overruled, and the Plaintiff is entitled to the information she seeks.

C. Defendant's Motion for Protective Order

The Defendant's Motion for Protective Order was filed on June 27, 2019, and seeks protection from discovery served on March 15, 2019. It is, therefore, untimely under Local Rule 26.1(g). The Defendant has failed to show good cause for the untimeliness and, thus, the Court finds that the Defendant is not entitled to the requested relief. The Court also notes that the Plaintiff's Response to the Motion for Protective Order fails to comply with the three page limit on responses to discovery motions, as provided in this Court's General Order on Discovery Objections and Procedures, entered on March 15, 2019. (ECF No. 10) As stated in that Order, "**THE COURT MAY DECLINE TO CONSIDER A MOTION OR RESPONSE WHICH DOES NOT COMPLY WITH THESE PROCEDURES**." (Id., emphasis in original). All counsel are reminded that compliance with the Local Rules and this Court's General Order is required.

III. CONCLUSION

For the reasons stated above, it is

ORDERED and ADJUDGED that the Plaintiff's Motion to Compel (ECF No. 21) is GRANTED. The Defendant shall produce the requested documents as to Requests for Production Nos. 10, 15, 16, 17, 18, and Interrogatory No. 5 no later than September 13, 2019.

Further, it is

ORDERED and ADJUDGED that the Defendant's Motion for Protective Order (ECF No. 31), is DENIED.

DONE and ORDERED at Fort Lauderdale, Florida this 10th day of September, 2019.

LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record