

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-62033-CIV-DIMITROULEAS/SNOW

DEBRA SLINGERLAND, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

CRISP MARKETING, LLC, a for-profit corporation,

Defendant.

ORDER

THIS CAUSE is before the Court on the Plaintiff's Motion to Compel Discovery (ECF No. 18), which was referred to United States Magistrate Judge Lurana S. Snow by the Honorable William P. Dimitrouleas, United States District Judge (ECF No. 15).

The Plaintiff filed this case on August 14, 2019, seeking damages for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA). According to the Complaint, the Plaintiff and a proposed class received non-emergency calls from the Defendant, Crisp Marketing, LLC, that were made by use of an automatic telephone dialing system or an artificial or prerecorded voice, and such calls were made without the recipients' prior express consent. Complaint (ECF No. 1), at ¶¶ 47-50. Specifically, the Plaintiff alleges that she received a call on July 12, 2019, and heard "a prerecorded message advertising an insurance plan and requesting that Plaintiff call telephone number 888-564-0494." *Id.*, at ¶¶ 25-27. The Plaintiff alleges that she never provided her express written consent to be contacted using a pre-recorded message by the Defendant. *Id.*, at ¶ 33. She also alleges that the Defendant made similar calls to other members of

the proposed class of plaintiffs and the calls were made “without regard to whether Defendant had first obtained express permission from the called party to make such calls.” *Id.*, at ¶¶ 4, 48-49. 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. *Id.*, at ¶¶ 6, 51.

The Defendant filed its Answer and Affirmative Defenses on September 25, 2019, alleging, *inter alia*, defenses of prior express consent, lack of standing by the Plaintiff, waiver, and that the penalties and fines of the TCPA are unconstitutional. (ECF No. 10)

On November 5, 2019, the Court entered its scheduling Order, setting trial for March 2021, and providing a discovery cutoff of October 16, 2029. (ECF No. 15)

On December 15, 2019, the Plaintiff filed her Motion to Compel, arguing that the Defendant’s discovery responses, served on November 20, 2019, were insufficient as to the Plaintiff’s Requests for Production and Interrogatories. (ECF No. 18). The Motion was timely, pursuant to Local Rule 26.1(g), S.D. Fla. L.R.

According to the Plaintiff, the Defendant refused to provide any discovery responses related to the class, and alleged that it had “valid prior express written consent” from Plaintiff. See, e.g., Defendant’s Response to Plaintiff’s First Request for Production (ECF No. 18-3), at 3. The Plaintiff argues that the Defendant is preventing the Plaintiff from obtaining relevant discovery that is necessary for her to prepare her motion for class certification. The Defendant’s opposition to the Motion to Compel failed to address any of the specific discovery requests and instead stated its position as to bifurcation of discovery. On today’s date, Judge Dimitrouleas denied the Defendant’s Motion to Bifurcate Discovery, Order (ECF No. 24).

The Court has reviewed the Plaintiff's Motion to Compel and agrees with the Plaintiff that the Defendant's responses are insufficient and the objections should be overruled. 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). 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).¹

A party seeking class certification bears the burden of establishing each element of 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. The party seeking class certification "must not only 'be prepared to prove that there

¹The 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).

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 Defendant's objections based on its unwillingness to produce information for each class member before the proposed class has been certified are overruled. Moreover, the type of discovery sought is within the bounds of Rule 26(b)(1), Fed. R. Civ. P. For example, 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). "[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 are overruled, and the Plaintiff is entitled to the information she seeks. Therefore, it is

ORDERED and ADJUDGED that the Plaintiff's Motion to Compel (ECF No. 18) is GRANTED. The Defendant shall produce the requested documents and respond to the Interrogatories no later than January 24, 2020.

DONE and ORDERED at Fort Lauderdale, Florida this 16th day of January, 2020.


LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of record