IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

JEROLD S. RAWSON, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 03 CH 14510
C.P. PARTNERS, L.L.C., doing business as COMFORT INN O'HARE, and JOHN DOES 1-20,	)	Judge Patrick E. McGann
	)	Calendar 6
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Jerold Rawson ("Rawson") on behalf of himself and all others similarly situated, moves, pursuant to Section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, to certify a class of all persons with Illinois fax numbers who, on or after four years prior to the filing of this action, were sent advertising faxes promoting Defendant C.P. Partners, L.L.C. ("CP Partners"), products and services, to whom Defendant cannot provide evidence of prior express permission for the sending of such faxes. Defendant objects to class certification with respect to three of Section 2-801's requirements: (1) the requirement that there be "questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members" 735 ILCS 5/2-801(2); (2) the requirement that the class action be "an appropriate method for the fair and efficient adjudication of the controversy" 735 ILCS 5/2-801(4); and (3) the requirement that "the representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3).

I. FACTS RELEVANT TO THE MOTION

CP Partners owned and operated the Comfort Inn O'Hare hotel from 1997 to April 2003. Located near O'Hare International Airport, the hotel had served primarily business travelers since 1988. The Comfort Inn O'Hare used various methods of

advertising, including direct telephone marketing, in-person solicitations, internet advertising, and fax advertising. The fax advertising at issue in this case involves the use of fax numbers from previous hotel guests, numbers provided through the franchisor, corporate account lists, public directories of service companies and manufacturers, and lists obtained from a third-party vendor. Faxes were directed towards potential guests and to customers with already established business relationships with the Defendant.

Plaintiff seeks recovery under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227 (b)(1)(C). The TCPA, restricts any advertiser from using "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine…" An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. §227 (a)(4).

II LEGAL STANDARD

Class certification is a matter under the broad discretion of the trial court. McCabe v. Burgess, 75 Ill.2d 457, 464 (1979) The class action statute sets out very clearly the requirements for maintenance of a class action:

> Prerequisites for the maintenance of a class action.
> (a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
> (1) The class is so numerous that joinder of all members is impracticable.
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
> (3) The representative parties will fairly and adequately protect the interest of the class.
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801. The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. Gordon v. Boden, 224 Ill. App. 3d 195, 204 (1991).

In cases where there is a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action. Id. at 200.

The Plaintiff moves to classify a group of those recipients of the unsolicited advertisements and alleges that it has met all four requirements of the statute.
CP Partners contests three of the alleged requirements. These will be discussed below.

The Court, however, is required to analyze all four statutory elements. The potential class exceeds 33,000 members. The numerosity requirement is met. See Wood River Area Development Corp. v. Germania Federal Savings and Loan, 198 Ill. App. 3d 445 (1990).

Common Questions of Law and Fact

Rawson puts forth that the common question is whether the Defendant violated the TCPA. He claims that there is a common question of law and fact because the Defendant engaged in a pattern of sending unsolicited fax advertisements. However, CP Partners claims that individual questions of fact predominate because any established business relationship with a fax recipient would preclude a violation of the TCPA. CP Partners also claims that each class member will have to prove that they received the violative fax and that the fax was received on a fax machine, which printed the message.

First, this Court has previously determined that the receipt of the fax on a fax machine that prints the message is not necessarily an element of the federal statute. See Travel 100 Group, Inc. v. Empire Cooler Service, Inc., No. 03CH14510 (Ill. Cir. Ct. Oct. 19, 2004). To be liable under the TCPA, a fax machine must be used to *send* an unsolicited advertisement to a telephone fax machine. 47 U.S.C. §227 (b)(1)(C). The statute does not address the actual printing receipt of the advertisement in order to recover. Therefore, actual receipt of a printed message by members of the putative class is arguably not indispensable.

It is important to note that the TCPA furthers two important governmental interests. The first is preventing the transfer of advertising costs from the merchandiser to the customer. The second is the adverse effect on commerce caused by the unwanted message occupying the telephone lines and equipment of the consumer. While the

automatic printing of the message may not be required, some evidence of receipt must be shown otherwise the purpose of the Congress would be frustrated. For example, damages in a private right of action either equal the actual monetary loss or $500. 47 U.S.C. §227 (b)(3). If a plaintiff never received a fax, no actual monetary loss would be present and damages would not be warranted. However, where the evidence suggests that the sender sent multiple messages contemporaneously by use of automated equipment, actual proof of receipt may not be necessary to accomplish the interests of the statute. Information as to whether the telephone transmission was completed would be particularly within the Defendant's knowledge. There is no evidence of failed calls.

Second, the Defendant argues that individual issues predominate commonality. The Defendant asserts that the defined plaintiff class includes recipients that had an established business relationship with the Comfort Inn O'Hare hotel. Because the TCPA prohibits telephone facsimile messages sent without the recipients "prior express permission or consent," but affords an exception to faxes sent to recipients that have given permission or who have an "established business relationship" ("EBR") with the caller, CP partners contends that the commonality requirement is not met. See 47 U.S.C. § 227 (a)(4). This argument ignores the simple fact that the entities to whom the fax was distributed were not called from any existing database maintained by CP Partners. Rather, the list was purchased from a third party vendor who merely accumulated facsimile telephone numbers.

As noted by this Court in Travel 100 Group, Inc., No. 03CH14510 (Ill. Cir. Ct. October 19, 2004), a question as to this element would not defeat the commonality issue of whether the Defendant violated the TCPA. In a class action, the successful adjudication of the Plaintiff's claim will establish the other class members' right to recover. Society of St. Francis v. Dulman, 98 Ill. App. 3d 16, 18 (1981). Where the defendant is alleged to have acted wrongfully in the same basic manner as to an entire class, common class questions dominate the case. Martin v. Heinold Commodities, Inc., 139 Ill.App.3d 1049, 1060 (1985).

Here, the allegation is that the identical action by the Defendant of using a fax machine to send unsolicited advertisements is wrongful to all class members. The process by which the class members prove that the fax they received was unsolicited establishes

membership in the class. This proof identifies the class, but does not go to the commonality of the question. By certifying this class, this Court is not reaching a finding on the merits of the underlying cause of action, but merely setting the boundaries of the class.

This case can be differentiated from the cases referred to by the Defendant that denied certification due to the class including both, those who had EBRs with the defendant, as well as those who received unsolicited faxes. See Carnett's, Inc. v. Hammond, 610 S.E.2d 529 (Ga. 2005); Kondos v. Lincoln Property Co., 110 S.W.3d 716 (Tex. Ct. App. 2003); Livingston & Westland Marketing, Inc. v. U.S. Bank, 58 P.3d 1088 (Colo. Ct. App. 2002). In those cases, individual inquiries into the facts and circumstances of each recipient's permission to fax were required because the faxes were sent to both those who gave permission and those who did not. This Court also specifically rejects the reasoning of the Georgia Supreme Court in Carnett's, supra. There the Court held there was a possibility that some existing customers may have been included in the facsimile advertising campaign. This possibility defeated class certification. Such an approach is contrary to the intent of Congress as expressed in the TCPA. It is clear to this Court that this legislation scheme was designed to prevent advertisers from transferring their costs to unwilling and unknowing potential customers. Hence, where as here, the advertiser purchased databanks containing facsimile members without editing to identify existing customers, distribution to those machines creates a prima facie violation of the TCPA for all recipients.

Carnett's is also distinguishable from Damas v. Ergotron, Inc., No. 03CH10667 (Ill. Cir. Ct. August 11, 2004), where this Court declined to certify a class of recipients who were frequent recipients of advertising material by mail and telephone facsimile over a long period of time. This Court concluded that this established multiple questions as to the existence of an existing business relationship between the advertiser and the targeted recipient. Here, the Defendant did not limit distribution to customers who stayed at their hotel for even one night. Instead, they distributed materials to more than 30,000 businesses, regardless of prior patronage.

Decisions denying class certification because of uncertainty as to whether certain people in the plaintiff class gave "express invitation or permission," necessitate an

individualized inquiry into each fax. See Foreman v Data Transfer, Inc., 164 F.R.D. 400 (E.D. Pa. 1995); see also Kenro, Inc. v. Fax Daily Inc., 962 F. Supp. 1162 (S.D. Ind. 1997); Carnett's, Inc. v. Hammond, 610 S.E.2d 529 (Ga. 2005); Livingston & Westland Marketing, Inc. v. U.S. Bank, 58 P.3d 1088 (Colo. Ct. App. 2002). Courts denying class certification for this reason seem to resolve the matter based upon a belief that this form of messaging is occasional or sporadic and not an organized program. As noted, the facts before this Court yield that this Defendant purchased fax numbers from a third-party vendor, sending more than 33,000 faxes to targeted businesses from that vendor list. There is nothing to suggest the existing customers were in any way segregated on the list. It appears that if any of those persons received an advertisement, it was fortuitous. The manner in which the Defendant identified these recipients will not require individualized inquiry. Furthermore, if the Defendant had an EBR with certain recipients of the faxes, production of that evidence may have changed the Court's analysis or excluded those parties from the class.

Appropriate Method for the Fair and Efficient Adjudication of Controversy

The Defendant asserts that a class action certification does not allow for a fair or efficient adjudication. The certification will not be fair because of the potential amount of damages which may be awarded represents an amount significantly greater than the actual monetary injury to the class members and is inconsistent with Congress' intent. In addition, the Defendant contends that class certification violates due process.

To determine if class action is the appropriate method for fair and efficient adjudication, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1991). It is this Court's opinion that the economies of time, effort and expense, and uniformity will be served by certifying the Plaintiff's class. The predominate question of the Defendant's violation of the TCPA will be resolved in one forum and thus promote efficiency and uniformity. Litigating the individual lawsuits in the present case would be an inefficient use of judicial resources, and addressing the common issues in

one action would aid judicial administration. See Clark v. TAP Pharm. Prods., Inc., 343 Ill. App. 3d 538, 552 (2003).

As to the Defendant's concerns about the propriety of the amount of damages and Congress' intent, the Court finds helpful and informative the following text from the California Appellate Court:

> "[T]he TCPA damages provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements, but also to address and deter the overall public harm caused by such conduct. ... [T]he TCPA was meant to [(1)] 'take into account the difficult[y] [of] quantify[ing] [the] business interruption costs imposed upon recipients of unsolicited fax advertisements, [(2)] effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of "junk faxes," and [(3)] "provide adequate incentive for an individual plaintiff to bring suit on his own behalf." ' ... [S]tatutory damages designed to address such 'public wrongs' need not be 'confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury ...
>
> "... Congress identified two legitimate public harms addressed by the TCPA's ban on junk faxes: (1) unsolicited fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, at the exclusion of other messages; and (2) junk faxes shift nearly all of the advertiser's printing costs to the recipient of the advertisement... [T]he TCPA's $ 500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring such conduct, is not so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.' " (*Texas v. American Blastfax, Inc., supra,* 121 F. Supp. 2d at pp. 1090-1091.)
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> As another federal court has stated: "[I]n mathematical terms, a $500 penalty for violation of the TCPA is not so high in relation to actual damages as to violate the Due Process clause. ... [E]ven if the actual monetary costs imposed by advertisers upon the recipients of unsolicited fax advertisements [are] small when compared to the $500 minimum penalty for such conduct, that penalty is not so

> 'severe and oppressive' as to run afoul of the Due Process clause." (*Kenro, supra*, 962 F. Supp. at pp. 1166-1167; accord, *ESI Ergonomic Solutions v. United Artists* (2002) 203 Ariz. 94, 100 [50 P.3d 844, 850] (*ESI Ergonomic Solutions*) ["penalty is not so disproportionate to actual damages as to violate due process"].)
> Kaufman v. ACS Systems, Inc., 110 Cal. App. 4th 886, 922-923 (Cal. Ct. App., 2003)

The Defendant argues that a more appropriate and intended manner to adjudicate claims under the TCPA is through each State's attorney general. Defendant relies on In re Trans Union Corporation Privacy Litigation, 211 F.R.D. 328 (N.D. Ill. 2002), to support this contention. However, the court in that case was extremely wary of making such a decision calling its result, "anomalous," applying the stricter federal standard in which unfairness based on disproportionate damages defeated a class certification. In re Trans Union Corp. Privacy Litigation., 211 F.R.D. at 351. There, the class members were approximately 190 million individuals and the statutory damages were set at a minimum of $100. The District Court also commented that the Federal Government had already taken administrative action to end the illegal action complained of by the plaintiff. This fact, the court concluded, vitiated any consumer protection concerns.

The Defendant also argues that because the Plaintiff brought this action as an individual, then presumably any of the potential plaintiffs in the class could also bring their own claim. However, a "controlling factor in many cases is that the class action is the only practical means for class members to receive redress, particularly where the claims are small." Gordon, 224 Ill. App. 3d at 203-204. Here, it appears that forcing the class members to pursue their claims individually will make their claims impractical as they will be required to hire counsel in order to receive an award of $500. This result would seriously undermine the goal of the TCPA scheme.

As noted, the potential class is approximately 33,000 persons who received the illegal facsimile message. The actual loss is difficult to measure but the Defendant claimed the actual cost of receiving a message at fifteen cents. The TCPA's statutory penalty is $500, which results in a potential claim of $16,781,500. On its face this appears to be an enormous disparity. However, to claim that this disparity precludes certification is extremely premature and is based to a great deal on conjecture. Basing a

ruling solely on the disparity also gives the Defendant little incentive to conform its conduct to legal requirements.

The disparity issue is rooted in the concern that great pressure will be placed on defendants to settle such claims in order to avoid financial ruin. See In re Rhone Poulenc Rorer, 51 F. 3d 1293, 1299-1300 (7th Cir. 1995). Henry J. Friendly, Federal Jurisdiction: A General View, 120 (1973). However, the four arguments that support this theory: (1) class actions are not triable; (2) defendants exposure to valid small claims is increased; (3) weak but large claims coerce compromise; and, (4) class actions inherently coerce settlements, are entirely contradictory and not supported by empirical evidence. See Silver, We're Scared to Death: Class Certification and Blackmail, 78 N.Y.U.L. Rev 1357 (2003). These arguments also ignore the fact that the Defendant, if the allegations are proven, broke the law.

Here, the claims can easily be tried. The value of the claims is readily ascertainable and individually, relatively small in number and amount. In addition, it appears the Court has the inherent authority under its power of remitturer to reduce the aggregate amount of the award to avoid the feared consequences, while enforcing the stated goal of the statutory scheme. Parker v. Time Warner Entertainment Company, L.P., 331 F3d 13 (2nd Cir. 2003), Newman, J., concurring at pp 37-47.

Adequate Representation by Proposed Representative, Mr. Rawson

The Defendant argues that the named plaintiff, Mr. Rawson, is not an appropriate class representative. The Defendant contends that Mr. Rawson's business relationship with class counsel creates the appearance of impropriety and due to this relationship asserts that Mr. Rawson cannot carry out his role as a fiduciary for the class.

To determine adequacy of representation, the trial judge must examine two issues: (1) will representation by the proposed class representative protect the absent members of the class who must be afforded due process? Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 339 (1977); and (2) does the attorney have the skill, qualifications and experience to conduct the proposed litigation? Steinberg, 69 Ill. 2d at 339.

Unlike the requirement in Rule 23 of the Federal Rules of Civil Procedure that the claim of the proposed class representative be typical of those of the class, Illinois has

adopted a more liberal approach. Carrao v. Health Care Service Corp., 118 Ill. App. 3d 417 (1st Dist. 1983). Instead, Illinois requires that the representative fairly, adequately and efficiently represent absent class members. Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

This requirement has been defined as a showing that the interest of the proposed class representatives are not antagonistic to those of the absent class members. Thus, issues such as slight variations in the claim, Purcell v. Wardrope Chtd. v. Hertz Corp., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1975), or individualized affirmative defenses, Wenhold v. AT & T, 142 Ill. App. 3d 612, 619 (1st Dist. 1986) will not defeat certification. However, in cases where there is evidence of antagonism or collusion, Hansberg v. Lee 311 U.S. 32 (1940), between the proposed representative and absent class members or a close connection with the lawyer representing the proposed class, Barliant v. Follett Corporation, 74 Ill. 2d 266 (1978), class certification should be scrutinized.

Numerous cases cite policy reasons for denial of class certification, due to the possible conflict of interest between the putative class representative and the putative class attorney. For example, courts fear that a class representative who is closely associated with the class attorney could be more likely to settle in a less than favorable manner to the class members. See Stull v. Pool, 63 F.R.D. 702 (S.D.N.Y. 1974); see also Sussman v. Lincoln American Corp.,561 F.2d 86 (7th Cir. 1977). There is also the risk of champerty when a putative class representative has a close relationship with their attorney. See Sussman,561 F.2d 86. Finally, even the mere appearance of impropriety between a putative class representative and the class attorney has resulted in denial of class certification. Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir. 1976).

Here, the Defendant relies on this Court's decision in Bernstein v. American Family Insurance Company, No. 02CH6905 (Ill. Cir. Ct. July 6, 2005), arguing that class certification should be denied due to Mr. Rawson's relationship with the Edelman firm and the appearance of impropriety. In Bernstein, this Court denied class certification because the class representative selected the Edelman firm as counsel in four other TCPA cases. No. 02CH6905, at *3. This Court reasoned that the cases were brought "not as individual claims by an aggrieved owner of a facsimile machine and telephone line, but

as a skilled litigant who has culled through the numerous invaders of his privacy to select only those who have collectability." Bernstein, No. 02CH6905, at *3. Furthermore, Bernstein, as class representative, was in a position to settle the case in a way that would maintain his business relationship with the firm, but result in a "less than ideal" outcome for the class members. Id. Finally, Mr. Bernstein and the selected law firm had acted as co-counsel on a resolved and at least one pending class action claim. The holding by this Court hinged on the Court's determination that its fiduciary duty to the absent class members might not be properly discharged because of the business and litigation relationships present.

In this case, Mr. Rawson's relationship with the Edelman firm is arguably extensive, as he has filed at least nine other TCPA class action suits, represented by their firm. This, the Defendants assert, alone creates the potential for impropriety. See Bertstein, No. 02CH6905 at *4. The Plaintiff argues that there is nothing inappropriate about Mr. Rawson's history as a litigant or the fact that he is an attorney.

Citing to In re Lupron Marketing and Sales Litigation, 228 F.R.D. 75 (D. Mass. 2005) (holding that a "professional plaintiffs'" experience with prior similar litigation enhances its role as class representative), the Plaintiff argues that courts often prefer repeat plaintiffs because of their knowledge of the legal issues. However, that case can be differentiated from this matter because the so-called "professional plaintiffs" were not represented by the same attorneys on multiple different actions, as here. 228 F.R.D. at 90. In addition, the court found no evidence the plaintiffs actually had litigated multiple other matters.

Furthermore, the Plaintiff asserts that Mr. Rawson's deposition testimony reveals that he would not be willing to settle individually without protecting the interests of the class. Plaintiff's counsel also posits that should Mr. Rawson do so, the requirement that the court approve any settlement would limit any unfair result. This additional protection provided by the Court, alone does not dismiss the requirement that a person representing a class must protect the absent members of the class "with forthrightness and vigor," and cannot appear to have a possible conflict of interest. See Mersay v. First Republic Corp., 43 F.R.D. 465, 470 (S.D.N.Y. 1968); see also Sussman v. Lincoln American Corp., 561 F.2d at 91.

Regardless, in the final analysis, there is nothing to distinguish this Plaintiff from others who for very prudent reasons retain the same counsel for multiple cases. There is no evidence that Mr. Rawson has received any additional compensation or reward in any other case. Nor has there been any question as to the adequacy of any settlement he has negotiated. Finally, there is nothing to suggest that the services he rendered in these other cases were less than required. This situation is distinguishable from that presented in Bernstein, supra., where the attorney and putative class representative had previous and ongoing professional business relationships that, in this Court's opinion, create conditions which might impact adversely on the absent class members.

IT IS HEREBY ORDERED

1. Plaintiff's Motion for Class Certification is GRANTED.

2. The Court certifies the following class:

> All persons who were sent facsimiles of material advertising the commercial availability of any services by or on behalf of C.P. PARTNERS, L.L.C., doing business as COMFORT INN O'HARE and with respect to whom Defendant cannot provide evidence of prior express permission for the sending of such faxes, and which were sent to telephone numbers within Illinois within four years of the date of service of the summons and complaint upon Defendant"

3. This case is continued for case management on October 28, 2005, at 9:45 a.m.

Entered: ______________________________

Judge 1510