UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81386-CIV-MARRA

ALEX JACOBS,

Plaintiff,

vs.

QUICKEN LOANS, INC., a Michigan corporation,

Defendant.
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ORDER DENYING CLASS CERTIFICATION

This cause is before the Court upon Plaintiff's Motion for Class Certification, Appointment of Class Representative and Class Counsel (DE 124); Defendant's Motion to Seal its Motion to Exclude Portions of the Expert Report of Jeffrey A. Hansen (DE 137); Defendant's Motion to Exclude Portions of the Expert Report of Jeffrey A. Hansen (DE 138) and Plaintiff's Motion to Unseal (DE 146). The Court held oral argument on August 25, 2017. The Court has carefully considered the Motions and the arguments of counsel and is otherwise fully advised in the premises.

I. Background

On November 30, 2015, Plaintiff Alex Jacobs ("Plaintiff") filed his First Amended Class Action Complaint ("FAC," DE 17) against Defendant Quicken Loans, Inc. ("Defendant") for violations of the Telephone Consumer Protection Act, 47 U.S.C. 227 et seq. ("TCPA"). The FAC alleges that Defendant made telephone calls, using an automatic telephone dialing system or pre-recorded or artificial voice, to the cellular telephones of Plaintiff and the Class, without their

express consent. According to Plaintiff, Defendant obtained the names, telephone numbers and detailed information about Plaintiff and the Class by purchasing sale leads from Experian Information Solutions, Inc. ("Experian") for the purpose of selling Plaintiff and the Class mortgage services. (Mot. at 3.)

The TCPA prohibits "any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii).

Plaintiffs now seek to certify a class pursuant to Federal Rules of Civil Procedure 23. They propose a class defined as:

> The Prior Express Written Consent Class: all persons within the United States who received a non-emergency telephone call on their cellular telephone initiated by Defendant using Defendant's automatic dialer for which Plaintiff and the Class did not give prior express written consent, from October 16, 2013 through October 6, 2015, including only those persons that are Experian Leads and with whom Defendant never had any prior communications.
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> The Prior Express Consent Class: all persons within the United States who received a non-emergency telephone call on their cellular telephone initiated by Defendant using Defendant's automatic dialer for which Plaintiff and the Class did not give prior express consent, from October 6, 2011 through October 15, 2013, including only those persons that are Experian Leads and with whom Defendant never had any prior communications.

(Mot. at 13.)

Plaintiff asserts that he has met all prerequisites to class certification under Rule 23. In response, Defendant argues that Plaintiff has not met these requirements, especially the predominance requirement in Rule 23(b)(3).

II. Discussion

Rule 23 governs the certification of class actions. Rule 23(a)'s requirements are: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there is a question of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ. P. 23(a). In additional to Rule 23(a), the party seeking class certification "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."[1] Comcast Corp. v. Behrend, 569 U.S. 27, —, 133 S. Ct. 1426, 1432 (2013). Rule 23(b)(2) provides that if Rule 23(a) is satisfied and if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole", a class action may be maintained. Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) 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).

Rule 23 is more than a pleading standard; it requires the party seeking class certification to affirmatively demonstrate compliance with the Rule, and it requires the trial court to engage in a "rigorous analysis" of whether the Rule 23(a) prerequisites have been satisfied. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

With these principles in mind, the Court analyzes whether Plaintiff has affirmatively

[1] Plaintiffs seek certification under Rule 23(b)(2) or (3).

demonstrated Rule 23's requirements for class certification. The Court begins by examining the predominance requirement under Rule 23(b)(3).

The Eleventh Circuit has described the predominance requirement under Rule 23(b)(3) as follows:

> To obtain Rule 23(b)(3) class certification the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof. Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief. On the other hand, common issues will not predominate over individual questions if, as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues. Certification is inappropriate if the plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims. The predominance inquiry requires an examination of the claims, defenses, relevant facts, and applicable substantive law to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant.

Babineau v. Federal Exp. Corp., 576 F.3d 1183, 1191 (11th Cir. 2009) (internal citations, quotation marks, brackets and ellipses omitted).

Pivotal to this analysis is whether Plaintiff has met his burden to show that the issue of consent for the challenged telephone calls can be resolved by common, classwide evidence or whether it is an individualized issue.[2] Dukes, 564 U.S. at 350 (claims must depend on a common contention capable of classwide resolution). Plaintiff claims that, due to the absence of express written consent, there are no individual issues. Furthermore, Plaintiff states that, by limiting the

[2] Many of the problems identified by the Court with respect to predominance also apply to the Rule 23(a) requirement of commonality, although the predominance inquiry is "more demanding." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009).

Class to only those persons with whom Defendant had no prior contact prior to calling them, there can be no individual issues. (Mot. at 25-26.)

Defendant, however, has shown that the issue of consent will require an examination of individual calls because consent is not limited to communications between the Experian leads and Defendant. Evidence produced by Defendant reveals that the Experian leads consented to calls from Defendant in communications with Defendant's affiliates and third-party business partners. Consent from other Experian leads was obtained through a representative, such as a spouse. (Amy Courtney Decl. ¶¶ 50, 53, 58-60, 66-68, DE 136-1; John Henson Decl. ¶¶ 4-13, DE 136-2; James Kearns Decl. ¶¶ 4-27, DE 136-2; Dalita Lara Decl. ¶¶ 2-9, DE 136-2; David Altesleben Decl. ¶ 13, DE 136-1; Joseph Battistelli Decl. ¶¶ 13-14, DE 136-1; Joe Flores Decl. ¶¶ 13-14, DE 136-1.) Because "a consumer's express prior consent may be obtained through and conveyed by an intermediary," an inquiry into consent cannot be limited only to communications between the Experian leads and Defendant. FCC Decl. Ruling 14-33 (Mar. 27, 2014); see also Lawrence v. Bayview Loan Servicing, LLC, 152 F. Supp. 3d 1376, 1380 (S.D. Fla. 2016) (express consent when the borrower gave consent to original servicer who passed along borrower's file when the defendant assumed the administration of the mortgage).

Equally problematic for Plaintiff is that Defendant's evidence shows that the purpose of the telephone calls varied. This is significant because in determining consent, "the trier of fact must determine whether each challenged call was made for a telemarketing purpose. If so, prior express written consent would have been required. If not, prior express written consent need not have been in writing." Newhart v. Quicken Loans Inc., No. 9:15-CV-81250, 2016 WL 7118998, at * 3 (S.D. Fla. Oct. 12, 2016) (citing 47 C.F.R. § 64.1200(a)(2) and In the Matter of Rules &

Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 1830, 1842 (2012)).

Defendant has provided evidence that some calls it made were in response to requests via voicemails, emails, outbound calls, inbound calls or website submissions. (Courtney Decl. ¶¶ 28-68; Altesleben Decl. ¶¶ 9,11,13-18; Battistelli Decl. ¶¶ 6-13; Flores Decl. ¶¶ 7-10, 12-13, 15-17.) Other telephone calls were follow-up calls regarding loan applications. (Altesleben Decl. ¶¶ 10-12; Battistelli Decl. ¶¶ 18; Flores Decl. ¶¶ 15-17.) In other words, some of the telephone calls either were not initiated by Defendant or did not constitute telemarketing. See Newhart, 2016 WL 7118998, at * 4 (calls that do not encourage the purchase of goods or services or calls requested by a client are not telemarketing calls). Once there has been a determination regarding the nature of call, then an inquiry regarding whether individuals consented to the telemarketing calls must be undertaken. It is likely that a manual review of records will be needed, as well as the testimony of the borrowers to inquire into consent. Id. at * 4-5. This is especially the case here because there are a number of ways that consent could be obtained (calls, voicemails, emails). Furthermore, consent can be inferred from acts or events, and can be partially revoked. See Lawrence, 666 F. App'x at 880 (the plaintiff "provided apparent consent by repeatedly providing his cell phone number to [the defendant] without qualification"); Schweitzer v. Comenity Bank, — F.3d —, 2017 WL 3429381, at * 1 (11th Cir. Aug. 10, 2017) (the TCPA permits a consumer to partially revoke consent to called by an automatic telephone dialing system).

Next, the Court concludes that evidence relating to the "called party" will also require individualized evidence. Under the TCPA, only the subscriber (the consumer assigned the

number and billed) or the non-subscriber's customary user included in the calling plan can be the called party under the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8000-01 ¶ 73 (2015); see Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014). As explained by Defendant's expert, Jan Kostyun, there is no public database of cell phone subscribers, and private services are often inaccurate and incomplete. (Kostyn Report ¶¶ 14-15, DE 136-1.) Additionally, even if a carrier-by-carrier investigation was undertaken, it still would not ensure accuracy. (Id. at ¶¶ 16-19.) See Shamblin v. Obama for Am., No. 8:13–cv–2428–T–33TBM, 2015 WL 1909765, at * 7 (M.D. Fla. Apr. 27, 2015) ("there can never be common answers to the questions of whether [ ] the telephone number dialed was assigned to a cellular telephone at the time of the call").

The Court is less persuaded by Plaintiff's evidence. For example, Plaintiff's expert, Jeffrey Hansen, did not address the issue of consent head-on. Instead, he conflated this issue with the issue of identifying call recipients with no prior contact. (Hansen Report ¶¶ 25-33, DE 124-6.) As discussed above, however, these two issues are not the same because consent could be given by someone other than the subscriber, such as a third-party affiliate, or spouse of a call recipient. Moreover, unlike Defendant's evidence, Hansen's report, as well as other evidence submitted by Plaintiff, cited to the less credible deposition testimony of Defendant's corporate representatives[3] as opposed to challenging the voluminous evidence submitted by Defendant and

[3] Oddly, Hansen's citation to deposition testimony relies more on the deposition testimony from Defendant's corporate representative deposed in a different case, not in the present case. (Hansen Report ¶ ¶25, 27-28, 33, 40, 44.)

its expert in response to the class certification motion.[4] (Kevin Lang Dep., DE 124-17; William Emerson, DE 124-5.) In addition, many of Plaintiff's arguments regarding the potential class are based on speculation and fueled by a common sense belief that the class certification requirements are met, as opposed to being grounded in evidence.[5] (Mot. at 18; Hansen Report ¶ ¶ 24-25.)

To the extent Plaintiff seeks to change his class definition on the basis of the arguments raised by Defendant, the Court finds that permitting this would prejudice Defendant who conducted discovery and provided briefing based on the current class definition. See, e.g., Davis v. AT&T Corp., No. 15-2342, 2017 WL 1155350, at *4 (S.D. Cal. Mar. 28, 2017) (denying amendment of class in a TCPA action based on prejudice to the defendant when plaintiff sought to certify an amended class definition that was not previously before the court).

Nor does Plaintiff fair any better by proceeding under Rule 23(b)(2). Claims for monetary relief may not be certified under this provision where the monetary relief is not incidental to the injunctive or declaratory relief. Davis, 564 U.S. at 360. Here, the predominant

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[4] For example, Hansen states that, by using an outside service, he has been able to identify users of particular telephone numbers, but does not address the problems with those outside services identified by Kostyun, Defendant's expert. (Hansen Report ¶ 34.) See, e.g., Sherman v. Yahoo, No. 13-0041, 2015 WL 5604400, at *5-6 (S.D. Cal. Sept. 23, 2015) (records from a cell phone provider and use of reverse lookup systems fail to demonstrate an "administratively feasible method of identifying the putative class members").

[5] For example, Plaintiff's expert stated that based on his review, it was his opinion that "to a very high degree of certainty" one could query Defendant's databases to determine the existence of prior communications. (Hansen Report ¶ 25.) In reviewing telephone numbers provided to him, Plaintiff's expert stated "Of the 4004 unique numbers [Defendant] identified as cellular numbers[,] 1293 were actually landline[s]. Based on my experience[,] this would also mean that a substantial percentage of numbers which are identified in [Defendant's] databases as landline numbers may actually be cellular numbers." (Id. at ¶ 24(k).)

relief is monetary, and Plaintiff's claim arises from one telephone call. Plaintiff does not explain how injunctive relief is primary. See Connelly v. Hilton Grand Vacations Co., LLC, 294 F.R.D. 574, 579 (S.D. Ca. 2013) (finding the plaintiff's TCPA claim ineligible for class certification under Rule 23(b)(2) when each plaintiff was entitled to statutory damages, regardless of request for injunctive relief).

III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1) Plaintiff's Motion for Class Certification, Appointment of Class Representative and Class Counsel (DE 124) is **DENIED**.

2) Defendant's Motion to Seal its Motion to Exclude Portions of the Expert Report of Jeffrey A. Hansen (DE 137) is **GRANTED**. Sealing this motion is consistent with the Court's prior sealing orders. The parties shall file a redacted version of the motion.

3) Defendant's Motion to Exclude Portions of the Expert Report of Jeffrey A. Hansen (DE 138) is **GRANTED**. The Court finds the proposed redactions are appropriate and limited in nature.

4) Plaintiff's Motion to Unseal (DE 146) is **DENIED**. The Court finds the

proposed redactions are appropriate and limited in nature.[6]

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 19th day of October, 2017.

KENNETH A. MARRA
United States District Judge

[6] DE 142 is not a motion and the Clerk shall terminate it for statistical purposes.