1 of 4 DOCUMENTS

DOUGLAS JULY, et al., Plaintiffs, v. BOARD OF SCHOOL COMMISSIONERS, etc., et al., Defendants.

CIVIL ACTION 11-0539-WS-B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

2013 U.S. Dist. LEXIS 74500

May 28, 2013, Decided

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OPINION
[*1]

ORDER

This matter is before the Court on the plaintiffs' motion for class certification. (Doc. 58). The parties have filed briefs and evidentiary materials in support of their respective positions, (Docs. 52, 59, 67, 68, 73, 74),1 and the motion is ripe for resolution. After careful consideration, the Court concludes that the motion is due to be denied.

BACKGROUND

According to the complaint, (Doc. 1), the seven named plaintiffs are African-Americans who are or were employed by the entity defendant ("the Board") as assistant principals.2 While some of the plaintiffs have served as principals, the Board "has never allowed" any of them to serve as principal of a school with a predominantly white student body. This is because the Board "largely excludes African-Americans from the position of principal at schools which have predominantly White student bodies, and segregates

1The plaintiffs' unopposed motion to exceed the page limitation applicable to reply briefs, (Doc. 72), is **granted**. The defendants' motion to strike affidavits, (Doc. 66), is **denied**.

2 The complaint also names Roy D. Nichols, Jr., as a defendant, both in his individual capacity and in his official capacity as Board superintendent. [*2] (Doc. 1 at 6). The plaintiffs later dropped Nichols as a defendant in his individual capacity and substituted his successor, Martha L. Peek, in her official capacity. (Docs. 37, 39).

African-Americans by limiting them to principalships of schools which have predominantly African-American student bodies." (*Id*. at 13-14). The complaint advances theories of "disparate impact and the pattern and practice of racial discrimination." (*Id*. at 14). The single count of the complaint alleges race discrimination and segregation in employment in violation of Section 1981 (via Section 1983) and Title VII. (*Id*. at 22-24). The plaintiffs seek, for each member of the class, a declaration that the Board's employment practices have and do violate their legal rights; a

permanent injunction against continued violations of Title VII and Section 1981; and make-whole relief in the form of back pay (including fringe benefits and interest), front pay, offers of promotion and compensatory damages. (*Id*. at 25-26).

The plaintiffs seek to represent a class defined as follows: "All present and former African-American employees of the School Board who, at any time since September 16, 2007, have held a certificate issued [*3] by the Alabama State Department of Education qualifying them to be a principal in Mobile County." (Doc. 58 at 2).3

DISCUSSION

"The burden of proof to establish the propriety of class certification rests with the advocate of the class." *Valley Drug Co. v. Geneva Pharmaceuticals, Inc*., 350 F.3d 1181, 1187 (11th Cir. 2003). "Questions concerning class certification are left to the sound discretion of the district court." *Cooper v. Southern Co*., 390 F.3d 695, 711 (11th Cir. 2004), *overruled in part on other grounds, Ash v. Tyson Foods, Inc*., 546 U.S. 454, 457-58 (2006).

"For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *Klay v. Humana, Inc*., 382 F.3d 1241, 1250 (11th Cir. 2004). The Court

3 This opening date is exactly four years prior to the filing of the lawsuit. It is almost two years earlier than the August 4, 2009 date proposed in the complaint. (Doc. 1 at 6). Neither side has remarked on the inconsistency.

pretermits consideration of standing and Rule 23(a) because it [*4] is plain that the plaintiffs cannot satisfy any of the Rule 23(b) alternatives.

Rule 23(b) provides three routes to class certification, the second and third of which the plaintiffs invoke.

A class action may be maintained if Rule 23(a) is satisfied and if:

...

(2) 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; or

(3) the court finds 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). The plaintiffs argue that class certification is appropriate under Rule 23(b)(2), Rule 23(b)(3), or by a combination of both.

A. Pattern or Practice.

Because it figures prominently in the plaintiffs' argument, the Court pauses to consider the contours of a pattern-or-practice theory in an employment discrimination context.

Pattern or practice is one of two theories available to a Title VII plaintiff to prove intentional discrimination. [*5] *Cooper*, 390 F.3d at 723. Under this theory, "the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's standard operating procedure." *Id*. at 724 (internal quotes omitted). "A pattern or practice claim may be brought under § 1981 as well as Title VII, in which case Title VII's substantive rules

inform the § 1981 rules of decision."

Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 965 n.17 (11thCir. 2008).

Title VII expressly authorizes the EEOC to bring a pattern or practice claim on behalf of a group. 42 U.S.C. § 2000e-6(a), (c). But "[a] pattern or practice claim ... may also be brought under Title VII as a class action ...." *Davis*, 516 F.3d at 965. Such a claim may be brought as a class action under Section 1981 as well. *Id*. at 965 n.18.

3

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the government brought a pattern-or-practice claim under Section 2000e-6. The Supreme Court explained that such an action proceeds in two stages or phases. In "the initial, 'liability' stage," the plaintiff attempts to show that "unlawful discrimination has been a regular procedure or policy followed by an employer [*6] ...." *Id*. at 360. If that case is made and not rebutted by the employer, "a trial court may then conclude that a violation has occurred and determine the appropriate remedy." *Id*. at 361. The remedy sought determines the proceedings necessary to its award.

"Without any further evidence from the [plaintiff], a court's finding of a pattern or practice justifies an award of prospective relief," including an injunction against further violations. *Teamsters*, 431 U.S. at 361. But if "individual relief" is sought, "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id*. At this "second, 'remedial' stage of trial," the "proof of the pattern or practice [established in the first phase] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id*. at 362. The plaintiff thus "need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Id*.4 Once the plaintiff has done so, "the burden then rests on the employer [*7] to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id*.

The *Teamsters* paradigm is still the law, and it applies to class actions asserting a pattern or practice theory. *Davis*, 516 F.3d at 966.

B. Rule 23(b)(2).

"Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of candidates for Rule 23(b)(2) certification.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997). The plaintiffs rely on this

4 As to non-applicants, each plaintiff must show that "he would have applied for the job had it not been for those [discriminatory] practices" of the employer. *Id*. at 364, 368.

4

and similarly generic statements to argue that their class may be certified under subsection (b)(2). (Doc. 59 at 28-30). They ignore the Supreme Court's more recent ruling in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), at their peril.

In *Dukes*, the High Court held that "claims for monetary relief may [not] be certified under" Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." 131 S. Ct. at 2557. In *Dukes*, as here, the plaintiffs alleged a pattern or practice [*8] of discrimination under Title VII. *Id*. at 2552. As here, the *Dukes* plaintiffs sought back pay in addition to injunctive and declaratory relief but nevertheless requested certification under Rule 23(b)(2). *Id*. at 2547. The Supreme Court refused, concluding that the requested back pay relief was not incidental to the prospective relief. *Id*. at 2557.

Even prior to *Dukes*, the Eleventh Circuit recognized that "monetary relief ... is only available in a Rule 23(b)(2) class action if it is incidental to the requested injunctive or declaratory relief." *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1265 n.8 (11th Cir. 2009). After the defendants pointed this out in their opposition, (Doc. 67 at 11), the plaintiffs suggested that their request for monetary relief is incidental because, under

Teamsters, it does not become an issue until the second phase, after injunctive and declaratory relief has been granted in the first phase. (Doc. 73 at 11-12). But *Dukes* precludes this argument as well.

Rule 23(b)(2), the *Dukes* Court ruled, "does not authorize class certification when each class member would be entitled to an individualized award of money damages," 131 S. Ct. at 2557, and a Title VII defendant in [*9] a pattern or practice case "is entitled to individualized determinations of each employee's eligibility for backpay." *Id*. at 2560. The *Dukes* Court acknowledged the staggered proceedings applicable to pattern or practice cases under *Teamsters* but did not consider the mere temporal priority of injunctive relief to justify deeming second phase determinations of back pay to be incidental under Rule 23(b)(2). Instead, the Court ruled as follows:

We have established a procedure for trying pattern or practice cases that gives effect to these statutory requirements [of Section

5

2000e-5(g) that back pay cannot be awarded when the employer proves

it took action against the employee for any reason other than discrimination]. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." *Teamsters*, 431 U.S. at 361 .... At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied [*10] an employment opportunity for lawful reasons." *Id*. at 362 ....

... [A] class cannot be certified on the premise that [the employer] will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, arguendo, that "incidental" monetary relief can be awarded to a 23(b)(2) class.

131 S. Ct. at 2561. The Board has asserted that "[a]ll employment decisions made by

Defendant were made upon the basis of factors other than race." (Doc. 9 at 6). Under

Dukes, the Board's entitlement to offer such proof on an individual basis dooms the plaintiffs' request for certification under Rule 23(b)(2).5

Even prior to *Dukes*, the Eleventh Circuit recognized that, when compensatory damages are sought, certification under Rule 23(b)(2) is difficult if not impossible.6 In

5Prior to *Dukes*, the Eleventh Circuit ruled that "[b]ack pay is considered equitable relief and can therefore be awarded in a case certified under Rule 23(b)(2)." *Cooper*, 390 F.3d at 720. The Supreme Court, however, noted that Rule 23(b)(2) speaks of injunctions and [*11] declaratory judgments, not of equitable relief generally. Because back pay is neither declaratory nor injunctive relief, "it is irrelevant" that it may be considered an equitable remedy. 131 S. Ct. at 2560.

6*See, e.g.*, *Davis*, 516 F.3d at 965 n.18 (when a plaintiff seeks compensatory and punitive damages under Section 1981 as well as back pay under Title VII, "[t]he maintenance of a Rule 23(b)(2) class action for all the relief these two

statutes together afford is problematical."); *Murray v. Auslander*, 244 F.3d 807, 812 (11thCir. 2001) (where ADA plaintiffs sought compensatory damages for pain and suffering, emotional distress and humiliation, Rule 23(b)(2) certification was inappropriate because all class members "would not be automatically entitled" to such damages and because "assessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances"); *see also Cooper*, 390 F.3d at 720 (where Title VII plaintiffs sought compensatory and punitive damages, Rule 23(b)(2) certification was inappropriate under *Murray*).

6

addition to back pay, the complaint also demands compensatory damages for each class member, underscoring the impropriety [*12] of certification under this rule.

C. Rule 23(b)(3).

The two indispensable requirements for certification under Rule 23(b)(3) are predominance and superiority. The Court need not reach the second requirement because the first is not satisfied.

"In determining whether class or individual issues predominate in a putative class action suit, we must take into account the claims, defenses, relevant facts, and applicable substantive law ...." *Klay*, 382 F.3d at 1254. The defenses to be considered include affirmative defenses. *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc*., 601 F.3d 1159, 1176-77 (11thCir. 2010). "[T]he Rule requires a pragmatic assessment of the entire action and all the issues involved." *Williams v. Mohawk Industries, Inc*., 568 F.3d 1350, 1357 (11thCir. 2009) (internal quotes omitted).

The point of this review is "to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Klay*, 382 F.3d at 1254. "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 [*13] and monetary relief." *Id*. at 1255 (internal quotes omitted). Ordinarily, "that individualized determinations are necessary to determine the extent of damages allegedly suffered by each plaintiff" is of itself "insufficient to defeat class certification under Rule 23(b)(3)." *Id*. at 1259. Instead, "[i]t is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification." *Id*. at 1260. As another way of looking at the question of predominance, "if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues (made relevant only through the inclusion of these new class members) are important." *Id*. at 1255.

7

The plaintiffs identify the common question as whether the Board engaged in a pattern or practice of assigning principals based on race. (Doc. 59 at 32, 33). There are in addition, however, a number of individualized questions - addressing both liability and damages - that prevent this single common question from predominating.

As noted in *Teamsters* and *Dukes*, the existence of a [*14] pattern or practice of discrimination does not of itself entitle any particular plaintiff to back pay or other monetary relief. On the contrary, the Board "is entitled to individualized determinations of each employee's eligibility for backpay." *Dukes*, 131 S. Ct. at 2560. There are at least two steps in this process. First, each plaintiff must separately establish that he or she applied for a particular position or would have done so but for the Board's discriminatory practices. *Teamsters*, 431 U.S. at 367-68. This is a "difficult task," and it must be undertaken "with respect to each specific individual." *Id*. at 364, 371. Second, since proof of the pattern or practice supports an inference that any individual decision was the product of discrimination but does not conclusively resolve the issue, *id*. at 362, the Board may attempt to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id*.; *accord Dukes*, 131 S. Ct. at 2561. As the *Teamsters* Court observed, "[t]he court will have to make a substantial number of individual determinations in deciding which of the

minority employees were actual victims of the company's discriminatory practices." [*15] 431 U.S. at 371-72.

As noted, the Board intends to offer such evidence. Indeed, the Board argues that its evidence of the reasons for the selection of a particular principal and for the non-selection of a particular class member will be unique for each, not only because each candidate is different but also because the relevant factors - including without limitation a school's student body, its faculty, and the community it serves - vary between schools and vary over time within a given school, as do outside agency requirements. (Doc. 67 at 14). The plaintiffs do not challenge this assertion, which suggests an almost endless procession of evidence, unique to each class member and to each decision, thereby amplifying the individual liability determinations that must be made.

8

The plaintiffs acknowledge that these are individual issues. (Doc. 73 at 15). However, pointing to *Teamsters*' staged analysis, they insist that these individualized questions are "not relevant to the issue of liability" for purposes of *Klay*'s predominance analysis because they "cannot arise until after a finding of liability." (*Id*. at 14-15). The plaintiffs appear to believe that only the first stage under *Teamsters* [*16] concerns liability. But *Teamsters*' description of the first phase as the "liability stage" and of the second phase as the "remedial stage" does not magically convert all second-phase questions into damages issues. As noted, pattern or practice is a theory of intentional discrimination, and an employer cannot be liable to an individual under that theory without a finding of discrimination against that individual. Such a finding cannot be made until after the individual plaintiff has shown that he or she applied (or would have done so but for the unlawful practice) and until after the defendant has presented its evidence that the plaintiff was or would have been denied the position for non-discriminatory reasons. These questions are precursors to damages in the sense that all questions concerning liability are, but they are not "damages issues" any more than is the color of the traffic light in a personal injury case. The *Dukes* Court made this clear when it described the issues to be decided in the second phase as "*liability* for sex discrimination and the backpay owing as a result." 131 S. Ct. at 2561 (emphasis added).

In addition to these substantial individual issues concerning liability [*17] are the individual issues concerning damages. The complaint seeks compensatory damages for each class member. The plaintiffs identify these damages as including emotional distress. (Doc. 59 at 14 n.4). Their effort to recover such damages "must 'focus almost entirely on facts and issues specific to individuals rather than the class as a whole,'" including "'how did [the discrimination] affect each plaintiff emotionally and physically at work and at home.'" *Rutstein v. Avis Rent-A-Car Systems, Inc*., 211 F.3d 1228, 1240 (11th Cir. 2000) (quoting *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 419 (5th Cir. 1998)). And since the reality and quantum of emotional distress depends in part on physical and other manifestations, individual proof of "what treatment did each plaintiff receive and at what expense" will be injected, "and so on and so on." *Allison*, 151 F.3d at 419. "Under such

9

circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." *Id*. (internal quotes omitted); *see also Cooper*, 390 F.3d at 721 ("[D]etermining the level of damages to which each class member was entitled plainly would require detailed, [*18] case-by-case fact finding, carefully calibrated for each individual employee.").7

Under *Klay*, upon which the plaintiffs rely, the single common issue they raise does not predominate. First, "[i]t is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification," 382 F.3d at 1260 and this case presents both multiple significant individualized questions going to liability and multiple significant individualized assessments of damages. Second, the addition of each new plaintiff "requires the presentation of significant amounts of new evidence," *id*. at 1255, because each new plaintiff must introduce separate, individualized evidence that she applied for a position as principal at a predominantly white school (or that she would have applied but for the Board's discriminatory practice) and of the existence, length and severity of the emotional distress she has experienced as a result of the discrimination,

and because the defendant will, for each new plaintiff, be entitled to present separate, individualized evidence as to why that plaintiff was not, or would not have been, [*19] selected for a particular position. Third, common issues 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," *id*. at 1255 (emphasis added), but the existence of a pattern or practice of discrimination does not have a direct impact on each class member's entitlement to monetary relief, only the incidental impact of not precluding such relief.

7Also to be considered in evaluating claims of emotional distress in the Title VII context is whether the plaintiff lost the esteem of her peers. *Akouri v. Florida Department of Transportation*, 408 F.3d 1338, 1345 n.5 (11thCir. 2005). Of course, the defendant may also introduce evidence of mitigating circumstances. *Id*.

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The parties have cited no binding case addressing certification of a Title VII pattern or practice case under Rule 23(b)(3).8 The Court has found a single example, and it is not favorable to the plaintiffs.

In *Cooper*, the plaintiffs brought suit under Title VII and Section 1981, alleging a pattern or practice of race discrimination. 390 F.3d at 702-03. The Eleventh Circuit found no abuse of discretion in the trial [*20] court's determination that the plaintiffs' evidence did not support the pattern-or-practice predicate of their claim. *Id*. at 719. But the Court went on to rule that, even had there been an abuse of discretion in this regard, certification under Rule 23(b)(3) was still properly denied because "the individual determinations on liability and damages necessary for the individual plaintiffs to succeed would require highly fact-specific inquiries concerning each plaintiff." *Id*. at 720, 722-23. Despite its vagueness, *Cooper* suggests that the mere existence of a pattern or practice does not satisfy the predominance inquiry even in a *Teamsters* scenario.

Two other Eleventh Circuit opinions have rejected certification under Rule 23(b)(3) when it was sought based on an overarching policy of discrimination. In

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11thCir. 1997), the plaintiffs alleged a practice or policy of refusing to rent to non-whites, segregation of non-white guests, and provision of substandard services to non-white guests, in violation of Title II and Section 1981. *Id*. at 1001-02. The Court held that the common issue of the existence vel non of such a practice or policy did [*21] not predominate over the individual issues because, even were such a policy to be proved, the class members' claims "will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." *Id*. at 1006. In *Rutstein*, the plaintiffs alleged a policy or practice of discrimination against Jewish individuals and businesses with respect to business accounts, in violation of Section 1981. 211 F.3d at 1230, 1232, 1235. The Court again

8 This is not terribly surprising since, until the passage of Section 1981a in 1991, a Title VII plaintiff could not recover compensatory or punitive damages and since, until *Dukes* was decided in 2011, back pay was recoverable in a Rule 23(b)(2) class action due to its equitable nature. The Eleventh Circuit confirmed in 2000 that only equitable relief had ever been sought under the *Teamsters* paradigm. *Rutstein*, 211 F.3d at 1239.

11

held that the common issue of this policy did not predominate over individual issues concerning each class member's effort to establish such an account, because the policy of discrimination, even if proved, "cannot establish that the company intentionally discriminated against every member of [*22] the putative class." *Id*. at 1235-36.

The problem is similar under Title VII. While a pattern or practice established under *Teamsters* carries more evidentiary significance than one established in other contexts, as discussed above it does not of itself establish that the

defendant discriminated against any particular person. Thus, before the defendant can be declared liable to any class member for monetary or other individual relief, the class member must, and the employer may (and here, will) introduce substantial additional evidence particular to that class member. Except for the burden of proof being shifted to the employer, this scenario is no different than it was in *Jackson* or *Rutstein*. The individual issues concerning damages tilt predominance even further away from the plaintiffs.

Several sister courts within the Circuit have reached similar conclusions. In *Reid v. Lockheed Martin Aeronautics Co*., 205 F.R.D. 655 (N.D. Ga. 2001), the plaintiffs alleged a pattern or practice of discrimination under Title VII and Section 1981. *Id*. at 657-58. The Court concluded that the common issue of the pattern or practice did not predominate over individual issues. *Id*. at 681-86. Like this Court, [*23] the *Reid* Court identified "[t]he true problem with certifying Plaintiffs' discrimination claims under Rule 23(b)(3) [as] not merely a question of relief but a question of liability itself." *Id*. at 684. "Claims of discrimination, in employment or elsewhere, depend heavily on the specific circumstances and conditions in which the victim finds himself or herself. An individual's qualifications, experience, and background for a particular job or contract must be considered in any case where discrimination is alleged. [citations omitted] Such individual issues are present in every employment discrimination claim regardless of the type of relief sought, although claims for damages certainly enhance such issues. This is especially true where the plaintiffs' claims involve allegations of discrimination in promotions ..., which are by their very nature extremely individualized and fact-intensive claims." *Id*.

12

The *Reid* plaintiffs, like the plaintiffs here, argued that the *Teamsters* presumption "renders predominant ... the common issue of Defendants' alleged pattern and practice of discrimination." 205 F.R.D. at 685. But, the *Reid* Court responded, cases employing

Teamsters "almost uniformly" concern [*24] certification under Rule 23(b)(2), where the predominance of common or individual questions is immaterial. *Id*.9 As long as certification is sought under Rule 23(b)(2), "the particularized issues inherent in employment discrimination claims matter little to the class certification decision." *Id*. "Once under the framework of Rule 23(b)(3), on the other hand, these same issues present intrinsic problems for class certification that must be overcome by those seeking certification, no matter what type of relief is sought." *Id*.

In *Adler v. Wallace Computer Services, Inc*., 202 F.R.D. 666 (N.D. Ga. 2001), the plaintiffs claimed a pattern or practice of sex discrimination in violation of Title VII. *Id*. at 669. The Court ruled that the defendant's "pattern and practice of discrimination may be relevant in a particular case, but it does not establish that the company discriminated against each member of the putative class." *Id*. at 672. "Individual issues still exist," including the requirement that each class member prove she experienced an adverse employment action and the defendant's "opportunity to show that the employee was refused a promotion, paid less, or terminated for a legitimate nondiscriminatory [*25] reason."

Id. "These individual issues related to liability," *id*., and they "predominate over the one common issue noted by Plaintiffs - [the employer's] alleged pattern and practice of discrimination." *Id*. Moreover, "[t]he predominance problem here is compounded by the fact that the compensatory and punitive damages requested require individualized proof."

Id. at 673.

In *Faulk v. Home Oil Co*., 186 F.R.D. 660 (M.D. Ala. 1999), the plaintiffs brought suit under Title VII asserting a pattern or practice of race discrimination. *Id*. at 661, 663. The Court refused certification under Rule 23(b)(3) despite this allegation, noting that "[q]uestions affecting individual members, such as how they were discriminated against

9 While leaving room for a possible exception, the *Reid* Court cited no case applying *Teamsters* in a Rule 23(b)(3) context.

13

and how it affected them individually, involve not merely 'separate issues concerning damages,' but differences in whether individual members can prove their claims." Id. at 664. Moreover, "[e]ntitlement to recovery on the plaintiffs' claims for compensatory and punitive damages will come not merely from a finding of liability on the common issues, but from [*26] individualized proof of actual injury." *Id*.

For reasons already stated, the Court finds itself in agreement with its brethren in

Reid, *Adler* and *Faulk*. The plaintiffs understandably cite none of these decisions. Instead, they present several trial court opinions from the District of Columbia, all for the proposition that predominance automatically exists any time a single issue or element of a claim may be established by common proof. Whatever the relative merits of such an approach, it is decidedly not the law of this Circuit.

The plaintiffs also offer the Supreme Court's recent opinion in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 131 S. Ct. 1184 (2013). According to the plaintiffs, *Amgen* stands for the proposition that, if the plaintiffs' failure to prove a threshold common issue would doom the lawsuit (as when the common issue is an essential element of the claim), the common issue necessarily predominates over subsequent individual issues. (Doc. 73 at 13-14). But *Amgen* says no such thing. The

Amgen Court ruled only that, if the failure of the threshold common issue would end the lawsuit, individual issues *generated by that failure* cannot predominate because the failure [*27] of the lawsuit means they will never be reached. *Id*. at 1196.10 Here, the many individual issues in this case do not arise only upon the plaintiffs' failure to prove a pattern or practice; they are present even if such a pattern or practice is proved and therefore must be weighed in measuring predominance.

10 In *Amgen*, the common issue was materiality. Failure to prove materiality would preclude the plaintiffs from proving reliance on a group basis, because it would eliminate any fraud-on-the-market theory. Thus, failure to prove materiality would require individual proof of reliance. But, since materiality was also an essential element of the securities fraud claim, failure to prove materiality would end the lawsuit without the individual reliance issues being reached. 131 S. Ct. at 1195-96.

14

Certification of Title VII pattern-or-practice class actions under Rule 23(b)(2) remains freely available, although the attractiveness to plaintiffs of this approach is diminished now that *Dukes* precludes the recovery of back pay or other individual monetary relief in such an action. As this case reflects, certification of a Title VII pattern-or-practice class action under Rule 23(b)(3) is extremely [*28] problematic. Whether these restrictions on the use of the class action vehicle in employment discrimination cases represent good policy is for others to debate; the Court's task is to apply Rule 23 in light of the governing principles. Having done so, the Court concludes that common issues do not predominate and that certification under Rule 23(b)(3) must therefore be denied.

D. Hybrid Certification.

The plaintiff proposes that the Court certify a class under Rule 23(b)(2) as to their claim for declaratory and injunctive relief and another class under Rule 23(b)(3) as to their claim for monetary relief. (Doc. 59 at 37). Since, as addressed in Part C, there can be no certification under Rule 23(b)(3), neither can there be certification under both that rule and Rule 23(b)(2).

E. Disparate Impact.

The plaintiffs' briefing focuses on pattern or practice but contains isolated references to disparate impact. (Doc. 59 at 16, 21-22, 26, 34). The Court thus assumes that the plaintiffs seek certification based on a disparate impact theory.

"To prove disparate impact, a plaintiff *must* establish ... a specific, facially neutral employment practice ...." *Cooper*, 390 F.3d at 716 (emphasis in original). The [*29] plaintiffs, however, identify no practice displaying these qualities. According to the plaintiffs, the Board selects principals based on the recommendation of the superintendent, with the superintendent recommending principals based on the racial composition of the student body and on the wishes of the Board member representing the area in which the school is located - with the African-American Board members insisting

15

that African-Americans be named principals of predominantly African-American schools. (Doc. 59 at 5-6, 10-12). There is nothing remotely neutral about this practice; it is overtly racial.

"Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Babineau v. Federal Express Corporation*, 576 F.3d 1183, 1190 (11th Cir. 2009) (internal quotes omitted). "Commonality [as demanded by Rule 23(a)(2)] requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams*, 568 F.3d at 1355. The plaintiffs [*30] identify the common issue for purposes of their disparate impact theory as their evidence of statistical disparity between the ranks of African-American employees qualified for a principal position and the representation of African-Americans as principals of predominantly white schools. (Doc. 59 at 16-17). However, without a specific, facially neutral practice on the table to which the disparity may be traced, the existence of the disparity cannot affect the class and thus cannot satisfy the commonality requirement.

Even had the plaintiffs identified a specific, facially neutral practice, the common issue of its disparate impact would not predominate over the individual issues still to be decided. After a disparate impact violation is established, in order to obtain individual relief a plaintiff must "sho[w] that he or she was within the class of persons negatively impacted by the unlawful employment practice," and "then the employer must be given an opportunity to demonstrate a legitimate nondiscriminatory reason why, absent the offending practice, the individual plaintiff would not have been awarded the job or job benefit at issue anyway." *In re: Employment Discrimination Litigation*, 198 F.3d 1305, 1315 (11th Cir. 1999). [*31] This structure echoes the second *Teamsters* phase11 and, combined

11 As the plaintiffs' own authority puts it, "in order for an employee to obtain individual relief (e.g., back or front pay), an inquiry similar to the remedial stage of a pattern-or-practice disparate treatment claim is generally required." *Robinson v. Metro-North Commuter Railroad Co*., 267 F.3d 147, 161 (2ndCir. 2001) (citing*In re: Employment Discrimination Litigation*).

16

with the individualized issues concerning damages, proves fatal to predominance of the common issue on grounds more fully discussed in Part C.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion for class certification is

denied.

DONE and ORDERED this 28th day of May, 2013.

s/ WILLIAM H. STEELE

CHIEF UNITED STATES DISTRICT JUDGE

17

2 of 4 DOCUMENTS

JOHNNY O'CONNOR, Plaintiff, vs. DIVERSIFIED CONSULTANTS, INC., Defendant.

Case No. 4:11CV1722 RWS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

2013 U.S. Dist. LEXIS 74469

May 28, 2013, Decided
May 28, 2013, Filed

COUNSEL: [*1] For Johnny O'Connor, Plaintiff: Richard A. Voytas, Jr., LEAD ATTORNEY, James W. Eason, EASON AND VOYTAS, LLC, St. Louis, MO.

For Diversified Consultants, Inc., Defendant: Steven R. Dunn, PRO HAC VICE, THE DUNN LAW FIRM, Dallas, TX; Patrick T. McLaughlin, SPENCER AND FANE, LLP, St. Louis, MO.

JUDGES: RODNEY W. SIPPEL, UNITED STATES DISTRICT JUDGE.

OPINION BY: RODNEY W. SIPPEL

OPINION

MEMORANDUM AND ORDER

Plaintiff Johnny O'Connor brought suit against Defendant Diversified Consultants, Inc. on his own behalf and on behalf of other similarly situated individuals. The basis of this action is Diversified's alleged violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq. and the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, et seq. A class certification hearing was held in this matter and the parties filed supplemental briefs after the hearing. Because I find that there are unique evidentiary issues that will need to be resolved on an individual case basis, I will deny O'Connor's motion to certify a class.

Background

Plaintiff O'Connor's complaint claims that Diversified violated the FDCPA and the TCPA when its representatives called O'Connor several times on his cell phone [*2] in an attempt to collect a debt O'Connor owed to U.S. Cellular. O'Connor asserts that Diversified acquired the debt for collection on July 23, 2011. [1] He alleges that Diversified representatives called him two times on July 25, 2011. In the first call the representative allegedly yelled at O'Connor, demanded payment of the debt, and refused to send "anything" regarding the debt in writing. A second representative

allegedly called later that day and demanded immediate payment of the debt but did agree to send paperwork. On July 26, 2011, another Diversified representative called O'Connor and allegedly demanded immediate payment of the debt and told O'Connor he had no right to dispute the debt. O'Connor alleges that he received another call from Diversified on July 27, 2013 in which the representative allegedly yelled at him and refused to send "anything in writing whatsoever."

> 1 I note that the complaint gives conflicting dates as to when Diversified acquired the debt. Paragraph 15 of the complaint states that it was on July, 23, 2011 while paragraph 7 states that it was acquired on July 24, 2013. For purposes of deciding the present class action certification motion, it makes no difference [*3] whether it was the 23rd or the 24th.

O'Connor alleges that during these calls Diversified's representatives "never told Plaintiff that the payment demand was subject to Plaintiff's rights to dispute the debt, request validation, or to receive verification of the debt." (Doc. # 42, Pl.'s Second Amend Compl. at ¶ 43) O'Connor asserts that Diversified's demands for immediate payment within the thirty day dispute period provided for by § 1692g "overshadowed" his "dispute/ verification/ validation rights" thereby violating the FDCPA.

O'Connor's claim under the TCPA is based on Diversified's alleged use of an automatic telephone dialing system to place calls to O'Connor's cell phone without his permission.

In his second amended complaint, O'Connor seeks to establish two classes. One asserting a claim under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq. and a second class asserting a claim under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, et seq. [2] A class certification was held in which O'Connor presented his argument in support of the certification of these two classes. Diversified argued that class certification is unwarranted because [*4] of the need to conduct individual discovery in each plaintiff's case.

> 2 The definitions of the classes were altered in O'Connor's motion and memorandum in support of class certification. Although this is not the proper procedure to modify a class definition, I will use the modified definitions in ruling upon the motion.

Legal Standard

A class action may be brought only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. of Civ. P. 23. "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). "Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising [*5] the plaintiff's cause of action." Id. (internal quotations and citations omitted). If a plaintiff establishes these prerequisites, a class action must also qualify under one of the three subdivisions of Rule 23(b).

O'Connor seeks to certify his classes under Rule 23(b)(3). That section provides for class certification if I find that "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).

> The requirement of Rule 23(b)(3) that common questions predominate over individual questions tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual. If, to make a prima facie showing on a given question, the members of a proposed class will

> need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common [*6] question.

Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)(internal quotations and citation omitted). "In making its determination, the district court must undertake a rigorous analysis that includes examination of what the parties would be required to prove at trial." Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1029 (8th Cir. 2010)(internal quotation omitted).

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores, Inc., 131 S. Ct. at 2550. (internal quotation and citation omitted). The "plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." Coleman v. Watt, 40 F.3d 255, 258 -259 (8th Cir. 1994).

Analysis

In his motion and memorandum in support of class certification, O'Connor asserts that Diversified has been retained by U.S. Cellular to collect debt on at least 25,000 U.S. Cellular accounts. O'Connor seeks to certify two classes, one under the FDCPA and the other under the TCPA, limiting the classes to the collection of these U.S. Cellular debts. [3]

> 3 As noted above, O'Connor has changed the definitions of the two [*7] classes from his second amended complaint. His complaint did not limit the classes to U.S. Cellular debt collection actions. In ruling on the present motion, I will use the definitions of classes that O'Connor presents in his motion and memorandum in support of class certification.

FDCPA Class

The FDCPA is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices. See 15 U.S.C. § 1692

O'Connor defines this proposed class as:

> All residents of the United States who, within one year prior to the filing of this Complaint, (1) received a telephone call from Defendant regarding a U.S. Cellular consumer debt (2) where such a call occurred within thirty days of the Defendant's acquisition of that debt from U.S. Cellular (3) where Defendant made a payment demand without explaining that the demand was subject to the consumer's right to dispute the debt, to request validation of the debt.

(Doc. # 45, Pl's Mem. in Support of Class Cert. at 7)

Assuming, without deciding, that O'Connor has established the prerequisites of Rule 23(a), he must also establish that his proposed classes qualify under one of the three subdivisions of Rule 23(b).

O'Connor seeks [*8] to certify his classes under Rule 23(b)(3). That section requires O'Connor to establish that questions of law or fact common to class members predominate over any questions affecting only individual members. If "the members of a proposed class will need to present evidence that varies from member to member, then" the claims are not appropriate for a class action. Blades, 400 F.3d at 566.

The FDCPA requires collectors give debtors a written "validation notice" of their rights within 5 days of the initial communication with the debtor. If debtors make a written request within 30 days of receiving the validation notice, the debt collection must cease collection efforts until the debt collector places verification information in the mail to the debtor. 15 U.S.C. § 1692g. "[T]he validation period is not a grace period; in the absence of a dispute notice, the debt

collector is allowed to demand immediate payment and to continue collection activity." Ellis v. Solomon and Solomon, P.C., 591 F.3d 130, 135 (2nd Cir. 2010)(internal quotation and citation omitted). However "[a]ny collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure [*9] of the consumer's right to dispute the debt..." § 1692g(b).

O'Connor's proposed class is for debtors who were contacted within thirty days of Diversified's acquisition of the debt where a demand for an immediate payment of the debt was made without informing the debtor of his right to dispute the debt. O'Connor's proposed class convolutes the notice requirements of the FDCPA. Nothing in the Act prevents a debt collector from calling a debtor within thirty days of the collector's acquisition of the debt. [4] Nor is a debt collector barred from calling a debtor, letting him know his debt has been assigned for collection, and requesting that the debtor pay the debt. The Act does not require the collector in its initial contact with the debtor to notify him of his right to dispute the debt. The Act requires a debt collector to send a notice of rights to the debtor within five days of the initial contact. See § 1692g. In [*10] its opposition brief and at the class certification hearing Diversified represented that it complied with the written notice requirement in O'Connor's case and provided the required written notice as the normal course of business in all of it collections efforts for U.S. Cellular.

> 4 O'Connor alternatively identifies Diversified's methods as "quick calling." O'Connor asserts that these calls are made within the thirty day dispute period provided by 15 U.S.C. § 1692g. However, as stated above, the thirty day dispute period does not run from the date the debt collector acquires the debt for collection. The thirty days referred to in section 1692g provides that if a debtor makes a written request within thirty days of being notified of their rights, the debt collector must cease collection efforts until the debt collector places verification information in the mail to the debtor.

However, a debt collector cannot use collection tactics that lead a debtor to believe he does not have any right to challenge the debt. Such a course of action has been labeled "overshadowing" in the FDCPA. § 1692g(b). O'Connor's proposed class is for debtors who were subjected to phone calls by Diversified which [*11] amounted to overshadowing. The inquiry of which debtors were subjected to such alleged tactics is an individual inquiry. This is not a case where each debtor was sent the same written communication which violated the FDCPA. To determine whether Diversified's phone calls to each plaintiff establishes an overshadowing claim will demand an individual inquiry into the communications made to each plaintiff. As a result, a certification of a class action claim under the FDCPA is not appropriate.

TCPA Class

The TCPA was enacted by Congress in response to a growing number of consumer complaints regarding intrusive nuisance telemarketing practices. Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740, 744 (2012). The TCPA, as it relates to the present lawsuit, prohibits making a call to a cellular telephone using an automatic telephone dialing system (ATDS) without the prior express consent of the called party. 47 U.S.C. § 227(b).

O'Connor defines this proposed class as:

> All residents of the United States who received on their cellular phone, within one year prior to the date of the Complaint: (i) Any telephone call from Defendant pertaining to a U.S. Cellular bill; (ii) Where defendant used its [*12] ATDS, and (iii) Where the call was placed in a non-emergency situation, and (iv) Where the consumer failed to provide prior express consent to Defendant to be contacted on his or her cellular telephone with an ATDS. [5]

(Doc. # 45, Pl's Mem. in Support of Class Cert. at 11)

> 5 As with his FDCPA claim, the proposed TCPA class differs from the class asserted in O'Connor second amended complaint.

Stated more simply, the proposed TCPA class is for any debtor of U.S. Cellular who was called on their cell phone by Diversified using an ATDS without the debtor's consent. [6] Whether the debtor's consented to be called on their cell phone is a pivotal issue in determining whether to certify this class. The debt forming the basis of this class is for cellular service provided by U.S. Cellular. The evidence at the class certification hearing is that Diversified obtained the proposed class cell phone numbers from U.S. Cellular. These cell phone numbers were either assigned to the to the debtors by U.S. Cellular when they obtained cellular service or they were cell phone numbers provided by the debtor to U.S. Cellular during the application process. (O'Connor's counsel stated at the class certification [*13] hearing that he did not know how U.S. Cellular obtained the cell number on which Diversified called O'Connor.)

6 I note that there is compelling evidence presented by Diversified that it did not use an ATDS when calling the U.S. Cellular debtors. Although Diversified has not moved for summary judgment on this basis, this fact is gives additional weight to my decision not to certify a TCPA class.

The Federal Communications Commission has issued two relevant orders regarding consent to call a cell phone. On October 16, 1992, the FCC issued an order which stated that cellular carriers do not need consent from "their cellular subscribers prior to initiating autodialer ... calls for which the cellular subscriber is not charged." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8775. On January 4, 2008, the FCC issued an order stating that if a party provides a cell phone number to a creditor, for example, as part of a credit application, they are deemed to have provided express consent to be autodialed by the creditor at that cell phone number. In the matter of Rules and Regulations Implementing the Telephone Consumer Protection [*14] Ast of 1991, 23 F.C.C.R. 559, 564. [7] The FFC order also states that calls "placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call." Id. at 565.

7 "Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."

The FCC has established that cellular carriers need not get permission to autodial their subscribers where no charge is incurred and that calls by a debt collector are treated as if the creditor itself placed the call. Diversified argues that in collecting the debt from these cellular customers, it stands in the shoes of U.S. Cellular and is entitled to the shelter that the FCC has provided to cellular companies. I agree with Diversified's position. I find that a debt collector for a cellular company may [*15] invoke the shelter given to the cellular company for calls to its subscribers. Because the shelter only applies where the cellular subscriber has not incurred a charge for the call, an individual inquiry will be necessary to determine if a charge was incurred. Such an individual inquiry makes the certification of a TCPA class inappropriate.

Alternatively, if a debtor provided a cell number to U.S. Cellular to contact (separate from the one issued by U.S. Cellular) then they consented to be called on that number. [8] As noted earlier, when asked at the certification hearing, O'Connor's counsel did not know if the cell number Diversified used to contact O'Connor was assigned to him by U.S. Cellular. An individual case by case inquiry will be necessary to determine whether the debtors in the proposed class consented to be contacted on their cell phones regarding their debt to U.S. Cellular by providing their cell number to U.S. Cellular. Discovery into the debtor's agreements with U.S. Cellular will involve an individual inquiry into each plaintiff's agreement. Such an individualized inquiry weighs against class certification. See Versteeg v. Bennett, Deloney, & Noyes, P.C., 271 F.R.D. 668, 674 (D. Wyo. 2011)(discovery [*16] issue of whether individual proposed class members provided their cell number to creditors which were called by a debt collector precluded the certification of a class for a TCPA claim); Forman v. Data Transfer, Inc., 164 F.R.D. 400, 404 (E.D. Pa. 1995)(denial of class certification where an individual inquiry would be undertaken regarding a consent to receive facsimiles). As a result, a certification of a class action claim under the TCPA is not appropriate.

8 O'Connor concedes this point in his reply brief in which he states "The 2008 FCC ruling liberalized the

statute and allowed a debt collector such as Defendant to piggy-back on appropriate consent consent given to an original creditor like U.S. Cellular." (Doc. # 49, Reply Br. at 2, n. 1)

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Johnny O'Connor's motion for class certification [#45] is **DENIED.**

A Rule 16 Conference will be set in this matter in an separate order.

/s/ Rodney W. Sippel

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

Dated this 28th day of May, 2013.

3 of 4 DOCUMENTS

ANTHONY FELIX, an individual; on behalf of himself and all others similarly situated, Plaintiffs, v. NORTHSTAR LOCATION SERVICES, LLC, a New York Limited Liability Company; and JOHN AND JANE DOES NUMBERS 1 THROUGH 25, Defendants. DONNIE JO HARB, an individual; on behalf of herself and all others similarly situated, Plaintiffs, v. NORTHSTAR LOCATION SERVICES, LLC, a New York Limited Liability Company; and JOHN AND JANE DOES NUMBERS 1 THROUGH 25, Defendants.

11-CV-00166(JJM)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 74717

May 28, 2013, Decided
May 28, 2013, Filed

COUNSEL: [*1] For Anthony Felix, an individual; on behalf of himself and all others similarly situated, Plaintiff: Robert L. Arleo, LEAD ATTORNEY, Haines Falls, NY; William F. Horn, LEAD ATTORNEY, Law Office of William F. Horn, Fresh Meadows, NY; Marianne Cardo Zack, Roy A. Mura, Mura & Storm, PLLC, Buffalo, NY.

For Donnie Jo Harb, an individual; on behalf of herself and all others similarly situated, Consol Plaintiff: Marianne Cardo Zack, Roy A. Mura, Mura & Storm, PLLC, Buffalo, NY; Robert L. Arleo, LEAD ATTORNEY, Haines Falls, NY; William F. Horn, LEAD ATTORNEY, Law Office of William F. Horn, Fresh Meadows, NY.

For Northstar Location Services, LLC, a New York Limited Liability Company, Defendant: Paul A. Sanders, LEAD ATTORNEY, Hiscock & Barclay LLP, Rochester, NY.

JUDGES: JEREMIAH J. MCCARTHY, United States Magistrate Judge.

OPINION BY: JEREMIAH J. MCCARTHY

OPINION

DECISION AND ORDER/ORDER TO SHOW CAUSE

Before me is plaintiffs' "Consent Motion for an Order Conditionally Certifying Class and Granting Preliminary Approval of Class Action Settlement and Injunctive Relief" [42, 42-1].[1] The parties have consented to jurisdiction by a United States Magistrate Judge ([32] in this action, [25] in 11-CV-253).

1 Bracketed citations refer [*2] to the CM/ECF docket entries. Unless otherwise indicated, all docket references will be to the consolidated docket in 11-CV-0166.

"[T]he 'settlement only' class has become a stock device in modern class action litigation." In re American International Group, Inc. Securities Litigation, 689 F.3d 229, 238 (2d Cir. 2012). "[A] district court confronted with a request for settlement-only class certification need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial . . . . At the same time, however . . . other specifications of Rule 23 - those designed to protect absentees by blocking unwarranted or overbroad class definitions - demand undiluted, even heightened, attention." Id. at 239.

This Consent Motion presents a perfect example of why that is so. While I conclude that the Motion should be denied for several independent reasons, I will examine each of them separately, for the benefit of the reviewing court in the event of an appeal.

BACKGROUND

By Text Order dated June 15, 2011 [24], I granted the parties' motions to consolidate these two actions under Case Number 11-CV-166. Plaintiff Anthony Felix, a citizen of [*3] California, seeks relief under the Fair Debt Collection Practices Act, 15 U.S.C. §§1692, *et seq*. ("FDCPA") and the California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§1788, *et seq*. ("RFDCPA") on his own behalf and on behalf of a proposed class of similarly situated individuals, against defendant Northstar Location Services, LLC ("Northstar") and a number of Joe Doe defendants. First Amended Complaint [5]. He alleges that he received several telephonic voice messages from Northstar which failed to disclose that the communication was from a debt collector, the purpose or nature of the communication, or the identification of Northstar as the caller. Id., ¶¶40-42. In addition to class certification, he seeks "maximum statutory damages" for class actions under the FDCPA and RFDCPA, "declaratory relief adjudicating that Northstar's telephone messages violate the FDCPA . . . [and] RFDCPA", "[a]ttorney's fees, litigations expenses, and costs", and "such other and further relief as may be just and proper". Id., ¶81.

Plaintiff Donnie Jo Harb, a citizen of North Carolina and represented by the same attorneys as plaintiff Felix (William F. Horn and Robert L. Arleo) filed a [*4] separate Complaint (11-cv-253 [1]) against Northstar and John Doe defendants, alleging that she likewise received telephonic voice messages from Northstar which failed to disclose that the communications were from a debt collector, the purpose or nature of the communications, or the identification of Northstar as the caller (id, ¶¶27-36). Additionally she alleges that when she returned a call placed by Northstar that the individual she spoke to did not identify himself as a debt collector or inform her that the conversation might be surreptitiously monitored or recorded at the outset of the call (id., ¶¶63-69), and that Northstar placed a call to her employer, in which it failed to inform plaintiff's employer that the conversation might be surreptitiously monitored or recorded. Id. ¶¶77-83.

She seeks to certify a class of "all persons in the State of North Carolina . . . with whom [Northstar] engaged in a conversation via telephone, . . . wherein [Northstar] failed to disclose at the outset of the conversation that the call may be monitored or recorded by an unannounced third person(s), . . . made in connection with Defendant's attempt to

collect a debt, . . . which conduct violated [*5] the FDCPA . . . during a period beginning one year prior to the filing of this initial action and ending 21 days after service of this complaint." Id., ¶98. She further seeks FDCPA remedies identical to those sought by plaintiff Felix, except she does not request declaratory relief (id., ¶111).

Accompanying the pending motion is an executed Stipulation of Settlement [42-2]. Although Northstar denies "each and every claim and allegation of wrongdoing or conduct that violates the FDCPA or the RFDCPA", it deems it "desirable and prudent that the Consolidated Action . . . be fully and finally resolved and settled in the manner and upon the terms set forth in this Stipulation". Stipulation of Settlement [42-2], pp. 3, 4.

The Consent Motion asks me to certify the Settlement Class (defined in the Stipulation of Settlement) pursuant to Rule 23(b)(1)(B) and 23(b)(2), preliminarily approve the Stipulation of Settlement, direct notice to the class, set dates for objections to the proposed settlement, and schedule a final fairness hearing ([42], pp. 1-2).

ANALYSIS

A. General Considerations

"Rule 23 does not set forth a mere pleading standard." Wal--Mart Stores, Inc. v. Dukes, U.S. , 131 S.Ct. 2541, 2551 (2011). [*6] "The party seeking class certification must affirmatively demonstrate compliance with the Rule, and a district court may only certify a class if it is satisfied, after a rigorous analysis, that the requirements of Rule 23 are met." American International Group, 689 F.3d at 237-38.

"Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied . . . . Thus, the court must assess whether the proposed class satisfies Rule 23(a)'s four threshold requirements: (1) numerosity ('the class is so numerous that joinder of all members is impracticable'), (2) commonality ('there are questions of law or fact common to the class'), (3) typicality ('the claims or defenses of the representative parties are typical of the claims or defenses of the class'), and (4) adequacy of representation ('the representative parties will fairly and adequately protect the interests of the class')." Id. at 238.

"To be certified, a putative class must first meet all four prerequisites set forth in Rule 23(a) . . . . Not only must each of the requirements set forth in Rule 23(a) be met, but certification of [*7] the class must also be deemed appropriate under one of the three subdivisions of Rule 23(b)." Brown v. Kelly, 609 F.3d 467, 475-76 (2d Cir. 2010).

B. Is There an Ascertainable Class?

"Although not explicit in Rule 23(a) or (b), courts have universally recognized that the first essential ingredient to class treatment is the ascertainability of the class . . . . Thus, the named plaintiff must define the proposed class in a manner that adequately identifies its members." Grimes v. Rave Motion Pictures Birmingham, L.L.C., 264 F.R.D. 659, 663-64 (N.D.Ala. 2010). *See also* In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 209 F.R.D. 323, 336 (S.D.N.Y. 2002) ("while Rule 23(a) does not expressly require that a class be definite in order to be certified, a requirement that there be an identifiable class has been implied by the courts"); In re Initial Public Offerings Securities Litigation, 471 F.3d 24, 30 (2d Cir. 2006) (discussing "[t]he implied requirement of ascertainability" of the class); 1 Newberg on Class Actions, §§3.1 *et seq*. (5th ed.)

"The implied requirement of ascertainability obligates plaintiffs to demonstrate that the class they seek to certify is readily [*8] identifiable, such that the court can determine who is in the class and, thus, bound by the ruling . . . .When a proposed class definition links class membership with the merits of the class members' claims, the class is not ascertainable." Eng-Hatcher v. Sprint Nextel Corp., 2009 WL 7311383, *7 (S.D.N.Y. 2009); Barrus v. Dick's Sporting Goods, Inc., 732 F. Supp.2d 243, 250 (W.D.N.Y. 2010) (Siragusa, J.) ("Plaintiffs' proposed class definition is defective because it is not based upon objective criteria and, instead, would require the Court to make a merits determination for each potential class member just to determine class membership"); 5 Moore's Federal Practice, §23.21[3][c] (Matthew Bender 3d ed.) ("A class definition is inadequate if a court must make a determination of the merits of the individual

claims to determine whether a particular person is a member of the class").

The Stipulation of Settlement defines the "Settlement Class" as "the FDCPA and RFDCPA Class collectively". [42-2], ¶1.17. The "FDCPA Settlement Class" is defined as:

> "all persons with addresses in the United States of America who received a voice message left by Defendant on a telephone answering device, *or* [*9] who engaged in a telephone communication with Defendant, wherein the Defendant did not identify itself by its company name as the caller, state the purpose or nature of the communication or disclose that the communication was from a debt collector, *or* where the Defendant did not disclose at the outset of a communication that the call may be monitored or recorded, *or* where the Defendant made a false representation or used a deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer, and where such communication occurred between February 28, 2010, through and including the date of order granting preliminary certification of the Settlement Class." Id., ¶1.6 (emphasis added).

The "RFDCPA Settlement Class" is defined as:

> "all persons with addresses in the State of California who received a voice message left by Defendant on a telephone answering device, *or* who engaged in a telephone communication with Defendant, wherein the Defendant did not identify itself by its company name as the caller, state the purpose or nature of the communication or disclose that the communication was from a debt collector, *or* did not disclose at the outset of a communication [*10] that the call may be monitored or recorded, *or* where the Defendant made a false representation *or* used a deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer, and where such communication occurred between February 28, 2010, through and including the date of order granting preliminary certification of the Settlement Class." Id., ¶1.15 (emphasis added).

The repeated use of the word "or" in the class definition requires me to interpret Northstar's alleged "false representations" or "deceptive means" as meaning something other than its failure to identify itself, or to indicate that the call was from a debt collector and could be monitored. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise").

However, the class definition sheds no further light on what types of false representations or deceptive means may have been involved, choosing instead to merely parrot the language of the FDCPA.[2] Such a broad definition cannot create an ascertainable class, because it would require inquiry into the [*11] merits of each potential class member's claim to determine whether that person had been the victim of a "false representation" or "deceptive means". *See* Drinkman v. Encore Receivable Management, Inc., 2007 WL 4458307, *2 (W.D.Wis. 2007) ("Several district courts have determined that a class definition was not definite when the plaintiff had simply incorporated the language of the statutory prohibition into its class definition because the court would be required to conduct individual inquires into the merits of each potential plaintiff's case in order to determine their qualifications as class members . . . . [T]he Court considers such reasoning persuasive").

> 2 "A debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt." 15 U.S.C. §1692e.

In Drinkman, an FDCPA case, the court held that a class definition referring to violations of 15 U.S.C. §1692d(6) was too indefinite to describe the class. "Plaintiff's class definition merely incorporates the statutory prohibition that a debt collector not place telephone calls without 'meaningful disclosure' of its identity. 15 U.S.C. §1692d(6). If plaintiff's

class definition [*12] stands as is, the Court would be required to conduct individual inquires into whether each potential class member received a message containing 'meaningful disclosure' of defendant's identity in an effort to determine if each potential class member was qualified to be an actual class member . . . . Accordingly, the fact that the Court would be forced to make individual decisions on the merits of each potential class member's claim, including Drinkman's claim, before it could even certify the class demonstrates that plaintiff's class definition is not definite." Id., *3.

Although the court in Drinkman solved the problem by re-defining the proposed class more narrowly,[3] that court was not asked to certify a settlement class. Here, by contrast, the class definition has been agreed to by the parties in the Stipulation of Settlement, and I "cannot rewrite the terms of the parties' agreement". Shiotani v. Walters, 2012 WL 6621279, *5, n. 4 (S.D.N.Y. 2012). "The requirement that a district court review and approve a class action settlement before it binds all class members does not affect the binding nature of the parties' underlying agreement . . . . A district court is not a party to the [*13] settlement, nor may it modify the terms of a voluntary settlement agreement between the parties." Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3rd Cir. 2010).

> 3 "[T]he definiteness problem can be easily remedied without denying certification. Accordingly, the Court amends the class definition in the following manner: All Wisconsin 'consumers' (as that term is defined by 15 U.S.C. §1692a(3)) that received pre-recorded messages from Defendant, within one year prior to July 3, 2007, in which Defendant included nothing more than the caller's name, a phone number and a reference to some important matter." Id.

"Thus, because mini-hearings on the merits are required here to determine class membership, this class definition is untenable and cannot be certified." Kondratick v. Beneficial Consumer Discount Co., 2006 WL 305399, *10 (E.D.Pa. 2006). Nevertheless, I will next consider the requirements of Rule 23(a) and (b), which furnish independent reasons for denying the Consent Motion.

C. Have Rule 23(a)'s Criteria Been Satisfied?

1. Rule 23(a)(1): Numerosity

Northstar believes that there are approximately 400,000 potential members of the Settlement Class, and the parties agree that this will be [*14] "subject to confirmatory discovery by the Settling Parties." Stipulation of Settlement [42-2], p. 5, ¶E. Since "numerosity is presumed at a level of 40 members", Consolidated Rail Corp. v. Town of Hyde Park, 47 F. 3d 473, 483 (2d Cir.), cert. denied, 515 U.S. 1122 (1995), I conclude that, irrespective of the precise parameters of the class, the numerosity requirement is satisfied.

2. Rule 23(a)(2): Commonality

"The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997). Plaintiffs argue that "commonality is established by the Defendant's business practice of leaving the same type of uniform telephone messages for Plaintiffs and the Settlement Class Members, and by its uniform failure to provide other disclosures at the outset of telephone conversations". Consent Motion [42-1], §2.04.

I disagree. As stated previously, the conduct alleged in the definition of the Settlement Class is not limited to the "same type of uniform messages" - instead, it extends to "false representations" and "deceptive means", which, by the use of the disjunctive,[4] must be interpreted to mean something different [*15] from the type of messages the named plaintiffs received.[5] 15 U.S.C. §1692e prohibits "*any* false, deceptive or misleading representation" (emphasis added), and "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'". United States v. Gonzales, 520 U.S. 1, 5 (1997) (*quoting* Webster's Third New International Dictionary (1976)).

> 4 " . . . *or* where the Defendant made a false representation or used a deceptive means to collect or attempt to

collect any debt . . .". Stipulation of Settlement [42-2] §§1.6, 1.15 (emphasis added).

5 "The Felix Action seeks to certify a class consisting of all residents who received telephonic communications from Defendant, including voice messages on a voicemail system or answering machine, that did not disclose that the call was for collection purposes *or that otherwise* used *any* false representation or deceptive means to collect or attempt to collect any debt . . . which messages violate the FDCPA and RFDCPA". Consent Motion [42-1], p. 2 (emphasis added).

For example, the settlement class as currently defined could include someone to whom Northstar stated that it would foreclose upon their property the [*16] following day if they did not pay the debt immediately - without any intention to do so. Such conduct would readily constitute a "false statement" or a "deceptive means" within the meaning of §1692e, yet would have little in common with the type of messages the named plaintiffs claim to have received. While I have no way of knowing whether Northstar engaged in such conduct, absent a "mini-hearing" into the merits of each class member's claims I have no way of knowing that it did not. Therefore, "[c]ommonality cannot be shown because the resolution of common issues about the collection efforts depend on individualized factual determinations that could be different for each proposed class member." Kondratick, *10.

3. Rule 23(a)(3): Typicality

"Typicality . . . requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Marisol A., 126 F. 3d at 376.

Plaintiffs argue that their claims are typical of the claims of the Settlement Class because Northstar left them and all Settlement Class members [*17] the same type of messages, which "failed to provide meaningful disclosure of the caller's identity", "did not contain the disclosures required by 15 U.S.C. §1692e(11)", and "did not advise them at the outset of the call that their conversation might be recorded". Consent Motion [42-1], §2.06.

However, as previously discussed, the parties did not limit the Settlement Class in that manner. Rather, by use of the disjunctive "or", the class might include persons as to whom completely different types of false statements or deceptive practices were directed. Therefore, "mini-hearings on the merits would be the only way to determine if the [named plaintiffs'] claims are typical and whether they can adequately represent the class' interests because the mini-hearings would be the only way to determine if the proposed class members had experienced a similar set of circumstances as the [named plaintiffs]." Kondratick, *10.

4. Rule 23(a)(4): Fair and Adequate Protection of Class Interests

"The adequacy-of-representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether maintenance of a class action is economical [*18] and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 n. 20 (1997). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Id. at 625-26. I conclude that plaintiffs have failed to satisfy this criterion for the same reasons that they have failed to demonstrate typicality.

Certification is appropriate only where "all four prerequisites set forth in Rule 23(a)" are satisfied. Brown, 609 F.3d at 475. However, the Consent Motion satisfies only one those prerequisites - numerosity. Therefore, Rule 23(a) would likewise preclude certification.

D. Have Rule 23(b)'s Criteria Been Satisfied?

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem, 521 U.S. at 614. Having decided that the requirements of Rule

23(a) have not been satisfied, it is unnecessary for me to consider Rule 23(b). Nevertheless, I will do so. *See* Karvaly v. [*19] eBay, Inc., 245 F.R.D. 71, 83 (E.D.N.Y. 2007) ("Although the Court need not comment on the Rule 23(b) . . . factors because it has determined that the Rule 23(a) factors are not satisfied by the class as presently defined, it nevertheless does so for the purpose of pointing out the problems with the proposed class definition that further support its conclusion that the class as defined cannot be certified pursuant to Rule 23").

The Consent Motion seeks certification of the Settlement Class under Rule 23(b)(1)(B) and/or 23(b)(2). [42-1], pp. 10-13. Each criterion will be addressed:[6]

> 6 I will also address plaintiffs' oblique reference to Rule 23(b)(1)(A). Although the Consent Motion does not request certification under that Rule, plaintiffs quote its language ("prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class") while referring to it as Rule 23(b)(1)(b), a Rule which does not exist. Consent Motion [42-1], p. 13. Since the Stipulation of Settlement specifically *allows* individual actions [*20] by class members ([42-2], §3.2, p. 16), the risk of "inconsistent or varying adjudications" is one which Northstar is willing to bear.

1. Rule 23(b)(1)(B)

Rule 23(b)(1)(B) provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of . . . (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests". "The classic example of a (b)(1)(B) class action is a limited fund case: a situation in which many litigants have claims against a single asset and the asset's total value is unlikely to satisfy all of the claims. If the claims are adjudicated individually, the fund will run out before the claimants do." 2 Newberg, §4:18.

Plaintiffs argue that "because the amount of statutory damages recoverable on a class-wide basis for the claims asserted here is statutorily limited to '1 per centum of the net worth of the Defendant', 15 U.S.C. §1692k(a)(2)(b) . . . the Settlement [*21] Class is uniquely appropriate for certification under . . . Rule 23(b)(1)(b)." Consent Motion [42-1], p. 13 [*sic*].[7] However, the limitation under 15 U.S.C. §1692k(a)(2)(B) applies only to *class* claims for statutory damages, not to *individual* claims for such damages (which are capped at $1,000 per action by an individual. *See* 15 U.S.C. §1692k(a)(2)(A)).

> 7 Plaintiffs' references to 15 U.S.C. §1692k(a)(2)(b) rather than 15 U.S.C. §1692k(a) (2)(B), and to Rule 23(b)(1)(b) rather than Rule 23(b)(1)(B), are presumably typographical errors.

Since plaintiffs do not argue that Northstar would be incapable of satisfying individual claims for statutory damages, Rule 23(b)(1)(B) is inapplicable. *See* Petrolito v. Arrow Financial Services, LLC, 221 F.R.D. 303, 313 (D. Conn. 2004) ("Rule 23(b)(1)(B) is typically applied in limited fund cases; there is no such allegation of limited defendant resources here").

2. Rule 23(b)(2)

Certification is appropriate under Rule 23(b)(2) if Rule 23(a) is satisfied and "the party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a [*22] whole".

Plaintiffs acknowledge that certification under Rule 23(b)(2) "is *not* appropriate if the damage claims 'predominate' the plaintiff's request for injunctive relief" (Consent Motion [42-1], p. 10) (emphasis added). However, they argue that "courts may certify classes under Rule 23(b)(2) when a plaintiff seeks both injunctive relief and monetary damages if the monetary damages are secondary or 'incidental' to the injunctive relief". Id. They note that numerous courts "have

certified FDCPA class action lawsuits pursuant to [Rule] 23(b)(2), even though injunctive and/or declaratory relief is not available as a matter of right to private litigants under the FDCPA . . . . in part because '[t]he monetary damages would be so *de minimis* that the value of the injunction to the plaintiffs clearly outweighs any potential financial recompense'". Id.

Among the cases which they cite in support of that proposition is Gravina v. United Collection Bureau, (E.D.N.Y. Case No. 2:09-cv-0846) (id., p. 11). They note that Gravina was one of the cases in which "[c]ourts [*23] have . . . approved class settlements including statutory damages awards as incidental to stipulated injunctions under [Rule] 23(b)(2)". Id. What they *fail* to mention, however, is that in Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 224 (2d Cir. 2012), the Second Circuit concluded "that the claim for damages in *Gravina* predominated over the claim for injunctive relief". If the pertinent facts in Gravina are similar to those of this case, then plaintiffs' argument for certification under Rule 23(b)(2) does not have a leg to stand on, given their admission that, under such circumstances, certification under Rule 23(b)(2) "is not appropriate". Consent Motion [42-1], p. 10.

Since Messrs. Horn and Arleo were also class counsel in Gravina, they well know that the relevant facts of that case, as summarized in Hecht, are not merely similar, but virtually identical to those of this case:

> "The *Gravina* complaint requested 'the maximum statutory damages' under the FDCPA but failed even to mention injunctive relief. The Settlement Order defines the *Gravina* class members as victims of a completed harm with no reference to ongoing injury or risk of future injury: 'the 'Settlement Class' is [*24] defined as all persons who received a message left by UCB which did not identify UCB itself by name as the caller, state the purpose or nature of the communication, or disclose that the communication was from a debt collector . . . . The *Gravina* complaint and Stipulation of Settlement included the same class definition. Absent from this retrospective class definition is any forward-looking requirement - that, for example, the class members' debt remained outstanding, they were at risk of incurring future debt, UCB might again be engaged to collect from them, or even that they feared UCB would again attempt to collect from them - even though the injunctive order was solely addressed to UCB's future conduct. Assuming that the FDCPA permits injunctive relief, an injunction is generally unavailable where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . . . The *Gravina* complaint, Stipulation of Settlement, and Settlement Order thus defined the *Gravina* class to ensure that every member would be entitled to damages, but not that every member would have standing to seek injunctive relief." Hecht, 691 F.3d at 223-24.

By letter dated August 18, [*25] 2012 (the day after Hecht was decided), Mr. Horn told another court: "Mr. Arleo and I believe it is our ethical duty to promptly advise Your Honor of the ruling issued yesterday by the Second Circuit Court of Appeals in the matter of Hecht v. United Collection Bureau, Inc." Corpac v. Rubin & Rothman, LLC, 2013 WL 342704, *3 (E.D.N.Y. 2013). I fail to see why they did not have the same ethical duty to advise me of Hecht, which completely undercuts their argument for certification under Rule 23(b)(2).[8]

> 8 "A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Rules of Professional Conduct, Rule 3.3(a)(2) (22 N.Y.C.R.R. §1200.00); United States v. Gaines, 295 F.3d 293, 302 (2d Cir. 2002).

Not only does the Consent Motion fail to cite Hecht, it also fails to cite Dukes, which furnishes yet *another* reason for denying certification under Rule 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted - the notion that the conduct is such that it can be enjoined or declared unlawful only [*26] as to all of the class members or as to none of them." Dukes, 131 S.Ct. at 2557. "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or

declaratory judgment against the defendant." Id. (emphasis in original).

The Stipulation of Settlement provides that Northstar "shall consent to entry of a stipulated injunction mandating that [Northstar] use its best efforts to ensure that, in telephone communications it has with debtors subject to the FDCPA or RFDCPA, including the leaving of voice messages, [Northstar]:(a) identifies itself by its legal name; (b) discloses that the communication is from a debt collector; (c) discloses that the communication concerns the collection of a debt; and (d) advises callers at the beginning of any telephone conversations that the call may be monitored or recorded". [42-2], §2.3(d). While such an injunction might benefit debtors who might otherwise receive that type of communication in the future, the Settlement Class is defined as those who *received* [*27] telephonic messages "between February 28, 2010, through and including the date of order granting preliminary certification of the Settlement Class" (id., §§1.6, 1.15) - not as those who *will* receive such messages in the future.

Therefore, the injunction would clearly not benefit all (if, indeed, any) members of the Settlement Class. *See* Hecht, 691 F.3d at 223, 224 ("The Settlement Order defines the *Gravina* class members as victims of a completed harm with no reference to ongoing injury or risk of future injury . . . . not . . . every member would have standing to seek injunctive relief").

Moreover, the stipulated injunction would be of no benefit to class members who were the victims of *other* types of false representations or deceptive means. As stated previously, the wrongful conduct mentioned in the definition of the Settlement Class is not limited to the sending of standardized voicemail messages, but extends to *any* type of false or deceptive telephonic communication by Northstar.

Since plaintiffs have not demonstrated that "a single injunction or declaratory judgment would provide relief to each member of the class" (Dukes, 131 S.Ct. at 2557), the Settlement Class cannot be certified [*28] under Rule 23(b)(2). *See* Shook v. Board of County Commissioners, 543 F.3d 597, 604 (10th Cir. 2008) ("In short, under Rule 23(b)(2) the class members' injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members").

E. Is the Proposed Settlement "Fair, Reasonable, and Adequate"?

"If the class satisfies the requirements of Rules 23(a) and (b), then the district court must separately evaluate whether the settlement agreement is 'fair, reasonable, and adequate' under Rule 23(e)." American International Group, 689 F.3d at 238.[9] "The District Court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness . . . and that it was not a product of collusion." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001). "When a settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness." Id.

> 9 "Although the Court has determined that the class, as defined in the Settlement Agreement, cannot be certified under Rule 23(a) and (b), it nevertheless will address several obvious deficiencies of the proposed Settlement [*29] Agreement that would preclude the Court from granting preliminary approval to the settlement in its current form, even if the class were certifiable." Karvaly, 245 F.R.D. at 86.

At this stage the parties seek only preliminary, not final, approval of the settlement. "Preliminary approval of a class action settlement, in contrast to final approval, is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness . . . . A proposed settlement of a class action should therefore be preliminarily approved where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." Davis v. J.P. Morgan Chase & Co., 775 F. Supp.2d 601, 607 (W.D.N.Y. 2011) (Larimer, J.).

In considering the fairness of the proposed settlement - even preliminarily - I am struck by the lengths to which the named plaintiffs have gone to exclude class members from any say in the certification decision or the settlement itself.

For [*30] example, they contend that "no notice of the Settlement is [required] and Settlement Class Members are not permitted to opt out of the Settlement" (Stipulation of Settlement [42-2], p. 6, §J), ignoring Hecht's holding that in Gravina, involving virtually identical circumstances, "the claim for damages . . . predominated over the claim for injunctive relief", giving the absent class members "a *due process* right to notice . . . and the opportunity to opt out" of the settlement. 691 F.3d at 224 (emphasis added).

Rule 23(e)(1) provides that "the court must direct notice [of the settlement] in a reasonable manner to all class members who would be bound by the proposal". That notice "must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings". Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 438 (2d Cir. 2007). While paying lip service to the absent class members' right to object to the settlement,[10] plaintiffs propose that "[n]otice of the Settlement to the Settlement Class Representative Plaintiffs [Felix and Harb] shall constitute due and sufficient notice to the Settlement [*31] Class Members". Stipulation of Settlement [42-2], p. 6, §J.

> 10 "Notwithstanding their inability to opt-out of the Settlement, all Settlement Class Members have the right to object to the Settlement." Consent Motion [42-1], p. 16 (emphasis in original).

I cannot conceive of a method which would be *less* likely to convey notice of the proposed settlement to the absent class members. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Hecht, 691 F.3d at 224.

If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do. The Stipulation [*32] of Settlement calls for Northstar to pay into a Settlement Fund the sum of $129,238.58 ([42-2], §2.3(a)). From that Fund, plaintiff Felix is to be paid $3,500 ($1,000 as FDCPA statutory damages, $1,000 as RFDCPA statutory damages, and $1,500 for "services to the Settlement Class Members"), and plaintiff Harb is to be paid $2,500 ($1,000 as FDCPA statutory damages and $1,500 for "services to the Settlement Class Members"). Id. The sum of $58,238.58 is to be paid to one or more "charitable organizations without any religious or political affiliations". Id., §§2.3(b), (c). Messrs. Horn and Arleo, as Settlement Class Counsel, are entitled to receive up to $65,000 for fees and expenses (subject to court approval), and Northstar agrees not to oppose their fee application as long as it does not exceed that amount. Id., §2.3(e).

And what do the absent class members receive? If not nothing, then close to it. They receive no money whatsoever, and while some of them *may* arguably benefit from Northstar's promise to use its "best efforts" in future telephone calls to identify itself and to indicate that the call relates to collection of a debt and may be recorded (id., §2(d),[11] that promise - even [*33] if confirmed in a stipulated injunction - would be of no benefit to those class members who received calls in the past but would not receive them in the future, or to those class members who were the victims of false statements or deceptive conduct *other* than that encompassed by the injunction.

> 11 Whether "best efforts" were used "will almost invariably involve a question of fact". Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc., 2012 WL 4891584, *5 (W.D.N.Y. 2012) (Telesca, J.).

In return for this ethereal benefit, the absent Settlement Class Members are required to release Northstar and its affiliates from, *inter alia*, "all class claims for damages or injunctive relief for its violations of 15. U.S.C. § . . . 1692e(10) ["The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer"] . . . and any and all class claims or causes of action whatsoever, including Unknown Claims, arising out of or relating to the allegations and/or claims asserted in the Consolidated Action arising out of state or federal law". Id., §3.2 (emphasis in original).

While plaintiffs emphasize that, unlike named plaintiffs [*34] Felix and Harb, the other Settlement Class members are not releasing any *individual* claims against Northstar, the fact remains that the *class* claims which they are releasing must have some value - for why else would Northstar agree to the settlement? Moreover, the class claims being released - for any false representation or deceptive means, and for any violation of state of federal law - are potentially far broader than the limited claims asserted by plaintiffs Felix and Harb, which relate merely to Northstar's failure to identify itself, or to disclose that the calls related to a debt and might be monitored.

"[S]ettling class members generally cannot validly release other class members' claims that they themselves do not possess, for no consideration . . . . A court, then, when reviewing the fairness of a proposed class action settlement, must take special care to ensure that the release of a claim not asserted within a class action or not shared alike by all class members does not represent an advantage to the class bought by the uncompensated sacrifice of claims of members, whether few or many." Davis v. J.P. Morgan Chase & Co., 827 F. Supp.2d 172, 181 (W.D.N.Y. 2011) (Larimer, [*35] J.). "Here, the class representatives seek to advance their own interests by sacrificing the rights of the majority of Class Members, who stand to gain nothing of substantial value from the proposed settlement." Karvaly, 245 F.R.D. at 89.

"The court's role in reviewing the proposed settlement is as a fiduciary serving as a guardian of the rights of absent class members." In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 758 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Therefore, had I concluded that the Settlement Class could be certified, I could not - even preliminarily - approve a settlement agreement such as this.

CONCLUSION AND ORDER TO SHOW CAUSE

For these reasons, the Consent Motion [42] is denied. Furthermore, given the holdings of Hecht and Dukes, neither of which were cited to me, I fail to see how the Consent Motion could have been filed in good faith - particularly by experienced class action counsel such as Messrs. Horn and Arleo.

Therefore, pursuant to Rule 11(c)(3), on or before June 11, 2013, plaintiffs' attorneys Horn and Arleo shall show cause why their arguments for class certification under Rule 23(b) have [*36] not violated Rule 11(b), and why they should not be sanctioned accordingly.

SO ORDERED

DATED May 28, 2013

/s/ Jeremiah J. McCarthy

JEREMIAH J. MCCARTHY

United States Magistrate Judge

4 of 4 DOCUMENTS

FREDDIE BELOTE, on behalf of himself and all others similarly situated, Plaintiff, v. RIVET SOFTWARE, INC., Defendant.

Civil Action No. 12-cv-02792-WYD-MJW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

2013 U.S. Dist. LEXIS 74529

May 28, 2013, Decided
May 28, 2013, Filed

COUNSEL: [*1] For Freddie Belote, on behalf of himself and all those similarly situated, Plaintiff: Jack A. Raisner, Rene S. Roupinian, Outten & Golden, LLP, New York, NY.

For Rivet Software, Inc, Defendant: Brett C. Painter, Kristi Anhthu Walton, Davis Graham & Stubbs, LLP-Denver, Denver, CO.

JUDGES: Wiley Y. Daniel, Senior United States District Judge.

OPINION BY: Wiley Y. Daniel

OPINION

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Class Certification and Related Relief filed on March 1, 2013. The motion seeks (a) certification of a class pursuant to Fed. R. Civ. P. 23 comprised of Plaintiff and the other persons similarly situated who were allegedly terminated without cause in connection with the mass layoff and/or plant closing on or about June 1, 2012 at Defendant's facility, (b) the appointment of Outten & Golden LLP as Class Counsel, (c) the appointment of Plaintiff as the Class Representative, (d) approval of the form and manner of Notice of Class Action, and (e) such other relief as this Court may deem proper. The motion is supported by the attached declarations of Plaintiff Freddie Belote ("Plaintiff's Declaration") and René S. Roupinian, a partner of Outten & Golden LLP ("Roupinian Declaration").

By [*2] way of background, the motion asserts that immediately prior to June 1, 2012, Plaintiff and approximately 125 other similarly situated persons who were employees of Defendant were terminated as part of, or as a result of the mass layoff and/or shutdown, as defined by the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101(a)(2) (the "WARN Act") at Defendant's facility located at 4340 South Monaco Street, Suite 100, Denver, Colorado (the "Denver Facility"). Plaintiff asserts that the layoff and/or shutdown was carried out without giving advance notice to the employees as required by the WARN Act, and that neither Plaintiff nor any of the other former employees who worked at the Denver Facility (the "Class") received 60 days' pay and benefits in lieu of notice. The Complaint alleges a Rule 23(b)(3) class claim arising from Defendant's violation of the WARN Act.

As to the merits of the motion, I note that Defendant filed a response on March 20, 2013, wherein it does not oppose the motion. Nevertheless, I must satisfy myself that Plaintiff has shown that each of the four prerequisites for class certification set forth in Rule 23 are satisfied. *See Trevizo v. Adams*, 455 F.3d 1155, 1161-62 (10th Cir. 2006) [*3] ("A party seeking class certification must show 'under a strict burden of proof' that all four requirements are clearly met") (quotation omitted). Rule 23(a) requires a showing of "(1) Numerosity: 'the class is so numerous that joinder of all members is impracticable'; (2) Commonality: 'there are questions of law or fact that are common to the class'; (3) Typicality: 'the claims or defenses of the representative parties are typical of the claims or defenses of the class'; and (4) Adequacy of representation: 'the representative parties will fairly and adequately represent the interests of the class.'" *Id*. (quoting Fed. R. Civ. P. 23(a)).

I find that Plaintiff has shown in the motion that the prerequisites for class certification are present in this action. I first note that violations of the WARN Act have given rise to numerous class action cases for which class certification has been granted. *See, e.g., Pearson v. Component Tech. Corp*., 247 F.3d 471 (3rd Cir. 2001); *Jurcev v. Cent. Cmty. Hosp*., 7 F.3d 618 (7th Cir. 1993); *In re Taylor Bean & Whitaker Mortg. Corp*., No. 3:09-bk-07047-JAF, 2010 WL

4025873 (Bankr. M.D. Fla. Sept. 27, 2010); *Kettle v. Bill Heard Enterprises, Inc*., 400 B.R. 795 (Bankr. N.D.Ala. 2009).

As [*4] to the requirements for certification, Plaintiff asserts as to numerosity that there are approximately 125 class members. The Tenth Circuit has not adopted a "'set formula'" to determine whether the numerosity requirement is met; instead, it is a fact-specific inquiry best left to the discretion of the district court's discretion." *Lowery v. City of Albuquerque*, 273 F.R.D. 668, 678 (D.N.M. 2011) (quoting *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978)). Here, Plaintiff's motion and Declaration point out that the cost of litigation of WARN claims is high compared to recovery which is low. I agree, finding that the putative class members' claims are too small to be prosecuted individually as such solo actions are not economical or feasible. See *Maez v. Springs Auto. Grp., LLC*, 268 F.R.D. 391, 395 (D. Colo. 2010) (numerosity satisfied where the individual claims are relatively small in relation to the cost of litigation). Courts have held that similar class sizes in WARN cases meet the numerosity requirement. *Cashman v. Dolce Int'l/Hartford, Inc*., 225 F.R.D. 73, 91 (D. Conn. 2004) (proposed class of 117 former employees of the defendant was large enough to satisfy the numerosity requirement); [*5] *Finnan v. L.F. Rothschild & Co., Inc*., 726 F. Supp. 460, 465 (S.D.N.Y. 1989) (class of approximately 127 former employees of the defendant satisfied the requirements of Rule 23(a)).[1] Thus, I find that Plaintiff has satisfied the numerosity requirement of Fed. R. Civ. P. 23(a)(1).

1 As the motion also points out, WARN Act classes have been certified with even smaller groups of claimants.

Commonality is also satisfied. Here, Plaintiff claims that he and the other Class Members were terminated as part of a common plan stemming from Defendant's decision to terminate employees at the Denver Facility. Additionally, the factual and legal questions stem from a common core of factual allegations regarding Defendant's actions and a common core of legal issues regarding every Class Member's rights, as follows: (a) Defendant employed more than 100 employees; (b) all the Class Members are protected by the WARN Act; (c) the Class Members were employees of Defendant; (d) Defendant discharged the Class Members on or within 30 days of June 1, 2012, and thereafter in connection with a mass layoff or plant closing; (e) the Class Members were "affected employees", as they lost their employment as a result [*6] of the mass layoff or plant closing; (f) Defendant terminated the employment of the Class Members without cause; (g) Defendant terminated the employment of the Class Members without giving them at least 60 days' prior written notice as required by the WARN Act; and (h) Defendant failed to pay the Class Members 60 days' wages and benefits. The only differences are minor, namely, the rate of pay and the date of termination.

As to typicality, the Class Representative (Plaintiff) suffered the same type of injury as the rest of the class and the motion and supporting material represents that there are no conflicts of interest between the Class Representative and the other Class Members. Defendant's alleged failure to comply with the requirements of the WARN Act represents a single course of conduct resulting in injury to all Class Members, including Plaintiff. Plaintiff alleges that neither he nor other Class Members received 60 days' notice or 60 days' wages and benefits, pursuant to the requirements of the WARN Act. Thus, I find that the factual situation of the Class Representative and the legal theories upon which the action is grounded are typical of the entire Class.

Finally, I must [*7] address the adequacy of representation--whether Plaintiff will fairly and adequately protect the interests of the class. The adequacy inquiry in the Tenth Circuit focuses on two questions: "(i) whether the named plaintiffs and their counsel have any conflicts with other class members; and (ii) will the named plaintiffs and their counsel vigorously prosecute the action on behalf of the class." *Lowery*, 273 F.R.D. at 680 (D.N.M. 2011) (citing *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1187-88 (10th Cir. 2002)). Here, I find that the first element of Rule 23(a)(4) is met in this case because, as set forth above, no divergence exists between the interests of the proposed Class Representative and the interests of the Class as a whole. The second element of Rule 23(a)(4) is met because Plaintiff's counsel appear from the Roupinian Declaration to be "qualified, experienced and generally able to conduct the proposed litigation." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). Additionally, it appears from the Roupinian Declaration that proposed class counsel is qualified to represent the putative class in this WARN Action and has diligently prosecuted Plaintiff's [*8] claims.

Based on the foregoing, the four prerequisites of Rule 23(a) for Class certification are met. However, in addition to meeting the prerequisites for class certification under Rule 23(a), a class must also meet one of the three alternative requirements for treatment as a class action under Fed. R. Civ. P. 23(b). Here, Plaintiff seeks class certification under Fed. R. Civ. P. 23(b)(3).

Class certification is proper under Rule 23(b)(3) where "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Maez*, 268 F.R.D. at 397; *Lowery*, 273 F.R.D. at 687. In determining whether predominance is satisfied under Rule 23(b)(3), the Court "must determine whether the members of the class seek a remedy to a common legal grievance and whether the common questions of law and fact central to the litigation are common to all class members." *United Food and Commercial Workers Union v. Chesapeake Energy Corp*., 281 F.R.D. 641, 655 (W.D. Okla. 2012). "'Class wide issues predominate if resolution of some of the [*9] legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject to only individualized proof.'" *Id*. (quotation omitted).

I find that a class action is the superior method of resolving this dispute because many of the claims are quite small, making individual lawsuits impracticable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Eisen*, 391 F.2d at 566-567; *United Food and Commercial Workers Union*, 281 F.R.D. at 657. As shown above, common questions of fact and law overwhelmingly predominate over the minor questions affecting individual claims.

Additionally, Fed. R. Civ. P. 23(b)(3) requires that the Plaintiff demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Four factors are set forth in Rule 23(b)(3) to guide the court's determination as to whether a class action is superior and whether issues of fact and law common to class members predominate over individual matters:

> (A) the interest of members of the class in individually controlling the prosecution [*10] or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

Here, I find that neither Plaintiff nor any of the other Class Members have an interest in individually controlling the prosecution of separate actions. (*See* Pl.'s Decl., Ex. A to Mot.) Concentrating the WARN litigation in a class action will avoid duplicate efforts of multiple suits. Finally, the difficulties in managing this litigation as a class action are few: the Class Members can be easily identified; the potential liability of Defendant can be readily calculated; and there is but one combined course of conduct--that of Defendant--to examine and adjudicate. (*Id*.) Accordingly, I find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir.2010) (class action device is frequently superior where proceeding individually [*11] would be difficult for class members with small claims).

I now turn to the portion of Plaintiff's motion that seeks to appoint Outten & Golden LLP as Class Counsel and to appoint Plaintiff as the Class Representative. I find that these requests should be granted. As to Class Counsel, the Roupinian Declaration shows that Plaintiff's counsel is qualified and has been actively and diligently prosecuting this action, expending considerable attorney and paralegal time in furtherance of the litigation. Moreover, Plaintiff is being represented by attorneys who are highly experienced in class action litigation and experienced in prosecuting claims under the WARN Act, having been appointed Class Counsel in some 75 WARN class actions. (*See* Roupinian Decl., Ex. B to Mot.) Similarly, as to the appointment of Class Representative, I find that Plaintiff has been diligent in pursuing the class claim and has worked with counsel in initiating and prosecuting the action; he has no conflict of

interest with other Class Members, and he has and will fairly and adequately represent the interests of the Class. (*See* Pl.'s Decl., Ex. A.) Finally, I find that the form and manner of service of the notice attached [*12] to the motion is appropriate.

Based on the foregoing, it is

ORDERED that Plaintiff's Motion for Class Certification and Related Relief (ECF No. 26) is **GRANTED**. In accordance therewith, it is

ORDERED that a class is certified comprised of Plaintiff and the other former employees of Defendants (i) who worked at or reported to Defendant's Denver Facility and were terminated on or about June 1, 2012, within 30 days of June 1, 2012, or in anticipation of or as the foreseeable consequence of the mass layoff or plant closing ordered by Defendant on or about June 1 2012, and who are affected employees within the meaning of 29 U.S.C. § 2101(a)(5), and (ii) who have not filed a timely request to opt-out of the class. It is

FURTHER ORDERED that the class as certified meets the requirements of Fed. R. Civ. P. 23(b)(3). It is

FURTHER ORDERED that Outten & Golden LLP is appointed Class Counsel. It is

FURTHER ORDERED that Plaintiff Freddie Belote is appointed the Class Representative. It is

FURTHER ORDERED that the proposed form of Notice to the Class, attached to the motion as Exhibit C, is approved. That form of notice is found to be the best notice practicable under the circumstances and constitutes [*13] due and sufficient notice to all class members in full compliance with the notice requirements of Fed. R. Civ. P. 23. It is

FURTHER ORDERED that within ten (10) days after the entry of this Order, or by **Friday, June 7, 2013**, Defendant shall provide Class Counsel with the names and addresses of the class members as noted in Defendant's records. It is

FURTHER ORDERED that on or before ten (10) days after receipt from Defendant of the names and addresses of the Class members, Class Counsel shall provide notice of the pendency of the class action lawsuit by mailing the Notice, First Class postage prepaid, to each employee of Defendant who falls within the definition of the class, to their last known address as noted in the records of the Defendant. It is

FURTHER ORDERED that within ten (10) days after such mailing, Class Counsel shall serve and file a sworn statement affirming compliance with this Order concerning the mailing of the Notice. It is

FURTHER ORDERED that the deadline for any Class Member to opt-out of the Class shall be 30 days from the date of mailing of the Notice. Finally, it is

ORDERED that Class Counsel shall serve and file a sworn statement listing the names of any persons [*14] who have opted out of the Class.

Dated: May 28, 2013

BY THE COURT:

/s/ Wiley Y. Daniel

Wiley Y. Daniel

Senior United States District Judge