

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LOUIS FLOYD, individually and on behalf
of others similarly situated,

Plaintiff,

v.

SARATOGA DIAGNOSTICS, INC., and
THOMAS PALLONE

Defendants.

Case No. 20-CV-01520-LHK

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF’S MOTION
FOR CLASS CERTIFICATION**

Plaintiff Louis Floyd (“Plaintiff”) brings this putative class action against Defendants Saratoga Diagnostics, Inc. (“Saratoga”) and Thomas Pallone (collectively, “Defendants”) under the Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act. Complaint, ECF No. 1, at ¶ 4 (“Comp.”). Before the Court is Plaintiff’s motion for class certification. ECF No. 35 (“Mot.”).¹ Having considered Plaintiff’s submissions, the relevant law, and the record in this case, the Court DENIES without prejudice Plaintiff’s motion for class certification.

¹ Plaintiff’s motion for class certification contains a notice of motion paginated separately from the points and authorities in support of the motion. ECF No. 35, at i. Civil Local Rule 7-2(b) provides that the notice of motion and points and authorities must be contained in one document with the same pagination.

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I. BACKGROUND

A. Factual Background

Plaintiff Floyd is a resident of Campbell, California. Comp. at ¶ 1. Defendant Saratoga is a California corporation with its principal place of business in Saratoga, California. *Id.* at ¶ 2. Defendant Pallone is the President of Saratoga. *Id.* at ¶ 27.

On March 12, 2019, Defendants transmitted a facsimile advertisement by fax to Plaintiff. *Id.* at ¶ 18. This fax advertised continuing medical education seminars. *Id.* Plaintiff did not provide permission or invite Defendants to send a fax to Plaintiff and Plaintiff has no prior relationship with Defendants. *Id.* at ¶ 23.

Plaintiff alleges on information and belief that Defendants faxed the same unsolicited facsimile to more than 40 other recipients without those recipients’ permission or invitation. *Id.* at ¶ 24.

B. Procedural History

Plaintiff filed a complaint in the instant action on March 1, 2020. ECF No. 1. Plaintiff’s complaint alleges a single cause of action for violation of the Telephone Consumer Protection Act (“TCPA”), as amended by the Junk Fax Prevention Act (“JFPA”), 47 U.S.C. § 227, *et seq.* *Id.* at ¶ 42.

Plaintiff served Pallone by mail on July 13, 2020. ECF No. 24. Plaintiff served Saratoga via the California Secretary of State on August 17, 2020. ECF No. 27. To date, neither Defendant has appeared in this case.

On October 14, 2020, Plaintiff filed a motion for entry of default against both Defendants. ECF No. 28. On October 14, 2020, the Clerk of the Court entered default against both Defendants. ECF No. 29, 33.

On November 25, 2020, Plaintiff filed the instant motion for class certification. ECF No. 35 (“Mot.”). Plaintiff seeks to certify the following class under Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3):

All persons who (1) on or after four years prior to the filing of this action, (2) were sent, by Defendants or on Defendants’ behalf, (3) a telephone facsimile

1 message substantially similar to Exhibit A, (4) from whom Defendants claim
 2 they obtained prior express permission or invitation to send those faxes in the
 3 same manner as Defendants claim they obtained prior express permission or
 4 invitation to fax the Plaintiff, and (5) for whom Defendants had no prior
 5 business relationship.

6 Mot. at 1; Comp. at ¶ 32. Furthermore, Plaintiff seeks to have Plaintiff’s counsel, Patrick H.
 7 Peluso and Taylor T. Smith of Woodrow & Peluso, LLC, appointed as class counsel. *Id.* at 12.
 8 Finally, Plaintiff requests a 120-day period to conduct limited discovery. Specifically, Plaintiff
 9 seeks to conduct third-party discovery to “establish a notice plan, class wide damages, and
 10 determine what assets Defendants possess.” *Id.*

11 **II. LEGAL STANDARD**

12 Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23
 13 does not set forth a mere pleading standard. To obtain class certification, a plaintiff bears the
 14 burden of showing that he has affirmatively met each of the four requirements of Rule 23(a) and at
 15 least one subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186,
 16 *amended by* 273 F.3d 1266 (9th Cir. 2001). After an entry of default, the Court accepts the well-
 17 pleaded factual allegations in the complaint as true. *See TeleVideo Systems, Inc. v. Heidenthal*,
 18 826 F.2d 915, 917–18 (9th Cir. 1987). However, “[a] party seeking class certification must
 19 affirmatively demonstrate . . . compliance with the Rule[.]” *Wal-Mart Stores, Inc. v. Dukes*, 564
 20 U.S. 338, 350 (2011).

21 Rule 23(a) provides that a district court may certify a class only if: “(1) the class is so
 22 numerous that joinder of all members is impracticable; (2) there are questions of law or fact
 23 common to the class; (3) the claims or defenses of the representative parties are typical of the
 24 claims or defenses of the class; and (4) the representative parties will fairly and adequately protect
 25 the interests of the class.” Fed. R. Civ. P. 23(a)(1)-(4). That is, the class must satisfy the
 26 requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a
 27 class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012).

28 If all four prerequisites of Rule 23(a) are satisfied, the Court must also find that Plaintiff
 “satisfy[ies] through evidentiary proof” at least one of the three subsections of Rule 23(b).

1 *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rule 23(b) sets forth three general types of
 2 class actions. *See* Fed. R. Civ. P. 23(b)(1)–(b)(3). As relevant here, Plaintiff seeks certification
 3 under Rule 23(b)(3) or Rule 23(b)(2). A class may be certified under 23(b)(3) if a court finds that
 4 “questions of law or fact common to class members predominate over any questions affecting only
 5 individual members, and that a class action is superior to other available methods for fairly and
 6 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). A class may be certified under
 7 23(b)(2) if a court finds that “the party opposing the class has acted or refused to act on grounds
 8 that apply generally to the class, so that final injunctive or corresponding declaratory relief is
 9 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

10 “[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap
 11 with the merits of the plaintiff’s underlying claim[.]’” *Amgen Inc. v. Conn. Ret. Plans & Trust*
 12 *Funds*, 568 U.S. 455, 465–66 (2013) (quoting *Dukes*, 564 U.S. at 351). This “rigorous” analysis
 13 applies to both Rule 23(a) and Rule 23(b). *Comcast*, 569 U.S. at 34. (discussing how Congress
 14 included “addition[al] . . . procedural safeguards for (b)(3) class members beyond those provided
 15 for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out),” and how a court has a “duty to
 16 take a ‘close look’ at whether common questions predominate over individual ones”). When
 17 conducting this rigorous analysis, the Court may be required to “judg[e] the persuasiveness of the
 18 evidence presented.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

19 Nevertheless, “Rule 23 grants courts no license to engage in free-ranging merits inquiries
 20 at the certification stage.” *Amgen*, 568 U.S. at 466. “Merits questions may be considered to the
 21 extent—but only to the extent—that they are relevant to determine whether the Rule 23
 22 prerequisites for class certification are satisfied.” *Id.* If a court concludes that the moving party
 23 has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*, 253
 24 F.3d at 1186.

25 **III. DISCUSSION**

26 Plaintiff contends that he has met all threshold requirements for class certification under
 27 Rule 23(a), and therefore seeks certification of a damages class under Rule 23(b)(3) or an

1 injunctive relief class under Rule 23(b)(2).

2 The Court first addresses the numerosity requirement of Rule 23(a)(1) below. Because
3 Plaintiff's failure to establish numerosity is sufficient to require denial of class certification, the
4 Court need not reach Plaintiff's further arguments for class certification under Rule 23(a) and Rule
5 23(b).

6 **A. Plaintiff Has Failed to Establish Numerosity under Rule 23(a)(1)**

7 In order to establish numerosity under Federal Rule of Civil Procedure 23(a)(1), Plaintiff
8 must show that "the class is so numerous that joinder of all members is impracticable." Fed. R.
9 Civ. P. 23(a)(1). When evaluating numerosity, the Court considers the specific facts of the case
10 and the rule itself "imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446
11 U.S. 318, 330 (1980). However, "[a]s a general rule, classes of 20 are too small, classes of 20–40
12 may or may not be big enough depending on the circumstances of each case, and classes of 40 or
13 more are numerous enough." *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 522 (C.D.
14 Cal. 2012). In analyzing numerosity "a court may make common-sense assumptions and
15 reasonable inferences." *The Civil Rights Educ. & Enforcement Ctr. v. RLJ Lodging Trust*, 2016
16 WL 314400, at *6 (N.D. Cal. 2016).

17 Plaintiff argues that he has satisfied Rule 23(a)(1) because Plaintiff has adequately pled
18 that Defendants sent faxes to hundreds if not thousands of individuals who fall into the putative
19 class. Mot. at 6. Plaintiff also argues that "common sense dictates that for a facsimile advertising
20 scheme to have any worthwhile result, Defendants would have had to fax hundreds if not
21 thousands of individuals." *Id.*

22 However, Plaintiff's complaint is not clear on the number of individuals that Defendants
23 faxed with the unsolicited advertisement. In the factual background section of Plaintiff's
24 complaint, Plaintiff alleges that "[o]n information and belief, Defendants faxed the same
25 unsolicited facsimile to Plaintiff and more than 40 other recipients without first receiving the
26 recipients' express permission or invitation." CAC at ¶ 24. By contrast, in the class action section
27 of the complaint, Plaintiff states that "Plaintiff is informed and believes, and upon such

1 information and belief avers, that the number of class members is in the thousands.” *Id.* at ¶ 36.
 2 At no point does Plaintiff explain the discrepancy between these two allegations in the complaint.
 3 This lack of clarity undermines Plaintiff’s argument that he has affirmatively demonstrated “that
 4 there are in fact sufficiently numerous parties” under Rule 23(a)(1). *Dukes*, 564 U.S. at 350.

5 Moreover, despite the fact that Plaintiff argues that hundreds if not thousands of other
 6 individuals received the same unsolicited advertisement by fax from Defendants, Plaintiff has not
 7 provided evidence that a single other individual received the same fax from Defendants. This lack
 8 of supporting evidence of numerosity is fatal to Plaintiff’s argument that he has affirmatively met
 9 the numerosity requirement of Rule 23(a)(1). “Rule 23 does not set forth a mere pleading
 10 standard. A party seeking class certification must affirmatively demonstrate his compliance with
 11 the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties,
 12 common questions of law or fact, etc.” *Dukes*, 564 U.S. at 350. As such, Plaintiff must provide
 13 specific evidence of numerosity beyond a mere assertion that hundreds if not thousands of putative
 14 class members exist.

15 Comparing this case to other cases where class certification has been granted or denied
 16 after default confirms the Court’s conclusion. For example, in *Whitaker v. Bennett Law* the court
 17 granted class certification after defendant defaulted on a TCPA claim. *Whitaker v. Bennett Law*,
 18 *PLLC*, 2014 WL 5454398, at *7 (S.D. Cal. Oct. 27, 2014). The court found that there was
 19 sufficient evidence to demonstrate that the class would be of such a size that joinder of all
 20 members would be impractical. *Id.* Specifically, the court based its finding of numerosity on: (1)
 21 plaintiff’s allegation that there were thousands of putative class members; and (2) the fact that
 22 “[n]umerous online forums exist where a vast amount of complaints have been lodged against
 23 [defendant] regarding unethical debt collection endeavors, ranging from allegations of harassment
 24 to violations of the TCPA.” *Id.* at *4. In light of the numerous online complaints against
 25 defendant complaining of the same violation of the TCPA, the court found that plaintiff had met
 26 Rule 23(a)(1)’s numerosity requirement. *Id.*

27 Similarly, in *Jackson v. Paycron* the court granted class certification after defendant

1 defaulted on a TCPA claim. 2019 WL 2085430, at *4 (M.D. Fla. May 13, 2019). The court found
2 that there was sufficient evidence of numerosity because: (1) “telemarketing campaigns generally
3 place calls to hundreds of thousands or even millions of potential customers”; (2) there were a
4 large number of online complaints regarding defendant’s unsolicited calls; and (3) “[d]efendant
5 used an autodialer, which is used precisely because of its capacity to call consumers en masse.”
6 *Id.* at *2. The court found that this evidence, taken together, was sufficient to demonstrate that
7 plaintiff had affirmatively met the numerosity requirements of Rule 23(a)(1). *Id.*

8 In both *Whitaker* and *Jackson*, plaintiff provided specific evidence that numerous other
9 individuals had posted online complaints after receiving the same unsolicited call that gave rise to
10 plaintiff’s TCPA claim. This specific evidence that numerous other individuals had suffered the
11 violation as plaintiff demonstrated that the putative class was in fact sufficiently numerous as
12 required by Rule 23(a)(1). In the instant case, Plaintiff has provided no evidence that a single
13 other individual received the same unsolicited fax that Plaintiff received from Defendants.

14 As such, the instant case is more similar to two recent cases in which courts have denied
15 class certification after default. In *Wang v. Defense Tax Group*, the court denied class certification
16 after defendant defaulted on a TCPA claim. 2020 WL 6204578, at *3 (C.D. Cal. Aug. 10, 2020).
17 The Court denied class certification because of “[p]laintiff’s failure to present any evidence that
18 even a single other person received unwanted text messages like the ones [plaintiff] received.” *Id.*
19 at *2. Much like the instant case, plaintiff sought to establish numerosity by alleging that
20 defendant “sent at least three text message advertisements to 2,000 of its current or former
21 clients.” *Id.* The court found that these allegations were insufficient to affirmatively demonstrate
22 that plaintiff had met Rule 23(a)(1)’s numerosity requirement. *Id.* at *3. As such, the court denied
23 class certification. *Id.*

24 Similarly, in *Yarger v. Fresh Farms*, the court denied class certification after defendant
25 defaulted on a TCPA claim. 2020 WL 4673229, at *8 (D. Kan. Aug. 12, 2020). The court found
26 that plaintiff had failed to demonstrate numerosity because plaintiff’s only evidence that joinder
27 was impracticable was plaintiff’s allegation that “the number of class members is substantial and

1 may include hundreds if not thousands of persons.” *Id.* at *7. Plaintiff further alleged that
2 numerosity was “evidenced by the impersonal, pro forma advertising content of the subject
3 unsolicited text messages.” *Id.* The Court found that these allegations on their own were
4 insufficient to establish numerosity under Rule 23(a)(1).

5 Plaintiff’s allegations in the instant case are much closer to those in *Wang* and *Yarger* than
6 *Whitaker* or *Jackson*. In contrast to the plaintiffs in *Whitaker* and *Jackson*, Plaintiff has provided
7 no evidence that other individuals received Defendants’ unsolicited advertisement by fax. As
8 such, Plaintiff has failed to “prove that there are in fact sufficiently numerous parties” as required
9 by Rule 23(a)(1). *Dukes*, 564 U.S. at 350–51. The Court must therefore find that Plaintiff has
10 failed to establish that the putative class “is so numerous that joinder of all members is
11 impracticable.” Fed. R. Civ. P. 23(a)(1).

12 Accordingly, Plaintiff has failed to establish numerosity under Rule 23(a)(1). The Court
13 must therefore deny Plaintiff’s motion for class certification. *See Mazza*, 666 F.3d at 588 (“Rule
14 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality and adequacy of
15 representation in order to maintain a class action.”).

16 However, the Court notes the unique posture of this case. Defendants have failed to appear
17 in this case, and Defendants’ lack of appearance has hindered Plaintiff’s ability to conduct
18 discovery to identify the size of any putative class. Because of the unique posture of this case, the
19 Court DENIES without prejudice Plaintiff’s motion for class certification.

20 Furthermore, the Court GRANTS Plaintiff’s request for a 120-day period to conduct
21 limited discovery. *See Mot.* at 12. Thus, Plaintiff may conduct limited discovery until September
22 23, 2021. If Plaintiff chooses to file a renewed motion for class certification, he must do so by
23 October 14, 2021.

24 **B. Class Counsel**

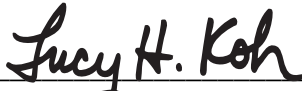
25 Plaintiff also requests that Plaintiff’s counsel, Woodrow & Peluso, LLC, be appointed
26 class counsel. *Mot.* at 13. However, Plaintiff’s request to appoint Woodrow & Peluso, LLC as
27 class counsel is moot because the Court denies Plaintiff’s motion to certify a class.

IV. CONCLUSION

In sum, the Court finds that Plaintiff has failed to satisfy the requirements of Rule 23(a)(1) with respect to Plaintiff’s putative class. Accordingly, the Court DENIES without prejudice Plaintiff’s motion for class certification.

IT IS SO ORDERED.

Dated: May 26, 2021



LUCY H. KOH
United States District Judge

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