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United States District Court,
N.D. Illinois.
The **SAVANNA** GROUP
v.
TRUAN.

No. 10 C 7995.
Feb. 20, 2013.

Phillip A. Bock, James Michael Smith, Jonathan B. Piper, Phillip James Bullimore, Tod Allen Lewis, Bock & Hatch, LLC, Chicago, IL, Brian J. Wanca, Ryan M. Kelly, Anderson & Wanca, Rolling Meadows, IL, for The Savanna Group.

Laura Milnichuk, Stephanie Wing Tipton, Litchfield Cavo, LLP, Chicago, IL, for Truan.

STATEMENT

AMY J. ST. EVE, J.

***1** Before the Court is Plaintiff Savanna Group Inc.'s Second Amended Motion for Class Certification. (R. 138.) After reviewing the parties' supplemental submissions, the Court grants the Motion.

BACKGROUND

On September 21, 2012, Plaintiff moved to certify a class action based upon Defendants' alleged violations of the Telephone Consumer Protection Act ("TCPA"). Plaintiff alleges that Defendants violated the TCPA by hiring Business to Business Solutions ("B2B"), a "fax advertising business run by Caroline Abraham," to send unsolicited fax advertisements. (R. 138, Pl.'s Mem in Support of Certification 1–2) ("Pl.'s Cert. Mem.") On January 4, 2013, the Court entered and continued Plaintiff's Second Amended Motion for Class Certification. (R. 156, Jan. 4, 2013 Order.) The Court concluded that it lacked sufficient information to determine whether Plaintiff had satisfied its burden under Rule 23 of demonstrating the adequacy of class counsel. (*Id.* at 29.) Specifically, the Court lacked information regarding the circumstances of an attempted $5,000 payment from Mr. Brian Wanca, one of Plaintiff's Counsel, to Mr. Eric Rubin, Caroline Abraham's attorney at the time. (*Id.*) Accordingly, the Court ordered Plaintiff to submit the following for each counsel of record: a "(1) detailed affidavit with appropriate support explaining the $5,000 attempted payment to Caroline Abraham; and (2) a detailed affidavit describing any past, present, or proposed financial arrangements with Caroline Abraham, Joel Abraham, or their counsel, or any attempts to establish such relationships." (*Id.* at 28.) Pursuant to this order, on January 24, 2013, Plaintiff's Counsel filed the required affidavits for the following individuals: Brian J. Wanca, Ryan M. Kelly, Phillip A. Bock, James M. Smith, Phillip J. Bullimore, Jonathan B. Piper, and Todd Lewis. (R. 162, Pl.'s Supp. Mem.)

LEGAL STANDARD

To be entitled to class certification, a plaintiff must satisfy each requirement of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and one subsection of Rule 23(b). *See Harper v. Sheriff of Cook Co.*, 581 F.3d 511, 513 (7th Cir.2009); *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 513 (7th Cir.2006). Rule 23 also requires the adequacy of class counsel. *See* Fed.R.Civ.P. 23(g)(2); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir.2002) ("For purposes of determining whether the class representative is an adequate representative of the members of the class, the performance of the class lawyer is inseparable from that of the class representative."). Under Federal Rule of Civil Procedure 23(g)(4), class counsel must "fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(4). Courts must consider the following in appointing class counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the

types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law;" (4) "the resources that counsel will commit to representing the class." Fed.R.Civ.P. 23(g)(1)(A)(i)-(iv). In addition, courts may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed.R.Civ.P. 23(g)(1)(B).

***2** Class counsel acts as a fiduciary of the class. *See Creative Montessori Learning Ctrs. v. Ashford Gear LLC,* 662 F.3d 913, 917 (7th Cir.2011); *Culver,* 277 F.3d at 913. As such, class counsel must show the district court that "they would prosecute the case in the interest of the class ... rather than just in their interests as lawyers who if successful will obtain a share of any judgment or settlement as compensation for their efforts." *Creative Montessori,* 662 F.3d at 917 (citations omitted). "If, therefore, the lawyer, through breach of his fiduciary obligations to the class, or otherwise, demonstrates that he is not an adequate representative of the interests of the class as a whole, realism requires that certification be denied." *Culver,* 277 F.3d at 913 (citations omitted).

In determining adequacy, courts should consider class counsel's integrity and capacity to act as "conscientious fiduciaries of the class." *Creative Montessori,* 662 F.3d at 918. Class counsel need not commit "egregious misconduct" to qualify as inadequate. Rather, courts must deny certification if "[m]isconduct by class counsel ... creates a serious doubt that counsel will represent the class loyally." 662 F.3d at 918. In clarifying the standard, the Seventh Circuit has noted that "[n]ot any ethical breach justifies the grave option of denying class certification." *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.,* No. 12–2599, 2013 WL 85937, at *8–9 (7th Cir. Jan.9, 2013) ("A 'slight' or 'harmless' breach of ethics will not impugn the adequacy of class counsel.") Nevertheless, "unethical conduct, not necessarily prejudicial to the class ... raises a 'serious doubt' about the adequacy of class counsel when the misconduct jeopardizes the court's ability to reach a just and proper outcome in the case." *Id.* at *9.

ANALYSIS

In challenging the adequacy of Plaintiff's proposed Class Counsel under Rule 23, Defendants raise three allegations of misconduct: (1) Plaintiff's Counsel breached a confidentiality agreement with Caroline Abraham regarding information on a 13213 hard drive and backup disks; (2) Plaintiff's Counsel misrepresented the nature of the class action in a solicitation letter to Plaintiff; and (3) Plaintiff's Counsel acted improperly in sending a $5,000 check to Mr. Rubin, Caroline Abraham's attorney at the time, allegedly to induce Ms. Abraham to provide further information about 13213's faxing operation. (R. 145, Defs.' Resp. Opposing Certification 15–20.) ("Defs.' Cert. Resp.") While considering the allegations as a whole to determine the adequacy of class counsel, the Court will detail each separately below.

I. Alleged Breach of a Confidentiality Agreement

First, Defendant alleges that Plaintiff's counsel breached a confidentiality agreement with Caroline Abraham by using in subsequent TCPA litigation information on a B2B computer hard drive and DVDs that Caroline Abraham's son, Joel Abraham, had produced to Plaintiff's counsel on Caroline's behalf in February 2009. (Defs.' Cert. Resp. 18.) Beginning in July 2008, Mr. Ryan Kelly of Anderson + Wanca, requested various documents from Ms. Abraham in connection with four other TCPA cases in which Anderson + Wanca also served as counsel to TCPA plaintiffs. (Defs.' Cert. Resp., Ex. G. at 2.) Ms. Abraham claims that Plaintiff's Counsel represented to her during a December 14, 2008 conversation that "nobody would look at anything on these media not related to these four cases." (Defs.' Cert. Resp., Ex. G., Abraham Decl. 2–3.) In a December 16, 2008 email from Mr. Kelly to Ms. Abraham, Mr. Kelly attached a copy of an agreed protective order, which Mr. Kelly stated in the email would "prevent [him] from disclosing any of the back-up disks or hard drive to any third-party."

(Defs.' Cert. Resp., Ex. 10.) In January 2009, Joel Abraham, acting at his mother's instruction, produced the hard drive and back up DVDs, (Defs.' Cert. Resp., Rubin Dep. Tr. 145–47), to Mr. Rubin, Joel and Caroline's attorney at the time, who then sent the materials on to Mr. Kelly in late February 2009. (Rubin Dep. Tr. 146:14–15.)

***3** In response, Plaintiff argues that the hard drive "was not produced in response to [an] alleged promise of confidentiality." (Pl.'s Cert. Mem. Law 14.) Rather, after Caroline Abraham "repeatedly refused to cooperate," Anderson + Wanca obtained the hard drive from Mr. Rubin, Joel Abraham's attorney at the time, pursuant to a subpoena to Joel Abraham. (*Id.* at 16.) Plaintiff contends that neither Joel Abraham nor Mr. Rubin indicated at any time that Plaintiff should keep the materials confidential. (*Id.* at 16.)

In *Reliable Money Order*, No. 12–2599, 2013 WL 85937 (7th Cir. Jan.9, 2013), the Seventh Circuit considered whether the district court had abused its discretion in refusing to deny certification based upon the same allegations against the same proposed class counsel as in this case. *Reliable Money Order*, 704 F.3d 489, 2013 WL 85937, at*10–11. With respect to the alleged breach of confidentiality with Caroline Abraham, the Seventh Circuit upheld the district court's conclusion that while the "conduct ... certainly raises concerns about the professionalism of plaintiff's counsel, [it] does not raise serious doubts about their ability to represent the class faithfully." *Id.* at *10 (noting the conduct neither "prejudice[s] the class or create[s] a conflict of interest"). In limiting its holding, the Seventh Circuit noted that it "reflects only the judgment that actions such as occurred here ... do not mandate disqualification of counsel." *Id.* Here, Defendants make substantially the same allegations and arguments with respect to this issue against the adequacy of class counsel as the defendant in *Reliable Money Order*. Moreover, Defendants have not presented any evidence showing that Plaintiff's Counsel's conduct, while less than transparent, will prejudice the class or rises to the level of "undermin[ing] the integrity of the proceedings." Accordingly, Plaintiff's Counsel's conduct with respect to Caroline Abraham on this issue does not render Plaintiff's Counsel inadequate.

II. Solicitation Letter

Next, Defendants argue that Plaintiff's Counsel's letter to Savanna Group demonstrates that Plaintiff's Counsel is not adequate to represent the class. Specifically, Defendants argue that the letter is "misleading" because it implies that Plaintiff is already a member of a certified class and improperly states the compensation Plaintiff would receive if Plaintiff's counsel prevailed in the suit. (Defs.' Cert. Resp. 16.)

The September 20, 2010 letter to Tim Caldwell of Savanna Group from Brian Wanca of Anderson + Wanca states the following, in relevant part:

> During our investigation, we have determined that you are likely to be a class member in one or more of the cases we are pursuing. You might not remember receiving the junk faxes, but if the lawsuit were successful, you would receive compensation (from $500 up to $1500) for each junk fax sent to you.
>
> (Defs.' Cert. Resp., Ex. N.)

***4** As with the alleged breach of confidentiality with Caroline Abraham, the Seventh Circuit in *Reliable Money Order* concluded that the solicitation letter did not render class counsel inadequate.2013 WL 85937, at *11. Instead, the Seventh Circuit likened the solicitation letter to the "slight" ethical breaches in *Halverson v. Convenient Food Mart*, 458 F.2d 927 (7th Cir.1972), which involved an attorney's communication with potential class members prior to the filing of the class action. 458 F.2d at 930. Moreover, as *Reliable Money Order* noted, on remand from the Seventh Circuit in *Creative Montessori*, the district court concluded that the "misrepresentation [in the solicitation letter] ... is not so significant as to cast serious doubt on coun-

sels' ability to represent the class loyally." *Creative Montessori II*, No. 09 C 3969, 2012 WL 3961307, at *3 (N.D.Ill. Sept. 10, 2012). Here, too, the Court agrees that the conduct, while questionable, neither prejudices the class nor compromises the "court's ability to reach a just and proper outcome in the case." *Reliable Money Order*, 704 F.3d 489, 2013 WL 85937, at *9.

III. $5,000 Attempted Payment to Caroline Abraham

In early August of 2009, Mr. Brian Wanca, one of Plaintiff's counsel of record, sent Caroline Abraham's attorney, Mr. Rubin, a $5,000 check made out personally to Mr. Rubin with a notation in the memo line, "document retrieval." (Defs.' Cert. Resp. 19.) The check was in a Ramada Inn envelope and without a cover letter. (*Id.*) Defendants contend that the payment was in the least a "clear demonstration of professional impropriety" and likely a "bribe for [Mr. Rubin] to get Ms. Abraham to cooperate with Plaintiff's counsel in a scheme to file hundreds of TCPA lawsuits." (Defs.' Cert. Resp. 19.) In their supplemental submissions, Defendants also argue that the $5,000 attempted payment from Mr. Wanca to Caroline Abraham through Mr. Rubin constituted an improper inducement to Caroline Abraham in violation of Illinois Rule of Professional Conduct 3.4. (Defs.' Supp. Mem. 9.)

Unlike the prior allegations, *Reliable Money Order* noted that the allegation of improper witness payments against Plaintiff's Counsel, if proven, would render them inadequate as class counsel. *Reliable Money Order*, 704 F.3d 489, 2013 WL 85937, at *11 ("Thus, without a doubt, if Wanca sent Rub[i]n the check to influence Caroline Abraham's testimony or made payment of expenses contingent upon the outcome of the case, Wanca would have committed a serious breach of the ethical rules that would require denial of class certification.") Although the issue of the $5,000 payment was not strictly before the Court in *Reliable Money Order*, the Seventh Circuit nonetheless commented on its merits. The Seventh Circuit concluded that "determining the propriety of the $5,000 check [would] require[ ] balancing the credibility of Rub[i]n's testimony against that of Wanca, who denied the allegations." *Id.* at *11. Furthermore, the Court noted that the *Reliable Money Order* defendant had not shown clear error in the *Cy's Crabhouse* court's factual findings that "no evidence existed to show improper motive for the payment." *Id.* at *11.

***5** Mr. Wanca avers in his affidavit that from July 10, 2008 to April 20, 2009, he "wrote checks to Caroline Abraham and Joel Abraham to compensate them for their time and expense in retrieving documents and sitting for depositions or sworn statements in 12 cases in which Business to Business Solutions acted as the fax broadcaster." (Pl.'s Supp. Mem., Ex. A, B. Wanca Decl., Ex. 1, at 2 (June 25, 2010).) Specifically, with respect to the $5,000 check, Mr. Wanca stated the following:

> We anticipated seeking documents and testimony for more TCPA cases in the future and believed that it would be best to take possession of the computer(s) to retrieve the data ourselves at our own time and expense. It was my understanding that the Abrahams sought to be compensated for turnover of the computer and loss of use of that computer. (In other words, they would need to buy a new computer and software.) Although I had no communications with Eric Rubin or the Abrahams, as those were handled by Ryan Kelly, while traveling with my family, in August of 2009, I sent a check in the amount of $5,000 ... to Rubin for "document retrieval" to be used to reimburse Caroline or Joel for retrieving documents on cases that Kelly requested documents on, for sitting for future depositions/sworn statements, and for turnover of the computer and to compensate for loss of use of the computer. (*Id.* ¶ 12.)

Mr. Wanca further asserted that "he believed this $5,000 amount to be reasonable because [he] believed Caroline and Joel had spent a considerable amount of time in responding to all previous requests" and he "anticipated that they would spend a

considerable amount of time in the future responding to document requests and sitting for sworn statements/depositions." (*Id.* ¶ 13.) Mr. Wanca allegedly made the check payable to Mr. Rubin "to prevent Caroline and/or Joel from simply depositing the check and then disappearing." (*Id.* ¶ 13.) Mr. Rubin responded on August 12, 2009 with a letter to Mr. Wanca, in which he stated that he believed the check "to be of questionable propriety" and "an attempt to pay [his] client for their cooperation in providing [Plaintiff's Counsel] with information or documents identifying third parties that may have sent fax transmissions through Business to Business." (Defs.' Supp. Mem., Ex. I.) After Mr. Rubin returned the check, Mr. Wanca averred that he "sent [him] a handwritten note of apology for any misunderstanding." (B. Wanca Decl., Ex. 1, ¶ 13 (June 25, 2010).)

Mr. Kelly avers that he "had communication with Eric Rubin" and "discussed compensating Caroline for sitting for depositions/sworn statements ..., and for turnover of the computer and to compensate for loss of use of the computer." (Pl.'s Supp. Mem., Ex. B, Kelly Decl., Ex. 1, ¶ 3.) Mr. Kelly also stated that he believed the $5,000 payment was reasonable because "it was anticipated that Caroline would spend a considerable amount of time in the future responding to document requests and sitting for sworn statements/depositions." (*Id.* ¶ 4.) According to Mr. Kelly, "Rubin stated that he would talk to Caroline about this matter and would let me know if Caroline would agree to provide additional documents and make herself available to provide sworn statements for the other TCPA cases." (*Id.*)

***6** In their supplemental Memorandum accompanying the affidavits, Plaintiff's Counsel further argue that the $5,000 check was not improper on the grounds that (1) "Caroline Abraham had been deposed several times and there was no issue of influencing her testimony, which was essentially locked in" (Pl.'s Supp. Mem. 2); and (2) by August 2009, Anderson + Wanca "had already made payments totaling over $3,500 to Caroline Abraham and her son Joel to compensate their time and expenses for providing that information." (*Id.*)

Based upon its review of the supplemental submissions and consideration of Plaintiff's Counsel's actions as a whole, the Court finds that the conduct does not render Plaintiff's Counsel inadequate. Neither party disputes that Ms. Abraham had accepted reimbursement payment from Plaintiff's Counsel prior to the August 2009 incident. (Pl.'s Supp. Mem. 2; Defs.' Supp Mem. 2.) Although Plaintiff's explanation of the manner and amount of the payment leaves unanswered questions, the record before the Court does not demonstrate that Mr. Wanca or any other attorney of record for Plaintiff sent the payment with the motive to induce particular testimony from Caroline Abraham, especially because she had already testified several times on these issues. Nor does it demonstrate action on the part of Plaintiff's Counsel that would otherwise prejudice the class in whole or in part or undermine the integrity of the judicial proceeding. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 960 (9th Cir.2009) (disapproving of incentive agreements creating a "disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other"); *Kaplan v. Pomerantz*, 132 F.R.D. 504, 511 (N.D.Ill.1990) (decertifying class in part on grounds that "plaintiff's counsel was at least a silent accomplice in, and at most encouraged, plaintiff's false testimony"). Additionally, while not dispositive, the analyses of other district courts that have considered this allegation with respect to the adequacy of class counsel further support this conclusion. [FN1] *See CE Design Ltd. v. CY's Crabhouse N., Inc.*, 07 C 5456, 2010 WL 3327876, at *7 (N.D.Ill. Aug.23, 2010) ("Though Abraham and Rubin may have viewed the larger $5,000 check as an attempt to induce her cooperation, that inference is not based on any communication from plaintiff's counsel."); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, No. 09–CV–1162, 2012 WL 3027953, at *7 (W.D.Mich. July 24, 2012) ("This Court is in

agreement with the district court in *CE Design* that no evidence suggests that Wanca or Kelly paid or attempted to pay Abraham or Joel Abraham contingent upon the *content* of their testimony or documents."). Thus, Plaintiff's Counsel's conduct, while questionable, does not rise to the level of prejudicing the class or compromising the "court's ability to reach a just and proper outcome in the case." [FN2] *Reliable Money Order*, 704 F.3d 489, 2013 WL 85937, at *9.

FN1. Although in *Reliable Money Order*, the Seventh Circuit assumed without deciding that evidence that Mr. Rubin perceived the check as pay-off was insufficient to establish that the payment "was contingent on the outcome of the case or the content of the testimony," this Court agrees with the district court in *Cy's Crabhouse* that such evidence, given the circumstances, is insufficient alone to establish an improper motive on the part of Mr. Wanca. *Reliable Money Order*, at *11.

FN2. Defendants urge the Court to conclude that Plaintiff's Counsel's conduct violated Illinois Rule of Professional Conduct 3.4(b). The Rule provides that a "lawyer shall not ... offer an inducement to a witness that is prohibited by law." Rule 3.4(b). The comments to the Rule further explain that a lawyer may "pay a witness or prospective witness the reasonable expenses incurred in providing evidence" and "reasonable charges for travel to the place of a deposition or hearing or to the place of consultation with the lawyer and for reasonable related out-of-pocket costs." Rule 3.4(b) cmt. Offers of payment or payment of expenses, however, "may not be contingent on the content of the testimony or the outcome of the litigation, or otherwise prohibited by law." Rule 3.4(b) cmt. As the issue of whether or not Plaintiff's Counsel violated the Rule is not dispositive of the adequacy of the class counsel, the Court will not reach this issue. *See Reliable Money Order*, 704 F.3d 489, 2013 WL 85937, at *9.

***7** Moreover, as the *Reliable Money Order* court noted, in assessing the adequacy of class counsel, courts should also consider "counsel's work on the case to date, counsel's class action experience, counsel's knowledge of the applicable law, and the resources counsel will commit to the case." 704 F.3d 489, 2013 WL 85937, at *9. Defendants have not presented any evidence suggesting any deficiencies of Plaintiff's Counsel in this regard. *Id.* at *9 n.7 ("No one disputes the qualifications of plaintiff's counsel under [the other Rule 23] metrics.")

Plaintiff, therefore, has satisfied its burden under Rule 23 of demonstrating the adequacy of class counsel. Accordingly, the Court grants Plaintiff's Second Amended Motion for Class Certification and appoints Plaintiff's counsel of record as Class Counsel.

CONCLUSION

The Court grants Plaintiff's Second Amended Motion for Class Certification. Pursuant to Rule 23(c), the Court appoints Plaintiff's Counsel of record as Class Counsel and certifies the following class: All persons who were successfully sent a facsimile on December 19, 2006 or December 20, 2006, from "SnowEx ... Leaders in Ice Control" promoting the "best built ... best backed" salt spreaders, offering "50% off on extended warranty for all of our spreaders purchased in December, 2006 and January, 2007," and instructing interested recipients to "Call 1–800–Salters for more information." (R. 161, Am.Com pl.3–4.)

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