

STATE OF SOUTH CAROLINA)
)
 RICHLAND COUNTY)
)
 WPS, Inc., d/b/a Honda Cars of Columbia,)
 on its own behalf and on behalf of those)
 similarly situated,)
)
 Plaintiff,)
)
 v.)
)
 Lobel Financial, Inc.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Case No. 01CP402092

ORDER

FILED
 01 OCT 15 AM 11:50
 JAMES A. SCOTT
 C.C.C. & G.S.

This matter is before the court upon consideration of the motion of Plaintiff, WPS, Inc., d/b/a Honda Cars of Columbia (hereinafter "WPS"), to certify the within action as a class action, to approve the proposed class settlement, to appoint WPS's counsel as class counsel, and to approve the notice publication. For the reasons stated herein, this court finds certification of the class is appropriate, the settlement should be approved, and notice of the relief obtained should be published.

WPS, in this matter, seeks certification of a class of persons in the State of South Carolina who have been, and who would continue to be, recipients of unsolicited facsimiles which were sent by or at the direction of Lobel Financial, Inc., (hereinafter "Lobel"). In its amended complaint, WPS in its individual capacity and on behalf similarly situated members of the class, seeks injunctive relief for Lobel's alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (hereinafter "TCPA") and applicable regulations. Pursuant to the terms of this settlement, Lobel has agreed to injunctive relief and will not send unsolicited facsimiles in the future. Further, should any individual claims of class members for monetary damages exist, such claims are unaffected by this settlement.

The TCPA is codified at 47 U.S.C. § 227. That statute provides in pertinent part as follows:


§ 227 Restrictions on use of telephone equipment

(b)(1) Prohibitions

It shall be unlawful for any person in the United States -

(c) to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine. . .

The purpose of the TCPA is to stop the practice of sending unsolicited facsimiles.¹ The act creates a private right of action in state court, and expressly provides that “[a] person or entity may, if otherwise permitted by the laws or rules of a state, bring in an appropriate court of that state,” an action based on a violation for injunctive relief and damages. See 47 U.S.C. § 227(b)(3) The recipient of an unsolicited or “junk fax” is having his or her phone lines, equipment, toner and paper misappropriated at his cost and at the sender’s benefit. This action is also brought pursuant to Rule 23, S.C.R.C.P., and is brought on behalf of WPS, individually, and on behalf of the following class of persons:



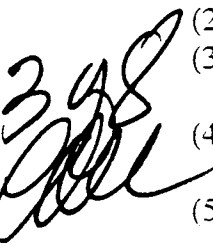
All entities who have received unsolicited facsimiles from Lobel Financial, Inc. on or after January 1, 1998.

South Carolina courts have, since the adoption of Rule 23, S.C.R.C.P., adopted a liberal standard in certifying cases for class disposition. As noted by the South Carolina Supreme Court, “Our class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP).

¹ Although this matter is brought under the Telephone Consumer Protection Act, South Carolina has also enacted a similar statute prohibiting the sending of unsolicited facsimiles. See SC Code Ann. § 15-75-51. The South Carolina statute is supplemental to the action created by TCPA. See *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363 (Ct. App. 2001)(State statute prohibiting transmission of unsolicited facsimile advertisements does not preclude private actions by consumers under TCPA for sending unsolicited advertisements via facsimile machines.) *Accord, Intl. Science & Technology Institute, Inc. v. Inacom*, 106 F.3d 1146 (4th Cir. 1997).

By omitting the additional requirements found in Rule 23, SCRCPP, endorses a more expansive view of class action availability than its federal counterpart." *Littlefield v. S.C. Forestry Comm'n*, 523 S.E.2d 781, 784 (1999). Since the adoption of Rule 23, S.C.R.C.P., many cases have used the class action procedure to allow adequate representatives to address issues affecting large groups of citizens. *Id.* citing, e.g., *Redmond v. Lexington County School Dist. No. Four*, 314 S.C. 431, 445 S.E.2d 441 (1994); *Brown v. County of Horry*, 308 S.C. 180, 417 S.E.2d 565 (1992); *Payne v. Duke Power Co.*, 304 S.C. 447, 405 S.E.2d 399 (1991); *South Carolina Pub. Serv. Auth. v. Citizens and Southern Nat'l Bank of South Carolina*, 300 S.C. 142, 386 S.E.2d 775 (1989).

In making its determination regarding the propriety of class certification, this court will review the criteria set forth in Rule 23, S.C.R.C.P. *in seriatim*. Those requirements are that:

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- (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;
 - (4) the representative parties will fairly and adequately protect the interests of the class;
 - and
 - (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

S.C.R.C.P. 23(a): *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 2001, 201 (1991).


A. Numerosity

For a class action to be appropriate, the proposed class must be so numerous that "joinder of all members is impracticable." S.C.R.C.P. 23(a)(1). "Impracticable" does not mean "impossible." *Fifth Moorings Condominium, Inc. v. Shere*, 81 F.R.D. 712, 716 (S.D. Fla. 1979). To meet this requirement, the class representatives need only show that it is difficult or

inconvenient to join all the members of the class. *See, e.g., Carbon Dioxide*, 149 F.R.D. at 232. Geographical dispersion of the class members is appropriately considered. *Kingston Square Tenants Ass'n. v. Tuskegee Gardens, LTD.*, 1994 WL 80874, at *3 (S.D. Fla. 1994).

Here, WPS alleges that members of the proposed class live throughout the state and number at least over one hundred (Complaint, ¶ 6), thus easily exceeding the threshold for a presumption of impracticality of joinder.² The facsimile in question was a blanket advertisement sent to business entities. Plaintiff is one such business entity among those businesses that received this fax. Since such business entities are spread throughout the state, the geographic diversity of the class, as well as the number of class members involved mitigates toward certification.

B. Commonality

 In order to maintain a class action, there must be "questions of law or fact common to the class." S.C.R.C.P. 23(a)(2) (emphasis added). This commonality requirement has been characterized as a "low hurdle" easily surmounted. *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. 111. 1992); *see also, Stewart v. Wintr*, 669 F.2d 328, 335 (5th Cir. 1982) (commonality test is met when there is "at least one issue whose resolution will affect all or a significant number of the putative class members"). The rule thus does not require a complete identity of circumstances among class members. Differences among class members are not fatal

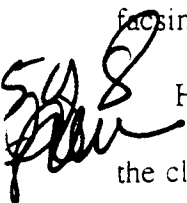
² *See* H. Newberg, *Newberg on Class Actions*, § 3.05, at 3-25 (Shepard's 1992) ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone."); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.) (generally, more than 40 class members satisfies numerosity), *cert. denied*, 479 U.S. 883 (1986); *Cf. Carbon Dioxide*, 149 F.R.D. at 237 (plaintiffs' contention that purchasers of product "numbers in the thousands" held adequate to satisfy numerosity requirement); *Kingston*, 1994 WL 80874, at *3 (proposed class of approximately 100 tenant families satisfied numerosity).

to a class action as long as some common questions of fact or law exist. *McGann v. Mongo*, 287 S.C. 561, 567-68, 340 S.E. 2d 254, 157-58 (S.C.App. 1986).

WPS alleges that Lobel engaged in a common course of conduct in the sending of unsolicited facsimiles. The Complaint identifies at least three common issues of fact and law (*See* Complaint ¶ 11(b)), all relating to the standardized sending of unsolicited facsimiles in violation of the TCPA. These common questions alleged in the Complaint amply satisfy the commonality requirement of Rule 23(a)(2). *Cf. McGann*, 287 S.C. at 568, 340 S.E.2d at 158.

C. Typicality

"[T]ypicality is satisfied where the interests of the named parties arise from the same course of conduct that gave rise to the claims of the class they seek to represent, and are based on the same legal or remedial theory. . . ." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.1985). Typicality is established in that WPS was the recipient of unsolicited facsimiles allegedly sent by Lobel, just as class members were.

 Here, the claims arise from *precisely* the same alleged course of conduct that gives rise to the claims of the class it seeks to represent. There are no factual differences, and, even if there were, the "strong similarity" of legal theories nevertheless satisfies the typicality requirement. WPS's claims are based upon the underlying principle that it is wrongful for a company to send unsolicited facsimiles in violation of the TCPA.

D. Adequacy of Representation

The fourth prerequisite of Rule 23 (a) requires that "the representative parties will fairly and adequately protect the interests of the class." First, the class representatives must not possess interests antagonistic to the interests of the class. *Waller v. Seabrook Island Property Owners*,

300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Second, the representative's counsel must be qualified, experienced and generally able to conduct the proposed litigation. There are no antagonisms between WPS and the members of the class. All were recipients of unsolicited facsimiles from Lobel. The injunctive relief obtained will benefit all class members. Moreover, WPS's counsel are experienced and capable of pursuing this litigation.

E. Amount in Controversy

In an action primarily for injunctive relief, the \$100 threshold set forth in S.C.R.C.P. 23 is not required. However, WPS has alleged that each class member suffered damages in excess of one hundred dollars as a result of Lobel's actions. The alleged violation of the TCPA, if proven by an individual class member, is remedied by a \$500 penalty payment for each unsolicited facsimile. If individual class members determine it appropriate to do so, they will remain free to pursue individual claims. The fifth and final prerequisite to class certification under Rule 23(a) is thus satisfied by the allegations in the Complaint. *Cf. Gardner*, 304 S.C. at 330-31, 404 S.E.2d at 201 (sum claimed by plaintiff controls unless it appears otherwise to a legal certainty).

F. Notice


In classes in which the relief sought is primarily injunctive relief, notice is not constitutionally mandated or necessary. See *Hammond v. Powell*, 462 F.2d 1053 (6th Cir. 1972). However, S.C.R.C.P. 23(c) does not distinguish between injunctive or compensatory-type claims. For that reason, WPS has proposed notice of this settlement be provided by publication of the following statement in The State newspaper, published in Columbia, South Carolina:

Please take notice that in the matter of WPS, Inc., et al. v. Lobel Financial, Inc., Case No. 01CP402092 (Richland County Court of

Common Pleas), a class action has been certified and settled wherein defendant, Lobel Financial, Inc., is enjoined from the sending of unsolicited facsimiles to class members within the State of South Carolina in violation of 47 U.S.C. § 227. This settlement does not affect any individual damage claims class members may pursue. For further information, you may contact any of the following class counsel:

James C. Anders
John G. Felder, Jr.
James C. Anders, P.A. & Associates
Post Office Box 7485
Columbia, SC 29202
803-799-9400

Chad McGowan
James, C. Anders, P.A. & Associates
125 Hampton Street
Suite 300
Rock Hill, SC 29730
803-366-2236

798

Timothy E. Eble
Timothy E. Eble, P.A.
P.O. Box 2313
Mount Pleasant, SC 29465
843-856-5234

Since individual claims of class members are not affected by this settlement, but such class members shall benefit by not receiving unsolicited facsimiles in the future, such a procedure for providing notice to the class is appropriate. Therefore, the above notice publication complies with Rule 23, S.C.R.P.

Now, therefore, in consideration of the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion to certify a class is GRANTED;

Plaintiff's motion to approve the proposed class settlement is GRANTED;

Defendant, Lobel Financial, Inc., will hereinafter maintain records demonstrating permission has been granted by any class member recipient to receive any advertisements for products or services via facsimile. Acceptance of an advertisement by facsimile by a class member will be recorded before such facsimile is transmitted. Defendant, Lobel Financial, Inc., will not send unsolicited facsimiles in violation of the Telephone Consumer Protection Act to class members in the future

Plaintiff's motion to appoint class counsel is GRANTED; and

Plaintiff's motion to approve publication of notice is GRANTED.

Fees and expenses of the litigation shall be addressed by separate order.



So Ordered:



Judge, Court of Common Pleas

Dated: Oct. 12, 2001