UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRENDA DRAKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:19-cv-01458-RLY-DML
	)	
MIRAND RESPONSE SYSTEMS, INC. and,	)	
WOODFOREST NATIONAL BANK,	)	
	)	
Defendants.	)	

ENTRY ON DEFENDANTS' JOINT MOTION TO STRIKE CLASS ALLEGATIONS

Plaintiff, Brenda Drake, brought this class action against Defendants, Mirand Response Systems, Inc., a debt collection agency, and Woodforest National Bank, for violating the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and against Mirand for violating the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. Plaintiff alleges Defendants violated the TCPA by using an automated dialer system and an artificial or prerecorded voice to place non-emergency calls—otherwise known as robocalls—to her cell phone number regarding an account that did not belong to her, and without her prior consent. She further alleges that Mirand violated the FDCPA by leaving prerecorded voice messages on her cell phone in an attempt to collect a debt without disclosing its identity.

Defendants now move to strike Plaintiff's class allegations. For the following reasons, Defendants' motion is **DENIED**.

I. Background

In May 2018, Plaintiff received a new cell phone number. (Filing No. 1-1, Complaint ¶ 24). Mirand placed multiple calls to this phone number in connection with the collection of a debt alleged to be owed to Woodforest. (*Id.* ¶ 27). Plaintiff claims she never had an account with Woodforest and never gave her cell phone number to either defendant. (*Id.* ¶¶ 37-39). Plaintiff's counsel informed Mirand that it had been calling the wrong person, but Mirand later placed two additional calls to Plaintiff's cell phone number. (*Id.* ¶¶ 35-36).

Plaintiff seeks to represent one TCPA class, one TCPA subclass, and one FDCPA class:

> **TCPA Class**: All persons throughout the United States (1) to whom Mirand Response Systems, Inc. placed, or caused to be placed, a call, (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of Mirand Response Systems, Inc.'s calls, (3) by using an automatic telephone dialing system or an artificial or prerecorded voice, (4) within the four years preceding the date of this complaint through the date of class certification.
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> **TCPA Subclass**: All persons throughout the United States (1) to whom Mirand Response Systems, Inc. placed, or caused to be placed, a call, on behalf of Woodforest National Bank, (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of Mirand Response Systems, Inc.'s calls, (3) by using an automatic telephone dialing system or an artificial or prerecorded voice, (4) within the four years preceding the date of this complaint.
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> **FDCPA Class**: All persons (1) with an Indiana address, (2) for whom Mirand Response Systems, Inc. left, or caused to be left, a voice message, (3) in connection with collection of a consumer debt, (4) within the year preceding this complaint through the date of class certification, (5) where in Mirand Response Systems, Inc. failed to state its name.

(*Id.* ¶ 65). Plaintiff has not moved to certify the classes, nor has Plaintiff had an opportunity to conduct discovery.

Defendants move to strike the TCPA class allegations for the following reasons: the class definition demonstrates that unique issues of law and fact predominate over common questions, proceeding on a class basis is not superior to proceeding on an individual basis, and the class is impossible to ascertain. Defendants challenge the FDCPA class for similar reasons.

II. Legal Standard

Rule 23(c)(1)(a) instructs that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." In keeping with this direction, a court may deny class certification even before the plaintiff moves to certify. *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 563 (7th Cir. 2011). "If the plaintiff's class allegations are facially and inherently deficient, for example, 'a motion to strike class allegations . . . can be an appropriate device to determine whether [the] case will proceed as a class action.'" *Buonomo v. Optimum Outcomes, Inc.*, 301 F.R.D. 292, 295 (N.D. Ill. 2014) (St. Eve, J.) (quoting *Bohn v. Boiron, Inc.*, No. 11 C 08704, 2013 WL 3975126, at *5 (N.D. Ill. Aug. 1, 2013)).

But motions to strike class allegations are generally disfavored. *DuRocher v. Nat'l Collegiate Athletic Ass'n,* No. 1:13-CV-01570-SEB, 2015 WL 1505675, at *4, n.2 (S.D. Ind. Mar. 31, 2015) (collecting cases). If the dispute over certification is factual in nature and discovery is needed to determine whether to certify a class, a motion to strike class allegations at the pleadings stage is premature. *Buonomo*, 301 F.R.D at 295. "Since class certification 'generally involves considerations that are enmeshed in the factual and legal

issues comprising the plaintiff's cause of action,' striking class allegations at the pleading stage is generally inappropriate." *Brown v. Swagway, LLC*, No. 3:15-CV-588 JVB, 2017 WL 899949, at *1 (N.D. Ind. Mar. 7, 2017) (quoting *Boatwright v. Walgreen Co.*, No. 10-cv-3902, 2011 WL 843898, at *2 (N.D. Ill. Mar. 4, 2011)).

Where, as here, a defendant attempts to preemptively strike class allegations on the face of the complaint prior to the plaintiff's motion for class certification and before discovery has been conducted, the court accepts the plaintiff's allegations supporting class certification as true. *Cox v. Sherman Capital LLC*, No. 1:12-CV-01654-TWP, 2014 WL 1328147, at *9 (S.D. Ind. Mar. 31, 2014). The burden falls on the defendant to demonstrate that "no possible set of factual allegations . . . could justify certifying a class." *Id.* (citing *Boyce v. Wachovia Sec., LLC*, No. 5:09-CV-263-FL, 2010 WL 1253744, at *7 (E.D.N.C. Feb. 17, 2010) ("To prevail at this early stage, defendants have the burden of demonstrating from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.") (quotations omitted)). With this framework in mind, the court will consider whether Plaintiff's complaint is so facially lacking that no amount of discovery could yield a certifiable class.

III. Analysis

The requirements of Rule 23 are familiar. First, a plaintiff must satisfy the elements in Rule 23(a): numerosity, commonality, typicality, and adequacy. A plaintiff must then satisfy one of the requirements under Rule 23(b). Plaintiff in this case proceeds under Rule 23(b)(3), which allows a class action to be maintained only if

"questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Defendants object to the class definitions for three primary reasons. First, Plaintiff will be unable to demonstrate common injury because class members' phone numbers could have been reassigned at different times resulting in different numbers of calls to the wrong recipient, and issues of consent require an individualized inquiry. Second, the proposed classes are not ascertainable because many people who receive a call may just say it was a wrong number to avoid the call, and Mirand can't determine who they actually called if the person who answered the call wasn't the intended recipient. Finally, Plaintiff's injuries are not typical of the class claims because class members may have received different numbers of calls, and some class members may have informed Mirand that it was calling the wrong number. Defendant objects to the FDCPA class by arguing that Mirand has a policy of identifying itself in every message, and Plaintiff will be required to present individual evidence for each class member. The court is not convinced that Plaintiff's complaint is so facially lacking that no class could be certified.

First, Defendants' argument as to commonality is unpersuasive. Courts in this district have considered and rejected similar arguments in the TCPA context before. In *Johnson v. Navient Solutions, Inc.*, the defendant argued that the factual differences between individual claims of proposed class members would overwhelm the litigation and destroy the required commonality. 315 F.R.D. 501, 502 (S.D. Ind. 2016) (McKinney, J.). "These differences will include difficult damage calculations, individual

determinations of who the telephone user was, when the call was made and proof that Navient actually made the calls." *Id.* at 503. The court rejected this challenge: "There will undoubtedly be differences in the amount of damages claimed by class members, differences on users and habits of users, yet these matters can be efficiently addressed." *Id.* So too here.

As for consent, the parties' citations indicate a split of authority. *Compare Ung v. Universal Acceptance Corp.*, 319 F.R.D. 537, 541 (D. Minn. 2017) (finding individualized inquiries on the consent issue precluded class certification), *with Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008) (finding the possibility that some individuals may have consented to be an insufficient basis for denying certification). At this stage, however, Defendant has not demonstrated that these concerns are anything more than hypothetical or speculative. This is not sufficient to strike Plaintiff's class allegations. *See Jamison v. First Credit Servs.*, 290 F.R.D. 92, 107 (N.D. Ill. 2013) ("[I]f the defendants fail to set forth this specific evidence and instead only make vague assertions about consent, then individualized issues regarding consent will not predominate over common questions of law or fact so as to prevent class certification.").

Defendants' argument regarding ascertainability is equally unpersuasive. The Seventh Circuit requires that classes be defined "clearly and based on objective criteria." *Mullins v. Direct Dig., Ltd. Liab. Co.*, 795 F.3d 654, 659 (7th Cir. 2015). This analysis focuses on "the adequacy of the class definition itself," not on whether "it would be difficult to identify particular members of the class." *Id.* The Seventh Circuit does not

require Plaintiffs to prove at the pleadings or certification stage that there is a "reliable and administratively feasible" way to identify all who fall within a class definition. *Id.* at 657 (rejecting the heightened ascertainability requirements imposed in other circuits). This circuit's approach to ascertainability addresses three common issues with class actions. First, "classes that are defined too vaguely fail to satisfy the 'clear definition' component." *Id.* Second, "classes that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement." *Id.* at 660. Third, "classes that are defined in terms of success on the merits—so-called 'fail-safe classes'—also are not properly defined." *Id.* It does not appear impossible that Plaintiff's proposed classes can comply with these requirements. The classes identify particular groups of individuals harmed in particular ways during a particular period of time. The classes are not defined using subjective criteria. And the definitions do not create fail-safe classes. If Defendants' prevail, *res judicata* will bar class members from re-litigating their claims.

Defendants' typicality argument also fails at this stage. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). "The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Defendant's speculate that proposed class members may have received a different number of calls, and that some may have informed Mirand that

it was calling the wrong number. Discovery may reveal sufficient differences between proposed class members such that certification is inappropriate. But at this point, Defendants' concerns do not render the complaint facially invalid or demonstrate that it is impossible for Plaintiff to certify a class.

Finally, Plaintiff is entitled to challenge Defendants' factual assertions and to propose methods of discovery that may produce relevant information. The court does not yet know what records may be identified during discovery, although Defendants acknowledge they retain at least some records relevant to certification issues. Plaintiff also suggests that affidavits may be used to identify potential class members. *See Mullins*, 795 F.3d at 669. ("[A] district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.").

The court makes no determinations at this juncture whether Plaintiff's proposed classes will be certified. After conducting discovery, it may well be the case that Plaintiff cannot carry her burden of showing, by a preponderance of the evidence, that she has satisfied Rule 23(a)'s requirements. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The court finds only that Plaintiff must be afforded the opportunity to further develop the record before moving for certification. Defendants may raise their objections again at that point.

IV. Conclusion

Because Defendants have not demonstrated that it is impossible for Plaintiff to certify a class, Defendants' Motion to Strike Class Allegations is **DENIED**.

SO ORDERED this 22nd day of July 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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