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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** Plaintiff's Motion for Class Certification (Dkt. No. 185)

This matter is before us on Plaintiff The Dominic Corea Limited Partnership's ("Plaintiff") Motion for Class Certification. We have considered the arguments in support of and in opposition to the Motion and consider this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

In 2009, Plaintiff filed this putative class action in state court against Defendants ILD Telecommunications, Inc. ("ILD") and Advanced Business Services, LLC ("ABS"). Following removal and discovery, Plaintiff filed a Second Amended Complaint ("SAC"), which added Solution Marketing, LLC ("Solution Marketing"), Verification Resources, LLC ("Verification Resources"), daData, Inc. ("daData"), and Vici Marketing, LLC ("Vici Marketing") as Defendants. Plaintiff alleges that Defendants together engaged in the practice of "cramming," whereby Defendants contacted consumers to illegally and insufficiently obtain their authorization to place charges for e-fax services onto their local telephone bills.

In particular, Plaintiff alleges that ABS, the company that purportedly offered the e-fax services, subcontracted with Solution Marketing to sell the services through telemarketing. (Mot. 2). Solution Marketing in turn subcontracted its obligation to Vici Marketing, which conducted the sales portion of the call. (Mot. 2-3). During the sales portion of the call, if the consumer indicated that he or she was interested in purchasing the e-fax services, the call was then transferred to Verification Resources – a subcontractor of Vici Marketing – to verify and finalize the sale. (Mot. 3). Only the verification portions of the calls were recorded. (Mot. 7). ABS also contracted with ILD for billing and collection services and with daData to handle ABS's customer service calls. (Mot. 3-4). daData also provided the platform for the e-fax services that ABS purportedly offered. (*Id.*). Based on these allegations, Plaintiff asserts the following four causes of action against all Defendants: (1) violation of Business and

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Professions Code § 17200; (2) violation of California Public Utilities Code § 2890; (3) unjust enrichment; and (4) injunctive relief.

On July 12, 2012, Plaintiff filed the instant Motion to certify the following class: "All individuals and entities residing in California that received, during the four years prior to the filing of the Complaint, telephone bills from a Local Exchange Carrier ("LEC"), including but not limited to AT&T, containing charges from Defendants for services which were never authorized." Based on this definition, whether a customer who was billed for the e-fax service is a Class Member depends on whether he or she authorized the charge. Although this inquiry appears inherently individualized, Plaintiff argues that in this case, no authorization was provided by any customer who was charged for the e-fax service during the Class period because the Authorization Question in the verification script is so misleading and confusing as a matter of law that it vitiated authorization in every case.[1]

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[1] A review of one version of the sales and verification scripts, dated October 25, 2007, shows that a complete telemarketing call proceeded as follows. In the sales portion of the call, the operator would begin by introducing himself or herself and describing the e-fax services. The operator would then inform the consumer of the cost of the e-fax services ($45.95) and the consumer's right to cancel the service. The operator would then ask the consumer the following two questions: "Are you 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct? (response). Are you ready to purchase this very valuable and practical service? (response)." (Mot., Ex. A, at 22). Then, after informing the consumer that the product materials will arrive in 7 to 10 business days and that the consumers can call its Customer Service Department with any questions or to cancel the service, the operator would transfer the call to another operator at Verification Resources to "confirm [the customer's] information and complete the activation process." (*Id.*).

During the verification process, the operator would begin by informing the consumer that "the $49.95 will appear on your monthly telephone bill automatically each month, unless of course you give us a call to cancel. These charges will appear on the ILD Teleservices bill page as being billed on behalf of Advanced Business Services." (*Id.* at 23). After obtaining assurance from the consumer that he or she "understand[s] that Advanced Business Services is not affiliated with your local company," the operator would proceed by asking whether he or she can "start your business on the Advanced Business Services plan? (must get a clear affirmative)." The operator would then proceed to ask 6 verification questions: (1) "I have your name as _____ (read full name, first, last). Is this correct? (response)"; (2) "I have your business name as _____. Is this correct? (response)"; (3) "I show your mailing address as _____ (include street, apt#, city, state and zip). Is this correct? (response)"; (4) "Your business telephone number is _____ (include area code). Is this correct? (response)"; (5) "You are requesting Advanced Business Services for this number only, correct? (response) (yes, right or correct)"; (6) "And You are 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct? (response) (yes, right or correct)." (*Id.* at 23). If the customer affirmed the purchase, the operator would then conclude the call by informing the consumer of the contact information of ABS's Customer Service Department.

Plaintiff further requests that we appoint Plaintiff as the Class Representative and the law firms of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, LLP, and McNicholas & McNicholas, LLP as co-lead Class Counsel. Although the Motion states that class certification is sought "pursuant to Rules 23(a) and 23(b)(2) and/or 23(b)(3) of the Federal Rules of Civil Procedure," Plaintiff addresses only the certification requirements under 23(b)(3) in its Motion. Thus, we deem Plaintiff to have abandoned class certification under Rule 23(b)(2). Accordingly, we address only whether Plaintiff has satisfied the requirements for class certification under Rule 23(b)(3).

II. Legal Standard

A motion for class certification is governed by the requirements of Federal Rule of Civil Procedure 23. In determining whether to certify the class, we generally take the substantive allegations of the complaint as true. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). However, we must look beyond the pleadings to evaluate the merits of a plaintiff's substantive claims to the extent they overlap with the Rule 23 requirements, *id.*, as "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *General Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). "When considering class certification under Rule 23," we "must perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied." *Ellis*, 657 F.3d at 980.

Plaintiff seeks to certify a Rule 23(b)(3) Class. Accordingly, Plaintiff bears the burden of establishing that the following Rule 23(a) and Rule 23(b)(3) requirements are met:

(1) "the class is so numerous that joinder of all members is impracticable," Rule 23(a)(1);
(2) "there are questions of law or fact common to the class," Rule 23(a)(2);
(3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Rule 23(a)(3);
(4) "the representative parties will fairly and adequately protect the interests of the class," Rule 23(a)(4);
(5) "the questions of law or fact common to class members predominate over any questions affecting only individual members," Rule 23(b)(3); and
(6) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Rule 23(b)(3).

III. Analysis

A. Commonality

Rule 23(a)(2) requires Plaintiff to show that "there are questions of law or fact common to the class." These common issue or issues must be *material* to the resolution of the claims asserted and demonstrate that putative Class Members "suffered the same injury." *Gen. Tel. Co. of Sw. v. Falcon*,

457 U.S. 147, 157 (1992). In *Dukes*, 131 S. Ct. at 2551, the Supreme Court explained that while a single common issue may suffice, it "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Indeed, after *Dukes*, "what matters to class certification is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551 (internal quotation and alteration removed).

In *Dukes*, the plaintiffs failed to establish the existence of a common question because they "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy." *Id.* Specifically, the Court found that where the plaintiffs alleged that every woman at Wal-Mart was "the victim of one common discriminatory practice," they failed to offer "significant proof" that Wal-Mart operated under a general policy of discrimination, given that plaintiffs' expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.* at 2548, 2554. Similarly, in *Ellis*, decided after *Dukes*, the Ninth Circuit required the district court to engage in a "rigorous analysis" to determine, on remand, "whether there was 'significant proof' that [the defendant] operated under a general policy of discrimination" that could "affect the class *as a whole*." *Ellis*, 657 F.3d at 983.

Thus, under the post-*Dukes* commonality inquiry, we must conduct a "rigorous analysis" to determine if plaintiffs have offered "significant proof" that there was a common policy or practice concerning an issue central to the plaintiffs' claims "that could affect the class *as a whole*." *Id.* Under *Dukes*, it is the existence of this common policy or practice that drives the generation of common questions or answers. *See* 131 S. Ct. at 2551.

In this case, Plaintiff asserts that the common question shared by all Class Members is whether "the verification script, uniformly applied to the proposed class, could not as a matter of law and fact give rise to a valid authorization because it utilized compound, confusing and misleading questions." (Reply 15). In particular, Plaintiff asserts that the "Authorization Question" asked at the end of the verification process – "And you are 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct?" – is so compound, confusing, and misleading, that it could give rise to no valid authorization, even if the consumer responded affirmatively. (Mot. 6). Essentially, Plaintiff argues that Defendant subjected Class Members to the common practice of being asked the allegedly misleadingly and confusing Authorization Question.

While we find that Plaintiff has offered "significant proof" that Defendants had a common practice of posing the Authorization Question, in light of the contracts between Defendants that required

the scripts be read verbatim[2] and Defendants' acknowledgment that the Authorization Question constituted an essential element of the verification script that was never changed,[3] we conclude that Plaintiff's assertion that the Authorization Question can generate common answers as to the class does not withstand the "rigorous analysis" required under *Dukes*.

In particular, we reject Plaintiff's flawed premise that we may artificially isolate a single question from a script to determine whether it is so misleading as to vitiate all authorization. Plaintiff cites no authority for such proposition, nor can we find any. Instead, the authorities indicate that to the extent a standardized sales script may give rise to sufficient commonality, it must do so as a whole. *See, e.g.*, *In re First Alliance Mortgage Co.*, 471 F.3d 977, 984-85 (9th Cir. 2006) (finding that class treatment based on oral misrepresentations by subprime loan officers was warranted because the officers were trained to follow a manual and script that contained an "elaborate and detailed sales presentation" that was "unquestionably designed to obfuscate points, fees, interest rate, and the true principal amount of the loan," in order to persuade borrowers to take out loans with high interest rates and hidden fees); *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425, 430 (D. Ariz. 1992) (concluding that class treatment based on a standardized sales pitch by bond representatives was appropriate because the representatives' testimony showed that as a whole, the sales pitch evidenced a "centrally orchestrated strategy" that involved seven principal cornerstones, including the "de-emphasis or rationalization of risks or negative publicity associated with ACC/Lincoln and the bonds" and the "omission of information about defects in ACC/Lincoln's economic prospects"); *McPhail v. First Command Financial Planning, Inc.*, 247 F.R.D. 598, 602, 609 (S.D. Cal. 2007) (finding sufficiently commonality where the sale agents were trained to memorize a script and utilized accompanying charts and graphs that contained misleading statements and omissions "that triggered SEC cease-and-desist proceedings and a [National Association of Securities Dealers] investigation into alleged rule violations"). The requirement that we analyze the script as a whole makes sense given that

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[2] The contract between ABS and Solution Marketing provides that "[a]ll scripts must be PRE-APPROVED by ABS before their use and Solutions agrees that such approved scripts will be read verbatim and that it will train its agents to read such scripts verbatim." (Mot, Ex. J, at § 2.04). The contract between Solution Marketing and Vici Marketing provides that "[a]ll scripts must be PRE-APPROVED by SOLUTION before their use and VICI Marketing LLC agrees that such approved scripts will be read verbatim and that it will train its agents to read such scripts verbatim." (Mot, Ex. K, at § 2.04). The contract between Vici Marketing and Verification Resources likewise provides that "VR shall use only VICI provided and approved scripts, shall require its VERIFICATION agents to read the approved scripts verbatim, and shall train its Verifiers to read such scripts verbatim." (Mot., Ex. L, § 2.2).

[3] In his deposition, the representative of ABS acknowledged that the components of the Authorization Question, i.e., having the customers "acknowledge[] that they are 18 years of age or older and . . . acknowledge that they are authorized to incur charges on that telephone account," are "two pieces [of information] that are absolutely fundamentally required." (Mot., Ex. B, at 89:2-6).