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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEREMIAH REVITCH, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CITIBANK, N.A.,

Defendant.

CASE NO. 3:17-cv-06907-WHA

CLASS ACTION

[Assigned to the Hon. William Alsup]

SUPPLEMENTAL OPPOSITION OF DEFENDANT CITIBANK, N.A. TO MOTION FOR CLASS CERTIFICATION

Hearing
Date: April 4, 2019
Time: 8:00 a.m.
Location: Courtroom 12, 19th Floor
[Supplemental Declaration of Marcos D. Sasso and Surrebuttal of Margaret Daley concurrently filed]

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I. INTRODUCTION

The fundamental flaw with Plaintiff's proposed class continues to be that Plaintiff does not, and cannot, present any reliable common method of proof to satisfy Rule 23's requirements, including predominance.[1] This Court has emphasized that, to certify a putative class, Plaintiff must submit a reliable "common method of proof as a requirement of predominance[.]" *Etter v. Allstate Ins. Co.*, 323 F.R.D. 308, 313 (N.D. Cal. 2017) (Alsup, J.) (citations omitted). That is, Plaintiff must be able to prove, without reference to any individualized account records or other individualized analysis, that the persons who Citibank called were not who it "intended" to call.

The problem here is readily apparent in Plaintiff's class definition, which purports to include persons called by Citibank using its collection dialing system who were "not listed in Defendant's records as the **intended** recipient of the calls." Of course, determining who Citibank **intended** to call necessarily requires an account-by-account review of Citibank's individualized account records to ascertain Citibank's **intent**. In this regard, Citibank has presented to the Court specific and unrebutted evidence showing that the Methodology—Plaintiff's proposed "common method of proof"—is wholly meaningless because Citibank's account records demonstrate that the Methodology cannot identify any particular person that should be included in the proposed class or resolve that person's claims on a class basis. Indeed, the Methodology is so flawed that it still does not even identify Plaintiff as a class member.

Recognizing the many flaws in his first proposed "Methodology," Plaintiff "changed" it on the eve of the certification hearing, resulting in this additional briefing. Citibank's further analysis (including by its expert), combined with Plaintiff's expert's testimony, confirms that Plaintiff's last-minute "changes" cannot salvage Plaintiff's useless Methodology[2]. For example:

- Plaintiff's expert still does not know if any of the individuals identified by the Methodology actually received wrong number calls. Although Plaintiff's counsel ***argues*** (without supporting evidence) that these individuals are class members – his expert freely

[1] Unless stated, terms have the same meaning as in Citibank's Opposition (ECF No. 108-4).

[2] The concurrently-filed Surrebuttal of Margaret Daley ("Daley Surreb.") addresses the testimony of Plaintiff's expert, Colin Weir, regarding the changes to the Methodology.

admits that he has no idea if any of these people did in fact receive a wrong number call.

- Plaintiff's expert concedes (again) that he did nothing to account for phone number and account associations – that is, a single phone number can be commonly associated with multiple accounts owned by different people.
- Plaintiff's expert freely admits that, despite the numerous accounts that a person may have with Citibank (e.g., Home Depot, Best Buy, etc.), he did not check to see whether calls were made on the same account where the number was marked as a "wrong" number. Instead, if a number was marked "wrong" on one account, Plaintiff arbitrarily considered every future call to that number as "wrong," even when those calls were made to another individual or account where the number is marked as correct.
- Plaintiff's expert concedes that the revised Methodology ignores critical account records, including memorialized communications with consumers that evidence consent to call and whether a call was to the intended recipient. Citibank's expert cited multiple examples of how individual account records are critical to the analysis of each putative class member's claim and why that analysis can only be done through an individualized, manual review of the unique evidence applicable to each putative class member. Despite having these records and knowing they contain critical information, Plaintiff's expert ignored them.

Contrary to Plaintiff's suggestion, the decision in *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018), has no meaningful application here because Citibank is not asking this Court to speculate or surmise as to what impact Citibank's affirmative defenses "might" have without reference to any specific evidence. Rather, Citibank has shown, through specific and unrebutted evidence, that identifying and resolving putative class members' claims requires an individualized review of evidence unique to each class member. That same individual analysis must be done at trial for each class member and it cannot be done through Plaintiff's still flawed Methodology. Given the enormous volume of individual TCPA litigation, individuals who want to pursue such a claim clearly have avenues and incentive to do so.[3] Accordingly, Plaintiff's motion for class certification should be denied.

[3] See https://webrecon.com/webrecon-stats-for-jan-2019-out-of-the-gates/.

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II. ARGUMENT

A. The Methodology still suffers from the same critical flaws.

Without question, Plaintiff "changed" the Methodology to address flaws specifically identified by Citibank and its expert. The changes did not identify any new phone numbers or alleged class members. Weir Dep. 15:21-16:3.[4] Instead, **the changes reduce the putative class size by 24%** by eliminating 43 phone numbers from the original list of 176 numbers. Weir Dep. 40:23-41:4, 55:22-25; see also Daley Surreb. ¶¶ 6-8. This is a major reduction of something that Plaintiff readily represented to the Court correctly worked. Had Citibank not taken the time and incurred the significant cost to check the actual results of the prior Methodology—something neither Plaintiff nor his experts bothered to do—Plaintiff would not have fixed these flaws.[5] While a conceded 24% error rate alone wholly undermines the Methodology's efficacy, more troubling are the flaws that remain. These flaws highlight why the Methodology remains unreliable and should be rejected.

1. Plaintiff still has no idea who, if anyone, received a "wrong" number call and still intentionally ignores key data that is available to him.

Plaintiff insists that his Methodology identifies similarly situated individuals who received wrong number calls. Yet despite two iterations of the Methodology, his expert still admits that he does not know if any of the people identified do in fact own the number associated with them (as opposed to Citibank's customer) and did in fact receive a wrong number call from Citibank.[6] Weir Dep. 61:11-22; 122:2-11 ("not offering an opinion . . . one way or the other" about whether any of the 133 phone numbers received a "wrong" number call); id. 63:14-64:4

[4] Cited deposition excerpts are attached as exhibits to the Supplemental Sasso Declaration.

[5] The Methodology now excludes phone numbers (1) where only the "first" name reported by TLOxp matches Citibank's records (previously only numbers with "last" name matches were excluded) and/or (2) associated with businesses. Weir Dep. 21:8-22:15, 26:19-27:18, 31:2-32:13. Plaintiff claimed that the Methodology was modified only to address these issues, Mr. Weir made additional changes that were not identified in the Reply that had no impact on the "first" name and business issues. Id. 39:24-40:22, 52:2-53:6. Nevertheless, as implemented, the "modified" Methodology still is ripe with numerous material errors. Daley Surreb. ¶¶ 14-23.

[6] Plaintiff has the burden of proving the elements of Rule 23 – including commonality, typicality and predominance, each of which require the identification of similarly situated recipients of wrong number calls. He cannot avoid his failure to do so by complaining that Citibank's expert did not prove that any of the identified individuals were not the recipient of wrong number calls.

("not offering an opinion about whether these people do or do not constitute class members").

Despite two chances, Plaintiff still has not confirmed whether any of the individuals he identified actually own the number Plaintiff associates with them or received wrong number calls from Citibank. Even with a second chance at proving that the Methodology works, Plaintiff did not validate the results by calling the 133 phone numbers to see who owns them or by reviewing the associated Citibank account records. Id. 109:14-24. This, of course, is consistent with Plaintiff's experts' prior testimony, both of who testified that they had not reviewed the results of the prior Methodology and were not opining as to whether the results identified actual "wrong" number call recipients.[7] Opp. at 13-14, n.8-9 (citing testimony).

Even more troubling, Plaintiff's expert readily admits that he has data from Citibank that would answer the question of phone ownership and receipt of wrong number calls – but he ignored it. Plaintiff's expert acknowledges that the account records memorialize conversations with individuals and contain critical data about phone number ownership or use, consent from consumers and why a number may or may not be marked wrong. Weir Dep. 91:13-20, 94:3-6. Citibank's expert gave multiple examples of how this data is critical to the analysis of each putative class member's claim and of how this data answers the questions the Methodology fails to answer. Opp. at 6-9, 20-22; Daley Decl. [No. 109-12], ¶¶ 83-90, 120-51. Plaintiff's expert admitted to reviewing those examples and conceded he could check those examples or perform similar analyses, but he testified that he did not look at any of the data. Weir Dep. 54:11-17, 55:2-9, 60:4-18, 83:3-18. The only explanation for this failure is that review of the account records is an individualized and manual process that cannot be done on a class wide basis. But it is critically important – and something Citibank will be required to do for every putative class member to defend any class claim – because the account records contain important facts about phone ownership and use, consent and the foundation for why a number might be marked as wrong. While Plaintiff may not like that this critically important data can only be reviewed

[7] Contrary to Plaintiff's suggestion in the Reply, Mr. Snyder expressly testified that he **never** reviewed or verified any of the results from Mr. Weir's analysis, and he **never** made a single evaluation as to whether a particular person or number should be included in the putative class. That testimony is cited at page 13, n.8 of the Opposition and is part of the record. See Sasso Decl. [No. 109-2] Ex. 4 192:17-20, 206:3-6, 206:21-25.

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manually, he cannot wholesale ignore it just because it obviates class certification.

To be clear, Plaintiff has the burden of proving the elements of Rule 23. As this Court has instructed, the critical issue is whether Plaintiff has put forward a "common method of proof" for resolving putative class claims viewed "through the practical lens of how the trial will unfold[.]" *Etter*, 323 F.R.D. at 313. The simple fact is that Plaintiff has no clue whether any of the individuals he identifies are members of the class and he has intentionally ignored critical data that could answer that question because it requires individualized manual examinations that obviate his request for class certification. He, therefore, has not met his burden of proving that there are similarly situated individuals for whom he can satisfy the elements of Rule 23.

2. Mr. Weir made no effort to match calls to accounts to ensure that only calls to accounts with a number marked as "wrong" are included.

Plaintiff's revised Methodology also fails because he has again failed to determine who Citibank intended to call and/or to limit calls to accounts that have the number marked "wrong." Plaintiff's expert admits that a single phone number is often associated with multiple accounts owned by different individuals. Weir Dep. 114:19-115:2. Despite this concession, the revised Methodology still does not limit calls to specific accounts. Id. 115:4-15, 117:1-7. Instead, if a number is marked "wrong" on any account, the Methodology considers every future call to that number as "wrong" regardless of which account was called. Id.

This simple example highlights the problem. Tim and Jane are not related and both have Citibank accounts. Tim used to own phone number 1234, but gave the number up in 2012 at which time Jane obtained the number. In 2017 the 1234 number was marked "wrong" on Tim's account. The 1234 number has been marked as a good number on Jane's account since that date. Every call to the 1234 number since 2017 has been made to Jane on Jane's account, and no calls since 2017 were made to Tim on Tim's account. Plaintiff's Methodology would identify the number as wrong because of Tim's account. That should not be a big deal, because no calls were made to Tim. However, because the Methodology ignores number and account associations, it would improperly assume that the calls to Jane's account were intended for Tim and identify the number as belonging to a putative class member.

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This is not a small problem. As Citibank's expert previously explained, when you fix this and consider only calls made to the account where the number was marked "wrong," all but 6 individuals in the prior list are removed from the class. Daley Decl., ¶ 152. As the many examples in the Daley Declaration illustrate, a phone number may be "wrong" for one account or person but valid for a different account or person. Id. ¶¶ 83-90, 120-51. This is critical because Plaintiff defines the class as persons who were not listed in Citibank's records as the **intended** recipient of the calls and because identifying "wrong" calls requires an analysis of each potential owner of that number based on Citibank's **records**. Thus, if Plaintiff claims to want to identify the actual owner of the number, he cannot ignore other accounts owned by other people who have represented the number to be their own. This data, as proven by the examples given by Citibank's expert, also establishes the affirmative defense of consent. Id.

Once again, Plaintiff has confirmed that his Methodology ignores the available facts and data in an effort to manufacture class claims. While Plaintiff's expert acknowledges that a single number might be listed on multiple accounts owned by various people, he also admits that the revised Methodology does not check to see whether or not the calls were made on the same account where the number was marked as a "wrong" number.[8] Weir Dep. 114:19-115:15; Daley Surreb. ¶¶ 9-11, 24-25, 28. The Methodology should be rejected and class certification denied.

B. The Methodology is so fundamentally flawed it does not identify Plaintiff.

Finally, Plaintiff's expert concedes that no matter how many times they "modify" it, Plaintiff's Methodology will never be able to identify Plaintiff. Weir Dep. 91:22-92:5. Plaintiff is the only person Plaintiff knows in fact received a wrong number call. Yet the Methodology he trumpets as the solution for identifying similarly situated individuals and satisfying the elements of Rule 23 does not, and cannot be modified to, identify him.

As Citibank previously explained, Plaintiff can only be identified from either his own

[8] Any claim that Mr. Weir was unable to cross reference accounts because account numbers were produced in partially redacted or tokenized form is simply false. Mr. Weir not only was never asked to cross reference the data, but he never asked for data to cross reference despite knowing about the issue. Weir Dep. 119:8-20. Still, Citibank produced a list of unencrypted account numbers for the original list of 176 phone numbers (Supp. Sasso Decl. ¶ 2), and Mr. Weir testified he had never seen it before or received it from Plaintiff's counsel. Weir Dep. 121:8-24.

testimony or an individualized review of account records, including listing to call recordings, and **not** by the Methodology. Opp. at 9-11; Daley Decl., ¶¶ 66-68. Plaintiff's sole solution to this problem is to redefine the class as Plaintiff **plus** those individuals who are identified by the Methodology. The failure to propose a method that identifies Plaintiff, and the need to rely upon subjective criteria to identify him, exemplifies the unique individualized examination that must be performed for each individual. *C.f. Tetsuo Akaosugi v. Benihana Nat'l Corp.*, 282 F.R.D. 241, 256 (N.D. Cal. 2012) (Alsup, J.) ("Proposed classes are ascertainable when their membership is determinable from objective rather than subjective criteria.") (citation omitted); *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2008 U.S. Dist. LEXIS 123376, at *7 (N.D. Cal. Sep. 11, 2008) (Alsup, J.) ("A class definition should be precise, objective, and presently ascertainable.") (citation omitted).

Plaintiff is a perfect representative of the putative class in this regard: he can only be identified and the merits of his claim can only be examined through a detailed, individualized examination of the underlying account records. That individualized examination renders class certification improper. Plaintiff cannot avoid this fact by claiming that the failure to identify him was caused by the "deletion" or "spoliation" of data. Plaintiff's expert readily admitted that the data Plaintiff's counsel claims was "deleted" exists in the account records and therefore could be examined, including to identify Plaintiff, however, all of those records were ignored by Plaintiff and his experts. Weir Dep. 91:13-20, 93:18-94:19, 99:24-100:22; Daley Surreb. ¶ 12.

This data – Citibank account records, including historical data relating to Plaintiff's phone number, as well as for each of the phone numbers identified by the Methodology – has [redacted] the phone indicator code change history for a particular phone number still exists in the account notes and records. Meeks Decl. (ECF No. 108-1) ¶¶ 6-12. Citibank's expert analyzed and opined, having personally reviewed the account notes and records, that the data Plaintiff's counsel claims spoliation of exists and is maintained within the individual account records, where it can be accessed and reviewed on a per-account basis. Daley Dep. 92:7-13; 94:16-19; 110:4-7; 273:17-274:10; 276:16-277:4; see also Kalat Dep. 98:21-

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99:23, 100:12-101:1. The account records can be manually reviewed to reconstruct the code change history for a particular number to identify when consent was updated prior to November 2017, however, this requires a painstaking account-by-account review because the records are not automatically searchable. Daley Decl., ¶¶ 27-34, 123, n.79; Daley Dep. 280:1-283:12.

Plaintiff's expert did not analyze that data and does not rebut Citibank's expert's testimony (rather he agrees with it). Plaintiff's expert did not review the data because he was not asked to – presumably because performing that review would prove the individualized nature of each putative class member's claim. Thus, the record on this point is undisputed. Ultimately, even with a second attempt to get it right, Plaintiff's Methodology still fails – as it still cannot identify the single person Plaintiff knows received wrong number calls – himself.

C. The Arbitration Agreement still precludes Certification.

Despite the "changed" Methodology, certification must be denied based upon Citibank's arbitration agreement. As instructed by the Ninth Circuit, a non-accountholder, like Plaintiff, cannot "represent a Rule 23 class that includes [accountholders] who are subject to arbitration agreements." *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, No. 15-cv-04456, 2018 U.S. Dist. LEXIS 215287, *19 (N.D. Cal. Dec. 21, 2018) (citing *Avilez v. Pinkerton Gov't Servs.*, 596 F. App'x 579, 579 (9th Cir. 2015)). Because accountholders bound by Citibank's arbitration agreement have "potential defenses that [Plaintiff] would be unable to argue on their behalf," including, challenging the agreement's existence or enforceability, Plaintiff is an inadequate representative and atypical under Rule 23(a)(3) and (4) and certification must be denied. *Id.* at *19-20 (citing *Avilez*); *see also Jensen v. Cablevision Sys. Corp.*, No. 17-cv-100, 2019 U.S. Dist. LEXIS 31398, *56-57 (E.D.N.Y. Feb. 27, 2019) (citing *Avilez*).

III. CONCLUSION

For the reasons stated above, and in the Opposition, Citibank respectfully requests that the Court deny Plaintiff's Motion for Class Certification.

Dated: March 14, 2019

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