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United States District Court, M.D. Florida,
Orlando Division.

Susan FENNELL, Plaintiff,
v.
NAVIENT SOLUTIONS, LLC, Defendant.

Case No. 6:17-cv-2083-Orl-37DCI
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**Attorneys and Law Firms**

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## ORDER

ROY B. DALTON JR., United States District Judge

***1** Before the Court is Plaintiff's Motion for Class Certification (Doc. 95 ("**Motion**")), Defendant's response (Doc. 108), and Plaintiff's reply (Doc. 119). The Court held a hearing on the Motion. (Doc. 125.) On review, the Motion is due to be denied.

## I. BACKGROUND

This is a putative class action under the Telephone Consumer Protection Act ("**TCPA**"), 47 U.S.C. § 227. (*See* Doc. 1.) Plaintiff Susan Fennell ("**Fennell**") has two student loans that originated under the Federal Family Education Loan Program ("**FFELP**").[1] (*See* Doc. 108, p. 4.). Defendant Navient Solutions, LLC ("**Navient**") is the servicer of Fennell's loans, who Fennell alleges repeatedly called her to collect on her student loan debt, even though she expressly revoked consent for Navient to call her. (*See* Doc. 1, ¶¶ 12–17.)

Navient's "**Class System**" is its primary servicing and records platform. (Doc. 95, p. 11; Doc. 108, p. 6.) Navient has between 600 to 1,000 different dialing "campaigns" which it uses to place calls to borrowers. (Doc. 95, p. 17.) In Fennell's case, after her FFELP became delinquent, the loans lost their guarantees and were subsequently assigned to a specific Navient business unit — the Cures Unit — which is part of Navient's Cures-Grid Campaign. (Doc. 108, p. 5.)

Fennell asserts that Navient's calls to her cell phone were made using an automatic telephone dialing system ("**ATDS**"). (Doc. 1, ¶ 24.) Specifically, Fennell asserts that the calls to her cell phone "included delays in time before the telephone call was transferred to a representative to speak," "sounded like an artificial or pre-recorded voice," and "started with a delay in time before the representative joined the line to leave a message." (*Id.* ¶¶ 28–31.) Fennell contends the use of the ATDS to call her violates the TCPA and brings this action on behalf of herself and all others similarly situated. (*Id.* ¶¶ 48–53.)

Now, Fennell seeks to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(3) of:

> All persons within the United States whose (1) cellular telephone number was called by [Navient]; (2) with an automatic telephone dialing system; (3) without consent; and (4) from December 4, 2013 to October 31, 2018.

(Doc. 95, p. 20.) Based on discovery, Fennell contends Navient placed 9,645,524 debt collection calls to at least 27,397 customers who told Navient to stop calling during the class period in violation of the TCPA. (*Id.* at 9; *see also* Doc. 95–9.) Navient opposes (Doc. 95) and the Court held a hearing (Doc. 125), so the Motion is ripe.

## I. NAVIENT'S DISPUTED CALLING SYSTEM

  

As a threshold matter, the parties disagree as to the capabilities of Navient's calling systems. Specifically, the parties dispute the ability of the dialing systems to complete predictive calls subject to the TCPA. (*See* Doc. 95, pp. 11–18; Doc. 108, pp. 1–8; Doc. 119, pp. 4–5.) Fennell asserts that Navient admitted the two autodialers used during the class period, Noble Systems Corporation's ("**Noble**") Maestro dialer and Genesys Telecommunications Laboratories, Inc.'s ("**Genesys**") Customer Interaction Center dialer, are predictive dialers. (Doc. 95, pp. 11–12.) Further, Fennell contends the Genesys system[2] has two calling modes: (1) predictive dialing, which automatically dials numbers to keep agents continuously busy; and (2) power dialing, which automatically dials numbers only when the agents are available. (*Id.* at 13–14.) So, according to Fennell, calls placed by both systems violate the TCPA.

***2** In opposition, Navient admits its Noble and Genesys systems were used to dial callers like Fennell but maintains no calls were placed to Fennell using predictive or automatic dialing campaigns. (Doc. 108, pp. 4–6.) Rather, calls placed to Fennell, who was part of Navient's Cures-Grid Campaign, were only completed manually. (*Id.*) Navient contends that it uses a strata software to extract data from the overarching Class System and separates its accounts into various groups based on certain parameters, including the length and type of delinquency. (*Id.* at 5.) For calls placed to Fennell and others in the Cures-Grid Campaign, Navient explains how employees must manually select the account to call and individually key in all ten digits of the phone number or click to dial the number. (*Id.* at 6.)

## II. LEGAL STANDARD

"Questions concerning class certification are left to the sound discretion of the district court." *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir. 1985). To certify a class action, the named plaintiff must have standing, and the proposed class must: (1) be adequately defined and clearly ascertainable; (2) meet each of the requirements of Federal Rule of Civil Procedure 23(a); and (3) meet at least one of the requirements of Rule 23(b). *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *Busby v. JRHBW Realty Inc.*, 513 F.3d 1314, 1321 (11th Cir. 2008). Rule 23(a) requires the plaintiff demonstrate that the proposed class satisfies the prerequisites of "numerosity, commonality, typicality, and adequacy of representation." *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1189–90 (11th Cir. 2009) (citation omitted). To certify a class under Rule 23(b)(3), the plaintiff must demonstrate: (1) that questions of law or fact common to class members predominate over any questions affecting only individual members ("**predominance**"); and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ("**superiority**"). *Id.*

Certifying a class involves "rigorous analysis of the [R]ule 23 prerequisites." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)). Although the class certification stage does not equal a determination on the merits, a court "can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Babineau*, 576 F.3d at 1190 (quoting *Valley Drug v. Geneva Pharm.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003)). Inescapably, sometimes the demands of class certification and whether the plaintiffs can succeed on the merits overlap, so "the principle that a district court should not evaluate the merits of plaintiffs' claims should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether [the] plaintiff[s] ha[ve] met [their] burden of establishing each of the Rule 23 class action requirements.' " *Id.* (quoting *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984)) (alteration omitted). To that end, a court may, if necessary, "look beyond the pleadings and examine the parties' claims, defenses, and evidence to ensure that class certification would comport with Rule 23's standards." *Id.*

## III. DISCUSSION

Fennell seeks certification under Rule 23(b)(3) of the proposed class of borrowers who received a call from Navient via an ATDS after revoking consent. (Doc. 95.) Navient challenges class certification because, among other things: (1) the proposed class definition is an improper fail-safe; (2) the proposed class is not ascertainable; (3) Fennell's claims are not typical of the proposed class; and (4) Fennell is not an adequate class representative. (Doc. 108.) The Court agrees that the putative class is an improper fail-safe class that is not

  

ascertainable nor is Fennell's claim typical. Accordingly, the Motion is denied.

**A. Standing**

***3** To proceed, the Court must first ensure that Fennell, as the class representative, has standing. *See* *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987) ("[A]ny analysis of class certification must begin with the issue of standing."). This threshold question is not in dispute, and the Court's independent review finds that Fennell has satisfied standing here. Fennell alleges that Navient called her using an autodialer after she revoked consent. (Doc. 1, ¶¶ 11–35.) As this is a sufficient, cognizable injury giving rise to a claim under the TCPA, standing is met. *See* *Griffin*, 823 F.2d at 1482–83.

**B. Adequately Defined and Clearly Ascertainable**

Next, "before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish the proposed class is 'adequately defined and clearly ascertainable.' " *Little*, 691 F.3d at 1304 (quoting *DeBremaecker v. Short*, 433 F.2d 733, 743 (5th Cir. 1970)[3]). Navient argues that: (1) the proposed class is not adequately defined; and (2) Fennell's proposed method for identifying class members is not ascertainable. (Doc. 108, pp. 10–15.)

**1. Class Definition**

Navient posits that the proposed class is an impermissible fail-safe class because, by definition, any member of the class as described would be entitled to recover damages. (Doc. 108, pp. 10–15.) A fail-safe class is one whose definition incorporates the elements of a successful claim, such that determining whether an individual is a member of a class "front-ends a merits determination on [the defendant's] liability." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 694 (S.D. Fla. 2015). Put another way, being granted membership in a fail-safe class is "synonymous with victory on the underlying claim." *JWD Auto., Inc. v. DJM Advisory Grp. LLC*, 218 F. Supp. 3d 1335, 1342 (M.D. Fla. 2016). And certifying such a fail-sale class creates "logical and practical" problems. *Hunt v. Shelby Cty. Bd. of Educ.*, No. 2:13-CV-230-VEH, 2014 WL 4269113 at *8 (N.D. Ala. Aug. 21, 2014).[4]

So why is this a fail-safe class? An ATDS is defined as "equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The TCPA prohibits anyone from using an ATDS to call a cell phone without the party's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii); *see Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1305 (11th Cir. 2015). To establish a claim for a violation of the TCPA, a party must satisfy the following elements: "(1) a call was made to a cell or wireless phone, (2) by the use of an automatic dialing system or an artificial or prerecorded voice, and (3) without prior express consent of the called party." *Augustin v. Santander Consumer USA, Inc.*, 43 F. Supp. 3d 1251, 1253 (M.D. Fla. 2012) (citing 47 U.S.C. § 227(a)(1)).

***4** Here, Fennell proposes a class of:

> All persons within the United States whose (1) cellular telephone number was called by [Navient]; (2) with an automatic telephone dialing system; (3) without consent; and (4) from December 4, 2013 to October 31, 2018.

(Doc. 95, p. 20.) This definition incorporates all the elements of a TCPA claim. *See* 47 U.S.C. § 227(b)(1)(A)(iii). By defining the class to include anyone whose cell phone was called by an ATDS without consent, Fennell's proposed class definition would necessarily mean that only those with a successful claim against Navient will be a member of Fennell's proposed class. With that, the Court declines to certify the proposed class. *See, e.g.*, *Lindsay Transmission, LLC v. Office Depot, Inc.*, No. 4:12-CV-221 (CEJ), 2013 WL 275568, at *4 (E.D. Mo. Jan. 24, 2013) (finding the proposed class constituted an impermissible fail-safe class because it consisted "solely of persons who can establish that defendant violated the TCPA").

Even still, "confronted with a fail-safe class, courts may revise or permit the plaintiff to cure the flawed definitions." *Alhassid*, 307 F.R.D. at 694 (collecting cases). While the defective proposed class definition could potentially be

  

cured,[5] as explained below, the class definition is not the only basis for rejecting the proposed certification so amendment of the class definition is futile. *See, e.g.*, *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 289 (D.S.C. 2012) (finding that it was unnecessary to attempt to revise the proposed class definition because the proposed class also failed to satisfy other Rule 23 certification requirements).

**2. Ascertainability**

Next, the Court considers whether the proposed class is ascertainable. "[A] class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015)[6] (citing *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787–88 (11th Cir. 2014)). This demands a "manageable process that does not require much, if any, individual inquiry." *Bussey*, 562 F. App'x at 787 (internal quotation marks and citation omitted). "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Karhu*, 621 F. App'x at 948.

Navient contends Fennell failed to identify a manageable process and her proposed class requires individual inquiry, particularly as it relates to the question of revoked consent. (Doc. 108, p. 13.)

***5** The parties disagree as to what information is maintained on Navient's Class System. Fennell intends to use the Class System "stop calling" flags to determine who Navient called using an ATDS without consent. (Doc. 95, pp. 20–22.) But Navient contends this method is not feasible. Navient's review of a sample of borrowers revealed that individual inquiry would be required because Fennell's method produces numerous false positives of borrowers who did not revoke consent but would be encompassed in the proposed class. (*Id.*) For example, Fennell's method resulted in the inclusion of a borrower who told Navient to "stop calling [his] father in Ohio and deal with [him]." (*See* Doc. 108-7, p. 2.)

With that, eliminating any ambiguity in Navient's records as to whether consent was revoked would, of necessity, require an individualized inquiry. Navient's evidentiary support raised sufficient concerns that the Court is not convinced Fennell proposed a reasonable method for identifying the individuals Navient called via ATDS without consent. *See, e.g.*, *Stalley v. ADS Alliance Data Sys., Inc.*, 296 F.R.D. 670, 679–80 (M.D. Fla. 2013) (finding the proposed class was not clearly ascertainable where "[t]the [c]ourt ha[d] not been presented with reasonable methods for ascertaining the identity of the [class members]"). Fennell bears the burden of sorting the chaff from the wheat to show revoked consent, and no coherent plan for sorting out the potential ambiguity has been presented. *See, e.g.*, *Reyes v. Lincoln Auto. Fin. Servs.*, CV 15-0560, 2016 WL 3453651, at *2 (E.D.N.Y. June 20, 2016) (finding the plaintiff failed to demonstrate revocation of consent). So ascertainability has not been demonstrated on the current record.

Additionally, the Court is persuaded by Navient's argument that it services different types of loans, a fact that further implicates ascertainability. In addition to Fennell's FFELP student loans, Navient also services numerous private loans — many of which are subject to arbitration provisions and a class action waiver. (Doc. 108, p. 6 n.4.) Fennell fails to address the significance of the private loans, but loans like Fennell's and private loans subject to arbitration provisions or class action waivers cannot be certified in a single class. *See, e.g.*, *Pablo v. Servicemaster Global Holdings, Inc.*, No. C 08-03894 SI, 2011 WL 3476473, at *2–3 (N.D. Cal. Aug. 9, 2011) (denying class certification where it was unclear how many putative class members signed arbitration agreements); *Balasanyan v. Nordstrom, Inc.*, 294 F.R.D. 550, 573–74 (S.D. Cal. 2013) (finding that individuals who signed the arbitration agreement "may be properly excluded from the class"). So, the presence of the different loans creates further need for individual inquiry and manageability concerns. The proposed class is not ascertainable and class certification is not appropriate. Additional considerations for this proposed class are addressed below.

**C. Rule 23(a) and (b)(3) Requirements**

To certify a class action, the putative class must meet each of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Busby*, 513 F.3d at 1321. However, having already determined that class certification is

  

due to be denied, the Court focuses its discussion on Rule 23(a)'s typicality and adequacy requirements that Navient contends are deficient.

### 1. Typicality

Fennell contends that her claims are typical of the class members because she was called by an ATDS after revoking prior consent. (Doc. 95, pp. at 25–26.) In opposition, Navient argues that Fennell's claims are not typical because Fennell herself would not be a member of the proposed class as Navient manually dialed her number. (Doc. 108, pp. 16–20.)

***6** Typicality requires the claims or defenses of the representative parties to be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3); *see also* *Prad-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000) ("In many ways, the commonality and typically requirements of Rule 23(a) overlap."). Typicality measures whether a sufficient nexus exists between the claims of the named representative and those of the class at-large. *Busby*, 513 F.3d at 1322. A class representative's claim is typical if "the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009) (citation omitted). To meet typicality, a class representative must possess the same interest and suffer the same injury as the class members. *Id.* (citation omitted). This requirement may still be satisfied despite substantial factual differences when a strong similarity of legal theories exists. *Id.*

Fennell's argument that she was called by a predictive dialer hinges on her assertion that the fact that being manually dialed is of no moment in light of the FCC's determination that it is the "capacity" of a device to automatically complete calls that is controlling, not whether the call was actually made by utilizing the automatic dialing feature. (Doc. 95, pp. 30–32); *see* *ACA Int'l v. FCC*, 885 F.3d 687, 693–704 (D.C. Cir. 2018) (citing *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2015 FCC Ruling)*, 30 FCC Rcd. 7691, 7975 (2015)). Both parties to this proceeding misstate the holding and import of the *ACA* decision on this issue. The *ACA* court teed up the issue of whether it was "capacity" or the actual dialing method that triggered liability but declined to address the issue because it had not been challenged. *See* *ACA*, 885 F.3d at 703–04. The FCC was invited to revisit that issue but to date, has not done so, thereby leaving intact their prior determination that "capacity" and not the actual method used was determinative. *See id.*; *see also In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2015 FCC Ruling)*, 30 FCC Rcd. 7691, 7975 ¶ 19 n.70 (2015). Now, Navient wishes to litigate this issue, FCC rule notwithstanding, giving rise to the need to individually determine whether putative class members were called by the autodial feature or manually. (Doc. 108, pp. 18–20.)

So Fennell's claims are not typical of the proposed class she seeks to represent because of the potentially different use of the autodial versus manual dial feature to complete the calls. As part of the specific Cures-Grid Campaign, calls to Fennell required an agent to manually select an account to call and individually key all ten digits or click on a button to initiate the call. (*Id.* at 5–6.) Thus, because Fennell's claim may differ from many class members with respect to a central element of a TCPA claim — receiving a call from an ATDS — her claims are not typical of the proposed class and she failed to satisfy the Rule 23 typicality requirement.

### 2. Adequacy

Navient also contends that Fennell failed to demonstrate adequacy in her role as class representative. (Doc. 108, pp. 20–22.) Fennell disagrees, arguing that she has been an engaged and responsive plaintiff throughout the action. (Doc. 95, p. 26; Doc. 119, pp. 6–7.) Adequacy requires that the named plaintiff and class counsel fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). This requirement "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby*, 513 F.3d at 1323 (citation omitted). Even when those requirements are satisfied, "named plaintiffs might not qualify as adequate representatives because they do not possess the personal characteristics and integrity necessary to fulfill the fiduciary role of class representative." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (citations omitted).

***7** While there is no clear standard for evaluating the adequacy of a class representative, the Court is troubled by

Fennell's conduct during her deposition. Among other things, Fennell arrived late and was generally combative throughout the deposition. (Doc. 108-6, pp. 151:18–21; 207:5–209:12 (responding "Why are you asking me an obvious question? How is that relevant? Why are you asking me that?").) Further, Fennell construed questions about her personal cell phone as "humiliating." (*Id.* at 215:4–18; 374:3–375:15.) Thus, Fennell's contentious attitude at the deposition is an indication that she may be "unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Kilpatrick*, 827 F.2d at 727. Troubling as the conduct is, the Court declines to find that Fennell is not an adequate class representative at this stage of the proceedings.

## IV. CONCLUSION

In sum, the proposed class suffers from numerous deficiencies that cannot be remedied. In addition to constituting an impermissible fail-safe class that is not ascertainable, the proposed class also failed to meet the necessary Rule 23(a) factors. So the Court declines to certify the class and the Motion is denied without leave to amend.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Class Certification (Doc. 95) is **DENIED**.

**DONE AND ORDERED** in Chambers in Orlando, Florida, on June 13, 2019.

### All Citations

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Footnotes

1 FFELP loans are guaranteed first by non-profit guaranty agencies and, ultimately, by the United States Department of Education. (*See* Doc. 108, pp. 4–5.)

2 Navient no longer uses the Noble dialing system. (*See* Doc. 108, p. 5 n.3.)

3 The decisions of the former Fifth Circuit rendered before October 1, 1981 are binding on this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

4 There is a circuit split on whether fail-safe classes are *per se* improper for class certification. *See* *Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 624 (E.D. Pa. 2015) (collecting cases). The Eleventh Circuit has not yet addressed the issue of fail-safe classes. *See, e.g.*, *Alhassid*, 307 F.R.D. 693. But other district courts in this circuit have cautioned against their certification. *See, e.g.*, *Etzel v. Hooters of Am., LLC*, 223 F. Supp. 3d 1306, 1315 n.14 (N.D. Ga. 2016) (collecting cases).

5 For example, a certifiable class may include only those individuals who were members of the Cures-Grid Campaign who were manually dialed.

6 While unpublished opinions are not binding precedent, they may be considered as persuasive authority. *See* 11th Cir. R. 36-2; *see also* *United States v. Almedina*, 686 F.3d 1312, 1316 n.1 (11th Cir. 2012).