UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ERIK MATTSON,

Plaintiff,

v.

NEW PENN FINANCIAL, LLC,

Defendant.

Case No. 3:18-cv-00990-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge.

FINDINGS

Plaintiff Erik Mattson has filed a class action suit alleging that defendant New Penn Financial ("New Penn") made telephone solicitations in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). As the proposed class representative, Mattson asserts defendant made calls to a cellular telephone number ending in -1930 (the "subject number") in September 2017 and October 2017 in violation of the Federal Communication Commission ("FCC") regulations set forth in 47 C.F.R. § 64.1200(c) because the subject number was on the national Do Not Call Registry. Compl. ¶¶ 84-88, ECF 1.

On October 25, 2020, this court denied New Penn's Motion for Summary Judgment (ECF 46), finding there is a genuine issue of material fact regarding whether the subject number

was a residential or business phone number.[1] Order 3-4, ECF 71. New Penn has now filed a Motion to Deny Class Certification (ECF 74), arguing that uncertainty about plaintiff's standing makes him an atypical and inadequate class representative. Indeed, because a major focus of the trial will be on the question of whether plaintiff has standing, he is not a proper class representative, and New Penn's motion to deny class certification should be GRANTED.

I. Discussion

Under Federal Rule of Civil Procedure 23(a), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (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; and
> (4) the representative parties will fairly and adequately protect the interests of the class."

Additionally, Rule 23(b) has three requirements, one of which is at issue here, i.e., whether "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED.R.CIV.P. 23(b)(3). The party seeking class certification "bears the burden of demonstrating that [he] has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *opinion amended on denial of reh'g,* 273 F.3d 1266 (9th Cir. 2001).

[1] *See* Order 2, ECF 71 ("The TCPA does not apply to business telephone numbers.") (citing 47 C.F.R. § 64.1200(c)(2) ("No person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number" on the Do Not Call Registry)).

The court has discretion to grant or deny class certification. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) ("We review a district court's order denying class certification for an abuse of discretion."). "The United States Supreme Court requires district courts to engage in a 'rigorous analysis' of each Rule 23(a) factor when determining whether plaintiffs seeking class certification have met the requirements of Rule 23." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (quoting *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 161 (1982)).

"[S]tanding is the threshold issue in any suit," including a class action. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (quoting 3 Newberg on Class Actions § 3:19 (4th ed. 2002)). "In a class action, this standing inquiry focuses on the class representatives." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019). "If the individual plaintiff lacks standing, the court need never reach the class action issue." *Lierboe*, 350 F.3d at 1022. Otherwise stated, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

Moreover, if "a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed." *NEI Contracting & Eng'g*, 926 F.3d at 532. "It is well-established that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1236 (9th Cir. 2008) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). "'When evaluating whether [the standing] elements are present, we must look at the

facts as they exist at the time the complaint was filed.'" *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (alteration in original) (quoting *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006)). If federal jurisdiction never attaches because the named plaintiff lacked standing when the case was commenced, the proper remedy is to dismiss the action and vacate all prior rulings in the case, even where the case is a class action in which other potential class members have standing. *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998) (noting that outcome for a class action filed by named plaintiffs lacking standing is dismissal, even where "unnamed members of the class might have standing," and affirming dismissal of case and vacating all prior rulings in 16-year-old class action post-certification due to lack of standing of two original named plaintiffs).

Courts have recognized that "the uncertain standing of a class representative creates unique legal issues for that plaintiff and destroys its typicality and adequacy as a class representative." *S. Ferry LP No. 2 v. Killinger*, 271 F.R.D. 653, 659 (W.D. Wash. 2011); *see also English v. Apple Inc.*, No. 14-CV-01619-WHO, 2016 WL 1188200, at *8 (N.D. Cal. Jan. 5, 2016) ("The danger that the issue of [the plaintiff's] individual standing will become the focus of this litigation and will ultimately prejudice the class makes [the plaintiff] an atypical and inadequate class representative."). Where a plaintiff lacks standing to sue, he is "necessarily" an inadequate representative of the class and his claim is "necessarily" atypical of the claims of the class. *Ellis v. Experian Info. Sols., Inc.*, No. 17-CV-07092-LHK, 2018 WL 3036682, at *5 (N.D. Cal. June 19, 2018) (citing *In re Quarterdeck Office Sys., Inc. Sec. Litig.*, No. CV 92–3970–DWW(GHKx), 1993 WL 623310, at *3 (C.D. Cal. Sept. 30, 1993) (holding that the "named

plaintiffs' lack of standing provides adequate grounds for denying certification since it indicates that their claims are atypical and that they are unable to represent the class adequately")).[2]

"Regardless of whether the issue is framed in terms of the typicality of the representative's claims, . . . or the adequacy of its representation, . . . there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990), *abrogated by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("[A] named plaintiff's motion for class certification should not be granted if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'") (quoting *Gary Plastic Packaging*, 903 F.2d at 180).

[2] *See also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class."); *Castro Valley Union 76, Inc. v. Vapor Sys. Techs., Inc.*, No. C 11–0299 PJH, 2012 WL 5199458, at *3 (N.D. Cal. Oct. 22, 2012) ("With regard to adequacy, a threshold issue to seeking class certification is a showing by the named plaintiff and proposed class representative that he has personally been injured and therefore has standing to assert the claims alleged in the complaint."); *Swack v. Credit Suisse First Bos.*, 230 F.R.D. 250, 264 (D. Mass. 2005) ("[T]he typicality analysis is a functional one addressed primarily to the question of whether the putative class representative can fairly and adequately pursue the interests of the absent class members without being sidetracked by her own particular concerns."); *Rector v. City and Cty. of Denver*, 348 F.3d 935, 950 (10th Cir. 2003) ("By definition, class representatives who do not have Article III standing to pursue the class claims fail to meet the typicality requirements of Rule 23."); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1287 (11th Cir. 2001) ("It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class."); 7A Fed. Prac. & Proc. Civ. § 1764 (3d ed. 2002) ("Thus, courts have noted that the typicality requirement was designed to buttress the Rule 23(a)(4) adequate-representation requirement. In that sense, Rule 23(a)(3) assures that the claims of the named plaintiffs are similar enough to the claims of the class so that the representative will adequately represent them.").

Therefore, "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." *Koos v. First Nat. Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974).[3] In such cases, "[t]he fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *CE Design Ltd. v. King Architectural Metals, Inc.,* 637 F.3d 721, 726 (7th Cir. 2011) (internal quotation marks and citation omitted). These concerns exist not only at the trial level but also extend to the potential of an adverse decision on standing on appeal. *See S. Ferry LP No. 2*, 271 F.R.D. at 659 ("Even if the Court were to conclude that the assignments cured Metzler's standing deficiency, the Court of Appeals could hold otherwise. Metzler's standing presents a unique legal issue that could ultimately severely prejudice the class."); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128, 2009 WL 1905033, at *3 (S.D.N.Y. June 29, 2009) (holding investment advisor was an atypical and inadequate class representative, regardless of whether assignments cured its deficient standing, because its standing issues "could ultimately severely prejudice the class, either at the class certification stage or on some subsequent appeal"); *In re SLM Corp. Sec. Litig.,* 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (holding investment advisor did not satisfy the adequacy or typicality requirements, because "even if [the] Court held that the

[3] *See also Beck v. Status Game Corp.,* No. 89 Civ. 2923, 1995 WL 422067 at *1, *4 (S.D.N.Y. Jul. 14, 1995) (holding that "a representative who faces a unique defense does not satisfy the typicality requirement because he would be required to devote considerable time to rebut the unique defense and would thereby prejudice other class members") (internal quotation marks and citation omitted); *Grace v. Perception Technology Corp.,* 128 F.R.D. 165, 169 (D. Mass. Nov. 16, 1989) (finding putative class representatives atypical because they "may be subject to unique defenses at trial which would divert attention away from the common claims of the class members they seek to represent"); *Kas v. Financial General Bankshares, Inc.,* 105 F.R.D. 453, 461 (D.D.C. 1985) (holding that "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff . . . then the named plaintiff is not a proper class representative.").

assignment was sufficient to cure the lack of standing, the Court of Appeals could hold otherwise").

The court is not required to go so far as to decide that the unique issue actually divests the class representative of standing. *See Koos*, 496 F.2d at 1164–65 (holding the question is merely whether it is "predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass"); *Hanon*, 976 F.2d 508 (focusing on whether "there is a danger that absent class members will suffer"); *CE Design Ltd.,* 637 F.3d at 726 (observing it is enough if there is a "fear . . . that the named plaintiff will become distracted"). "The merits of the issue unique to the named plaintiff generally are not to be resolved in ruling on class certification. It is sufficient that it is arguable that the named plaintiff's individual claim would be defeated." *Gilmore v. Sw. Bell Mobile Sys., L.L.C.*, No. 01 C 2900, 2002 WL 548704, at *3 (N.D. Ill. Apr. 8, 2002); *see also Al Haj v. Pfizer Inc.*, No. 17 C 6730, 2020 WL 1330367, at *4 (N.D. Ill. Mar. 23, 2020) ("While it is *possible* for Al Haj to prevail at trial, her assertion misses the point of the adequacy inquiry. A defense unique to a proposed class representative need not be a sure bet to defeat adequacy; rather, it need only be 'arguable' . . . and 'substantial.'") (emphasis in original).

In *Bridge v. Credit One Fin.*, the plaintiff filed a class action suit under the TCPA, alleging that the defendant had used an auto-dialer to place calls to his cellular phone without his consent. 294 F. Supp. 3d 1019 (D. Nev. 2018). However, there was a "significant issue . . . regarding the manner by which [the plaintiff] accessed Credit One's system," specifically, there was evidence that the plaintiff had used his cellular phone to call Credit One in relation to his mother's account and that Credit One account holders agreed to be contacted at the phone numbers they used to contact Credit One. *Id.* at 1034. The court found these "disputed issues . .

. raise[d] a significant danger that this litigation will focus on issues and defenses unique to" the plaintiff." *Id.* The court held that the plaintiff was "atypical of the class, because of the danger that litigation of the TCPA claim will become preoccupied with defenses and issues unique to" him, and denied class certification. *Id.*

Similarly, in *Banarji v. Wilshire Consumer Capital, LLC*, another TCPA case, there were facts "unique" to the plaintiff "and "perhaps a small subset of the class." No. 14-CV-2967-BEN (KSC), 2016 WL 595323, at *3 (S.D. Cal. Feb. 12, 2016). There, the plaintiff's father had given plaintiff's number to the defendant and represented it was his own, and there was a question of whether "based on the circumstances of how the Banarji family looks after one another, Plaintiff's father may be a non-subscriber customary user of the phone line, which would give him authority to consent to receiving robocalls on that line." *Id.* The court found that "the majority of the proposed class may suffer as Plaintiff will be engrossed with disputing WCC's arguments regarding Plaintiff's individual case" and granted the defendant's motion to deny class certification. *Id.* (citing *Hanon,* 976 F.2d 497 at 508).

In yet another TCPA case, *Quality Mgmt. & Consulting Servs., Inc. v. SAR Orland Food Inc.*, the court again denied class certification based on issues unique to the class representative. No. 11 C 06791, 2013 WL 5835915 (N.D. Ill. Oct. 30, 2013). The plaintiff sued under a provision of the TCPA that prohibits the sending of "unsolicited" fax advertisements unless the sender can show: (1) the recipient consented, or (2) there was an "established business relationship" between the sender and recipient and a valid opt-out notice on the fax. *Id.* at *5. The parties disputed how the third-party advertising company had compiled its list of fax recipients, which included the plaintiff. *Id.* at *2. The defendant, a restaurant, claimed it had collected business cards from nearby businesses and for a VIP dinner and raffles, then sent that

information to the third-party advertising company, which sent faxes to those contacts. *Id.* at *1. The third-party advertising company had in its possession the business card of plaintiff's owner, who was also the company's sole employee. *Id.* The court held that this "business-relationship defense as applied to" the class representative was "distinguishable from the possible application of the defense to the class as a whole," and denied class certification due to lack of typicality and adequacy. *Id.* The court further emphasized that the plaintiff had failed to meet its burden on class certification:

> In urging the Court to disregard Camasta's business card, Quality Management is not owning-up to the fact that the burden at the class-certification stage is its own. . . [I]t was *Quality Management*'s burden to demonstrate that its claim is typical and that it is an adequate class representative.

Id. (emphasis in original).

Outside the TCPA context, courts also have denied class certification where the class representative was atypical or inadequate due to unique issues and defenses. *See*, *e.g.*, *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59–60 (2d Cir. 2000) (finding court's rejection of class representative was proper because her status as a professional broker had unique defenses); *Koos,* 496 F.2d at 1164-65 (upholding denial of class certification where plaintiffs were potentially excepted from the state statute that prohibited charging of usurious interest because of the type of loan they received); *Beck*, 1995 WL 422067 at *4 (finding class representative was atypical because his decision to buy stock was influenced by meeting with company executives, and considerable time would be devoted to rebutting this unique defense); *Grace,* 128 F.R.D. at 169 (finding that class representatives were atypical to represent the class where they had personal contact with corporate officers and special meetings at the company, which would make them subject to unique defenses at trial and divert attention away from the common class members they sought to represent).

In this case, as in the cases described above, there is an issue unique to plaintiff—whether the subject number is a residential or business phone number. "The determination about whether any particular wireless subscriber is a residential subscriber is fact-intensive." *Stevens-Bratton v. TruGreen, Inc.*, 437 F. Supp. 3d 648, 658 (W.D. Tenn. 2020) (quotation marks and citation omitted). Here, the issue is not only fact-intensive but also hotly contested, as the briefing on summary judgment illustrates. *See also* Mot. 5-6, ECF 74 (outlining evidence regarding whether the subject number is a business line). No doubt, plaintiff's "effort" at trial will be "necessarily . . . devoted to [his] own problems" and "may well . . . result[] in less attention to the issue which would be controlling for the rest of the class." *Koos*, 496 F.2d at 1164-65. Moreover, it is not necessary that defendant show plaintiff will fail to establish standing at trial. "To negate the typicality of the representative's claim, it is only necessary that the defense be unique, arguable and likely to usurp a significant portion of the litigant's time and energy." *McNichols v. Loeb Rhoades & Co.*, 97 F.R.D. 331, 334 (N.D. Ill. 1982). "A representative plaintiff should not be permitted to impose such a disadvantage on the class." *Koos*, 496 F.2d at 1165. Because "[i]t is predictable that [plaintiff's] standing could become a major focus of the litigation," he "is not a proper class representative." *S. Ferry LP No. 2*, 271 F.R.D. at 659.

Plaintiff contends that the issue is not unique to him but, rather, pertains to defendant's affirmative defense of consent. To the contrary, whether the subject phone is a residential phone number is something plaintiff must prove at trial.

> To prevail under 47 C.F.R. § 64.1200(c)(2), Plaintiff must establish that his cellular number is used for residential purposes. The FCC addressed this issue in its 2003 Order regarding the statute. In that Order, the FCC stated that it would presume that wireless numbers registered on the national do-not-call registry were residential numbers. It also stated, however, that in the case of an enforcement action, the complainant had the burden to prove that the wireless number was used as a residential number.

Lee v. Loandepot.com, LLC, No. 14-CV-01084-EFM, 2016 WL 4382786, at *6 (D. Kan. Aug. 17, 2016) (citing *In re Rules and Regulations Implementing the TCPA of 1991*, 18 F.C.C. Rcd. 14014, at 14039 (2003)); *see also Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 396 (M.D.N.C. 2015), *aff'd,* 925 F.3d 643 (4th Cir. 2019) (holding the plaintiff bears the burden to prove that a number called was residential). The fact that plaintiff bears the burden on this issue further illustrates how allowing him to proceed as class representative will "result[] in less attention to the issue[s] which would be controlling for the rest of the class." *Koos*, 496 F.2d at 1164-65.

As part of its motion to deny class certification, defendant also argues that individual issues will predominate over common ones in violation of Rule 23(b)(3) because "any trial of this action will require . . . individualized inquiries for each and every potential class member" regarding whether "every phone number in the putative class is a residential number, and not a business line." Mot. 14, 16, ECF 74. It is unnecessary to reach this issue where plaintiff has not met his burden of establishing typicality and adequacy as discussed above.

Finally, plaintiff argues that defendant's motion should be denied because (1) defendant filed the motion without first obtaining leave of the court and (2) it is procedurally improper to entertain a motion to deny class certification before class certification discovery has been completed. But, as defendant correctly notes, leave of the court was not required to file this motion. In fact, defendant informed the court in the proposed joint case management schedule "that it would move to deny certification . . . and that is exactly what it did." Reply 2 n.1, ECF 78.

Moreover, Rule 23 provides that a court "must determine" whether to certify a class action "[a]t an early practicable time after a person sues or is sued as a class representative."

FED. R. CIV. P. 23(c)(1)(A). The Ninth Circuit has made clear that "Rule 23 does not preclude a defendant from bringing a 'preemptive' motion to deny certification." *Vinole*, 571 F.3d at 937 ("A defendant may move to deny class certification before a plaintiff files a motion to certify a class."). Here, class discovery will not resolve the question of whether the subject number is a residential or business number. *See Banjari*, 2016 WL 595323, at *2 (finding it appropriate to address the defendant's motion to deny class certification before class certification discovery was conducted because such discovery "will not affect the uniqueness of Plaintiff's case"). And it is hardly surprising that defendant would attempt to avoid the cost of class certification discovery, as well as the cost of proceeding any further in a class action suit that might ultimately be dismissed if, at trial, it is determined that plaintiff lacked standing on the date the case was filed. Thus, defendant's motion is not procedurally improper.

RECOMMENDATION

For the reasons discussed, New Penn's Motion to Deny Class Certification (ECF 74) should be GRANTED.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, March 22, 2021. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED March 8, 2021.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge