IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GREG LEEB, *individually and on behalf of other similarly situated*,	)	
Plaintiff,	)	
v.	)	Case No: 4:17-cv-02780-SRC
CHARTER COMMUNICATIONS, INC.	)	
Defendant.	)	

CHARTER'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS

Background: In this case, Plaintiff alleges that while trying to reach Charter customers concerning past-due balances, non-parties TCN/Global Connect ("TCN") and NetTel USA ("NetTel") inadvertently called Plaintiff and putative class members at "wrong numbers" without "prior express consent," in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. *See* Am. Compl., Dkt. No. 50 at *passim*. On July 30, 2018, Plaintiff moved to compel a response to his Interrogatory No. 1 and Request for Production No. 2. Dkt. 45 at 3-5. The backbone of any putative class TCPA case is the production of a "call log," *i.e.* a log of outbound calls for which the defendant might potentially be held liable. Through the briefing of Plaintiff's Motion to Compel, Judge White understood that "Plaintiff ha[d] narrowed" his Requests to ask for, *inter alia*, such a call log, *i.e.* "call records for accounts where there were 'automated calls to phone numbers logged as 'wrong number' before the call was made.'" Dkt. 69 at 5-6.

The central question is whether Charter was required to produce data relating to the fact pattern in this case as Judge White ordered, or instead (as Plaintiff claims) whether Charter should be required to produce vast amounts of data relating to other types of calls from other vendors and systems that Plaintiff never received. Here, Plaintiff alleges that he received "wrong number" calls from TCN and Nettel after he advised a wrong number was reached. Judge White was aware of this: In its Opposition, Charter explained that "Plaintiff's original requests sought information regarding third parties that did not even call Plaintiff, as well as regarding different types of calls." Dkt. 51 at 10 & n.10. But "*Plaintiff agreed during the meet-and-confer process to limit the requests to information from the two, third party entities that actually called Plaintiff*." *Id.* at 10-11 (emphasis added). Judge White *adopted Plaintiff's limitation* in his Order: "The Court will grant Plaintiffs motion to compel … only as to the names and cell phone numbers of putative class members *and as narrowed by Plaintiff* and set forth in the first paragraph of subsection D of this Memorandum and Order," *i.e.* as limited to "calls to phone numbers logged as 'wrong number' before the call was made" that were "made on the same dialer that called Plaintiff." Dkt. 69 at 5-7 (emphasis added). Indeed, Judge White expressed concern and *denied* Plaintiff's Motion to the extent his other requests "relate[] to a number of potential fact patterns, such as *different types of calls and methods of calling not relevant* to the scope of the allegations in this case." *Id.* at 4 (emphasis added).

Charter's Production: Because none of the records of TCN and Nettel calls were in Charter's possession or control, Charter obtained them from third parties between January and July 2019. As the Parties jointly noted, "[t]he process for extraction of this data from third parties and processing this data to identify responsive outbound calls was significant, and neither Plaintiff nor Charter could control the timetable for the third party efforts required to compile and produce this data to Charter." Dkt. 105 at 9. Charter was required to cross-correlate hundreds of mutually incompatible, individual files reflecting calls placed by TCN and Nettel, to identify calls they placed after a "wrong number" had been "logged" by Nettel (as relevant here, Nettel is the only entity that "logs" *any* "wrong numbers"). Throughout this process, Charter remained in close contact with Plaintiff, conferring regularly on the design and scope of its production. Charter sent Plaintiff at least *four* letters detailing its process for identification of TCN and Nettel outbound calls after a "wrong number" had been "logged" by Nettel. *See* **Exhibit A** (May 10, 2019), **Exhibit B** (June 7, 2019), **Exhibit C** (June 18, 2019), **Exhibit D** (July 24, 2019). Far from objecting to this approach, Plaintiff agreed to it, and Charter committed extraordinary resources to obtaining, analyzing, and producing these voluminous third-party records *in reliance* on Plaintiff's

agreement. *See id.* Charter produced the TCN call logs on May 10 and the Nettel call logs on July 24. *Id.* Plaintiff reviewed those production files and agreed that Charter's production was complete, filing a ***Joint Motion*** stating that "[o]n July 24, 2019, Charter completed its data production to Plaintiff as ordered by the Court in its Order (Dkt. 69)." Dkt. 105 at 3 (¶ 9).

Plaintiff's Counsel Has Second Thoughts: Late on August 30, *2 business days* before this conference and the day before the holiday weekend, Plaintiff apparently decided that he was entitled to a discovery do-over of the last 9 months of agreed-upon work to create the "call log" of TCN and Nettel calls that forms the foundation of this entire case. He requested that Charter produce calls from "all vendors and all collections groups, including the field collection group and the recovery group," and "all calls to phone numbers where Charter made a prerecorded call to a phone number that had previously been logged as a wrong number." At 10:00 p.m., only 12 hours before the conference, Plaintiff filed a motion seeking "all … call data for calls that were placed after Charter was placed on notice that it was calling a 'wrong number.'" Dkt. 120 at 1.

Argument: Because Plaintiff filed his Motion less than 24 hours before it is to be heard, Charter outlines the arguments it will detail at today's conference. ***First***, this Motion was not timely filed in compliance with the Court's Requirements and the Court's Order (Dkt. 110), and should be denied. ***Second***, Charter complied with the Court's Order, which required production only of calls placed by the *same vendors* that called Plaintiff, after a "wrong number" was "logged." Plaintiff's broader reading of the Order to pertain to *any* type of outbound call by *any* Charter-affiliated entity after *any* type of "wrong number" "notice" (*e.g.*, an oral notice in a call recording, a freeform chat log or narrative notation on an account, etc.) is incompatible with the Court's Order, and would be impossible to comply with. ***Third***, if Plaintiff had concerns about Charter's production, he was required to come forward with these concerns long ago, before Charter committed extraordinary resources to create the production files. In addition other communications, Charter sent Plaintiff *four* letters detailing its process for identification of TCN and Nettel outbound calls after a "wrong number" was "logged" by Nettel. *See* Exhibits A-D. Plaintiff agreed to that approach, did not object, reviewed Charter's production files, and then filed a *joint* statement that "[o]n July 24, 2019, Charter completed its data production to Plaintiff as ordered by the Court in its Order." Dkt. 105 at 3. ***Fourth***, Plaintiff is requesting that Charter re-produce additional TCN and Nettel call data (of calls after additional "wrong number" "notices"). But under Fed. R. Civ. P. 26(b)(2)(C), the Court "must limit the frequency or extent of discovery" that "is unreasonably cumulative or duplicative." There is no reason to depart from the parties' agreement and require Charter to re-produce TCN and Nettel calling records again. ***Fifth***, the production limitations in Judge White's Order were correct, because Plaintiff lacks standing to bring putative class claims for calls placed by vendors and entities *that never called him* (including Charter itself)—among other reasons, because he could not show that such vendors' systems qualified as an "automatic telephone dialing system" or that a sufficient relationship existed to establish vicarious liability, when Plaintiff never received any calls from these systems/vendors. *Cf. Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 68 (S.D.N.Y. 2013). ***Sixth***, Charter's agreed production took 9 months to complete, and "neither Plaintiff nor Charter could control the timetable for the third party efforts required to compile and produce this data." Dkt. 105 at 9. Any expansion of Charter's production would yield needless delay. ***Finally***, if the Court orders that any additional records should produced, Plaintiff should be required to bear all costs of any such

production, for the same reasons discussed above. *Cf. Aguilar v. Immigration & Customs Enf't Div.*, 255 F.R.D. 350, 362 (S.D.N.Y. 2008).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was filed electronically with the Clerk of the Court to be served via operation of the Court's electronic filing system this 4th day of September, to all counsel of record:

/s/ Matthew D. Guletz