IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
DIVISION 1

TOP CRAFT, INCORPORATED, on behalf of itself and all those similarly situated,	)	
Plaintiff,	)	
vs.	)	Case No. 31104CC1360
CHIEF AUTOMOTIVE SYSTEMS, INC., A Delaware Corporation,	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS ACTION CERTIFICATION

Pending before the Court is Plaintiff's Motion for Class Certification. The Court has reviewed Plaintiff's motion, together with the suggestions and attachments provided. The Court has likewise reviewed Defendant's Brief in Opposition to Plaintiff's Motion for Class Certification and reviewed Plaintiff's Reply Suggestions in Support of Class Certification. In addition, the Court has heard the argument of counsel on the issues presented.

Finally, at the time of argument, counsel for both parties requested the Court consider their competing briefs, exhibits, and transcribed testimony offered in support of, and in opposition to, Defendant's Motion for Summary Judgment. The Court has considered that evidence, and those arguments, as well.

I. CLAIMS

Plaintiff claims that it received a single-page unsolicited facsimile advertisement ("fax") from Defendant on March 5, 2004, and that this fax violated the Telephone Consumer Protection Act, 47 U.S.C., § 227, et seq. (the "TCPA"). Defendant admits it

sent the single-page fax but also claims Plaintiff was a customer of Defendant, that the fax was a promotional flyer sent to its customer, and that it had an established business relationship ("EBR") with Plaintiff, and therefore was not in violation of the TCPA.

In a separate order denying Defendant's Motion for Summary Judgment, the Court found there remained a genuine issue of material fact with regard to the conduct and contacts between Plaintiff and Defendant prior to the March 5, 2004, fax.

II. SUMMARY OF FACTS

Plaintiff is a Missouri corporation engaged in the business of auto-body repair. Defendant is a manufacturer of industrial products that include equipment for the auto-body repair industry. The Court assumes, without specifically finding, that from February 2003 until March 2004 Defendant transmitted over 4,000 faxes concerning their automotive repair products. (The Court makes no effort to discern "advertisements" from "promotional flyers.") The parties are in agreement that while there were over 4,000 faxes, some recipients received more than one, and therefore there is something less than 4,000 recipients. There were eight different faxes produced and transmitted, only one of which was ever transmitted to Plaintiff, and that on a single occasion.

Plaintiff states that it had no prior relationship with Defendant whatsoever, never made any prior purchases from Defendant, never requested any information from Defendant, and never voluntarily provided Defendant its fax number.

Defendant states that prior to the fax at issue, Plaintiff did contact Defendant and requested a particular vehicle specification data sheet, that Defendant provided the specification data sheet to Plaintiff, that Plaintiff paid Defendant for the specification data

sheet, and that Plaintiff provided Defendant its fax number by which Defendant delivered the specification data sheet.

Defendant further suggests that with regard to all of the recipients to whom the faxes were sent, Defendant only included those recipients in its customer database based on customers who had purchased Defendant's products; customers, including potential customers who gave Defendant their contact information at tradeshows and designated what products or services they may be interested in; customers, including potential customers who responded to Defendant's advertisements in trade journals returning cards with their contact information in requesting information about Defendant's products and services; customers, including potential customers, who gave Defendant their contact information when contacted personally by a sales representative; customers, including potential customers, who gave Defendant their contact information in response to Defendant's website; and customers, including potential customers, who specifically called Defendant and requested that promotional material be sent to them by fax. Defendant asserts that it never purchased a list of fax numbers or used a telemarketing company to send any fax at issue in this case.

While this Court is not called upon, nor would it be appropriate, to make a merit determination of the case, the Court likewise finds that it would be inappropriate to refer to this case by the shorthand moniker "a fax blast case."

III. CLASS CERTIFICATION

Class certification in Missouri is governed by Civil Rule 52.08, RSMo. It is the party seeking certification that bears the burden of establishing the requirements for certification. ***Hale v. Walmart Stores, Inc.***, 231 S.W.3d 217 (Mo.App. 2007);

O'Sullivan v. Countrywide Home Loans, Inc., 319 F. 2d 732 (5th Circuit 2003)[1]. The [District Courts] must "conduct a rigorous analysis of the [Rule 23] prerequisites before certifying a class." *O'Sullivan* at 738. Certification of a class is within the sound discretion of the trial court. *State ex rel. American Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. 2003).

For a class certification to be proper, the record must demonstrate and support each of the requirements set forth in Rule 52.08(a), and must also demonstrate at least one of the requirements as set forth in Rule 52.08(b).

Rule 52.08(a) provides the following prerequisites to a class action:

> (a) **Prerequisites of a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all 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.

Rule 52.08(b) provides that one of following requirements must be satisfied in order for a class action to be maintainable:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and

[1] In their briefing, the parties have often referred the Court to opinions of the Federal Courts of varied jurisdictions. This Court will do likewise. Because Rule 52.08 is based on Fed. Rules. Civ. Proc. Rule 23, Missouri Courts often look to federal precedent in interpreting Rule 52.08. *Ralph v. American Family Mut. Ins. Co.*, 809 S.W. 2d 173, 174 (Mo.App. 1991).

efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(D) the difficulties likely to be encountered in the management of a class action.

IV. ANALYSIS OF RULE 52.08(a) – PREREQUISITES

(1) The class is so numerous that joinder is impracticable.

This prerequisite is generally referred to as "numerousity." Plaintiff suggests that whatever the precise number of the class may be, it is sufficient to satisfy the numerousity requirement.

This Court agrees and finds that Plaintiff's claim does meet the prerequisite of numerousity as set forth in Rule 52.08(a)(1).

(2) There are questions of law or fact common to the class.

This prerequisite is generally referred to as "commonality." The commonality prerequisite requires at least one issue common to all members of the class. It "does not require that all of the questions of law or fact raised by the case be common to all the plaintiffs." ***Walco Inves. Inc. v. Thenen***, 168 F.R.D. 315 (S.D. Fla. 1996). However, "a class action must involve issues that are susceptible to class-wide proof." ***Cooper v. Southern Co.***, 390 F.3d 695, 713 (11th Cir. 2004). "[T]he commonality requirement has been characterized as a 'low hurdle' easily surmounted." ***Scholes v. Stone, McGuire and Benjamin***, 143 F.R.D. 181, 185 (N.D. 1992). The Court's inquiry is typically focused on

"whether there are common liability issues which may be resolved efficiently on a class-wide basis." ***Brown v. SCI Funeral Servs. of Florida***, 212 F.R.D. 602, 606 (S.D. Fla. 2003).

In order for this Court to further analyze the issue of commonality, and later the issues of typicality and predominance, the Court must first address the issue of Defendant's claim of having an established business relationship defense. Defendant suggests that if it is determined it had an EBR with the recipient of a fax, there would be no violation of the TCPA. This conclusion is based on the Federal Communications Commission's ("FCC") interpretation of the regulations in force in 2004. The TCPA has since been amended to include the concept of a business relationship in the act. 47 U.S.C, § 227(a)(2). Defendant would further suggest that the Missouri Court of Appeals, Southern District, has acknowledged the application of the EBR defense in a case involving this same Plaintiff when it stated, "an established business relationship liability exception, previously recognized by regulation, now is codified." ***Top Craft, Inc. v. International Collection Servs.***, 258 S.W.3d 488, 489 (Mo.App. 2008).

Plaintiff suggests that the established business relationship is not specifically codified in the version of the act applicable to this case, and therefore, absent the recipient's "prior express invitation or permission" as required by 47 U.S.C., § 227(a)(4), Defendant would be liable. Plaintiff refers the Court to the Missouri Court of Appeals, Eastern District, opinion in ***Little v. Drury Inns, Inc.***, 2010 WL 98002 (Mo.App. 2010) (Motion to Transfer Pending). In ***Drury***, the court was presented with a motion for class certification under an alleged TCPA violation, but on facts substantially different from the instant case. The ***Drury*** case presented a more conventional "fax blast" case in that

the Defendant admitted that it hired a marketing company to send an unsolicited one-page fax flyer to approximately 20,000 fax numbers. It was later determined the fax was successfully transmitted to approximately 8,000 fax numbers. The facts presented were that defendant had no knowledge of how the marketing company obtained the fax numbers or who would be the intended recipients of the faxes. Thus, the defendant would not only fail to prove that it had the "prior express permission or invitation of any of the fax recipients," it was not in a position to make even a colorable claim of an established business relationship. ***Id.*** at 1. The court in ***Drury*** was called upon to consider the EBR in its analysis of the predominance element under the rule. ***Id.*** at 2. The court held "even if the EBR defense were available, however, Drury has failed to produce any evidence that any such relationship existed between Drury and any class member . . . At best, an EBR may be construed as a form of 'implied consent.'" ***Id.*** at 3.

The EBR defense to an alleged TCPA violation has been recognized in a variety of contexts. Advertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shops. ***Mo. ex rel, Nixon v. American Blast Fax Inc.***, 323 F.3d 649, 659 (8th Cir. 2003). Having an established business relationship with the recipient ... is a defense to liability. ***C.E. Design Limited v. Prism Media Inc.***, 2009 WL 2496568 (N.D. 2009). Several courts have held that proof of consent is an essential individual issue under the TCPA that makes class certification inappropriate. ***Gene and Gene LLC v. BioPay LLC***, 541 F.3d 318, 326-27 (5th Cir. 2008); ***Levitt v. Fax.com***, 207 U.S. Dist. Lexis 83143 at 11-13 (D. Md. 2007).

In the instant case, Plaintiff suggests that it will be able to show at trial the lack of express consent by itself and the class members. Plaintiff does not however describe how it intends to do so without the litigation devolving into innumerable mini-trials on the consent of every individual class member. Whether the burden of persuasion is on the Plaintiff, or the Defendant, ultimately consent is an issue that will have to be determined on an individual basis at trial. This Court, like the court in ***BioPay,*** infra, determines that it is not relevant in this context who may have the burden of proof on the consent issue. This Defendant has presented evidence that it did not merely purchase a random database of persons and send to each of those persons an admittedly unsolicited fax advertisement. If class certification were granted, the case would ultimately require a series of individual factual determinations which is the antithesis of the commonality requirement.

Therefore, this Court finds that class certification of Plaintiff's claim would be improper for lack of commonality under Rule 52.08(a)(2).

(3) The claims of Plaintiff are typical of the class.

This prerequisite is generally referred to as "typicality." Although similar to commonality in that it concentrates on the nexus between class members and the named class representative, typicality differs from commonality in that it focuses on the named class representatives' individual characteristics in comparison to the proposed class. ***Piazza v. Ebsco, Ind. Co.***, 273 F.2d 1341, 1346 (11th Cir. 2001); ***Coger v. Hartford Life Ins. Co.***, 28 S.W.3d 405, 410 (Mo.App. 2000). If the named plaintiffs' individual circumstances are markedly different from those upon which the other class members' claims are based, there is no typicality. ***Dale v. DaimlerChrysler, Corp.,*** 204 S.W.3d 151

(Mo. 2006). The representative's claim must arise from the same event or course of conduct as the class claims. *Id.*

In the instant case, Plaintiff will be called upon to defend the Defendant's claim of an EBR based on Plaintiff's alleged voluntary contact and purchase of a data specification sheet as described above. This perhaps unique factual scenario might provide Defendant a defense to Plaintiff's specific claim, when there is none to certain other class members.

Likewise, based on the sworn testimony provided to this Court, the Court observes there may be evidence presented that some class members may have contacted Defendant directly and requested information by fax, a scenario not necessarily typical of all other class members. There may be evidence that some class members made inquiry of Defendant at a tradeshow, and provided contact information in that context, a scenario not necessarily typical of all other class members. There may be evidence that some class members returned a mailer to Defendant having viewed an advertisement in a trade journal, a scenario not necessarily typical of all other class members. In essence, each individual class member may have a different "story" as to how it came to be in Defendant's database, and thereby a recipient of a fax.

Finally, Plaintiff has suggested that there were eight separate faxes sent to various recipients during the time frame at issue. However, Plaintiff claims receipt of only one single fax. This Court presumes, although admittedly has not been referred to specific evidence, that other putative class members may have received more than one fax, and perhaps others did not receive the specific fax of which Plaintiff complains. Again, each is not typical of the other, and Plaintiff's claim is not typical of the whole.

As the ***Dale*** court recognized:

> The typicality requirement . . . is designed to screen out class actions involving legal or factual positions of the representative of the class which are markedly different from those of other class members. Thus, the typicality requirement will not be met when: [T]he named plaintiffs' individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will be based.

204 S.W.3d at 169.

Therefore, this Court finds that class certification of Plaintiff's claim would be improper for lack of typicality under Rule 52.08(a)(3).

(4) The representative party will fairly and accurately protect the interest of the class.

This prerequisite is commonly referred to as "adequacy." Plaintiff must demonstrate that it is in a position to fairly and adequately protect the interests of the members of the class. Conversely, it is axiomatic that a putative class representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. *See generally,* 7A CHARLES ALLEN WRIGHT AND ARTHUR R. MILLER FEDERAL PRACTICE AND PROCEDURE, § 1768 at 326 (Second Ed. 1986); ***In re Ins. Mgmt. Solutions Group Inc.***, 206 F.R.D. 514, 516 (M.D. Fla. 2002). In addition, this may include examination of the chosen class counsel, especially if there is a potential conflict of interest. ***Linden v. Walmart Stores***, 340 F.3d 1246, 1253 (11th Cir. 2003).

In the instant case, the Court is well satisfied with the integrity and capability of the putative class representatives' chosen counsel. Plaintiff's counsel is known to the Court to be experienced in the representation of Plaintiffs in consumer litigation, and

class action litigation, and there has been no suggestion that such counsel would not be appropriate if the class were certified.

However, in the instant case, Plaintiff's claims may prove antagonistic to other members of the purported class if it is ultimately determined by the trier of fact that Plaintiff actually made a purchase from Defendant, and provided its fax number to Defendant as part of the purchase with the expectation that later promotions would be conveyed to it by fax. This evidence offered in support of an EBR defense to liability. Other potential class members perhaps made no purchase, and thus, arguably would have a different response to Defendant's EBR defense, one that is not adequately represented by the Plaintiff herein.

In addition, as was discussed with regard to the typicality prerequisite, Plaintiff herein received only one of perhaps eight faxes sent during the time period at issue. Other putative class members may well not be adequately represented by a plaintiff who did not receive the same fax that they did, and received the fax under perhaps substantially dissimilar circumstances.

Therefore, this Court finds that class certification of Plaintiff's claim would be improper for lack of adequacy as required under Rule 52.08(a)(4).

V. ANALYSIS OF RULE 52.08(b)

If the four prerequisites set forth in Rule 52.08(a) are met, the class action may be maintained by Plaintiff only if at least one of the three sub-parts of Rule 52.08(b) is satisfied. Plaintiff, in the instant case, argues that it satisfies the requirement found in Rule 52.08(b)(3), which requires two separate showings: (A) questions of law or fact common to the members of the class predominate over any questions affecting only

individual members, referred to as "predominance"; and (B) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, referred to as "superiority."

(A) Predominance

The predominance requirement "is met if there is a common nucleus of operative facts relevant to the dispute and those common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication." ***Heartland Comm., Inc. v. Sprint Corp.***, 161 F.R.D. 111, 117 (D. Kan. 1995). Predominance does not require that all issues be common to the class members. ***Dale***, 204 S.W.3d at 175. Rather, it requires that common issues substantially predominate over individual ones. ***Craft v. Philip Morris Cos.***, 190 S.W.3d 368, 381 (Mo.App. 2005). To classify an issue as common or individual, a court looks to the nature of the evidence required to show the allegations of the petition. ***Id.*** at 382. If the same evidence on a given question will suffice for each class member, then it is common; if the evidence on a question varies from member to member, then it is an individual issue. ***Id.*** Finally, "the object of Rule 52.08(b)(3) is to get at the cases where a class action promises important advantages of economy of record and uniformity of result without undo dilution of procedural safeguards for members of the class or for the opposing party." ***State ex rel. American Family Mut. Ins. v. Clark***, 106 S.W.3d 483, 489 (Mo. 2003).

This Court considers the court's opinion in ***Drury***, which determined the predominance requirement was met in the context of the class action certification of the TCPA claim therein considered. In ***Drury***, the defendant contended that if an EBR is applicable, then there would need to be an individualized inquiry into the nature of each

of the over 8,000 "relationships" between Drury and the putative class members, thereby making class certification inappropriate under the predominance element. 2010 WL 98002 at 2. The ***Drury*** court disagreed. However, the court went on to point out that defendant failed to produce any evidence that any such relationship existed between Drury and any class member. ***Id.*** at 3. Therefore, the ***Drury*** court was left with a case wherein the defendant admitted that it had treated all putative class members alike; defendant admitted that all putative class members had received the same fax; defendant admitted that all putative class members were part of a commercially purchased database; and defendant admitted that no putative class member was part of a customer database assembled by defendant, and therefore, the court concluded the predominance requirement was met. ***Id.***

In the instant case the facts presented are inapposite to the ***Drury*** scenario. Here, there is no class-wide, common way to characterize the faxes in this case as being "unsolicited." The evidence supports the proposition that Defendant acquired the recipients' fax numbers under a variety of circumstances, some or all of which may defeat each individual class member's TCPA claim.

Other courts have refused to certify class actions under the TCPA because the common question predominance requirement was not satisfied. In ***BioPay***, the Fifth Circuit reversed the district court's grant of class certification and stated, "the unique facts of each case generally will determine whether certification is proper." 541 F.3d at 328. The court noted that plaintiffs must advance a viable theory implying generalized proof to establish liability with respect to the class involved, and that district courts must

not certify class actions filed under the TCPA when such a theory has not been advanced. *Id.*

In ***BioPay***, the court was presented with a defendant, not unlike Defendant in the instant case, which developed a fax recipient list from people who submitted their fax numbers through a website, at tradeshows, and generally within the context of an established business relationship. The court determined the fax numbers were collected over time and from a variety of sources, and the court held that only individual inquiries and mini-trials on a person-by-person basis could possibly resolve these issues. ***Id.*** at 329. The court held there was no class-wide way to establish consent, or the lack thereof, and this circumstance was distinguishable from those cases were the defendant obtained all of its recipients names from a single-source contact list generated by a third party. ***Id.*** at 329.

The reasoning in ***BioPay*** has been followed in ***Hicks v. Client Servs. Inc.***, 2008 WL 5479111 (S.D. Fla. 2008), which considered plaintiff's claim for class certification based on violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and the TCPA. With regard to the TCPA claims, the court considered the claim of predominance, at the same time it considered commonality. The court determined that "proof of consent is an essential individual issue under the TCPA that makes class certification inappropriate." 2008 WL 5479111 at 7, (citing ***BioPay***; ***Kenro, Inc. v. Fax Daily Inc.***, 962 F.Supp. 1162, 1169-70 (S.D. Ind. 1997) (a ruling that the consent issue made class certification inappropriate because of lack of typicality, commonality, and predominance). The ***Hicks*** court observed that "one court ruled in favor of class certification specifically because the defendant in that case asserted that consent arose

from the class members' voluntary inclusion in the single database from which the defendant obtained their numbers." *Id.* at 7 (citing ***Kavu, Inc. v. Omnipac Corp.***, 246 F.R.D. 642, 647-48 (W.D. Wash. 2007)). The court noted those particular circumstances lent themselves to resolving the consent issue on class-wide basis, however, they do not exist here.

While this Court does not find that there can be no case of an alleged TCPA violation that meets the predominance requirement, such as in ***Drury***, this Court does find that under the facts of the instant case, the individualized facts will predominate over the common facts.

Therefore, this Court finds that class certification of Plaintiff's claim would be improper under Rule 52.08(b)(3) for lack of predominance.

(B) Superiority

Rule 52.08(b)(3) requires that a class action be superior to other methods for the fair and efficient adjudication of the controversy. The rule goes on to provide certain factors the trial court must consider in determining whether the putative class meets the requirement of superiority. Those factors include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (D) the difficulties likely to be encountered in the management of a class action.

Rule 52.08(b)(3).

In *Dale*, the Supreme Court of Missouri noted the above is not an exhaustive list of factors and that the superiority requirement requires the trial court to balance, in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of "alternative available methods" of adjudication. 204 S.W.2d at 181. The *Dale* court went on to state the balancing must be in keeping with judicial integrity, convenience, and economy, and in balancing the relative merits of a class action verses alternative available methods of adjudicating the controversy, the trial court may consider "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Id.* at 182. This Court questions, without finding, whether the customers and potential customers of Defendant, admittedly the manufacturer of industrial products and equipment for the auto-body repair industry (the fax at issue offered the sale of a $40,000 piece of equipment), would ever be described as 'the poor or uninformed' with an inability to enforce their rights.

Plaintiff would suggest, with authority, that "[o]ne of the primary functions of the class suit is to provide a device for vindicating claims which, taken individually, are too small to justify legal action that which are of significant size if taken as a group." ***Brady v. LAC, Inc.***, 72 F.R.D. 22, 28 (S.D. N.Y. 1976).

The statutory damages for a single violation of the TCPA are the actual damages suffered by the Plaintiff, or $500, whichever is more. The $500 damage amount may be trebled if the Defendant's actions were willful or knowing. 47 U.S.C., § 227(b)(3).

Plaintiff's argument assumes, and the Court will do likewise for this purpose, that the sum of $500 would be more than the actual damage suffered by Plaintiff and likely

more than the actual damage suffered by any individual putative class member. Plaintiff asserts that the litigation costs for an individual class member would likely exceed the maximum possible recovery, making litigation of individual cases uneconomical. This Court need not determine the ultimate economics of pursuing a single TCPA violation case, versus pursuing the claim on a class-wide basis. It may be that the drafters of the TCPA determined that $500 was an adequate remedy for the single instance of the receipt of an unsolicited fax. In any event, the determination of the merits of any single claim would likely be straight-forward and perhaps requiring only a modest amount of legal effort. Courts have held that the statutory remedy under the TCPA providing for a minimum recovery of $500 for each violation, then the possibility of trebling those damages upon certain circumstances, is designed to provide an adequate incentive for an individual plaintiff to bring suit on his own behalf. ***Forman v. Data Transfer, Inc.***, 164 F.R.D. 400, 404 (E.D. Pa. 1995). "A class action would be inconsistent with the specific and personal remedy provided by congress to address the minor nuisance of unsolicited facsimile advertisements." ***Id.*** at 405. *See also* ***Ratner v. Chemical Bank New York Trust Co.***, 54 F.R.D. 412, 416 (S.D. NY 1972) (denying class certification where the truth in lending acts minimum award of $100 each for 130,000 class members would be a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant").

In evaluating the pertinent factors under parts (A), (B) and (C) of Rule 52.08(b)(3), the Court has been presented no evidence, or compelling argument suggesting there is any interest of any member of the proposed class in individually controlling the prosecution of the action; the Court has been presented no evidence, or

compelling argument suggesting that other potential members of the class have already commenced litigation concerning the controversy; and the Court has been presented no evidence, or compelling argument suggesting it would otherwise be undesirable to concentrate the litigation of the claims in this particular forum.

However, the final matter for the Court to consider is found at Rule 52.08(b)(3)(D), which requires an inquiry as to whether there are likely to be encountered unusual difficulties in the management of the case. While this Court is not averse to working through difficulties in the management of litigation, even if those difficulties are "unusual," the Court must presume the rule suggests more. For the reasons suggested in the Court's analysis of the commonality and typicality requirements, this case, in order to be fairly presented to the trier of fact, would arguably require the individual testimony of each class member. If the Court were to determine it is ultimately Plaintiff's burden of proof to go forward with testimony regarding EBR (this Court, as in ***BioPay***, makes no final determination on that issue). Plaintiff may be required to collect the individual testimony of thousands of plaintiffs located presumably all around the United States or each individual claim would be defeated. Conversely, if the Court were to determine it were Defendant's obligation to go forward with the EBR evidence, Defendant would be placed in the same position. In either event, the management of the case would be expensive, difficult and no economies of scale would be realized by the class forum.

Therefore, this Court finds that class certification of Plaintiff's claim would be improper for lack of superiority under Rule 52.08(b)(3).

VI. PROPOSED CLASS DEFINITION

Plaintiff has moved the Court to certify this action as a class action and define the class as "all persons to whom defendant sent one or more facsimile advertisements between January 1, 2003, and April 1, 2004."

An imprecise class definition, which does not give rise to presently ascertainable class members, undermines judicial economy and efficiency, thereby interfering with one of the primary purposes of class action suits. ***Dale***, 203 S.W.3d at 177-78. While the merits of a case are not determined in a hearing to determine if a class should be certified, the court may look beyond the pleadings in determining whether the class-certification requirements have been satisfied. ***Id.*** at 179.

As discussed above, the factual setting of this case demonstrates why the proposed class definition is overbroad. The class as defined is left wide open to persons who have given consent or who invited Defendant to communicate with them by fax. In ***BioPay***, the court reversed class certification in part because the plaintiff failed to present facts or arguments to support that a dispute over consent or permission will not exist as to a significant number of class members. 541 F.3d at 329. The same exists in the instant case.

Defining a class as that group of people who received a specific facsimile advertisement, during a specific time frame, and without any prior contact with the sender, i.e. ***Drury***, infra, may present a well-defined group for which class action resolution is appropriate. The instant case is inapposite. As this Court has determined the claim is not suitable for resolution as a class action, the Court must likewise find that

the proposed class definition does not present a well-defined group of persons that may properly be treated as a "class."

Plaintiff has suggested that if the Court were to err, the Court should err on the side of certifying the class as the Court would later have the opportunity to decertify the class if the action were determined to be inappropriate, or otherwise unmanageable. This Court must endeavor to interpret and apply the elements of Rule 52.08 properly at the outset and perhaps obviate the need to later correct an error.

VII. CONCLUSION

For reasons stated above Plaintiff's Motion for Class Certification is denied.

Entered this 16th day of March 2010.

Michael J. Cordonnier
Greene County Circuit Judge, Division 1