

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	09 C 2264	DATE	1/13/2010
CASE TITLE	Alan Donnelly vs. NCO Financial Systems, Inc.		

DOCKET ENTRY TEXT

For the reasons set forth in this order, the Court overrules NCO's objections to Magistrate Judge Nolan's December 16, 2008 order and directs NCO to comply fully with it or face sanctions that may include striking its defenses.

	Courtroom Deputy Initials:	LC/LM
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NCO objects to Magistrate Judge Nolan's December 16, 2009 Order granting in part and denying in part plaintiff's motion to compel. The Court will set aside the order only if it "is clearly erroneous or contrary to law." Fed .R. Civ. P. 72(a).

NCO says Judge Nolan erroneously order it to comply with plaintiff's requests for certain class-wide discovery because a class has yet to be certified. The Court finds this argument no more persuasive now than it did months ago when it rejected NCO's request to stay class discovery.

NCO also says class-wide discovery on its prior express consent defense, including plaintiff's requests for putative class members' credit applications, is inappropriate because it has not asserted that defense to the class claims. True, given that a class has not yet been certified. But NCO has asserted the defense to plaintiff's claims, has not disavowed it as to any class claims and has been ordered to proceed with class discovery. Thus, NCO's failure to raise a defense to inchoate claims is not a basis for denying plaintiff this discovery.

Nor is plaintiff's amendment to the class definition. Initially, plaintiff defined the class to include people who "had not placed [their] cellular telephone number on an application with the creditor" but had still received certain calls from NCO. (Compl. ¶ 24.) Plaintiff has amended the definition to include people who received the same kind of calls from NCO "without [having given] prior express consent." (Am. Compl. ¶ 33.) Given the FCC's position that "provi[ding] . . . a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent," *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 564 (2008), the amendment does not vitiate the applications' relevance.

NCO also argues that Judge Nolan's order improperly requires it to produce evidence it does not possess. Unless NCO never intended to, and will not, assert a consent defense to the putative class claims – an assertion it does not make – it should have marshaled the evidence in support of that defense long ago. If it has not done so, despite the Court's order to proceed with class discovery and the looming discovery deadline, there is nothing improper about requiring it to do so now.

Judge Nolan's order that NCO produce the contracts with its creditor-clients is also not erroneous. Contrary to NCO's belief, plaintiff requested their production, *see* Pl.'s Mot. Compel, Ex. 1, Document Production Request No. 15, and they are relevant to this suit. Thus, the contracts must be produced.

Finally, NCO says it cannot comply with Judge Nolan's order by the January 19 deadline she set. Because NCO has had nine months to prepare its production, depositions will be conducted shortly and discovery closes next month, the deadline set by Judge Nolan is entirely reasonably.