



## **Martinez. v. Medcredit, Inc. et al**

2017 | Cited 0 times | E.D. Missouri | July 24, 2017

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION JEREMY AVILES and RACHEL CATALA, individually and on behalf of all others similarly situated,

Plaintiffs, ) v. ) No. 4:16CV01138 ERW MEDICREDIT, INC., a Missouri corporations; and HCA HEALTH SERVICES OF FLORIDA, INC. d/b/a Osceola Regional Medical Center

Defendants. )

MEMORANDUM AND ORDER This matter comes before the Court on Plaintiffs Motion requesting leave to file a consolidated complaint that substitutes Marilynn Martinez as Plaintiff in place of Jeremy Aviles

Jurisdiction as to Plaintiffs Jeremy Aviles and Rachel Catala [ECF No. 71]. I. BACKGROUND

in this Court on July 13, 2016, against Defendants Medcredit, Inc., HCA Health Services of New Hampshire, Inc. doing business as Portsmouth Regional Hospital , and Went- worth- Martin action for damage arises under 47 Plaintiff Martin also brought this action on behalf of several classes of other similarly situated individuals, seeking damages and any other available legal or equitable remedies resulting from the illegal actions of On May 3, 2017, an Amended Complaint was filed which named Jeremy Aviles and Rachel Catala as Plaintiffs in this matter. Martin, the original Plaintiff was dismissed from the matter. On May 5, 2017, the Court entered an order consolidating this action with the action styled Hornberger et al. v. Medcredit, Inc., No. 4:17-cv-00409-SNLJ. On May 24, 2017, Plaintiffs moved to substitute Marilynn Martinez as plaintiff in place of Jeremy Aviles and Rachel Catala in the consolidated complaint, with Plaintiffs Todd Hornberger and Eric Johnson remaining as Plaintiffs in the consolidated action. Defendant Medcredit, pursuant to Federal Rule of Civil Procedure 12(b)(1), submitted a motion to dismiss the action for lack of subject matter jurisdiction in combination with its opposition to the Motion to Substitute. Medcredit argues Aviles and Catala do not have standing to bring the action, and therefore, they do not have standing to file a Motion to Substitute another plaintiff in their stead. Medcredit also claims any attempt to substitute Martinez as a representative plaintiff would be futile. They argue Martinez cannot satisfy the FRCP 23(a) typically requirement, because she is subject to unique defenses arising out of her relationship with the former Plaintiff Aviles.



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In a motion to dismiss, the Court accepts the allegations in the complaint as true. Great Rivers Habitat Alliance v. Fed. Emergency Mgmt. Agency, 615 F.3d 958, 988 (8th Cir. 2010). The following are the facts alleged by Plaintiffs. Mediacredit has equipment with the capacity to dial numbers without human intervention to be used to make non-emergency telephone calls to the cellular telephone of Plaintiffs and other members of the class. Mediacredit utilizes an artificial and/or prerecorded voice, and Mediacredit used this equipment to call Plaintiffs without regard as to whether they had obtained express permission from the called party to make such calls or after consent was revoked. In 2015 and 2016, Martinez received numerous telephone calls on her cell HCA by her adult son. Several calls used an artificial or prerecorded voice. At no time leading up to these calls did Martinez provide either Defendant with her cellphone number to be called Martinez believes her son gave HCA her name and cell phone as the

person to notify regarding the outcome of his medical treatment or any emergencies, not as a person to notify regarding an alleged debt.

Plaintiffs also bring this action on behalf of several classes of other similarly situated individuals, seeking damages and any other available legal or equitable remedies resulting from the illegal actions of Defendants in negligently, knowingly, or willfully contacting them on their cellular telephones in violation of the TCPA. The proposed No Consent Class and sub-classes are defined by Plaintiffs as follows:

**No Consent Class** All persons within the United States to whose cellular telephone number Mediacredit placed a debt collection related telephone call between July 14, 2015 and the date of certification through the use of any automatic telephone dialing system or artificial or prerecorded voice where such person did not provide that number in connection with the alleged debt.

**Person to Notify Subclass** All persons within the United States to whose cellular telephone number Mediacredit placed a debt collection related telephone call between July 14, 2015 and the date of certification through the use of any automatic telephone dialing system or artificial or prerecorded voice where such

Additionally, the proposed Wrong Number/Cease Contact class is defined as follows: **Wrong Number/Cease Contact Class** All persons within the United States to whose cellular telephone number Mediacredit placed a debt collection related telephone call between July 14, 2015 and the date of certification through the use of any automatic telephone dialing system or artificial or prerecorded voice where such person informed Mediacredit that it had the wrong number or requested that Mediacredit cease contact. Plaintiffs believe common questions of fact and law exist as to all members of the classes which predominate over any questions affecting only individual members of the classes. These questions include: whether, within the class period, Mediacredit made any call (other than a call made for emergency purposes or made with the prior express consent of the called party) to a class member using any automatic telephone dialing system or an artificial or prerecorded voice



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to any telephone number assigned to a cellular telephone service; whether Plaintiffs and the class members were damaged, and the extent of damage for such violation; whether HCA is vicariously liable for the calls placed on its behalf; and whether Mediacredit should be enjoined from engaging in such conduct in the future.

As persons who allegedly received calls from Mediacredit using an automatic telephone dialing system or any artificial or prerecorded voice, without their prior express consent, Plaintiffs argue they are asserting claims that are typical of the classes. Plaintiffs allege Defendants violated 47 U.S.C. § 227(b)(1)(A)(iii) of the TCPA by causing an automatic telephone dialing system and/or artificial or prerecorded voice to be used to make non-emergency telephone calls to Plaintiffs and the other members of the class without their prior express consent. Therefore, pursuant to Section 227(b)(3)(B) of the TCPA, Plaintiffs allege themselves and each class member is entitled to a minimum of \$500.00 in damages for each violation and if willfulness is proven up to \$1,500 for each violation. II.

### STANDARD

A. Motion to Substitute The Court is not required to grant leave to amend the complaint, but FRCP 15(a)(2) states

Van Horn v. Trickey, 840 F.2d 604, 608 (8 th

Cir. 1988). dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment, leave to amend should be Mo. Crop, LLC v. CGB Diversified Servs., No. 2:15CV00024 ERW, 2017 U.S. Dist. LEXIS 2384, at \*8 (E.D. Mo. Jan. 6, 2017), quoting Becker v. Univ. of Neb. at Omaha, 19 F.3d 904, 907-08 (8 th

Cir. 1999). A party may move to dismiss a claim for lack of subject matter jurisdiction. FRCP 12(b)(1); Blakley v. Schlumberger Tech. Corp. dismiss for lack of subject-matter jurisdiction can be decided three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, as with a summary judgment motion; and on Jessie v. Potter dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be

Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993).

The existence of subject matter jurisdiction is a question of law appropriate for the Court. , 645 F.3d 954, 958 (8th Cir. 2011). A district court has broad power in deciding whether it has the right to hear a case. Osborn v. United States cause jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it Id. III. DISCUSSION

A. Motion for Leave to Substitute Parties in Consolidated Complaint Plaintiffs request the Court substitute Martinez as Plaintiff in place of Aviles and Catala. Complaint filed by Aviles and Catala. They also contend they seek certification of a virtually



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identical class to the one proposed in the Amended Complaint.

Defendants argue the Motion to Substitute should be denied for two reasons. First, they state it is moot because Aviles and Catala lack standing. Second, they argue any attempt to introduce Martinez as a putative plaintiff in a class action complaint is futile, because Martinez, at minimum, cannot satisfy the FRCP 23(a)(3) typicality requirement. Mediacredit states Plaintiffs Aviles and Catala admit they had no cause of action under the TCPA, 47 U.S.C. § 227, because they were not autodialed without their consent and therefore, had not suffered an injury [ECF No. 71, ¶ 2]. Therefore, claims must be dismissed for lack of standing. As a result, Defendants assert they also do not have standing to file a Motion to Substitute another plaintiff in their stead.

Plaintiffs argue it is disputed whether Mediacredit had prior express consent to make the calls [ECF No. 62, ¶ 24]. Prior express consent is deemed to be granted only if the wireless number was provided by the consumer . . . during the transaction that resulted in the debt owed. *Zean v. Fairview Health Servs.*, 858 F.3d 520, 523 (8th Cir. 2017). Prior express consent may be *Wright v. Target Corp.*, No. 14-cv-3031 (SRN/HB), 2015 U.S. Dist. LEXIS 167000, at \*13 (D. Minn. Dec. 14, 2015). Aviles alleges on several occasions he asked Mediacredit to stop placing calls to his cellular telephone number, yet the calls did not stop [ECF No. 62, ¶ 24]. The Court is required to accept particularized and concrete injury, the court must accept all factual allegations in the complaint

*Young Am. Corp. v. Affiliated Computer Servs.*, 424 F.3d 840, 843 (8th

Cir. 2005). Lack of consent is not required to establish standing of a TCPA claim, but even if it were, Plaintiffs have sufficiently alleged facts they did not consent to the calls. Plaintiffs have standing this matter and therefore, they can file a Motion to Substitute. Finally, Defendants argue any attempt to name Martinez as a representative plaintiff will [ECF No. 72, p. 10]. They argue this for two reasons. First, they claim Aviles misappropriated

the telephone number of Martinez, who is his mother. Second, Martinez allegedly signed the Conditions of Admission, which expressly states she consented to being autodialed about any hospital debts. They argue this information raises serious doubts regarding whether Martinez could be a member of any of the following classes: No Consent Class, Person to Notify Subclass, and Wrong Number/Cease Contact. They claim, as a result, Martinez does not satisfy the typicality requirement, and any amendment to name her as a representative will be futile and should be denied. Typicality is an issue to be determined on a motion for class certification, not a motion to dismiss. See FRCP 23 ground.

The Court believes Plaintiffs have good cause for seeking substitution. This is the second time Plaintiffs are seeking to substitute, but since discovery is still in the early stages, the Court does not find this will result in prejudice towards Defendants. Therefore, the Court will allow the substitution.



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B. Motion to Dismiss Mediacredit moves to dismiss this action for lack of subject matter jurisdiction. In support of this Motion, Mediacredit argues Aviles and Catala were called about debts they personally owed and consented to being called about them, and therefore, their claims must be dismissed for lack of standing.

Accordingly,

IT IS HEREBY ORDERED and to remove Aviles and Catala as Plaintiffs [ECF No. 68] is GRANTED.

IT IS FURTHER ORDERED that

Subject Matter Jurisdiction [ECF No. 71] is DENIED, as moot.

Dated this 24th Day of July, 2017.

E. RICHARD WEBBER SENIOR UNITED STATES DISTRICT JUDGE

