UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: CONVERGENT TELEPHONE CONSUMER PROTECTION ACT LITIGATION	Master Dkt. No. 3:13-md-2478(AWT) MDL No. 2478
	Pretrial Order No. 15
	Civil No. 3:13-cv-1866(AWT)
THIS DOCUMENT RELATES TO: CINDY VAZQUEZ, Plaintiff, v. CONVERGENT OUTSOURCING, INC., Defendant.	

ORDER RE DISCOVERY DISPUTE
(TAX RETURNS; ETC.)

The parties have each filed two submissions with respect to the instant discovery dispute: Unilateral Status Report on Discovery Dispute (Case No. 13-cv-1866, Doc. No. 55); Plaintiff Vazquez's Response to Defendant's Unilateral Status Report (Doc. No. 177); Defendant Convergent Outsourcing, Inc.'s Supplemental Briefing Regarding Discovery Dispute (Case No. 13-cv-1866, Doc. No. 56); and Plaintiff Vazquez's Response to Convergent's Supplemental Briefing Regarding Discovery Dispute (Doc. No. 192).

Defendant Convergent Outsourcing, Inc. ("Convergent") seeks information and documents pertaining to plaintiff Cindy Vazquez's individual state and federal income tax returns for tax years 2005 to 2014 and pertaining to her ownership of a salon business and reporting for tax and license purposes with respect to that business. Convergent contends that this information is "relevant to and go[es] the heart of Ms. Vazquez's adequacy to serve as a class representative in this action." (Defendant Convergent Outsourcing, Inc.'s Supplemental Briefing Regarding Discovery Dispute at 1.)

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "The party seeking discovery bears the burden of initially showing relevance." Mandell v. The Maxon Company, Inc., No. 06 Civ. 460(RWS), 2007 WL 3022552, at *1 (S.D.N.Y. Oct. 16, 2007) (quoting Zanowic v. Reno, No. 97Civ.5292(JGK)(HBP), 2000 WL 1376251, at *6 (S.D.N.Y. Sept. 25, 2000))(brackets omitted). "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment,

oppression, or undue burden . . . .” Fed. R. Civ. P. 26(c)(1). “The burden is on the party resisting discovery to explain its objections and to provide support therefor[].” Shannon v. New York City Transit Auth., No. 00 CIV. 5079(RWS), 2001 WL 286727, at *1 (S.D.N.Y. Mar. 22, 2001).]

The information and documents sought are not relevant to any claim or defense in this litigation, nor do the information and documents appear to be otherwise admissible, for purposes of impeachment, or otherwise reasonably calculated to lead to the discovery of admissible evidence. Convergent does not seek information or documents that could be used to impeach Vazquez under Rule 609 of the Federal Rules of Evidence, because none of the information or documents relates to a criminal conviction.

Convergent argues that, nonetheless, Vazquez should be ordered to produce the information and documents it seeks because honesty and trustworthiness are relevant factors in determining an individual’s ability to serve as a class representative. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:68 (5th ed. 2015) contains an overview of the issue presented by the instant discovery dispute:

> Most courts have rejected the contention that a proposed representative is inadequate because of prior unrelated unsavory, unethical, or even illegal conduct. The concern underlying these types of challenges is that prior unethical conduct may undermine the representative's capacity to perform her duties with the diligence, integrity, credibility, and

> wisdom that the class deserves. Courts either do not permit challenges to adequacy on this basis or allow them only to the degree that the personal characteristics are somehow relevant to the litigation. . . . In the few instances where issues of credibility have led to a finding of inadequate representation, there were either confirmed examples of past dishonesty such as fraud or a criminal conviction, or the proposed representative had given inconsistent testimony on material issues in the litigation in a way that might jeopardize his credibility with the fact finder at trial.

Id. (footnotes omitted). The cases relied on by the parties generally fit into this rubric. In Charron v. Wiener, 731 F.3d 241 (2d Cir. 2013), the court articulated the general approach to determining adequacy of a class representative as follows: "To ensure that all members of the class are adequately represented, district courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members." Id. at 249 (2d Cir. 2013). Thus, "the courts look to personal characteristics only insofar as they touch upon the lawsuit." Jane B. by Martin v. New York City Dep't of Soc. Servs., 117 F.R.D. 64, 71 (S.D.N.Y. 1987). "'Character attacks made by opponents to a class certification motion have generally not been sympathetically received' unless there is 'a showing of a conflict of interest.'" Meyer v. Portfolio Recovery Associates, LLC, No. 11CV1008 AJB RBB, 2011 WL 11712610, at *4 (S.D. Cal. Sept. 14, 2011) (quoting In re Computer Memories Sec. Litig., 111 F.R.D. 675, 682 (N.D.Cal.

1986)). "For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 728 (7th Cir. 2011) (internal quotations omitted). "[C]redibility analysis is not an examination into the representatives' moral righteousness but instead relates to any improper or questionable conduct arising out of or touching up on the very prosecution of the lawsuit[.]" Curry v. Kraft Foods Global, Inc., No. 10 C 1288, 2011 WL 4036129, at *4 (N.D. Ill. Sept. 12, 2011) (internal quotations omitted).

These general principles are consistent with almost all of the cases relied on by Convergent. See Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) ("The fact that Savino offered differing accounts about the letters that form the very basis for his lawsuit surely would create serious concerns as to his credibility at any trial."); Hendricks v. J.P. Morgan Chase Bank, N.A., 263 F.R.D. 78, 88 (D. Conn. 2009) ("[E]vidence in the record shows that Hendricks lied on a job application about his employment with JPMorgan and subsequently tried to conceal this lie during discovery."); Hall v. Nat'l

Recovery Sys., Inc., No. 96-132-CIV-T-17(C), 1996 WL 467512, at *5 (M.D. Fla. Aug. 9, 1996) ("[T]his Court finds that with Mr. Hall's multitude of impeachable convictions and prior inconsistent statements, he would lack credibility at trial and, thus, materially prejudice other class members."); Kaplan v. Pomerantz, 132 F.R.D. 504, 510 (N.D. Ill. 1990) ("In light of these instances of false deposition testimony, the Court cannot in good conscience allow this case to continue as a class action with plaintiff serving as the class representative."); Weisman v. Darneille, 78 F.R.D. 669, 671 (S.D.N.Y. 1978) ("During the [plaintiff's] deposition, he expressed an inability to understand a question concerning his experience as a litigant and then testified falsely that his conviction was for a misdemeanor.").

The court agrees that Del Campo v. Am. Corrective Counseling Servs., Inc., No. C 01-21151 JW PVT, 2008 WL 2038047 (N.D. Cal. May 12, 2008) and In re ML-Lee Acquisition Fund II, L.P. & ML-Lee Acquisition Fund (Ret. Accounts) II, L.P. Sec. Litig., 149 F.R.D. 506 (D. Del. 1993) appear to support Convergent's position, but the court finds the language from these cases unpersuasive. In Del Campo, the court noted that:

> Generally, unsavory character or credibility problems will not justify a finding of inadequacy unless related to the issues in the litigation. That a proposed class representative may have written several bad checks "does not make her incapable of fairly and

> adequately protecting the interests of the class." Blair v. Equifax Check Svcs., Inc., 1999 WL 116225, at *3. The same court did note, however, that the history of financial responsibility of the proposed class representative did have "some remote relevance." Id.

Del Campo, 2008 WL 2038047, at *4. Based on that fact, the court concluded that the requested discovery was relevant. In ML-Lee Acquisition Fund, the court ordered the plaintiffs to produce information regarding their personal financial histories. The court reasoned that:

> When, as here, a Defendant demonstrates a legitimate concern about the ability of a Plaintiff to successfully lead a particular class, limited discovery into a Plaintiff's financial history is warranted. Without the requested financial information, it would be difficult for the Court to ascertain whether the Plaintiffs in this action satisfy the adequacy requirement of Rule 23(a)(4).

ML-Lee Acquisition Fund, 149 F.R.D. at 508-09 (internal quotation marks omitted).

With respect to Del Campo, the language quoted from Blair appears in the context of a motion to strike accusations about the plaintiff from the defendant's memorandum; the court states that it will deny the motion to strike because the assertions at issue are part of the defendant's memorandum and "Blair's financial responsibility has some remote relevance to Blair's responsibility as a whole . . ." Blair, 1999 WL 116225, at *3. With respect to ML-Lee Acquisition Fund, the above-quoted language is preceded by the court's taking note of the fact that

"Plaintiffs must bear the substantial cost of serving notice on more than 33,000 potential class members, as well as the costs of engaging in extensive discovery." 149 F.R.D. at 508. Thus, the context in which the quoted language in each of Del Campo and ML-Lee Acquisition Fund appears, makes it clear that the issue presented in each of those cases is not the issue presented here. For that reason the court finds the reasoning in those cases unhelpful to the analysis of the issue presented by the instant motion.

It is so ordered.

Dated this 5th day of October 2015, at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge