UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY HAIGHT, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

-vs- **Case No. 6:13-cv-1400-Orl-28KRS**

BLUESTEM BRANDS, INC. d/b/a FINGERHUT, a Delaware Corporation,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**PLAINTIFF'S MOTION FOR CLASS CERTIFICATION (Doc. No. 3)**
FILED:	**September 20, 2013**

THEREON it is **ORDERED** that the motion is **DENIED** without prejudice.

On September 11, 2013, Plaintiff Timothy Haight filed a Class Action Complaint alleging that Defendant BlueStem Brands, Inc. d/b/a Fingerhut ("Fingerhut") violated the Telephone Consumer Protection Act, 47 U.S.C. § 227(b) by placing automated calls to his cellular telephone and continuing to make such calls after he informed Fingerhut that it was calling the wrong number or the wrong person. Doc. No. 1. On September 20, 2013, Haight filed the above-referenced motion for class

certification. Doc. No. 3. Haight asks that the Court not rule on the motion pending service of process on Fingerhut and class action discovery. *Id.* at 1. His counsel states that the motion was filed "solely to prevent any individual 'buy off' of the putative class representative." *Id.* at 3 n.1.

Based on the cases cited, it appears that counsel for Haight fears that Fingerhut will tender an offer of judgment to Haight under Fed. R. Civ. P. 68 before a class is certified which, if accepted, might result in dismissal of this case as moot. "[A] number of courts have held that a Rule 68 offer of full relief by the defendant *after* the filing of a motion for class certification does not moot the class action." Wm. B. Rubenstein, *Newberg on Class Actions* § 2:15 (5th ed. Sept. 2013). It does not appear, however, that the United States Court of Appeals for the Eleventh Circuit has so held. Moreover, there is no evidence that Fingerhut is aware of the pendency of this case, that Fingerhut has indicated it intends to serve such an offer or that Haight has any present intent to accept an offer of judgment he has not yet received. Instead, it appears that counsel for Haight wishes to ensure that he can pursue a putative class action even if his client decides to settle his individual claim. If accepted, this argument would undermine the jurisdictional requirement that the case be litigated by an individual with standing to do so, and it would raise serious public policy concerns about whether class action litigation should be driven by the interests of counsel rather than the interests of the client. These issues need not be resolved here because the motion is otherwise deficient.

Fed. R. Civ. P. 5(d)(1) requires that any paper filed after the complaint that is required to be served be filed "within a reasonable time *after service*," and that the paper be supported by a "certificate of service." The certificate of service included with the above-referenced motion is inadequate in that it does not reflect upon whom the motion was served or the date of such service.

It merely states that the motion was electronically filed on September 19, 2013 and that it is "is being served this date via U.S. Mail and/or some other authorized manner for those counsel or parties, if any, who are not authorized to receive electronically Notice of Electronic Filing." Doc. No. 3 at 8.

Haight may file a renewed motion, after showing that service of process on Fingerhut has been perfected, supported by a certificate of service showing the date and manner in which the motion was served and identifying the person served. The motion should not be filed, however, until counsel for Haight has adequate facts and legal authority to support the motion consistently with the requirements of Fed. R. Civ. P. 11 and 23. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the rule -- that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 1551 (2011). If Haight wishes the Court to delay ruling on any subsequently filed motion, he should file a motion for stay separately from the motion for class certification.

DONE and **ORDERED** in Orlando, Florida on September 25, 2013.

Karla R. Spaulding

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE