UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILDER CHIROPRACTIC, INC., a Wisconsin Corporation, and as a representative of a class of similarly situated persons	:	
	:	Case No. 10-CV-229
Plaintiff,	:	
v.	:	Removed from:
	:	Dane County Circuit Court
PIZZA HUT OF SOUTHERN WISCONSIN, INC.	:	Case No. 10-CV-1467
Defendant.	:	

PIZZA HUT OF SOUTHERN WISCONSIN, INC.'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO STRIKE OFFER OF JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR CLASS CERTIFICATION AND IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

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STATUTES

Pizza Hut of Southern Wisconsin, Inc. ("PHSW"), by and through undersigned counsel, respectfully submits this Combined Memorandum of Law In Opposition to Plaintiff Wilder Chiropractic, Inc.'s ("Plaintiff" or "Wilder") Motion to Strike Offer of Judgment or, In The Alternative, Motion For Class Certification and In Support of Its Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1).

PRELIMINARY STATEMENT

This case has never been about Plaintiff. Rather, it is clear from the actions of Plaintiff's lawyers with the Anderson + Wanca law firm that this case – like so many others brought by them under the guise of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") – is exclusively about the attorneys and their generation of unwarranted legal fees.

In order to avoid protracted litigation, PHSW served on Plaintiff's counsel an Offer of Judgment pursuant to Federal Rule of Civil Procedure 68 ("Rule 68"). The Offer was served well in advance of Plaintiff's motion for class certification.[1] By its Offer, PHSW tendered to Plaintiff complete satisfaction on its claims, namely, $1,500 for each facsimile received in violation of the TCPA as well as a stipulated injunction as sought in the Complaint. Rather than accept, Plaintiff's lawyers convinced Wilder to reject the Offer despite the fact that it matched the maximum award that Plaintiff's lawyers boasted to Plaintiff that they could recover via a solicitation letter. As PHSW's Offer of Judgment provided Plaintiff with everything it could possibly obtain were it to prevail, its claims against PHSW are moot, subject matter jurisdiction in this Court is lacking and this case should be dismissed with prejudice.

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[1] PHSW does not concede the validity of Plaintiff's claim in any manner. As detailed herein, there are substantial deficiencies with Plaintiff's case, including, but not limited to, the manner in which Plaintiff's lawyers manufactured this lawsuit and their ability to serve as class counsel. As a result of PHSW's Offer, the Court need not address those issues. However, in the event this Court elects to allow this case to proceed for now, PHSW respectfully reserves its right and ability to challenge, among other things, the propriety of class certification.

Controlling precedent from the United States Court of Appeals for the Seventh Circuit is clear: "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under FED. R. CIV. P. 12(b)(1), because he has no remaining stake." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). As Judge Posner succinctly stated in *Greisz v. Household Bank*, "[y]ou cannot persist in suing after you've won." 176 F.3d 1012, 1015 (1999). This case should be dismissed with prejudice.[2]

BACKGROUND

Prior to addressing the dispositive effect of the Offer of Judgment, PHSW sets forth below the pertinent factual background. As Plaintiff's lawyers' conduct (as is relevant here) is particularly egregious, PHSW is compelled to explain the manner in which this case (along with many, many others) was manufactured by Plaintiff's lawyers.

A. Pizza Hut of Southern Wisconsin, Inc.

As set forth in the attached affidavit of its President, Mr. Richard Divelbiss, PHSW was formed in 1968, and has been headquartered in Madison, Wisconsin since that time. (*See* Affidavit of Richard J. Divelbiss, sworn to on September 27, 2010 ("Divelbiss Aff."), ¶¶ 2-3, attached as Ex. 1 hereto.) PHSW currently owns and operates thirty-three restaurants and employs more than 950 persons. (*Id.*, ¶¶ 3-4.)

B. B2B & Macaw

Under false pretenses, attorneys with the Anderson + Wanca firm obtained the computer hard drive and other confidential customer information of a company called Business to Business Solutions, Inc. ("B2B"). B2B was a business based in Brooklyn, New York and run by Caroline

[2] As PHSW's Offer of Judgment was not filed, but rather served – in accordance with Rule 68 – Plaintiff's request that it be stricken is inapposite and, as such, should be denied.

Abraham. (*See CE Design LTD v. Cy's Crab House North, Inc.*, No. 07-cv-5456, Memorandum Opinion and Order, D.I. # 260 (N.D. Ill. June 11, 2010) (the "June 11 Opinion") (attached as Ex. A to the Declaration of David S. Almeida, sworn to on September 28, 2010 (the "Almeida Decl."), attached as Ex. 2 hereto.) B2B, working in conjunction with a Romanian company named Macaw, SRL (a/k/a Maxileads) sent unsolicited faxes to unsuspecting companies offering to design and to send fax advertisements on their behalf. (*Id.* at *2.) Many companies – completely unaware of the TCPA and its proscriptions – elected to engage B2B's services and each paid hundreds of dollars for what amounted to litigation exposure.

C. Plaintiff's Counsel's Misrepresentations & Misuse of Confidential Information

In or about February 2009, B2B produced (in an unrelated TCPA case) a computer hard drive containing the customer lists for B2B and Macaw (*i.e.*, Maxileads). (*See id.* at **7-8.) B2B produced that information in reliance on assurances from Plaintiff's counsel (Mr. Ryan Kelly)[3] that the hard drive (and other related information) "would only be used in four [TCPA] cases that had already been filed." (*See id.* at *8 & *12 (citing December 16, 2008 e-mail to Ms. Abraham of B2B from Mr. Kelly stating "[p]lease find attached the protective order that will be entered that *will* prevent me from disclosing any of the back-up disks or hard drive to any third party").)

Ultimately, lawyers with the Anderson + Wanca firm took the improperly obtained B2B customer information (the "B2B Information") – and in direct violation of their representations to B2B and a court order restricting use of the information – used it to manufacture the case at bar as well as numerous other putative TCPA class actions. Unfortunately, Plaintiff's lawyers' success in collecting legal fees in so many of these "B2B cases" and their ability, so far, to avoid

[3] Mr. Kelly was at all relevant times (and, upon information and belief, continues to be) an attorney with the Anderson + Wanca law firm, which is co-lead counsel and proposed class counsel in this case.

any meaningful rebuke for their conduct, has only emboldened their behavior. Anderson + Wanca lawyers continue misusing the B2B Information and, worse yet, are gambling with their client's money in hopes of maximizing their legal fees.

D. Ms. Abraham's February 22, 2010 Letter

Once these transgressions began to come to light, Ms. Abraham, on or about February 22, 2010, sent a letter to Ms. Angela Rouse, Courtroom Deputy for Judge Kennelly (the "Letter") complaining about the improper use of the B2B information in a case captioned *CE Design Ltd. v. Cy's Crab House North, Inc.*, assigned case number 1:07-cv-05456 and pending before the Honorable Judge Kennelly of the United States District Court for the Northern District of Illinois. (*See* D.I. # 211, attached to the Almeida Decl. as Ex. B.) By her Letter, Ms. Abraham states that Plaintiff's counsel is improperly using B2B Information to manufacture additional TCPA cases around the country. (*See id.* at 1-2 (listing cases filed by the Anderson + Wanca law firm and noting that "[n]one of the cases could ever have been initiated without the data from [B2B's] disks and hard drive").[4] Notably – and as is true with the case at bar, "[i]n none of the [B2B] cases do any of the plaintiffs have actual fax ads received from any of the defendants." (*Id.* at 2.) In this case, Exhibit A to Plaintiff's Complaint – the fax in question – does *not* contain a fax legend and is *not* the fax received by Plaintiff. (*See* Ex. F to the Almeida Decl.) Rather, Ex. A is merely the ad designed by persons at B2B and/or Macaw as a result of their unsolicited facsimile to PHSW. (*See id.*)

[4] In a hearing in yet another TCPA matter initiated by the Anderson + Wanca law firm as a result of its improper use of the B2B Information, Ms. Abraham explained that B2B's information has been used by Plaintiff's counsel to "make many, many new cases against these old customers of ours, based simply on the evidence that we turned over." (*See G.M. Sign, Inc. v. Finish Thompson*, No. 07-cv-5953 (N.D. Ill. Mar. 29, 2009) D.I. # 215-2, March 22, 2010 Transcript, at *4, attached to the Almeida Decl. as Ex. C.)

E. Judge Kennelly's Order Restricting Use of B2B Information

In a June 11, 2010 Order, Judge Kennelly considered certain issues related to Plaintiff's counsel's use of the B2B Information and the concerns raised by Ms. Abraham's February 22, 2010 Letter. (*See generally* Almeida Decl., Ex. A, the June 11 Opinion.) The Court treated Ms. Abraham's Letter as "a request for protective order regarding those documents and electronic media that [B2B] produced containing fax numbers and other information about B2B's customers." (*See id.* at *17.) Although Ms. Abraham did not request the documents to be treated as confidential at the time of their production, the Court found that there was "good reason" for the delay in such a request in "that [Ms.] Abraham had been given reason to believe, based on [Plaintiff's counsel's] representations, that the materials were already designated confidential or would be so designated." (*Id.*) More fundamentally, Judge Kennelly ruled that the B2B Information constituted confidential information and was subject to the existing protective order, holding:

> going forward, the documents, disks, and media containing B2B customer information shall be treated as 'confidential' as defined by the protective order. ***Both parties are, therefore, forbidden from using the information 'for any purpose other than the defense or prosecution of this action.'***

(*Id.* at *17 (emphasis added)).[5]

Despite Judge Kennelly's order, Plaintiff's counsel has improperly used the "B2B" information to initiate <u>*at least*</u> thirty-eight (38) putative class action lawsuits. (*See* Affidavit of

[5] By his subsequent Order on August 23, 2010, Judge Kennelly expressed concern over additional aspects of Plaintiff's counsel's behavior. For instance, the Judge noted that delivery of a check for $5,000 to Ms. Abraham's former attorney (in a Ramada Inn envelope with no cover letter) by Plaintiff's lead counsel (Mr. Brian Wanca) was "ill-considered" and strongly advised "Plaintiff's counsel [] to avoid such tactics in the future." (*See CE Design LTD. v. Cy's Crab House North, Inc.*, No. 07-cv-5456, Memorandum Opinion and Order, D.I. # 330, at *15 (N.D. Ill., Aug. 23, 2010), attached to the Almeida Decl. as Ex. D.)

Erin A. Walsh, filed in Case No. 07-cv-5456, D.I. # 295-15, ¶ 10, and exhibits thereto, attached to the Almeida Decl. as Ex. E.)

F. This Case is a B2B Case Designed to Generate Unwarranted Legal Fees

Like so many other TCPA putative class actions initiated by Plaintiff's counsel using the confidential B2B Information, Plaintiff's case against PHSW is a B2B case, manufactured and continued for the financial gain of Anderson + Wanca lawyers. As an initial matter, the allegedly offending fax in question in this case was prepared and sent by B2B and/or Macaw as a result of an unsolicited facsimile solicitation to PHSW. (*See* Exhibit A to Plaintiff's putative Class Action Complaint, a copy is also attached to the Almeida Decl. as Ex. F.) The fax in question contains opt-out language which states, among other things, that "[t]his message is the exclusive property of Macaw, SRL, 46 Match Factory St, Sec 5, Buc, Rom, 050183, 40723294564, which is solely responsible for its contents and destinations." (*Id.*)

Second, the fax in question does ***not*** contain a fax legend. (*Id.*) As Ms. Abraham noted, the cases filed by Anderson + Wanca were commenced without the facsimile actually received by Plaintiff (assuming, of course, that one was ever received). (*See* Almeida Decl., Ex. B at 2.) Rather, Anderson + Wanca, upon their review of the hard drive and other B2B information, sent letters to the supposed recipients of those faxes soliciting their service as plaintiffs (and, in theory at least, class representatives) in prospective cases to be filed against the unsuspecting former clients of B2B. The form letter sent by Anderson + Wanca informed apparent recipients of faxes from B2B that they "would receive compensation (up to $1,500) for each junk fax sent."

(*See* Exhibit B to Affidavit of Brian J. Wanca, executed on March 11, 2010, and filed in Case No. 07-cv-5456, D.I. # 295-14 and attached to the Almeida Decl. as Ex. G.)[6]

Third, apparently not content to violate Judge Kennelly's June 11, 2010 Order, Plaintiff's counsel neglects to inform this Court regarding the full nature of its relationship with B2B and Macaw. Indeed, in its Motion, Plaintiff's counsel glibly notes that Plaintiff "has *found* correspondence from [PHSW] to B2B approving the form of the fax advertisement." (*See* Motion, ¶ 21, citing Ex. D thereto.) As an initial matter, the document is no smoking gun; rather it merely demonstrates that PHSW was solicited by B2B. Moreover, Plaintiff did not "find" the document. Rather, the document was given to Plaintiff by its counsel (in violation of a court order) who, in turn, received it as a result of affirmative misrepresentations to Ms. Abraham. (*See* Almeida Decl., Ex. A, June 11, 2010 Order at *17.)

Undaunted by the apparent lack of prior consequences to their actions, Plaintiff's counsel continue to freely use information provided by B2B pursuant to court order and subject to the protective order as if such information were their own property and not the fruit of a thoroughly poisonous tree. Indeed, Plaintiff's counsel states that Plaintiff also has *uncovered* an internal B2B e-mail between its owner, Caroline Abraham, and her computer support staff at Macaw, instructing Macaw as follows:

> This is the campaign for tomorrow [3/22/06] … Customer is Jeremy Alsaker. I asked you to do a count for him on Mar. 8. He wants a 5 mile radius from his location. Business is Pizza Hut. Address 811 S Gammon Rd, Madison, WI 53719. Phone 608-271-1778 … We will be sending this same database again on Wednesday March 29 and Wednesday April 5.

[6] There can be no doubt that Plaintiff's counsel does *not* have Plaintiff's interests in mind. By its Offer of Judgment, PHSW offered Plaintiff complete recovery on its claims. More concerned with generating legal fees to which they are not entitled, Plaintiff's counsel rejected that Offer.

(*See* Motion, ¶ 22, citing Ex. F thereto (internal footnote omitted).) Plaintiff's counsel neglects to inform this Court how it "found" and "uncovered" this information, how its use was prohibited by express court order or that Mr. Alsaker (on behalf of PHSW) engaged with B2B only after it sent him an unsolicited fax.

G. Relevant Proceedings In This Case

Plaintiff commenced this action by filing a Complaint in Dane County Circuit Court on or about March 19, 2010. (D.I. # 1-2, Ex. A.) On April 29, 2010, PHSW timely removed this case to this Court and thereafter filed its Answer and Affirmative Defenses. (*See* D.I. ## 1, 7 & 15.) The Court held a Preliminary Pretrial Conference with all counsel of record on July 15, 2010, and issued a Preliminary Pretrial Conference Order that same day. (*See* D.I. # 20.) On or about August 27, 2010, PHSW received Plaintiff's First Set of Discovery Requests. (D.I. # 25-2.) On or about September 10, 2010, PHSW moved this Court for a stay of discovery pending its determination of the dispositive issues presented by the pending motions.[7]

H. PHSW's Offer of Judgment

On August 4, 2010, PHSW served its initial Offer of Judgment pursuant to Rule 68. (D.I. # 21-4.) On August 17, 2010, PHSW served a revised Offer of Judgment Pursuant to Rule 68 (the "Offer"). (D.I. # 21-4, attached as Ex. H to Almeida Decl.) By that Offer, PHSW agreed to:

- allow judgment to be taken against it in the amount of $1,500 for each and every facsimile advertisement sent by PHSW and received by Wilder;
- pay Wilder any costs it would recover should it prevail, plus reasonable attorneys' fees, to be determined by the Court;
- entry of a stipulated injunction as requested in the Class Action Complaint; and

[7] As the case has been pending since March 19, 2010, Plaintiff's counsel had ample opportunity to file a motion for class certification.

- extend the identical offer (with the exception of taxable costs which would not be incurred by someone who had not filed suit) made to Wilder to any other person or entity represented by any of Wilder's counsel, who, as of the date of the Offer, also received a fax advertisement from PHSW and who contacted Wilder's counsel on or before the date of the Offer regarding a potential claim against PHSW for sending fax advertisements.

(*Id*.)

On August 31, 2010, Plaintiff – through its counsel – rejected PHSW's Offer by way of filing a Motion to Strike Defendant's Offer of Judgment Or, In the Alternative, Motion for Class Certification. (D.I. # 21.) By Order dated September 3, 2010, this Court granted PHSW's Motion for Extension of Time and ordered PHSW's response to be filed by September 28, 2010, with Plaintiff's reply to be filed by October 8, 2010. (D.I. # 22.)

ARGUMENT

PLAINTIFF'S CLAIMS ARE MOOT AND THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(1)

By its Complaint, Plaintiff alleges it is entitled to the statutory relief available under the TCPA: $500 per fax allegedly sent to him (if it could be determined that PHSW acted willfully or knowingly then Plaintiff seeks treble that amount) and an injunction prohibiting further transmissions to Plaintiff via fax.[8] (*See* Plaintiff's Complaint, attached to the Almeida Decl. as Ex. K, at ¶¶ 2, 22, 23 & p. 9.)

[8] The TCPA provides, in relevant part, that:

> [a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

Plaintiff alleges that it received two faxes from PHSW, one on or about March 22, 2006 and one on or about March 24, 2006. (*Id.*, ¶ 16.) Thus, consistent with the Complaint's allegations and the TCPA, the maximum amount that PHSW could *possibly* be liable to Plaintiff for *if* it could prove both violations occurred and were willful is $3,000 (two violations at $500 each since Plaintiff alleges it received two faxes, and each trebled).

Solely in order to avoid the costs of continued litigation, PHSW elected to resolve Plaintiff's claims in their entirety by offer of full payment of its claimed damages, as well as any recoverable costs, and by agreeing to the injunctive relief requested in the Complaint. (*See* Ex. H to Almeida Decl.) PHSW's offer – made prior to Plaintiff's motion for class certification – provided Plaintiff all the relief which it could possibly recover. As such, Plaintiff's claims are moot, there is no remaining case or controversy and there is therefore no federal subject matter jurisdiction. Accordingly, this case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

1. There Is No Case Or Controversy Remaining

Article III of the United States Constitution confers on federal courts subject matter jurisdiction over actual cases and controversies. *See* U.S. Const. Art. III § 2; *see also Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994) (affirming dismissal of case as moot because defendant had offered to fully satisfy plaintiff's individual claims). The Seventh Circuit has signaled that it will not relieve plaintiffs of the consequences of rejecting offers of complete

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(C) both such actions.

> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. § 227(b)(3).

relief. As it noted in *Rand v. Monsanto Co.*, "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under FED. R. CIV. P. 12(b)(1), because he has no remaining stake." 926 F.2d 596, 598 (7th Cir. 1991); *see also Dellarussiani v. Ed Donnelly Enters., Inc.*, No. 2:07-cv-00253, 2007 WL 3025340, at *7 (S.D. Ohio Oct. 15, 2007) ("[C]ompelling a plaintiff to accept a defendant's offer of judgment also discourages attorneys from needlessly amassing fees while better protecting plaintiffs who may not have been consulted prior to their counsel's rejection of the defendant's offer.").[9]

The law is clear that if no subject matter jurisdiction exists, the case must be dismissed. *See* FED. R. CIV. P. 12(b)(1) & (h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."); *see also Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (court is obligated to determine whether it has jurisdiction *sua sponte*); *White Eagle Coop. Ass'n. v. Johanns*, 508 F. Supp. 2d 664, 669 (N.D. Ind. 2007) ("FED. R. CIV. P. 12(b)(1) and (h)(3) authorize the court to dismiss claims for lack of subject matter jurisdiction.").

2. Offers of Judgment in the Class Action Context

In the class action context, an offer of judgment made to plaintiff *prior* to filing a motion for class certification results in dismissal for lack of subject matter jurisdiction. Several Seventh Circuit decisions and numerous decisions from district courts within the Circuit hold that a complete offer to a plaintiff in a putative class action made prior to a motion for class certification moots the claim and requires dismissal of the action.

[9] A true and correct copy of all unpublished decisions cited herein is attached to the Almeida Decl. at Group Ex. I.

a. Controlling Seventh Circuit Precedent Establishes that Plaintiff's Claim is Moot.

The Seventh Circuit has held on at least three different occasions that, in the class action context, the issue of whether a complete offer to the named plaintiff moots the claim depends on its timing: that is, complete offers received before a motion for class certification is filed moot the case, but offers received after the motion has been filed do not. For instance, in *Greisz v. Household Bank*, the Seventh Circuit affirmed the dismissal of a putative class action complaint on the ground that there was no longer a case or controversy based on plaintiff's rejection of the offer. 176 F.3d 1012, 1015 (7th Cir. 1999). In so doing, the Court noted that:

> By offering her $1,200 plus reasonable costs and attorney's fees, the bank thus was offering her more than her claim was worth to her in a pecuniary sense. Such an offer, by giving the plaintiff the equivalent of a default judgment (here it was actually larger by $200 than a default judgment would have been), eliminates a legal dispute upon which federal jurisdiction can be based.

Id. As is particularly relevant here in regard to the Anderson + Wanca law firm, Judge Posner went on to state that:

> You cannot persist in suing after you've won. [Plaintiff's counsel] may have thought that he had something to gain by pressing on -- additional attorney's fees. But if that is what he thought, he was mistaken. Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be reasonably incurred. So by spurning the defendants' offer, [plaintiff's counsel] shot both himself and his client in the foot. He lost his claim to attorney's fees by turning down the defendant's offer to pay them, and Greisz lost $1,200.

Id. Judge Posner also espoused on the importance of the offer's timing:

> We would have a different case if the bank had tried to buy off Greisz with a settlement offer greater than her claim before the judge decided whether to certify the class. For then [the plaintiff's attorney] would have had to find another named plaintiff to keep the suit alive, and if the defendants had bought off that plaintiff as well and had repeated this tactic as [the plaintiff's attorney]

> scrounged for a class representative, they might have hamstrung the suit. The tactic is precluded by the fact that *before the class is certified, which is to say at a time when there are many potential party plaintiffs to the suit, an offer to one is not an offer of the entire relief sought by the suit,* ***unless the offer comes before class*** *certification is sought, and so before the existence of other potential plaintiffs has been announced.*

Id. (emphasis added) (citations omitted).

In *Wiesmuller v. Kosobucki*, the Seventh Circuit held that if plaintiff's claim becomes moot before the class is certified, the suit must be dismissed because no one besides the plaintiff has a legally protectable interest in the lawsuit. 513 F.3d 784, 786 (7th Cir. 2008). In such situations, defendants "lose[ ] the preclusive effect on subsequent suits," but are saved the added expense of defending a class action. *See id.* at 787. Indeed, the *Wiesmuller* Court noted that defendants "may be content to oppose the members of the class one by one, as it were, by moving for summary judgment, every time [they are] sued, before the judge presiding over the suit decides whether to certify it as a class action." *Id.*[10]

b. The Supreme Court's Decision in Roper is Consistent with Seventh Circuit Precedent.

Plaintiff improperly relies on the Supreme Court's decision in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), in an attempt to resurrect its moot claim. (*See* Motion, ¶ 13.) A proper reading of *Roper* reveals that the Supreme Court specifically limited its holding to the facts of the case. *Roper* does not salvage Plaintiff's claims.

In *Roper*, credit card holders filed a class action complaint against a bank alleging various claims arising out of finance charges. 445 U.S. at 327-28. Plaintiffs moved for class certification but were denied. The Mississippi district court certified the order for interlocutory

[10] Not only has the Seventh Circuit held that a complete offer that precedes a motion for class certification moots the case, it has also held that a defendant is entitled to "pick off" named plaintiffs one by one via such tenders provided class certification has not been sought prior to tender. *See, e.g.*, *Greisz*, 176 F.3d at 1015; *Wiesmuller*, 513 F.3d at 787; *Holstein*, 29 F.3d at 1146.

appeal. *Id.* at 329. The Fifth Circuit denied plaintiffs' motion for interlocutory appeal. After the motion for class certification was filed, the bank *then* tendered an "Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability." *Id.* Plaintiffs declined and made a counteroffer of judgment that included a right to appeal the class certification ruling. The bank declined. Based upon the bank's offer, the district court entered judgment for plaintiffs over their objection. *Id.* at 329-30.

When plaintiffs sought review of the class certification ruling, the bank argued that the case had been mooted by entry of judgment in plaintiffs' favor. *Id.* at 330. The Fifth Circuit rejected the bank's argument. *Id.* Certiorari was granted to determine, among other things, whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by entry of judgment in their favor on the basis of that tender, moots the case and terminates plaintiffs' right to appeal the denial of class certification. *Id.* at 327.

Although the Supreme Court held that plaintiffs' claims were not mooted, it limited its holding to cases where offers of judgment are made *after* class certifications motions are pending. Specifically, the Court held that: "[t]o deny the *right to appeal* simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." *Id.* at 339 (emphasis added). However, the Court further explained that it would be in the defendant's best interests to forestall *the appeal* of *denial of class certification* by tendering the individual damages by the claimed named plaintiffs. *Id.* (emphasis added).

The Supreme Court thus intended for its discussion of "picking off" named plaintiffs to apply to situations where plaintiffs already had filed for class certification before defendants attempted to "pick them off." *Id.*; *see also Lusardi v. Xerox Corp.*, 975 F.2d 964, 979 (3d Cir.

1992) ("The *Roper* Court explicitly confined the holding of the case to its factual context [noting] that the issue at bar was the appealability of a procedural ruling, a matter over which the courts have a certain 'latitude' to formulate standards."). The *Roper* decision draws a clear distinction between those circumstances and those cases – like the case at bar – where a complete offer of settlement *precedes* a motion for class certification. *See also Ptasinska v. U.S. Dept. of State*, No. 07 C 3795, 2008 U.S. Dist. LEXIS 7355, at *5-6 (N.D. Ill. Jan. 31, 2008) (*Roper* demonstrates that it is only after a motion for certification that a defendant cannot "pick off" named plaintiffs) (attached as Ex. I-2 to Almeida Decl.); *White v. Humana Health Plan, Inc.*, No. 06 C 5546, 2007 WL 1297130, at *7, (N.D. Ill, May 2, 2007) (citing to *Roper*, holding that the rule permits a defendant to "pick off" plaintiffs one by one provided offers are made before motions for class certification are filed) (attached as Ex. I-3 to Almeida Decl.).[11]

c. Numerous Other Decisions Support PHSW's Position.

While PHSW recognizes that decisions of other federal district courts are not binding on this Court, they are nonetheless persuasive authority. In *Person v. Stupar, Schuster & Cooper, S.C.*, plaintiff commenced a putative class action against defendant law firm seeking relief under the Fair Debt Collections Practices Act. No. 00-C-0906, 2001 U.S. Dist. LEXIS 18203 (E.D. Wis. July 6, 2001) (attached as Ex. I-4 to Almeida Decl.). The *Person* Court began its analysis of the effect of defendant's offer of judgment by noting that "[t]he Seventh Circuit has held that when an offer of judgment is tendered that provides plaintiff with the maximum amount of damages plaintiff could hope to obtain by proceeding to court, the offer of judgment 'eliminates a legal dispute upon which federal jurisdiction is based.'" *Id.* at *6 (citation omitted). As Person

[11] The fact that Plaintiff's Complaint indicated that it sought relief on behalf of a putative class of persons does not affect the analysis. *See, e.g.*, *White*, 2007 WL 1297130, at *16 (stating that "[w]hile it is true that Plaintiff's complaint requested class certification, [] it is the motion for class certification that is of import") (citations omitted); *Wiskur v. Short Term Loans LLC*, 94 F. Supp. 2d 937, 938 (N.D. Ill. 2000) (offer of judgment mooted case as plaintiff did not yet represent the putative class).

did *not* move for class certification prior to defendant's offer of judgment, the Court adjudged his claim to be moot and dismissed the case. *See id.* at *11. In so doing, the Court denied Plaintiff's motion to strike defendant's offer of judgment (on the ground that it was improper for defendant to make an offer of judgment with respect to Person without making a settlement offer to the rest of the proposed class) by stating that "Defendants are … permitted to make offers of judgment to named plaintiffs before named plaintiffs file a motion for class certification." *Id.* at *13.

Just a few weeks ago, Judge Zagel of the Northern District of Illinois issued a ruling in *Damasco v. Clearwire Corp.* granting defendant's Rule 12(b)(1) motion to dismiss based on an unaccepted offer of judgment. *See* No. 10-cv-3063, 2010 WL 3522950, at **4-9 (N.D. Ill. Sept. 2, 2010) (attached as Ex. I-5 to Almeida Decl.). After thoroughly detailing controlling Seventh Circuit precedent, Judge Zagel stated that:

> The rule in the Seventh Circuit is clear – a complete offer of judgment made prior to filing for class certification moots the plaintiff's claim.

Id. at *4.

Similarly, in *White v. Humana Health Plan, Inc.*, Judge Leinenweber dismissed a putative class action complaint based on defendant's offer to make the named plaintiff whole prior to class certification being sought. *See* No. 06-cv-5546, 2007 WL 1297130 (N.D. Ill. May 2, 2007). In *White*, the named plaintiff, individually and on behalf of a class of similarly situated, brought a class action lawsuit under ERISA. Shortly after the lawsuit was filed, and prior to a motion for class certification, the defendant offered plaintiff all of the damages sought in the complaint. *Id.* at *6. Judge Leinenweber dismissed the case for lack of subject matter jurisdiction (*i.e.*, mootness) and held that the timing of the motion for class certification is determinative. *See id.* **6-7 (finding that because defendant's "offer fully satisfied plaintiffs'

requested relief and it was made before plaintiffs had filed a motion for class certification," the case was moot).

Finally, in *Martin v. PPP, Inc.*, plaintiff brought a putative class action pursuant to the TCPA based on defendants' alleged use of an automatic telephone dialing system to make calls featuring a promotional message for Papa John's Pizza. *See* No. 10-C-140, 2010 U.S. Dist. LEXIS 63192 (N.D. Ill. June 25, 2010) (attached as Ex. I-6 to Almeida Decl.). Co-defendant Fidelity served plaintiff with an offer "that was intended to provide him all of the relief he sought in his suit." *Id.* at *3. Plaintiff rejected the offer and filed a motion for class certification. *Id.* at *4. While the majority of the *Martin* decision centered on whether an informal settlement offer of complete relief has the same legal effect as a Rule 68 offer (it does), the Court also rejected the argument (asserted in this case as well) that a motion for class certification made after an offer of judgment but prior to expiration of the offer's term effectively moots the offer. In rejecting that contention, the *Martin* Court noted that plaintiff had not cited any Seventh Circuit authority for that proposition and that, in fact, controlling precedent expressly contradicted that position. *See id.* at **14-15 (citing *Greisz*, 176 F.3d at 1015; *White*, 2007 WL 1297130, at *7). The *Martin* Court found the offer of judgment – tendered prior to plaintiff's motion for class certification – to have fully satisfied plaintiff and therefore his claims against Fidelity were moot. Accordingly, Fidelity's motion to dismiss for lack of subject matter jurisdiction was granted. *Id.* at *16; *see also Baker v. N.P.F. Liquors, Inc*, No. 08-cv-3494, 2008 U.S. Dist. LEXIS 116964, at *9 (N.D. Ill. Dec. 30, 2008). ("Read together, *Greisz* and *Holstein* strongly indicate that an offer of complete relief moots the plaintiff's case if it is made before the plaintiff moves to certify a class.") (attached as Ex. I-7 to Almeida Decl.).) In sum, these cases are clear; unless

class certification is sought prior to the offer of judgment, then plaintiff's claim is moot and subject matter jurisdiction is lacking.[12]

CONCLUSION

Despite the fact that Plaintiff has been offered complete satisfaction of its claims, Plaintiff's counsel seeks to gamble with its client's money and to circumvent established principles of law in a transparent effort to line its own pockets. Simply put, no supposed right is being vindicated by Plaintiff's counsel's attempt to proceed in a case where, as Judge Posner ably put it, Plaintiff has already won. In light of the sordid history of B2B, Macaw and the Anderson + Wanca law firm, not to mention the fact that Plaintiff was offered complete satisfaction for a facsimile it has no proof it ever received, it is clear that Plaintiff's claims are moot and this Court should dismiss the case in its entirety and with prejudice.

This case epitomizes the concerns recently raised by Judge Shadur in *Blahnik v. U.S. Bank Nat'l. Ass'n.*, that certain consumer protection statutes are being abused by Plaintiff's class action lawyers to generate exorbitant legal fees rather than to protect consumers:

> Congress' understandable (and entirely appropriate) concern for the rights of consumers and other members of the general public . . . has led to the adoption of a substantial amount of protective legislation, a prime example of which is the Fair Credit Reporting Act. ***But regrettably the salutary purposes of such legislation have sometimes been diluted by the cottage industry that has consequently developed within the legal profession, some of whose members seem to exhibit more solicitude for the generation of legal fees than for the greater good of their clients***

[12] Federal Rule of Civil Procedure 23 likewise mandates dismissal. As amended in 2003, Rule 23, states in relevant part that "[t]he claims, issues, or defenses of a *certified* class may be settled, voluntarily dismissed, or compromised only with the court's approval." FED. R. CIV. P. 23(e) (emphasis added). Prior to 2003, Rule 23 required court approval of any settlement of a "class action." The 2003 amendments, however, required court approval only of settlements for members of a "certified class." This change suggests that defendants are free, prior to certification, to offer settlements to named plaintiffs.

– a situation that may call for special scrutiny in the area of the putative class action.

No. 07-4344, slip op., at *1 (N.D. Ill. Dec. 20, 2007) (emphasis added) (attached as Ex. I-8 to the Almeida Decl.).

For the foregoing reasons, Pizza Hut of Southern Wisconsin, Inc. respectfully requests that this Court: (i) deny Plaintiff's Motion to Strike Offer of Judgment or, In The Alternative, Motion For Class Certification in its entirety; (ii) dismiss Plaintiff's Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction; (iii) dismiss Plaintiff's Complaint with prejudice as Plaintiff's counsel's use of the B2B information in this litigation is violative of Judge Kennelly's June 11, 2010 Opinion and Order; and (iv) grant all such other relief it deems equitable and just.

Dated this 28th day of September 2010.

/s/ David S. Almeida

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