UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-60053-BB

JERRY EISENBAND,

Plaintiff,

v.

THE CREDIT PROS INTERNATIONAL CORPORATION,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION

THIS CAUSE is before the Court upon Defendant's Motion for Leave to Deposit Relief with the Court (the "Motion"). *See* ECF No. [24]. Plaintiff has filed a response in opposition to the Motion. *See* ECF No. [25]. For the reasons stated, the Motion is denied.

On January 10, 2018, Plaintiff filed a Class Action Complaint against Defendant "arising from Defendant's knowing and willful violations" of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"). On February 16, 2018, Defendant filed its Answer. *See* ECF No. [12]. On April 6, 2018, Defendant filed the present Motion. *See* ECF No. [24]. In the Motion, Defendant asks the Court pursuant to Federal Rule of Civil Procedure 67 "for leave to deposit $2,000 with the District Court as complete relief for the benefit of Plaintiff[,]" thereby dismissing Plaintiff's Complaint on mootness grounds. *Id*. at 2. Specifically, Defendant states:

> In *Campbell-Ewald Company v. Gomez*, the Supreme Court held that a plaintiff's claim does not become moot when the plaintiff rejects an offer of complete relief from a defendant, pursuant to Rule 68. Notably, however, the Court expressly refrained from deciding 'whether the result would be different if a defendant deposits the full amount of plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.' Despite the majority's reluctance to confront the issue of actual payment, the dissenting Justices clearly articulated that such a measure would moot the issue in

> controversy. Justice Alito concludes that '[t]oday's decision thus does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds.'

Id. at 2–3 (internal citations omitted) (*citing Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)). Defendant now takes up the question left open by the Supreme Court. While the Supreme Court in *Campbell-Ewald* did not decide whether tendering a check or depositing one with the Court can moot a plaintiff's individual claims, the Seventh and Ninth Circuit Courts of Appeals have dealt with the exact scenario and arguments presently before the Court and decided that dismissal is inappropriate.

In particular, the Court is persuaded by *Fulton Dental, LLC v. Bisco Inc.*, 860 F.3d 541 (7th Cir. 2017), where a plaintiff sued for damages under the TCPA. Before the plaintiff moved for class certification, however, the defendant attempted to moot the claims by tendering an offer, under Rule 67, that the defendant claimed gave the plaintiff all of the individual relief it could possibly expect.[1] *See Id*. at 542. The district court dismissed the entire action after concluding that the defendant's offer was enough to moot the plaintiff's individual claim and to disqualify it from serving as a class representative. *Id*. In reversing the district court, the Seventh Circuit concluded:

> From a broader perspective, we see no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell–Ewald*, and attempting to force a settlement on an unwilling party through Rule 67. In either case, all that exists is an unaccepted contract offer, and as the Supreme Court recognized, an unaccepted offer is not binding on the offeree . . . . [The plaintiff's] suit is about more than the statutory damages to which it believes it is entitled; it is also about the additional reward that it hopes to earn by serving as the lead plaintiff for a class action. Nothing forces it to accept [the defendant's] valuation of the latter part of the case.

[1] In the Motion, Defendant makes the same argument and relies on the same language from the Supreme Court's *Campbell-Ewald* decision as the defendant in *Fulton Dental, LLC*.

Id. at 545; *see also Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1147 (9th Cir. 2016) (holding, where defendant deposited funds in full settlement of plaintiff's individual claims and argued that plaintiff's putative class action complaint under the TCPA should be dismissed as moot, that "a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification"). The same reasoning can be applied to the present case, where Plaintiff, who has not yet moved for class certification, has rejected Defendant's offer (which fails to account for the additional reward Plaintiff hopes to earn by serving as the lead plaintiff in the class action). *See* ECF No. [25], at 7. As the Supreme Court stated in *Campbell-Ewald*, "a would-be class representative with a live claim of [his] own must be accorded a fair opportunity to show that certification is warranted." *Campbell–Ewald*, 136 S. Ct. at 672.

Defendant's argument has been rejected by the Seventh and Ninth Circuit Courts of Appeal. Finding the *Fulton Dental, LLC* and *Chen* decisions to be well-reasoned and correct, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Leave to Deposit Relief with the Court, **ECF No. [24]**, is **DENIED**.

DONE AND ORDERED in Miami, Florida, on this 10th day of April, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

cc:

Counsel of Record