

**FILED**

JUN 28 2005

Judge Robert W. Gettleman  
United States District Court

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

STEPHEN SOTELO, individually and on behalf of all  
persons similarly situated,

Index No. 05 C 2562

Plaintiffs,

Judge Gettleman

v.

DIRECTREVENUE, LLC; DIRECTREVENUE  
HOLDINGS, LLC; BETTERINTERNET, LLC;  
BYRON UDELL & ASSOCIATES, INC., D/B/A  
ACQUQUOTE; AQUANTIVE, INC., and JOHN DOES  
1-100,

Defendants.

**DEFENDANTS DIRECTREVENUE, LLC; DIRECTREVENUE  
HOLDINGS, LLC; BETTERINTERNET, LLC; AND BYRON UDELL &  
ASSOCIATES, INC.'S MOTION FOR PROTECTIVE ORDER AND TO  
BIFURCATE DISCOVERY**

Defendants DirectRevenue LLC, DirectRevenue Holdings LLC, BetterInternet LLC, and  
Byron Udell & Associates, d/b/a AccuQuote (collectively, the "Defendants"), through their  
undersigned attorneys, pursuant to Fed. R. Civ. P. 26(c)(4), hereby move the Court for entry of a  
protective order and an order bifurcating discovery in this matter. In support of their Motion,  
Defendants state as follows.

**I. SUMMARY OF THE MOTION**

Plaintiff recently served all of the Defendants and numerous third parties with  
voluminous and far-reaching sets of written discovery requests in this fledgling class action case.  
The discovery sets include multiple sets of interrogatories, document requests, requests to admit,  
and *fourteen* third party subpoenas which prematurely address the merits of the case, not class

certification issues.<sup>1</sup> However, if Plaintiff's putative class is *not certified*, the case likely will terminate. Responding to Plaintiff's discovery will be extremely time-consuming and expensive for Defendants, whose effort and resources will have been wasted if the Court ultimately does not certify the class.

Judicial economy, fairness, and common sense mandate that the Court should (a) limit early-stage discovery in this matter to *class certification issues only* and (b) issue a protective order regarding Plaintiff's overly broad and premature written discovery.

## II. RELEVANT PROCEDURAL HISTORY

On April 29, 2005, Defendants removed this case from the Circuit Court of Cook County, to the District Court for the Northern District of Illinois. Prior to removal, Plaintiff had filed a short motion to certify the putative class with the state court. Plaintiff's motion to certify was never presented to the state court, and Plaintiff has not yet presented the motion to this Court, but it is pending. *See*, 28 U.S.C. § 1450. A copy of Plaintiff's motion to certify is included in the separate appendix, filed contemporaneously herewith. On May 4, 2005, Plaintiff filed a motion to remand the case to state court, but later withdrew the motion after having received Defendants' opposition briefs.

---

<sup>1</sup> Copies of Plaintiff's written discovery sets directed to Defendants are included in the separate appendix, filed contemporaneously herewith. The discovery sets directed to Defendants are titled as follows: (1) Plaintiff's First Set of Interrogatories to DirectRevenue, (2) Plaintiff's First Set of Document Requests to Defendant DirectRevenue, (3) Plaintiff's Second Set of Interrogatories and Document Requests to DirectRevenue, (4) Plaintiff's First Set of Requests to Admit to DirectRevenue, (5) Plaintiff's First Set of Interrogatories to AccuQuote, and (6) Plaintiff's First Set of Document Requests to Defendant AccuQuote. In sum, Plaintiff has served Defendants DirectRevenue LLC, DirectRevenue Holdings LLC, and BetterInternet LLC with **96** discovery and admission requests thus far (excluding impermissible sub-parts). Plaintiff has served Defendant AccuQuote with **25** discovery requests thus far. Additionally, copies of Plaintiff's written discovery to Defendant aQuantive and Plaintiff's third party subpoenas also are included in the separately filed appendix as group exhibits, for the Court's reference.

Defendants have filed dispositive motions with this Court pursuant to Rule 12 (b)(2) and (6). Three Defendants also have moved to compel arbitration. All of Defendants' dispositive motions are currently pending before the Court and remain to be resolved. Plaintiff has not yet moved the Court to certify the putative class. Nor has he sought any discovery limited to class issues.

On June 15, the parties appeared before the Court on Plaintiff's motion to withdraw his motion to remand. During that appearance, the Court scheduled a hearing for August 23 to address the pending dispositive motions. The Court also suggested that the parties engage in a Rule 26(f) conference and develop a discovery plan to avoid "expensive" discovery in these early stages of the litigation. The Court's instruction is consistent with Rule 26(f)(2), which states that the parties' discovery planning should include, "whether discovery should be conducted in phases or be limited to or focused upon particular issues."

On June 16, pursuant to the Court's instruction and Local Rule 37.2 and Fed. R. Civ. P. 37 (a)(1)(A), counsel for Defendants, Neal Klausner, engaged in telephone conference with Plaintiff's counsel David Fish, and Defendant aQuantive's counsel Matthew Gehringer, in a good faith attempt to develop a discovery plan in accord with Rule 26(f) and the Court's instruction. The parties agreed to exchange the initial disclosures required by Rule 26(a) by July 8, 2005. The parties were unable to agree on any other discovery plan. All of the Defendants proposed that discovery should be conducted in phases as suggested by Rule 26(f); Plaintiff, however, would not agree to any phasing of discovery.

### III. ARGUMENT

#### A. COURTS ROUTINELY BIFURCATE DISCOVERY IN CLASS ACTION CASES.

Trial courts have discretion to bifurcate discovery in class action cases between (a) class certification issues, and (b) the merits of the case. The decision whether to bifurcate depends on the circumstances of the individual case. *American Nurses' Assoc. v. State of Illinois*, 1986 U.S. Dist. Lexis 20447, at \*7 (N.D. Ill. 1986); *Sheets v. Nat'l Action Financial Services, Inc.*, 2005 U.S. Dist Lexis 8439 at \*2 (N.D. Ind. May 9, 2005). In *American Nurses*, the plaintiffs sought to commence general discovery on the merits of their class action lawsuit prior to class certification, while the defendants requested that the trial court bifurcate discovery and proceed only with discovery related to the question of class certification. *Id.*

In agreeing with defendants that bifurcation was appropriate, the court stated as follows:

The court is persuaded that bifurcation of discovery would be prudent under the circumstances of this case. This approach will expedite the decision on class certification in accord with Federal Rule 23... While the bifurcation of discovery will inconvenience the named plaintiffs in [the way it enables the defendants to depose the named plaintiffs twice], it may result in substantial savings of time and energy later. *If class certification is denied, the scope of permissible discovery may be significantly narrowed; if a class is certified, defining that class should help determine the limits of discovery on the merits.* Therefore, discovery on the merits is stayed pending resolution of the class certification issue.

*Id.* at \*7-8 (emphasis added). The court in *American Nurses* thus focused on the possible substantial savings of time and energy in ordering bifurcation of discovery. *See also, Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (11<sup>th</sup> Cir. 1992) (“To make early class determination practicable and to best serve the ends of *fairness and efficiency*, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits) (emphasis added).

Similarly, in *Plumer v. Chicago Journeyman Plumbers' Local Union No. 130*, 77 F.R.D. 399, 401-02 (N.D.Ill. 1977), the defendants requested that the court stay discovery on the merits and limit discovery to material relevant to the issue of class certification. The court agreed with defendants and then examined the plaintiff's discovery requests to determine relevance, using the following guidelines:

The interrogatories are proper so long as they request information relevant to the class action issues. That is, they must seek Rule 23(a) information, information relevant to determining whether (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.* at 403; *see also, Rodriguez v. Banco Central*, 102 F.R.D. 897, 902-03 (Puerto Rico Dist. 1984) (“The class determination is preferable before substantial discovery on the merits has been conducted. *Therefore, to make early class determination practicable in many cases and to serve the ends of fairness and efficiency, the Court may direct the parties to focus their initial discovery on matters pertaining to class questions.*”) (emphasis added). The court in *Plumer* also noted that it was enough for a discovery request to be relevant to a class certification issue; it need not be *exclusively* relevant to a class certification issue to be proper. *Id.*

The Manual for Complex Litigation, Fourth Edition (2005) (“MCL”), recognizes the propriety of the bifurcation approach chosen by the courts in, *inter alia*, the *American Nurses, Sheets, Washington*, and *Plumer* cases, stating as follows:

Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. ... [I]n cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the

*certification decision and can create extraordinary and unnecessary expense and burden.*

MCL, § 21.14 (emphasis added).<sup>2</sup>

The policy considerations announced in the MCL and reflected in the case law cited above apply here. As more thoroughly detailed below, this case is unlikely to continue if the Court does not certify a class because, *inter alia*, Sotelo's individual damages as alleged in the Complaint, if any, are likely to be *de minimus*. Indeed, Sotelo does not even allege that he personally suffered any quantifiable damages. Second, it will be unquestionably burdensome and expensive for the Defendants to respond to the **121** discovery and admission requests issued by Plaintiff thus far. This conservative calculation even omits the scores of impermissible sub-parts included by Plaintiff in his discovery to avoid running afoul of the maximum number allowed under Rule 33 (see, *e.g.* Interrogatory No. 11 to DirectRevenue).

Third, Plaintiff's far-reaching discovery unavoidably will cause delay in the Court's certification decision. The Court should stay all discovery on the merits to avoid unnecessary expense, burden, and delay.

**B. THE COURT SHOULD BIFURCATE DISCOVERY IN THIS CASE.**

*1. It would be unfair and inefficient to allow Plaintiff to pursue discovery on the merits of the action.*

Plaintiff's voluminous (**121** discovery and admission requests served on Defendants, excluding subparts), mostly irrelevant discovery purportedly directed to the merits of the action will place an unnecessary and premature burden on Defendants. Plaintiff has not yet presented his state court-filed motion to certify the putative class to the Court, but it is pending. *See*, 28 U.S.C. § 1450. As discussed above, if the class is not certified, it is likely that the litigation will

terminate. If Defendants are forced to respond to merits-based discovery, yet the merits are never heard, it will be a colossal waste of Defendants' time, money, and resources. (See MCL, § 21.14). As noted by the court in *American Nurses*<sup>2</sup>, here, if class certification is denied, the scope of permissible discovery may be significantly narrowed or obviated. It would be unfair to subject Defendants to extremely burdensome and expensive discovery obligations which may be obviated in the near future.

Even if a class *is* eventually certified, defining that class should help determine the limits or boundaries of discovery on the merits. *See, American Nurses*, 1986 U.S. Dist. Lexis 20447, at \*7-8. However, if Plaintiff is allowed to pursue merits-based discovery proceeds now, it very well might exceed the limits that could eventually be defined by the class certification. This would result in unnecessary burden and waste. It makes little sense to move forward with merits-based discovery at this stage, when the prospective class certification stage of the litigation will be instructive in shaping the limits and bounds of discovery.

**2. *Defendants' pending motions could obviate the need for merits-based discovery.***

Defendants have filed several 12(b)(6) motions, a 12(b)(2) motion, and a motion to compel arbitration – any of which could make the alleged merits of Plaintiff's claims irrelevant to this Court if resolved in Defendants' favor. It would be unfair to require the Defendants to go through the burden and expense of answering Plaintiff's extensive discovery not directed at class certification at this stage in the case, when either (a) the granting of Defendants' pending dispositive motions, or (b) the denial of Plaintiff's prospective certification motion would

---

(continued . . . )

<sup>2</sup> A copy of the cited MCL section is included in the appendix hereto.

obviate such discovery. Defendants' time, effort, and money spent answering Plaintiff's discovery once again will have been wasted.

3. ***Plaintiff's discovery relates to the alleged merits of the claims, not class certification issues.***

Plaintiff's putative class is defined in the Complaint (para. 22) as follows:

"All persons and entities who had BetterInternet installed on their computers, located in Illinois, in or after April 1, 2002 – and who had advertisements sent to their computers as a result."

A sub-class of persons is defined as "All persons and entities who had BetterInternet downloaded from an Internet site that displayed to them a copy of BetterInternet's End User License Agreement."

A second sub-class of persons is defined as "All persons or entities who had BetterInternet downloaded from an Internet site that did not display to them a copy of BetterInternet's End User License Agreement."

Pursuant to Rule 23, to certify the class presumably Plaintiff will need to establish that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class, (3) the claims or defenses of Plaintiff are typical of the class; and (4) Plaintiff will fairly and adequately protect the interests of the class. Defendants concede that discovery directly relating to these discreet issues is appropriate at this stage.

In light of this, it would be proper, for instance, for early-stage discovery to occur on the following topics:

- Plaintiff's alleged installation of the BetterInternet software;
- Whether Plaintiff has installed software, other than BetterInternet, that delivers advertisements;
- Plaintiff's contact, if any, with the End User License Agreement ("EULA");
- Advertisements that Plaintiff experienced due to the BetterInternet software;
- The time frame during which Plaintiff allegedly received any such advertisements;

- The number of advertisements Plaintiff received due to BetterInternet software, if any;
- Damages Plaintiff alleges he has suffered, if any;
- Whether Plaintiff uninstalled the software; and
- The number of Illinois persons and entities who have lodged complaints to Defendants regarding the software during the relevant time period.

However, Plaintiff does not address topics of this nature in his discovery.

Instead, a scan of Plaintiff's discovery reveals that the requests have nothing to do with the core issues of numerosity, commonality, typicality, and adequacy of Plaintiff's putative class and/or class representative. Plaintiff arguably directs his discovery to the alleged merits of his claims.<sup>3</sup> As described above, the Court should not require Defendants to respond to discovery on the merits of the action at this pre-certification stage, as it would be inefficient, unfair, and unnecessarily burdensome on Defendants, while also potentially delaying prospective certification proceedings.

#### IV. CONCLUSION

For all of the foregoing reasons, Defendants DirectRevenue, LLC, DirectRevenue Holdings, LLC, BetterInternet LLC, and Byron Udell & Associates d/b/a AccuQuote respectfully request that the Court (a) issue a protective order alleviating Defendants' obligation to respond to

---

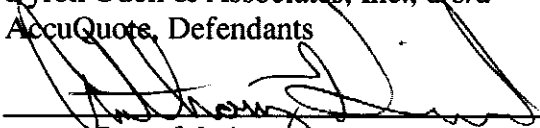
<sup>3</sup> Although not addressed by this Motion, Defendants hereby preserve their right to object to Plaintiff's discovery requests on the more "typical" bases, such as relevance, overbreadth, and burdensomeness if they are required to issue formal responses to Plaintiff's discovery as it currently stands. Indeed, if the Court allows Plaintiff to pursue the discovery complained of herein, it appears that the parties will be forced to engage in additional motion practice addressing the propriety and objectionable nature of Plaintiff's discovery. This excess motion practice unavoidably will result in a delay in class certification proceedings, frustrating the instruction of Rule 23(c)(1)(A) that "the court must – at an early practicable time – determine by order whether to certify the action as a class action." See, MCL, § 21.14 (attached hereto).

Plaintiff's merits-based discovery, (b) issue an order bifurcating discovery, and (c) grant Defendants such other relief as the Court deems just and proper.

Dated: June 28, 2005

DirectRevenue, LLC, DirectRevenue Holdings, LLC, BetterInternet, LLC, and Byron Udell & Associates, Inc., d/b/a AccuQuote, Defendants

By: \_\_\_\_\_

  
One of their attorneys

Neal H. Klausner (*pro hac vice*)  
David S. Greenberg (*pro hac vice*)  
DAVIS & GILBERT LLP  
1740 Broadway  
New York, New York 10019  
(212) 468-4800

Bradford P. Lyerla (3127392)  
Anthony S. Hind (6257797)  
MARSHALL, GERSTEIN & BORUN LLP  
6300 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6357  
(312) 474-6300

**CERTIFICATE OF SERVICE**

I, Anthony Hind, an attorney, hereby certify that I caused a true and correct copy of the foregoing Motion for Defendants DirectRevenue, LLC; DirectRevenue Holdings, LLC; BetterInternet, LLC; and Byron Udell & Associates, Inc.'s Motion for Protective Order and to Bifurcate Discovery, and all papers incorporated therein by reference, and copies of all documents required to be served by Fed. R. Civ. P. 5(a) to be served upon the following individuals this 28<sup>th</sup> day of June, 2005, via the noted methods of service:

David J. Fish  
The Collins Law Firm, P.C.  
1770 N. Park Street, Suite 200  
Naperville, Illinois 60563

Attorney for Plaintiff

*Via facsimile transmittal and regular USPS  
mail*

Matthew J. Gehringer  
Perkins Coie LLP  
131 S. Dearborn Street, Suite 1700  
Chicago, IL 60603-5559

Attorney for Defendant aQuantive, Inc.

*Via facsimile transmittal and regular USPS  
mail*

