UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HEATHER VENERUS,

Plaintiff,

v. **Case No: 6:13-cv-921-Orl-41GJK**

AVIS BUDGET CAR RENTAL, LLC and BUDGET RENT-A-CAR SYSTEM, INC.,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on the Joint Motion to Amend Class Definition (Doc. 389); Plaintiff's Motion for Approval of Pending Notice Plan (Doc. 391); Plaintiff's Unopposed Motion for Leave to File Reply (Doc. 396); and Plaintiff's Unopposed Motion to Set a Telephonic Status Conference (Doc. 390). Each motion will be addressed in turn.

I. BACKGROUND

Defendants are car rental companies.[1] They sell bundled rentals to international inbound customers. Under these bundled rentals, the customers pay one flat fee in exchange for the rental of a car along with certain other items, including third-party liability coverage—known as Supplemental Liability Insurance ("SLI") or Additional Liability Insurance ("ALI"). It is undisputed that SLI and ALI are the same thing and the terms are interchangeable. Plaintiff purchased one of these bundles, but Defendants did not purchase SLI/ALI on her behalf.

[1] Defendant Budget Rent-A-Car System, Inc. is owned by Defendant Avis Budget Car Rental, LLC, and at least some of the relevant decision-makers set business policies for both companies. The facts and analysis herein apply equally to both companies, and they will be addressed collectively as "Defendants."

Plaintiff originally brought several purported class claims against Defendants, including claims based on an alleged statutory violations,[2] and a claim for breach of the rental agreement. (*See generally* Compl., Doc. 1). The Court certified a class action for the claims based on the statutory violations and denied, *inter alia*, class certification of the breach of contract claims. (First Class Certification Order, Doc. 149, at 23–24). Because the certified class did not include breach of contract claims, which has a five-year statute of limitations, and the remaining claims all had four-year statutes of limitations, the class was limited to individuals who rented vehicles from Defendants after June 12, 2009, instead of the originally proposed date of June 12, 2008. (Doc. 149 at 13 & n.8). Subsequently, as relevant here, the Court granted summary judgment in favor of Defendant on the alleged statutory violation claims, granted summary judgment in favor of Plaintiff as to liability on her individual claim for breach of the rental agreement, and decertified the class. (Summary Judgment Order, Doc. 203, at 23–24; Reconsideration Order, Doc. 302, at 11–12). The parties then stipulated to the amount of Plaintiff's individual damages and the entry of judgment on her claim, (Am. Joint Stipulation, Doc. 307), judgment was entered, (Judgment, Doc. 311, at 1), and the parties appealed, (Pl.'s Notice of Appeal, Doc. 315, at 1; Defs.' Notice of Appeal, Doc. 318, at 1).

The Eleventh Circuit affirmed in part and reversed in part the Court's previous rulings and remanded to determine whether a class should be certified based on Plaintiff's breach of rental agreement claim. (Eleventh Circuit Opinion, Doc. 339, at 17 & n.4). The Court then granted Plaintiff's Renewed Motion for Class Certification (Doc. 343) and certified the following class:

[2] Specifically, Plaintiff brought claims for disgorgement and restitution as well as for violations of the Florida Deceptive and Unfair Trade Practices Act based on alleged violations of several Florida statutes that regulate the sale and provision of insurance policies. (Doc. 1 at 12–16).

> All individuals who (1) rented an Avis or Budget vehicle in the State of Florida after June 12, 2008, pursuant to a prepaid voucher, and (2) whose Rental Receipt contained the notation "SLI .00/Day Accepted" or "ALI .00/Day Accepted.
>
> Excluded from the Class are all such renters who have been involved in accidents and who have outstanding claims for liability or uninsured/underinsured motorist coverage, as well as all such renters whose liability or uninsured/underinsured motorist claims have been paid by Defendants.

(Second Class Certification Order, Doc. 370, at 9).

The parties now seek to amend that class definition so that it is limited to individuals who rented vehicles after June 12, 2008, and before January 1, 2016. (*See generally* Doc. 389). Plaintiff also seeks approval of her proposed Notice Plan, requests that Defendants be required to pay for the class notice, and requests that Defendants be required to provide the contact information for "new" class members—i.e., those who rented vehicles between June 12, 2008 and June 12, 2009, and were therefore not part of the originally certified class due to a now-inapplicable statute of limitations. Defendants do not oppose the form of notice suggested by Plaintiff,[3] but they disagree that they should be required to pay for the class notice, and they contend that they should not be required to provide updated class member information. Defendants also argue that notice should not be provided to the new class members because of European privacy laws. Each issue will be addressed in turn.

II. ANALYSIS

A. Disclosure of New Class Members' Information

1. Discovery

[3] The parties jointly proposed revised notice forms, which addressed Defendants' concerns. (*See generally* Joint Notice of Supplement, Doc. 388).

Defendants first argue that they should not be required to disclose the new class members' contact information because discovery is closed. Defendants are generally correct that discovery is closed and that the Court declined to re-open discovery post-remand because, at the time of appeal, liability had already been determined and this case was poised for trial on damages. (July 11, 2019 Order, Doc. 381, at 1). However, that logic does not extend to the instant matter. As explained, the class in this case that was originally certified did not include individuals who had rented vehicles prior to June 12, 2009, due to a now-inapplicable statute of limitations. Clearly, Plaintiff would not have been permitted to obtain contact information for class members who were not part of the class at the time. Thus, the Court finds Defendants' arguments that Plaintiff should have already acquired this information meritless.

2. Privacy Concerns

Defendants also argue that they should not be required to provide contact information for the new class members due to concerns that doing so could violate the European Union's General Data Protection Regulation ("GDPR"), subjecting Defendants to monetary liability. While the Court agrees that privacy concerns should be taken seriously, Defendants simply have not provided a legal basis for the Court to conclude that Defendants' disclosure of the limited information necessary to effectuate class notice to the new class members pursuant to a court order would violate the GDPR. (*See* Doc. 386 at 18 (explaining that, even after consulting with a United Kingdom-based attorney, "Defendants have found no European or USA-based precedent that definitively allows the processing of this information in the instant situation" but that "Defendants have also not found any definitive precedent that forbids it"); *see also id.* (conceding that Article 6(1)(c) of the GDPR "on its face . . . appears to cover the requested 'New Class Member' personal data disclosure" because it allows processing of information that "is necessary for compliance with

a legal obligation")). The Court will not exclude notice to the new class members, or the disclosure of those class members' contact information, on this basis.[4] And, Defendants will be required to produce the relevant identifying and contact information.

B. Ability for New Class Members to Opt Out

Defendants argue that the new class members should not be permitted to opt out at this stage of the litigation. However, Defendants provide no legal authority in support of their argument. "[B]ecause classes certified under Rule 23(b)(3) lack the inherent cohesion of Rule 23(b)(2) classes, individual notice to all class members is required, and each class member must be provided with the opportunity to opt out of the class litigation." *Reid v. Lockheed Martin Aero. Co.*, 205 F.R.D. 655, 682 (N.D. Ga. 2001) (citing Fed. R. Civ. P. 23(c)(2) and *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1156–57 (11th Cir. 1983)). The new class members will be given the ability to opt out.

C. Notice to Previous Class Members

Pursuant to Federal Rule of Civil Procedure 23(d)(1)(B)(i), "the court may issue orders that require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of . . . any step in the action." While Plaintiff submitted a proposed "Update Notice" for original class members in case the Court was inclined to provide it, neither party believes such a notice is necessary. The Court agrees. The class claims going forward at this stage are not so divorced from those originally certified to make a material difference, and the Court sees no basis to allow original class members a second chance to opt out at this stage of the proceedings. Update notice to previous class members will not be required.

[4] As discussed below, the Court is not requiring notice to previous class members, so any arguments related to those members are moot.

D. Payment

Plaintiff requests that the cost of notice be borne by Defendants. "The usual rule is that a plaintiff must initially bear the cost of notice to the class." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178–79 (1974). While the *Eisen* Court noted that there could be an exception to this rule in circumstances "where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit," it explicitly stated that "[w]here, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* The Supreme Court later noted that where "the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff," it may be appropriate to shift the burden to the defendant. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978). But, the *Oppenheimer Fund* Court cautioned "courts . . . not stray too far from the principle underlying *Eisen* . . . that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Id.* at 359.

Plaintiff cites out-of-circuit cases for the proposition that the cost can be shifted to Defendants when there has already been a decision on the merits. *See, e.g.*, *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009) ("[I]nterim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure." (quotation omitted)). The Eleventh Circuit does not appear to have addressed this issue yet, and the only in-circuit case cited by Plaintiff is a case from the Middle District of Alabama that was decided in 1973—prior to *Eisen* and *Oppenheimer Fund*. *Partain v. First Nat'l Bank of Montgomery*, 59 F.R.D. 56, 62 (M.D. Ala. 1973).

Thus, Plaintiff has not met its burden to show that the Court can deviate from the standard rule set forth by the Supreme Court. The costs of notice will not be shifted.

E. Notice Plan

For the reasons set forth in Plaintiff's Notice (Doc. 382) and the Joint Supplement (Doc. 388), the Court determines that the Notice Plan meets all relevant requirements. Specifically, the Notice Plan set forth in Plaintiff's Notice, (Doc. 382 at 2–7), as amended by the Joint Supplement, (Doc. 388 at 4–6), and the notice forms (Doc. Nos. 388-1 & 388-3) are approved. Because the Court finds that update notice to existing class members is unnecessary, the portions of the Notice Plan and the notice form relating to update notice (Doc. 388-2) shall be disregarded.

F. Defendant's Response

One final matter must be addressed. Plaintiff filed a Motion for Approval of Pending Notice Plan, asking the Court to approve the Notice Plan that was filed as a "Notice of Filing" instead of a motion. Plaintiff was concerned that it improperly filed the document and that, therefore, the Court had not been properly notified of it. (*See generally* Doc. 391). Instead of simply filing a Response stating that its position on the matter had already been fully addressed and pointing the Court to its previous filings, Defendant responded with a sixteen-page diatribe, accusing Plaintiff of acting in bad faith and requesting sanctions under 28 U.S.C. § 1927. Not only is the request for affirmative relief inappropriate in a response to a motion, but Defense counsel should think carefully before making such serious accusations. There is no basis to award sanctions here. The request will not be granted.

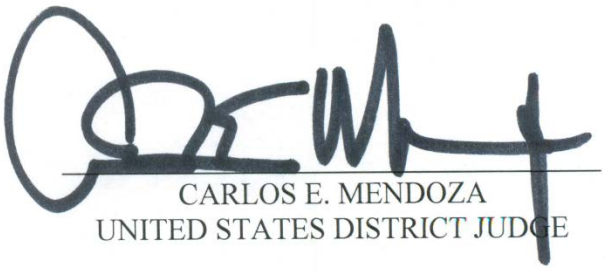
III. CONCLUSION

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Joint Motion to Amend Class Definition (Doc. 389) is **GRANTED**.

2. The Motion for Approval of Pending Notice Plan (Doc. 391) is **GRANTED in part**.
3. Plaintiff's Unopposed Motion for Leave to File Reply (Doc. 396) and Plaintiff's Unopposed Motion to Set a Telephonic Status Conference (Doc. 390) are **DENIED as moot**.
4. **On or before January 6, 2021**, Defendant shall provide to Plaintiff the new class member information necessary to effectuate service.
5. **On or before February 5, 2021**, Plaintiff shall effectuate notice to the new class members.
6. The new class members shall have sixty days to opt out of the Class.
7. This matter is set for a trial status conference on **March 18, 2021, at 10:00 a.m.**, where final pretrial deadlines and a date certain for trial will be set.

DONE and **ORDERED** in Orlando, Florida on November 30, 2020.



Copies furnished to:

Counsel of Record