

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WILDER CHIROPRACTIC, INC.,  
a Wisconsin corporation, and as a representative  
of a class of similarly situated persons,

ORDER

Plaintiff,

10-cv-229-bbc

v.

PIZZA HUT OF SOUTHERN WISCONSIN, INC.,

Defendant.  
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In an order dated December 6, 2010, dkt. #44, I concluded that defendant Pizza Hut of Southern Wisconsin, Inc. could not moot this proposed class action by making an offer of judgment under Fed. R. Civ. P. 68 to named plaintiff Wilder Chiropractic, Inc., so long as I granted the motion for class certification that plaintiff filed within the 14-day deadline for accepting defendant's offer. Defendant did not develop any argument in its briefs regarding the class certification issue, so I concluded that it was undisputed "that there are common questions of law and fact because all class members received the same fax from defendant, that the named plaintiff is an adequate representative because it does not have conflicting interests with other class members and that a class action is superior to individual

lawsuits because of the large number of class members and small size of their claims.” However, I stayed a decision on plaintiff’s motion for class certification to allow the parties to submit supplemental briefs and evidence on the following questions:

- (a) whether plaintiff has identified an ascertainable class;
- (b) whether faxes sent in April 2006 should be included in the class claims;
- (c) whether individualized determinations regarding the recipients’ consent preclude a finding that common questions of law and fact predominate; and
- (d) whether proposed class counsel satisfies the factors in Fed. R. Civ. P. 23(g).

Defendant has filed a motion for “clarification,” which is more accurately described as a request to expand the scope of the supplemental materials to include any issues regarding the class certification requirements. Dkt. #45. That motion will be denied.

Defendant had an opportunity to raise these matters in opposing plaintiff’s motion for class certification. Defendant says now that it did not address the class certification issues “because a dispositive, threshold issue was pending—whether [defendant’s] Rule 68 Offer of Judgment to Plaintiff mooted the case in its entirety.” *Id.* at 2-3. This is not a persuasive justification because plaintiff’s motion for class certification was pending as well. Defendant did not ask the court to stay any consideration of that motion pending resolution of defendant’s motion to dismiss. Instead, defendant took its chances by filing a response without addressing the Rule 23 requirements. A party cannot simply ignore a motion with

the hope that it will be mooted by the granting of a different motion and then ask the court for another chance to respond when the ruling does turn out the way the party hoped.

In the alternative, defendant asks for more time to file supplemental materials in the light of the upcoming holidays. I will grant this portion of the request.

#### ORDER

IT IS ORDERED that defendant Pizza Hut of Southern Wisconsin, Inc.'s motion for clarification, dkt. #45, is DENIED with respect to defendant's request to expand the scope of the issues it may raise in response to the December 6, 2010 order. The motion is GRANTED with respect to defendant's request for more time to respond to the order. The parties may have until January 10, 2011 to file their supplemental materials. The stay on discovery imposed on November 17, 2010, dkt. #43, is LIFTED.

Entered this 10<sup>th</sup> day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge