

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MARCELLA KIST, individually	)	
and on behalf of all others	)	
similarly situated,	)	
Plaintiff,	)	
	)	
v.	)	Civ. A. No. 13-10262-MLW
	)	
SEMPRIS, LLC and DIGITAL	)	
RIVER, INC.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J.

May 27, 2014

Defendant Sempris, LLC ("Sempris") operates "membership programs" that provide members with benefits in return for monthly fees. Defendant Digital River, Inc. ("Digital River") processes payments made by consumers to online merchants. In this putative class action, plaintiff Marcella Kist alleges that Digital River shares its customers' billing information with Sempris, and that these customers are then registered in Sempris membership programs without their meaningful consent.

Kist's First Amended Class Action Complaint (the "Complaint") asserts claims of: violations of Massachusetts General Laws Chapter 93A; fraud by omission; breach of contract; breach of the implied covenant of good faith and fair dealing; and unjust enrichment. The proposed plaintiff classes are defined in the Complaint as follows:

Sempris Class: All individuals who were enrolled in and charged for any Sempris Membership Program following their online purchase, completed through Defendant Digital River, of a product from www.applexsoft.com.

Massachusetts Subclass: All members of the Sempris Class who reside in Massachusetts.

Complaint ¶60.

Sempris moved to dismiss all but one of the Counts of the Complaint. Digital River moved to dismiss the Complaint in its entirety. After hearing argument on March 31, 2014, the court denied the motions to dismiss. See Apr. 1, 2014 Order ¶1; Mar. 31, 2014 Tr. at 28-32, 39-40, 45-46.

The Complaint asserts that it is subject to the court's jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1332(d). See Complaint §10.<sup>1</sup> CAFA confers original jurisdiction on the United States district courts over "class actions that satisfy the statute's minimal diversity" if "the matter in controversy exceeds the sum or value of \$5,000,000." Amoche v. Guar. Trust Life Ins., 556 F.3d 41, 43 (2009); 28 U.S.C. §1332(d)(2). A class action is not subject to CAFA jurisdiction, however, if "the number of members of all proposed plaintiff classes in the aggregate is less than 100." §1332(d)(5)(B).

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<sup>1</sup> The Complaint does not allege jurisdiction under 28 U.S.C. §1331 (federal question) or §1332(a)-(c) (non-CAFA diversity). See Complaint §10.

Defendants have not challenged Kist's assertion that CAFA jurisdiction applies in this case. However, "a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting." In re Rectical Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). Accordingly, at the March 31, 2014 hearing and in a subsequent written Order, the court ordered the parties to confer and to report their positions on, among other things, "[w]hether the court has jurisdiction over this putative class action under [CAFA]." Apr. 1, 2014 Order ¶3(b)(i).

In their response to the April 1, 2014 Order, the parties reported that "Digital River has provided information indicating that the putative class . . . consists of fewer than 100 persons with a total of approximately \$7,300 in paid membership fees." Joint Statement at 1. The parties, therefore, agree that the court lacks jurisdiction over this case as presently constituted. See id. at 1, 3, 5. Nevertheless, Kist seeks to conduct discovery "to determine whether the class definition should be amended to encompass products in addition to [the product named in the Complaint] and, if so, whether the amended class definition would meet CAFA's amount in controversy requirements." Id. at 2.

The requested discovery cannot be authorized. "[T]he court enjoys broad authority to order discovery . . . in order to determine its own jurisdiction." Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978). However, in the instant case, the facts presented by the parties are sufficient to establish that the court lacks jurisdiction over this action. "Without jurisdiction the court cannot proceed at all in any cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 7 Wall. 506, 514 (1868)). When it lacks jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." Id.; In re Recticel, 859 F.2d at 1002. Accordingly, the court cannot authorize the discovery requested by Kist, which is intended, in essence, to determine whether Kist could properly assert a different claim.

This case is, therefore, being dismissed. "When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case." Christopher v. Stanley-Bostitch, Inc., 240 F.3d 95, 100 (1st Cir. 2001); Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 45 (1st Cir. 2003); Fed. R. Civ. P. 41(b). The dismissal of this case is, therefore, without prejudice.

In view of the foregoing, it is hereby ORDERED that this case is DISMISSED without prejudice.

/s/ Mark L. Wolf  
UNITED STATES DISTRICT JUDGE