IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

TROY ELDRIDGE, an individual suing on behalf of himself and all others similarly situated,

Plaintiff,

v.

PET SUPERMARKET, INC., a profit corporation,

Defendant.
_____/

CASE NO. 2020-006035-CA-01 (44)

CLASS REPRESENTATION

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF STANDING

THIS CAUSE came before the Court on DEFENDANT'S Motion for Summary Judgment for Lack of Standing. After considering the motion, Defendant's opposition thereto, Plaintiff's reply, the evidence and testimony presented, and the arguments of counsel, and being otherwise fully advised in the premises, the Court makes the following findings:

Statement of Facts

Plaintiff filed this putative class action to address Defendant Pet Supermarket, Inc.'s practice of using automated technology to send marketing text messages to himself and more than 100,000 others without anyone's prior express written consent in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").

On December 19, 2017, Plaintiff alleges he visited a Pet Supermarket store in Miami, Florida. During the store visit, Plaintiff learned from a store clerk about a raffle where he could win a year-long supply of free pet food by texting the word "PETS" to short code 65047. Plaintiff handed his iPhone to a store clerk to enroll him. One of Defendant's employees then took

Plaintiff's cell phone and texted "PETS" so that Plaintiff could enter to win the free food. Defendant's software captured the data associated with the incoming "PETS" message, used that data to produce Plaintiff's cell phone number, and automatically enrolled him into Defendant's recurring text message marketing program. In response to the "PETS" message, Plaintiff immediately received two response messages and thereafter continued to receive marketing copyright autodialed messages onto his cell phone. Defendant readily admits that there is only one way that consumers became subjected to their message blitzes: by causing the word "PETS" to be sent to a short code, just like in Plaintiff's case. Pet Supermarket automatically enrolled Plaintiff's cell phone number in its automated text message advertising and telemarketing campaign.

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act makes it unlawful for "any person . . . to make any call . . . using any automatic telephone dialing system ["ATDS"] . . . to any telephone number assigned to . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii); *see also Murphy v. DCI Biologicals Orlando, LLC*, Case No. 6-12-cv-1459-Orl-36KRS, 2013 WL 6865772, at *4 (M.D. Fla. Dec. 31, 2013) ("There are two elements to an auto-dialer TCPA claim that a plaintiff must allege: (1) a call to a cellular telephone; (2) via an automated telephone dialing system."). To avoid liability for any automated "telephone call that includes or introduces an advertisement or constitutes telemarketing," the caller must first have obtained "the prior express written consent of the called party." 47 C.F.R. § 64.1200(a)(2). The term "advertisement means any material advertising the commercial availability or quality of any goods or services." 47 C.F.R. §§ 64.1200(f)(1). The term "telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. §§ 64.1200(f)(12). Thus, for any call or message

sent via an automated dialing system that introduces an advertisement or constitutes telemarketing, like the messages at issue here, the sender is required to have first obtained the recipient's "prior express written consent." "[T]he prior express [written] consent exemption acts as an affirmative defense," and "the burden will be on the [Defendant] to show it obtained the necessary prior express consent." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012).

Summary Judgment Standard

In accordance with Rule 1.510(c), Florida Rules of Civil Procedure, summary judgment will be ordered if the pleadings, depositions, affidavits, answers to interrogatories, and admissions filed together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). In simple terms, summary judgment is granted when there remains no issue of material fact to litigate. *ARC Foods, Inc. v. NGI Props.*, 724 So. 2d 663 (Fla. 2d DCA 1999). While the moving party has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, the non-moving party must then counter with evidence sufficient to reveal a genuine issue. *Publix Supermarkets, Inc. v. Austin, et al.*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995); *Golden Hills Golf & Turf Club, Inc. v. Spitzer, et al*., 475 So. 2d 254 (Fla. 5th DCA 1985). Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." *Volusia Cty*,. 760 So. 2d at 131.

The Florida Constitution requires that Florida's "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. The plenary jurisdiction that is constitutionally afforded to Florida's courts is broader

than what has been afforded to the federal courts. Art. V, § 5, Fla. Const. The Florida Supreme Court has held that "except as otherwise required by the constitution, Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720–21 (Fla. 1994). To satisfy the "case or controversy" requirement, a plaintiff need only show "that a case or controversy exists between him and the defendant, and that this case or controversy will continue throughout the existence of the litigation." *Sosa v. Safeway Premium Fin. Co*., 73 So. 3d 91, 116 (Fla. 2011). "In its broadest sense, standing is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Kumar Corp. v. Nopal Lines, Ltd*., 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985) (internal quotations omitted). Plaintiff has such a stake in this action because he asserts a claim against the Defendant for violation of a statutory right, or other legal right. *See Sosa*, 73 So. 3d at 117 ("A case or controversy exists if a party alleges an actual or legal injury.") *Laughlin v. Household Bank, Ltd*., 969 So. 2d 509, 513 (Fla. 1st DCA 2007) ("Laughlin is not required to prove actual damages, but only a violation of one of the prohibited practices in the FCCPA.").

Additionally, when the legislature creates a substantive right by enacting a statute, i.e., a new cause of action, the "statute ensures that the minimum requirements of standing—injury and interest in redress—will be met," and the plaintiff need not show any injury beyond a violation of that statutory right. *See Fla. Wildlife Fed'n v. State Dep't of Env't. Reg*., 390 So. 2d 64, 66–67 (Fla. 1980) ("We hold, therefore, that section 403.412 creates a new cause of action and that private citizens of Florida may institute suit under that statute without a showing of special injury."); *Delgado v. J.W. Courtesy Pontiac GMC-Truck*, 693 So. 2d 602, 606 (Fla. 2d DCA 1997) ("[T]he legislature clearly intended to establish a new cause of action for the benefit and protection of the

consuming public. As a new cause of action, the FDUTPA constitutes a substantive law which creates, defines, and regulates rights which are to be administered by the courts.") (citing *Fla. Wildlife Fed'n*, 390 So. 2d at 66); *Caloosa Prop. Owners Ass'n v. Palm Beach Cnty. Bd. of Cnty. Comm'rs*., 429 So. 2d 1260, 1267 (Fla. 1st DCA) ("[W]hen a new cause of action is established by statute, the law is substantive in nature."). As with other substantive legislation, the TCPA provides a statutory cause of action and does not require that a consumer suffer actual damages to seek relief. Thus, it is the finding of this Court that Plaintiff need only allege a violation of his statutory rights under the TCPA to have standing. He need not allege or demonstrate an actual injury. *See Fla. Wildlife Fed'n*, 390 So. 2d at 66. This means that Plaintiff has a cause of action against Pet Supermarket for multiple allege violations of the TCPA. Specifically, section 227(b)(3) of the TCPA provides: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—…. an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater…" *See id.*

Florida courts require litigants to demonstrate that he or she has standing to invoke the power of the court to determine the merits of an issue." *Vaughan v. First Union Nat'l Bank of Fla*., 740 So. 2d 1216, 1217 (Fla. 2d DCA 1999).

> "Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation." *Weiss v. Johansen*, 898 So.2d 1009, 1011 (Fla. 4th DCA 2005). "The interest cannot be conjectural or merely hypothetical[,]" id., nor can it be "indirect, inconsequential, or contingent," *Sweetwater Counto Club Homeowners' Ass'n v. Huskey Co*., 613 So.2d 936, 939 (Fla. 5th DCA 1993). The Florida Supreme Court has identified three minimal requirements for standing: "There are three requirements that constitute the irreducible constitutional minimum for standing. First, a plaintiff must demonstrate an injury in fact, which is concrete, distinct and palpable, and actual or imminent. Second, a plaintiff must establish a causal connection between the injury and the conduct complained of. Third, a plaintiff must show a substantial likelihood that the requested relief will remedy the alleged injury in fact. ...

Giuffre v. Edwards, 226 So. 3d 1034, 1038–39 (Fla. 4th DCA 2017) t (quoting *State v. J.P.*, 907 So. 2d 1101, 1113, n.4 (Fla. 2004))).

It is the conclusion of this Court that Plaintiff has sufficiently alleged an injury that has a causal connection to the Defendant's conduct, and which can be redressed by a positive outcome in the litigation. See *Giuffre*, 226 So. 3d at 1038–39 (Fla. 4th DCA 2017) (citing *J.P.*, 907 So. 2d at 1113, n.4).

Courts around the country have held that the receipt of just one or two messages sent in violation of the TCPA, without more, is sufficient to confer standing. *See, e.g., Melito v. Experian Mktg. Sols., Inc.*, 923 F. 3d 85, 88 (2d Cir. 2019) ("Plaintiffs' receipt of the unsolicited text messages, sans any other injury, is sufficient to demonstrate injury-in-fact."), cert. denied, 140 S. Ct. 677, 205 L.Ed.2d 440 (2019); *Sussino v. Work Out World Inc.*, 862 F. 3d 346, 352 (3d Cir. 2017) (violations of TCPA independently confer standing without showing of additional harm); *Gadelhak v. AT&T Servs., Inc.*, 950 F. 3d 458, 463 (7th Cir. 2020) ("[U]nwanted text messages can constitute a concrete injury-in-fact for Article III purposes."); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F. 3d 1037, 1043 (9th Cir. 2017) (two unwanted text messages constitute sufficient injury under TCPA); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F. 3d 1301, 1306 (11th Cir. 2020) ("'The receipt of more than one unwanted telemarketing call … is a concrete injury that meets the minimum requirements of Article III standing.'") (quoting *Cordoba v. DIRECTV, LLC*, 942 F. 3d 1259, 1270 (11th Cir. 2019)). Moreover, in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), the U.S. Supreme Court expressly considered and found standing in the context of a plaintiff who brought a putative TCPA. *Melito* also undermine Defendant's assertion that its violations of the TCPA should be ignored because unlawful robo texts are less annoying than illegal automated calls or faxes. *See id.* ("'[T]ext messages, while different in some respects from

the receipt of calls or faxes specifically mentioned in the TCPA, present the same 'nuisance and privacy invasion' envisioned by Congress when it enacted the TCPA.'") (*Melito*, 923 F. 3d at 93); *see also Pederson v. Donald J. Trump for President, Inc.*, --- F. Supp. 3d ----, 2020 WL 3047779, at *3 (D. Minn. June 8, 2020) ("[T]he Court finds no marked difference between the intrusiveness of a call and a text.

Additionally, Plaintiff alleges that: (1) [e]very time my iPhone receives a text message, it uses up some of its battery capacity; (2) charging his iPhone uses either his home's electricity, or his car's gasoline and car battery, and that [r]eceiving incoming text messages therefore costs me money; (3) [r]eceiving text messages also takes up a portion of my iPhone's available memory and storage space, of which his iPhone has only a finite amount suggesting that his iPhone's available memory and storage space was thus reduced in some measurable manner by Pet Supermarket's texts when he did not delete them; (4) receiving a text message requires his iPhone to allocate its memory and processing capabilities to processing and storing the message. Defendant, relying on the findings from the Federal Court, argues that the time wasted from opening and reading a text message is qualitatively different from the time wasted receiving other forms of telemarketing, because [a] cell phone user can continue to use all of the device's functions while it is receiving a text message. Thus, Defendant argues Plaintiff fails to allege an actual injury sufficient to confer on Plaintiff standing to proceed. This Court disagrees. Whether these allegations are sufficient to confer standing on Plaintiff is a factual issue not to be decided on a motion for summary judgment.

Based upon the record before this Court, it is

ORDERED AND ADJUDGED that Plaintiff has standing to pursue his TCPA claims. Therefore, the Defendant's Motion for Summary Judgment based upon lack of standing is **DENIED**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 04/23/21.

WILLIAM THOMAS
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.