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 PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

THIS CAUSE came before the Court on Plaintiff's Motion for Class Certification. After considering the motion, Defendants' oppositions 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 of fact and conclusions of law in support of class certification:

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).

The Plaintiff Has Standing

Standing is a threshold inquiry in any motion for class certification. *See Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d DCA 1997). To have standing, "the plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation." *Ferreiro v. Phila Indem. Ins. Co.*, 928 So. 2d 374, 377 (Fla. 3d DCA 2006). For all the reasons outlined in the Court's order denying the Defendant's Motion for Summary Judgment based upon Plaintiff's lack of standing (fully incorporated into this order without reproduction here), this Court concludes the Plaintiff has standing to pursue claims that allege a violation of his substantive rights under the TCPA. *See Summary Judgment Order entered April 23, 2021*.

The Proposed Class

Plaintiff seeks to certify a class of: All persons who received one or more SMS text messages, sent by or on behalf of Defendant, through the use of the Sweeppea or Responsys systems, which SMS text message (1) was sent to encourage the purchase of property goods, or services or (2) contained any material advertising the commercial availability or quality of any property, goods, or services.

The Requirements of Fla. R. Civ. P. 1.220

Under Rule 1.220(a), the Court must first conclude that: the members are so numerous that separate joinder of each member is impracticable [***numerosity***]; the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class [***commonality***]; the claim or defense of the representative party is typical of the claim or defense of each member of the class [***typicality***]; and the representative party can fairly and adequately protect and represent the interests of each member of the class [***adequacy***].

Numerosity

To satisfy numerosity, the "plaintiff need not allege the exact number and identity of the class members, but must only establish that joinder is impracticable through 'some evidence or reasonable estimate of the number of purported class members.'" *Anderson v. Bank of South, N.A.*, 118 F.R.D. 136, 145 (M.D. Fla. 1987) (quoting *Zeidman v. Jay Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). No specific number and no precise count are needed to sustain the numerosity requirement. *See Toledo v. Hillsborough County Hosp. Auth.*, 747 So. 2d 958, 961 (Fla. 2d DCA 1999). A class of forty people or more is generally considered adequate for such purpose. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). Florida courts have certified classes of homeowners or renters numbering as few as 100. *See Smith v. Glen Cove Apts. Condos. Master Ass'n*, 847 So. 2d 1107, 1109-10 (Fla. 4th DCA 2003); *Wittington Condo. Apts., Inc. v. Braemar Corp.*, 313 So. 2d 463, 468 (Fla. 4th DCA 1974); *cf. Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739, 743 (Fla. 2d DCA 1990) ("We note that classes as small as 25 have fulfilled the numerosity requirement."). Defendant conceded it sent identical text messages

to at least 5,000 consumers. The proposed class meets the numerosity requirement of Rule 1.220(a)(2).

Commonality

The proposed class meets the commonality requirement of Rule 1.220(a)(2). The TCPA is a strict liability statute. *Alea London Ltd. v. Am. Home Sers., Inc*., 638 F. 3d 768, 776 (11th Cir. 2011) ("TCPA is essentially a strict liability statute"). Because compliance with the TCPA is measured by objective criteria, whether Defendant's automated text message marketing complied with the TCPA involves the application of objective criteria to common questions of fact and law that can be determined for all class members.. Commonality is satisfied because each putative class member satisfies Rule 1.220(a)'s commonality requirement in that their claim revolves around Defendant's unlawful course of conduct of sending identical messages in automated fashion which affected all class members in a common manner. Here, the complaint alleges a common course of conduct giving rise to claims by all class members based upon the same legal theories i.e. whether the Defendants violated the TCPA by using an ATDS to text marketing materials to their cellphones without obtaining their prior express written consent.

Defendants argues that the Plaintiff has failed to satisfy its burden of demonstrating that its claims raise questions of law or fact common to those raised by the claims of each member. This Court disagrees. The same legal and factual questions exist for ***each*** putative member of the class, and the resolution of these issues in this action will resolve them for ***all*** putative class members. Common legal and factual issues include whether: (1) Defendant sent non-emergency text messages; (2) the text messages were sent using an ATDS; (3) the text messages introduce an advertisement or constitute telemarketing; (4) Defendant can meet its burden to show it obtained the mandatory prior express written consent; (5) the complained of conduct was knowing or

willful; and (6) Defendant's enrollment contained the requisite clear and conspicuous disclosures. Therefore, the commonality prerequisite is satisfied. *See Colonial Penn v. Magnetic Imaging Systems I, Ltd.,* 694 So. 2d 852, 853 (Fla. 3d DCA 1997) (finding commonality where insureds and medical providers alleged common scheme by insurer to fail to pay statutory interest even though each claim involved different amounts, treatment, and medical providers.); *Love v. Gen. Dev. Corp.,* 555 So. 2d 397, 398 (Fla 3d DCA 1989) ("[h]ere appellants are suing to recover for breaches of identical clauses in their purchase agreements ...[C]lass certification is appropriate because each claim is based on the same essential facts and each complainant seeks enforcement of the same contractual remedy.") This Court finds there are no individualized issues in the present case that would serve as an impediment to certification of a class where the Defendant's decision applies to behavior uniform to all class members. Plaintiff has, therefore, satisfied the commonality requirement of Rule 1.220.

Typicality

The key typicality inquiry is whether the class representative possesses the same legal interest and has endured the same legal injury as the putative class members. *Sosa.,* 73 So. 3d at 91 (citing *Morgan v. Coats,* 33 So. 3d 59, 65 (Fla. 2d DCA 2010). The typicality requirement is satisfied when there is a strong similarity in the legal theories upon which those claims are based and when the claims of the class representative and the class members are not antagonistic to one another. *See Morgan,* 33 So. 3d at 65 ("The typicality requirement may be satisfied despite substantial factual differences... when there is a strong similarity of legal theories."'). In cases alleging violations of the TCPA, typicality is met where "[t]he unnamed class members received text messages identical or similar to those received by Plaintiff and … were caused by the same course of conduct. That is sufficient for typicality." *Stern v. DoCircle, Inc.*, No. SACV 12-2005,

2014 WL 48626, at *5 (C.D. Cal. Jan 29, 2014) (emphasis added); *see also Northrup v. Innov. Health Ins. Partners, LLC,* 329 F.R.D. 443, 452 (M.D. Fla. Jan. 2, 2019). Plaintiff and the proposed class members were each subject to Defendant's allege business practice of sending advertisement and telemarketing text messages en masse using an ATDS, without having obtained anyone's prior express written consent. *See Eldridge v. Pet Supermarket, Inc*., 18-22531-CIV, 2019 WL 4694142 (S.D. Fla. Aug. 21, 2019), at *5. All class members received the same or similar marketing text messages. *See McFadden v. Staley*, 687 So. 2d 357, 359 (Fla. 4th DCA 1997) ("[T]he primary concern in considering … typicality … should be whether the representative's claim arises from the same course of conduct that gave rise to the other claims and whether the claims are based on the same legal theory."). The fact that Plaintiff may have received more or less text messages than other class members is irrelevant, as that does not negate typicality. *See Disc. Sleep of Ocala, LLC v. City of Ocala,* 245 So. 3d 842, 852 (Fla. 5th DCA 2018) ("Mere factual differences between the class representative's claims and the claims of the class members will not defeat typicality") (*citing Sosa*, 73 So. 3d at 114). Moreover, "[t]he fact that a store clerk assisted Plaintiff in [texting "PETS"] is inconsequential because '[e]ven if the fact patterns are unique to each claim, if the class representative and class members experienced the same objectionable conduct, the typicality requirement will be satisfied.'" *Eldridge,* 2019 WL 4694142, at *5 (quoting *Northrup,* 329 F.R.D. at 452.). Rather, "[t]he nexus in this case is that Defendant captured the phone numbers of the Plaintiff and the proposed class members after each of them texted the word 'PETS' to a short-code telephone number" and "typicality exists because Plaintiff and each proposed class member became involved with the same text marketing concern with the submission of the word 'PETS' to Defendant's short code number." *Id.* Therefore, Plaintiff has satisfied Rule 1.220's typicality requirement.

Adequacy

To grant class certification, a trial court must also determine that the class representative satisfies the adequacy requirement of Rule 1.220(a)(4), *i.e.*, it must find that "the representative party can fairly and adequately protect and represent the interests of each member of the class." Fla.R. Civ. P. 1.220(a)(4). "The 'adequacy of representation' requirement is met if the named representatives have interests in common with the proposed class members and the representatives and their qualified attorneys will properly prosecute the class action." *Broin v. Phillips Morris Cos.*, 641 So. 2d 888,892 (Fla. 3d DCA 1994) (quotation omitted). The trial court's inquiry concerning whether the adequacy requirement is satisfied is two-fold. *See City of Tampa v. Addison,* 979 So. 2d 246, 255 (Fla. 2d DCA 2007). The first prong concerns the qualifications, experience and ability of class counsel to conduct the litigation. The second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members. *Id.* Where the Lead Plaintiff seeks the same relief for themselves they seek for all class members – as here – there is no basis to presume that the Lead Plaintiff is likely to "neglect their obligations to the class." *Broin*, 641 So. 2d at 892.

Additionally, Class counsel are experienced in class-action litigation. The proposed class counsel from the law firm Carey Rodriguez Milian Gonya LLP regularly engage in major complex litigation and have been appointed lead class counsel in consumer class action lawsuits, including class actions brought under the TCPA. Accordingly, the adequacy requirements of Rule 1.220(a)(4) are satisfied. Class counsel are experienced in class-action litigation. This Court concludes –without fully itemizing the collective experience of counsel and their firm – that counsel is highly competent and they possess substantial experience litigating class action lawsuits on behalf of aggrieved investors. Counsel is adequately prepared to prosecute this action.

The Proposed Class Also Meets the Requirements Of Rule 1.220(b)(3)

In addition to meeting the requirements of Rule 1.220(a), a party seeking class certification must also satisfy one of three subdivisions of rule 1.220(b). Rule 1.220(b)(3) contains both a "predominance" and "superiority requirement." Rule 1.220(b)(3). Rule 1.220(b)(3) provides in pertinent part that (b)(3) class certification is appropriate when:

> the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

In determining whether to certify a (b)(3) class "the trial court must determine whether Plaintiff can prove [its] own individual case and, by doing so, necessarily prove[s] the cases for each of the [class members] ... [and] [i]f [it] cannot, a class should not be certified." *Miami Auto. Retail, Inc. v. Baldwin*, 97 So. 3d 846 (Fla. 3d DCA 2012)at 855. (Citations omitted). Rule 1.220(b)(3) "requires that common questions of law or fact predominate over any individual questions of separate class members." *Id.* It also requires that "class representation is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* If significant individual issues exist requiring proof from each member of the class, then class representation is not appropriate as the lawsuit becomes unmanageable. *Id.* In order to establish predominance, Plaintiff must "'demonstrate the existence of a reasonable methodology for generalized proof of class-wide impact and damages.'" *InPhyNet Contracting Services, Inc. v. Soria*, 33 So. 3d 766, 771–72 (Fla. 4th DCA 2010). (Citations omitted). The predominance requirement parallels the commonality requirement under rule 1.220(a), however, it is more stringent as it requires that common questions pervade. *Id.* If the putative class representative satisfies the "reasonable

methodology" requirement, he or she has shown that proving the case "necessarily proves the cases of the other class members."

As a practical matter, no individual issues have been identified because it is alleged that all class members, by definition, were sent identical text messages using an ATDS. Thus, the only contested element in Plaintiff's case-in-chief, is a question that applies equally to every class member. The Plaintiff has the same interests as the proposed class Members because he and the class members all received identical automated advertisement and/or telemarketing text messages from Defendant without giving their prior express written consent or receiving disclosures to which they were legally entitled. As such, the Court finds that the issues in the class action subject to generalized proof predominate and pervade over those issues subject to individualize proof.

Florida Rule of Civil Procedure 1.220(b)(3) also requires that "class representation is superior to other available methods for the fair and efficient adjudication of the controversy." The superiority analysis looks at whether the "class action would achieve economies of time, effort and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness." *Discount Sleep of Ocala*, 245 So. 3d at 856 (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 615). Predominance of common issues also has a large impact on the superiority of a class action lawsuit. *See In re Florida Microsoft Antitrust Litigation*, No. 99-27340, 2002 WL 31423620, at *18 (Fla. 11th Cir. Ct. Aug. 26, 2002). Here, because common issues so strongly predominate, the court may begin its superiority analysis with a strong presumption in favor of certification. *See Mohamed v. Am. Motor Co., LLC*, 320 F.R.D. 301, 317 (S.D. Fla. 2017) ("[D]ue to the strong presumption that stems from this finding of predominance, we also conclude that a class action would be the superior method …"). Where, like here, the absent class members' "individual claims are too small to expect them to be adjudicated

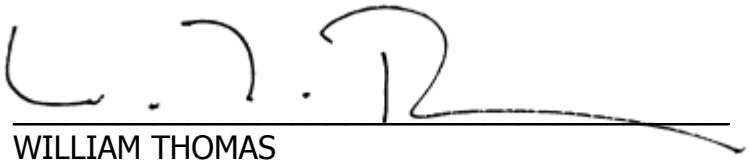
separately," the added efficiency of a class action is at its greatest. *Miami-Dade Expressway Auth. v. Tropical Trailer Leasing, L.L.C.*, 250 So. 3d 751, 757 (Fla. 3d DCA 2018). ,Absent a class action, most Class Members would find the cost of litigating their claims to be prohibitive. The cost of retaining a telecommunications expert, as are routinely retained in TCPA cases, would alone render it nearly impossible for a single claimant to justify filing suit on an individual basis. Moreover, hundreds of thousands of individual actions would be judicially inefficient. Rather, the proposed class action involves several common issues that can be disposed of in a single stroke. *See Krakauer v. Dish Network, L.L.C.*, 925 F. 3d 643, 663 (4th Cir. 2019) ("TCPA claims amenable to class resolution."). Absent a class-wide resolution, it is unlikely that any significant number of class members would obtain redress. For these reasons, a class action is the superior method of adjudicating this controversy. Thus, the Court finds that class action would be clearly superior to all other methods to the fair and efficient adjudication of this controversy.

Based upon all the above findings, it is

ORDERED AND ADJUDGED that the Plaintiff has demonstrated by competent, substantial evidence that this action meets all the requirements for class certification under Rule 1.220. Plaintiff has proved (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation as well as showing, in accordance with Rule 1.220(b)(3), that proof of Plaintiff's cause will necessarily be dispositive of the claims asserted in the Amended Complaint and that Plaintiff has acted and continues to act on grounds generally applicable to all the members of the putative class, thereby making final relief concerning the putative class as a whole appropriate.

Plaintiff, TROY ELDRIDGE, is appointed as Class representative and TROY ELDRIDGE'S attorneys are appointed as Class Counsel.

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.