2024 WL 306200 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-Dade County

Maria Fernanda Soto LEIGUE, Plaintiff(s),
v.
EVERGLADES COLLEGE INC, Defendant(s).

No. 2022-008872-CA-01.
January 3, 2024.

***1** SECTION: CA13

Order Denying Plaintiff's Motion for Class Certification

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Hon. Gina Beovides, Judge.

THIS CAUSE came before the Court on Plaintiff Maria Fernanda Soto Leigue's (“Plaintiff) Motion for Class Certification. After considering the motion, Defendant Everglades College, Inc.'s (Keiser University, “Defendant”) Opposition thereto, Plaintiff's reply, Defendant's surreply, 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:

STATEMENT OF FACTS

This is the second putative class action filed by Plaintiff asserting claims arising from text message communications allegedly sent by Defendant. The first lawsuit was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, on October 29, 2021, and voluntarily dismissed by Plaintiff while the case was proceeding in the Southern District of Florida, United States District Court. The instant action was filed on May 13, 2022, in this Court, removed to the Southern District of Florida, United States District Court, and then remanded to this Court upon stipulation of the parties and after the close of class certification discovery. Plaintiff thereafter filed her motion for class certification.

The basic facts are not in dispute. On January 2, 2020, Plaintiff researched campuses and graduate degrees online and provided her information to Defendant through a Keiser University web form. First Amended Complaint ("FAC"), ¶¶ 23, 56; Soto Leigue Tr. 46:4-15; 48:17-50:7. & Ex. 1. The online form she submitted stated: "By clicking the 'Request Info' button, I consent to calls, emails and texts from Keiser University at the phone number that I have provided and some of these calls may occur from automated technology." Soto Leigue Tr. Ex. 1; FAC ¶ 56. At first, Plaintiff "was genuinely interested in learning more about the courses." Soto Leigue Tr. 58:9-59:25. With the exception of the first text message regarding a meeting, the delivered text messages provided enrollment information and class start dates. For example: "Hi It's Ines Melendez @ Keiser University Classes starting 8/30/2021 You still have time to enroll & process your FA Call @ 305-596-2226 or text me & update." Coleman Tr. Ex. 12 (Keiser00021).

On October 15, 2020, Plaintiff replied to one of the text messages with the word "Stop." Coleman Tr. Ex. 12 (Keiser00021). Plaintiff did not receive another text message from Keiser again until August 6, 2021, at which time she received four text messages in the span of a few weeks. *Id.* (showing messages as "successfully delivered"). After four text messages were received by Plaintiff in that month, Plaintiff replied on September 23, 2021, with the words, "Please remove me from your contact list." *Id.* Plaintiff received one more text message two weeks later but received no text messages after that. *Id.*

***2** Plaintiff seeks to certify and represent two classes of persons alleging claims for statutory penalties under the Florida Telephone Solicitation Act, Fla. Stat. § 501.059(10)(a) for violations of Fla. Stat. §§ 501.059(8)(a) & 501.059(5) ("FTSA"). The FTSA was amended by the legislature on May 25, 2023, to clarify the scope of certain unsolicited telephone communications. Before its amendment, and at the time Plaintiff filed her Complaint, Section 501.059(8)(a) stated: "A person may not make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party."

Fla. Stat. § 501.059(5) stated: "A telephone solicitor or other person may not initiate an outbound telephone call, text message, or voicemail transmission to a consumer, business, or donor or potential donor who has previously communicated to the telephone solicitor or other person that he or she does not wish to receive an outbound telephone call, text message, or voicemail transmission ...." "Telephone solicitor" is in turn defined as a person who makes a "telephone sales call." Fla. Stat. § 501.059(1)(i).

For purposes of both sections, "telephonic sales call" means "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services." Fla. Stat. § 501.059(1)(j); FAC ¶ 73. The Plaintiff bears the burden of proving that the communications at issue fall within the definition of a "telephone sales call" and for purposes of the second class, that the consumer "has previously communicated…that he or she does not wish to receive an outbound…text message."

Plaintiff moves to certify the following two classes:

No Consent Class: All persons within Florida, (1) who were sent more than one text message regarding Defendant's property, goods and/or services, (2) between July 1, 2021, and December 2, 2021, (3) using the same equipment utilized to text message Plaintiff, and (3) where those messages were tagged as "message successfully delivered" within the transmission logs produced by Textlane.

Internal Do Not Call Class: All persons within Florida, (1) who were sent one or more text messages; (2) between July 1, 2021 through the date of filing the Complaint in this case; (3) after communicating to Defendant that they do not wish to receive future text messages; and (4) where those text messages were tagged as "Message successfully delivered" within the TextLane transmission logs.

Defendant maintains that Plaintiff lacks standing and fails to meet the procedural requirements for class certification. For reasons explained below, this Court agrees with the Defendant.

ANALYSIS

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 Indent. Ins. Co.*, 928 So. 2d 374, 377 (Fla. 3d DCA 2006). For the reasons outlined in the Defendant's opposition papers and at oral argument in court at the hearing (fully incorporated into this order without reproduction here), this Court concludes the Defendant properly raised a standing challenge and the Plaintiff lacks standing under the analysis set forth by the Third District Court of Appeal in *Pet Supermarket, Inc. v. Eldridge*, 360 So. 3d 1201 (Fla. 3d DCA 2023). This court finds that it is bound by the decision in *Eldridge.* Plaintiff argues that *Eldridge* relied in part on the Eleventh Circuit's holding in *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019), which was overturned by *Drazen v. Pinto*, which held: "Both harms reflect an intrusion into the peace and quiet in a realm that is private and personal. A plaintiff who receives an unwanted, illegal text message suffers a concrete injury. Because Drazen has endured a concrete injury, we remand this matter to the panel to consider the rest of the appeal." 74 F.4th 1336, 1339 (11th Cir. 2023). They further argue that in *Muccio v. Glob. Motivation, Inc.,* the Eleventh Circuit held that the receipt of a text message in violation of the FTSA is sufficient to satisfy the more stringent Article III standing requirement. 2023 U.S. App. LEXIS 22436 (11th Cir. Aug. 25, 2023). These arguments, however, are more appropriate to raise to the appellate court as *Eldridge* remains good law. Accordingly, Plaintiff may not pursue claims that allege a violation of her substantive rights under the FTSA, including as class representative.

***3** Because both parties fully briefed and argued Plaintiff's motion for class certification, the court will address these additional arguments.

Class Action Requirements

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***].

"To obtain class certification, the proponent of class certification carries the burden of pleading and proving the elements required under rule 1.220." *Miami Auto. Retail, Inc. v. Baldwin,* 97 So. 3d 846, 851 (Fla. 3d DCA 2012). The "burden is only met if there is a sound basis in fact, not supposition, because the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit." *Miami Auto. Retail*, 97 So. 3d at 851 (quotations omitted); *Binder v. Rainbow Medical Inc.,* 831 So. 2d 254, 255-56 (Fla. 3d DCA 2002).

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). However, "[n]umerosity … requires a class definition that allows a court to reasonably ascertain [through objective criteria] if a person or entity is a member of the class." *Canal Ins. Co. v. Gibraltar Budget Plan, Inc.*, 41 So. 3d 375, 377 (Fla. 4th DCA 2010) (quoting Fla. R. Civ. P. 1.220(a)(1)); *BJ's Wholesale Club, Inc. v. Bugliaro*, 273 So. 3d 1119, 1121 (Fla. 3d DCA 2019).

The No Consent Class consists of approximately 42,590 Class Members and the Internal Do-Not-Call Class consists of approximately 464 Class Members. The Class Members are thus so numerous that joinder of all members is impracticable. While Plaintiff cannot definitely state that all class members are located in Florida, sufficient evidence has been presented to meet the numerosity requirement of Rule 1.220(a)(a2). *See Exhibit 13.*

the numerosity requirement of Rule 1.220(a)(2).

Commonality

The Defendant combines the commonality and typicality analysis in its Opposition and argued at the hearing that a single common question of law or fact amongst the class members is insufficient to satisfy the commonality requirement of Rule 1.220(a)(2), which requires at least two common questions. Here, Defendant provided evidence that prospective and existing student claims do not revolve around a uniform course of conduct of sending identical messages in automated fashion which affected all class members in a common manner. The Court agrees. And because this Court finds there are individualized issues in the present case that serve as an obstacle to certification of the classes, the Court addresses the commonality issues *infra* under Rule 1.220(b)(3).

Typicality

***4** 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). Plaintiff argues that mere factual differences do not defeat typicality where the same legal theories and elements of liability under the FTSA are involved. *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."). However, "a factual difference in the representative's claims will render those claims atypical if the factual position of the class representative 'markedly differs from that of other members of the class.'" *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 671 (S.D. Fla. 2009). For example, "[t]ypicality may be destroyed by the existence of unique defenses that would preoccupy the named plaintiff to the detriment of the interests of absent class members." *Miami Auto. Retail*, 97 So. 3d at 854 (quotations omitted). In cases alleging violations of the TCPA, for example, typicality may be defeated where unique defenses pose impediments to a named plaintiff's interests. *Hirsch v. USHealth Advisors*, No. 4:18-CV-00245-P, 2020 WL 7186380, at *1 (N.D. Tex. Dec. 7, 2020); *Wesley v. Snap Finance, LLC*, 339 F.R.D. 277 (D. Utah 2021). For the reasons argued by Defendant, typicality is defeated in that Plaintiff lacks jurisdictional standing in this court for lack of judiciable injury-in-fact.

Accordingly, Plaintiff has not satisfied Rule 1.220'*s t*ypicality 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.* Plaintiff's standing issues can affect adequacy. *See The Club At Admiral's Cove, Inc. v. Skigen*, 879 So. 2d 57, 60 (Fla. 4th DCA 2004) ("Without the requisite standing, the [plaintiffs] cannot fairly and adequately represent the class."). Moreover, courts in this circuit consider undue delay in seeking class certification as evidence that putative class counsel will not adequately represent the interests of the putative class. *Ramos-Barrientos v.* Page 19 131803935 *Bland,* No. CV606-089, 2009 U.S. Dist. 107013, at *8-9 (S.D. Ga. Nov. 17, 2009).

Given that Plaintiff lacks standing, and the procedural posture and history of this action as set forth in the record, the Court finds that Plaintiff has failed to satisfy the adequacy requirement under Rule 1.220(a)(4).

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). Plaintiff moves to certify the classes for statutory penalties under Rule 1.220(b)(3), which contains both a "predominance" and "superiority requirement." 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.

***5** 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,* 97 So. 3d at 855 (citations omitted). 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." *Id.*

Plaintiffs primary evidence in support of the predominance requirement is the supplemental declaration of her expert, Aaron Woolfson, filed as Exhibit I to her motion. Defendant has challenged the admissibility and reliability of the methodology, findings and conclusions in the report in Mr. Woolfson's declaration. The admissibility of expert testimony is governed by section 90.702 of the Florida Evidence Code and *Daubert v. Merrell Dow Pharm*., Inc., 509 U.S. 579 (1993). The party

offering the expert testimony bears the burden to lay a proper foundation for its admission and must prove its admissibility by a preponderance of the evidence. *See* *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1268 (Fla. 2003) ("The proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology."). When expert testimony is proffered, "the trial court must … assess whether the reasoning or methodology underlying the testimony is scientifically valid and … whether that reasoning or methodology properly can be applied to the facts in issue." *Baan v. Columbia County*, 180 So. 3d 1127, 1133 (Fla. 1st DCA 2015) (internal quotations and citation omitted).

The Court has reviewed and evaluated the supplemental declaration of Mr. Woolfson, the rebuttal expert declaration of Mr. Julian Ackert, the declarations of Christopher Coleman and Ana Tagvoryan, and in so doing finds that Plaintiff's report is not based on sufficient facts or data, the methodology is not sufficiently reliable, and Mr. Woolfson has not reliably applied the methodology to the data or facts in issue. By way of example, and as more fully argued by Defendant, the methodology and conclusions drawn by Mr. Woolfson with respect to identifying and determining "telephone sales calls" and objective "requests not to receive future text messages" are insufficiently connected to the facts of the case and the data, appear incomplete, and cannot be objectively tested. *See* *Royal Caribbean*, 320 So. 3d at 291 (finding an expert's affidavit inadmissible since it included conclusory statements and failed to support his opinion with any type of testing). In addition, Defendant has provided affirmative evidence that Plaintiff's class evidence put forth through Mr. Woolfson include individualized issues regarding: (1) whether each of the 173,401 plus 1,138 text messages at issue fall under the definition of a "telephonic sales call" for purposes of both claims, respectively; [1] (2) whether the members in the second class "communicated that they no longer wish to receive text message" solicitations, but still received them; and (3) whether the text recipients had existing or prior enrollment agreements that would compel their claims to arbitration. Because Defendant has shown that the challenged calls were not uniform in purpose, "to determine the purpose of each call … the trier of fact must evaluate evidence … about the content of each call and the events that preceded it— a need inconsistent with class treatment." *Newhart v. Quicken Loans Inc.,* 2016 WL 7118998, *4 (S.D. Fla. October 12, 2016) (emphasis added). *See* *Jacobs v. Quicken Loans, Inc.,* 2017 WL 4838567, *3 (S.D. Fla. October 19, 2017) (denying certification in TCPA case where "the purposes of the telephone calls varied," and often "did not constitute telemarketing"); *Wakefield v. ViSalus*, 2017 WL 11510073 (D. Or. 2017) (denying certification under TCPA of internal do-not-call class because plaintiff failed to present any common evidence that certain individuals made such a request (to stop calling), and, therefore, this issue cannot be resolved on a class-wide basis due to the individual nature of the inquiry); *Southwell v. Mortgage Investors,* 2014 WL 3956699, at *3-4 (W.D. Wash. 2014) (denying certification of an internal do not call class for lack of sufficient evidence). The Court finds Plaintiff has not presented "substantial facts" to satisfy predominance. *Sosa*, 73 So. 3d at 105 (the trial court's factual findings must be based on competent, substantial evidence in the record).

***6** 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 do not predominate, the Court cannot find that superiority is satisfied. In addition, the individualized issues to be determined at trial would create substantial difficulties in management of the class action. Fla. R. Civ. P. 1.220(b)(3).

Applicability of the Amendments to the FTSA to the Class Claims

The Court finds that Plaintiff has failed to satisfy her burden of pleading and proving the elements required for class certification under Rule 1.220 as it relates to the FTSA provisions that remained unchanged between the prior and new versions of the FTSA. Therefore, the Court need not address the applicability of the FTSA amendments to the class certification issues. However, because both parties rely on the applicability of the amendments in arguing their respective positions, the Court addresses it briefly here.

First, the Court finds that Plaintiff has not sufficiently challenged the constitutionality of applying the FTSA amendment regarding its private right of action, found in Section 401.059(10)(c), to the class claims. Florida's Rules of Civil Procedure require "prompt" notice to the state Attorney General of a challenge to the constitutionality of a state statute by either certified or registered mail. Fla. R. Civ. P. 1.071. "Prompt" for purposes of Rule 1.071 is determined on a case-by-case basis. *In re 1975 Chevrolet Corvette,* 424 So. 3d 152, 153 (Fla. 5th DCA 1982). However, the state needs a "meaningful opportunity to intervene and be heard." *Brinkmann v. Francois*, 184 So.3d 504, 507 (Fla. 2016). "Failure to comply with rule 1.071 bars consideration of a claim that would result in the striking of a state statute as unconstitutional." *Lee Memorial Health System v. Progressive Select Ins. Co*., 260 So. 3d 1038, 1042 (Fla. 2018); *Ramie Int'l Corp. v. Mami-Dade Cnty.,* WL 6852519 at *3 (Fla. 3d DCA Oct. 18, 2023); *The Fla. Atlantic Univ. Bd. of Trustees v. Harbor Branch Oceanographic Institute Foundation, Inc.,* WL 3566658 at *17 (Fla. 4th DCA May 19, 2022); *Paylan v. Fla. Dept. of Health,* WL 17669431 at *3 (Fla. 1st DCA Nov. 17, 2022) (the remedy for failure to notify the AG of a constitutional challenge is non-consideration of the challenge). In other words, courts are precluded from considering constitutional challenges when the challenging party fails to demonstrate it complied with procedural requirements. *Ramie,* WL 6852519 at *3.

In this case, the Plaintiff raised the issue of constitutionality of the amendments to the private right of action under FTSA in her Reply in Support of Motion for Class Certification filed on June 20, 2023. The hearing on the Motion for Class Certification was held on Monday, December 11, 2023. Plaintiff did not file her Notice of Constitutional Challenge until after the hearing, or on December 13, 2023. The notice does not state whether the Attorney General was served in compliance with Fla. R. Civ. P. 1.071. Even if the Attorney General had been served with the notice, the Attorney General would not have had a meaningful opportunity to intervene and be heard at the December 11, 2023, hearing. Accordingly, the Court will not consider the constitutional challenge of Plaintiff.

CONCLUSION

***7** Based upon all the above findings, it is

ORDERED AND ADJUDGED that the Motion for Class certification is DENIED. Plaintiff lacks standing Plaintiff has not demonstrated by competent, substantial evidence that this action meets all the requirements for class certification under Rule 1.220. While Plaintiff met the numerosity requirement, the Plaintiff has not proved (1) commonality; (2) typicality; or (3) adequacy of representation; and has not shown, 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 classes, thereby making final relief concerning the putative class as a whole appropriate.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 3rd day of January. 2024.

<<signature>>

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Hon. Gina Beovides

CIRCUIT COURT JUDGE

Electronically Signed

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Physically Served:

Footnotes

1 Mr. Woolfson's reference to "marketing" messages and his example of a text message "template" that includes the words "are you ready to get into the program of your dreams" further complicates the reliability of his opinions because the FTSA does not use the term "marketing," Mr. Woolfson does not define it, and Plaintiff herself received messages with contents different than the example identified by Mr. Woolfson. Ex. 8 to Woolfson Supp. Decl. at p.6.

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