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

MARIAM GRIGORIAN,
individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

FCA US, LLC, a Delaware Limited
Liability Company

Defendant.
_____/

CASE NO. 2021-000976-CA-44

CLASS ACTION

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the court on Defendant, FCA US, LLC, Motion for Summary Judgment. The Court having reviewed the motion, response, and having heard argument of counsel and being otherwise advised in the premises, the Court makes the following findings:

Statement of Relevant Facts

Plaintiff pleads claims on behalf of a nationwide class and bases them on alleged violations of the TCPA. Plaintiff's claims are premised entirely on allegations of FCA US having "transmitted" a single "36 second" "prerecorded voice call" to her cell phone on July 17, 2018, while she "was at home studying for the Florida Bar exam." According to Plaintiff, these facts constitute a violation of 47 U.S.C. § 227(b)(1) and its regulations, the section of the TCPA which declares it unlawful to make a "call" to a cellular telephone using an artificial or prerecorded voice without the recipient's consent. Plaintiff pleads her claims on behalf of a putative class of "[a]ll persons within the United States" who "received a call using an artificial or prerecorded voice … advertising, promoting, and/or marketing Defendant's Chrysler Pacifica Hybrid minivan." She

seeks $500 in statutory damages "per violation" and treble statutory damages under 28 U.S.C. § 227(b)(3).

Originally, Plaintiff filed its claims in federal court. As here, in federal court, Plaintiff pleaded claims for alleged violations of 47 U.S.C. § 227(b)(1) and its regulations. These claims were based entirely on Plaintiff's receipt of the exact same July 17, 2018 voicemail that underlies her claims here. During the federal litigation, the federal court convened an evidentiary hearing to determine whether Plaintiff had standing. The federal court ultimately dismissed all of Plaintiff's claims for lack of standing. Plaintiff appealed the dismissal of her TCPA claims to the Eleventh Circuit. That court affirmed the dismissal for lack of standing. The Defendant now argues that the Plaintiff's claims in the instant action are barred because---in reaching its decision that it did not have standing---the federal court also concluded that the record evidence was insufficient to establish that Plaintiff had suffered a legally cognizable injury-in-fact to support a TCPA claim.

Summary Judgment Standard

Pursuant to rule 1.150, summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.150(1). Rule 1.150 was amended effective on May 1, 2021 "adopting the text of federal rule 56 almost verbatim." *See In re: Amendments to Florida Rule of Civil Procedure 1.150*, SC20-1490, 2021 WL 1684095 at *3 (Fla. Apr. 29, 2021). As such, rule 1.150 "shall be construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 150(a).

The initial burden is on the movant to demonstrate the absence of a "genuine, triable issue of material fact." *See* Fla. R. Civ. P. 1.150(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The substantive law applicable to the dispute will identify which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As such, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Once the moving party has met its initial burden, Rule [1.150] requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). In other words, the nonmoving party must come forward with sufficient evidence supporting the existence of a genuine triable issue of material fact. *See Anderson*, 477 U.S. at 248-249; *Celotex*, 477 U.S. at 327. If a dispute about a material fact is genuine, meaning, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party or the court could find in favor of the nonmoving party, summary judgment is not proper. *Anderson*, 477 U.S. at 248-49. The Court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but it is limited to determine whether there is a genuine issue for trial." *Id.* at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" or for the court to render a judgment in favor of the non-movant. *See id.* When the evidence is merely colorable or is not significantly probative and "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment may be granted. *See id.* at 249-250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Inferences to be drawn from the underlying facts and the record must be viewed in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. 574, 587 (1986).

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).

Plaintiff has Standing

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. See *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. She 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 Defendant, FCA, US, 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.*

Admittedly, the district court and Eleventh Circuit determined they did not have jurisdiction under Article III to adjudicate the merits of Plaintiff's claim. However, Article III is not the source of this Court's jurisdiction. This Court has jurisdiction under ***Florida***, not federal, jurisdictional limits. *See ASARCO v. Kadish*, 490 U.S. 605,617 (1989), ("[T]he constraints of Article III do not apply to state courts . . . .").

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) (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 (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.

The federal court dismissed the case for lack of Article III standing, meaning it found it did not have jurisdiction to address the merits. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) ("To reach the merits of a case, an Article III court must have jurisdiction."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (rejecting the doctrine of "hypothetical jurisdiction," in which a court assumes jurisdiction for the purpose of reaching the merits, because the practice "carries the courts beyond the bounds of authorized judicial action."). To the extent the federal judge purported to address the merits (which this court finds it did not), such opinion would be "beyond the bounds of authorized judicial action" and is of no import here. *See also Stalley ex rel. U.S v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1234–35 (11th Cir. 2008) (explaining that a dismissal for lack of standing was necessarily without prejudice because the court lacked subject matter jurisdiction and thus could not reach the merits of the claim); Restatement (Second) of Judgments § 20(1)(a) (1982) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for non-joinder or misjoinder of parties."); *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W. 3d 604, 612 (Mo. 2006) (en banc) ("Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes.").

Defendant seems to advance an argument that the "zone of interest" doctrine bars this subsequent litigation in state court. This Court disagrees. The "zone of interest" doctrine has no application in suits between private parties and is relevant only in the context of challenges to ***state*** action. *See, e.g.*, *Am. Postal Workers Union v. Indep. Postal Sys., Inc.*, 481 F. 2d 90, 92 (6th Cir. 1973) (explaining that the zone-of-interest test "has relevance only where the action under attack is that of a governmental agency," not in suits "between private parties.").

Additionally, collateral estoppel does not bar this subsequent action. It is universally understood that "dismissal for want of jurisdiction bars access to federal courts and is res judicata only of the lack of a federal court's power to act . . . [and] the rejected suitor may reassert his claim in any competent court." *Daigle v. Opelousas Health Care, Inc*., 774 F. 2d 1344, 1348 (5th Cir. 1985); *see also Polo v. Innoventions Int'l LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016) ("[A] failure of federal subject-matter jurisdiction means only that the federal courts have no power to adjudicate…State courts are not bound by the constraints of Article III.").

Additionally, the claims currently before this Court are not barred by claim or issue preclusion. Claim preclusion require final judgment on the merits. *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F. 2d 1544, 1550 (11th Cir. 1990) (one of the elements of claim preclusion is that "the judgment must be final and, on the merits.") In the instant case, there was no final judgment on the merits. *See* Restatement (Second) of Judgments § 20(1)(a) ("A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for non-joinder or mis-joinder of parties; *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F. 3d 1366, 1370 (Fed. Cir. 2003) (noting that ***claim*** preclusion does not apply where dismissal was for lack of standing); *Cutler v. Hayes*, 818 F. 2d 879 (D.C. Cir. 1987) (Article III

standing "ranks amongst those questions of jurisdiction and justiciability not involving an adjudication on the merits, whose disposition will not bar re-litigation of the cause of action originally asserted" and only precludes re-litigation "of the ***precise issues*** of jurisdiction"). The federal court did not include litigation over whether Florida ***state*** courts have jurisdiction under Florida ***state*** jurisdictional limits and and did not include whether Florida state courts have jurisdiction under Florida state jurisdictional limits and as such, no decision was rendered as to the issue that is currently before this Court. Because the federal court concluded it did not have jurisdiction under Article III, the federal court could not reach the merits of Plaintiff's claim under the TCPA. The state claims are not barred by claim or issue preclusion. Therefore, it is

ORDERED AND ADJUDGED that Defendant's motion for Summary Judgment is **DENIED**. A federal court's lack of jurisdiction under Article III of the United States Constitution does not preclude this Court from exercising jurisdiction pursuant to its own state's constitution. The federal dismissal without prejudice for lack of jurisdiction does not prevent the Plaintiff from litigating the merits of its claim before this Court.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 07/12/21.

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.