UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 2:19-cv-00403-SPC-MRM

DARYL TEBLUM,
individually and on behalf of all
others similarly situated,

Plaintiff,

CLASS ACTION

JURY TRIAL DEMANDED

v.

PHYSICIAN COMPASSIONATE CARE LLC
d/b/a DOCMJ,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Daryl Teblum hereby responds in opposition to Defendant Physician Compassionate Care LLC's, d/b/a DocMJ ("DocMJ"), Motion to Dismiss Plaintiff's First Amended Class Action Complaint (the "Motion"), [DE 40], and in support states:

I. INTRODUCTION

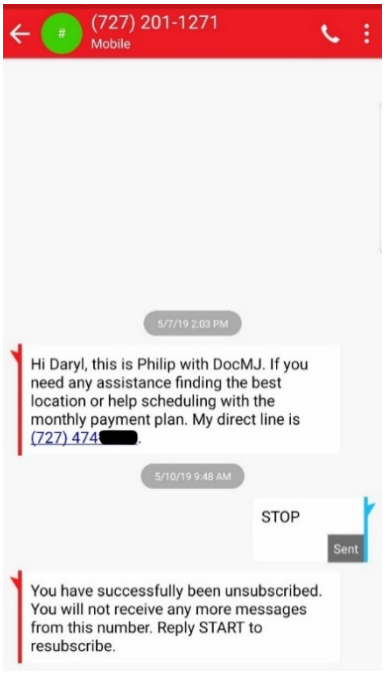
While heading to pick up his children from school, Plaintiff heard the ring of his phone notifying him that he had a new text message. He interrupted his activities to check his phone, only to realize, after spending approximately ten seconds reading the message, that it was an automated marketing text from a company to which he did not give consent. Even though Plaintiff has been on the Do Not Call list since 2011 to protect his privacy, it did not stop Defendant from marketing directly to his cell phone using automated technology. Aggravated by the call, Plaintiff then spent time investigating the issue and speaking to his attorneys regarding it. Replying "stop" to ensure no further messages were sent, Plaintiff then received *another* unwanted text message notifying him that he was unsubscribed from marketing he had never subscribed to in the first place.

According to Defendant, there is no harm here. In Defendant's view, it is free to send automated marketing text messages as it pleases and consumers have no recourse. Relying primarily on an expansion of the holding in *Salcedo* and a number of distinguishable cases, Defendant argues that the injury it caused to Plaintiff does not rise to the "identifiable trifle" Plaintiff needs for standing.

Contrary to Defendant's belief, the TCPA was enacted to stop exactly this kind of activity by companies like Defendant. Furthermore, Plaintiff has adequately alleged the harms necessary to demonstrate that Article III, and the actual holding in *Salcedo*, are satisfied. For the following reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion and allow him to pursue his legal rights under the TCPA.

II. FACTS

On May 7, 2019, Defendant caused the following automated text messages to be transmitted to Plaintiff's cellular telephone number ending in 0363 ("0363 Number"):



[1]

[1] Plaintiff has redacted the last four digits of the Salesman's direct phone number.

Amd. Compl., [DE 38], at ¶ 18.

Defendant's text messages caused Plaintiff's phone to audibly ring. Amd. Compl., [DE 38], at ¶ 42. Plaintiff estimates that he has spent approximately ten seconds reviewing Defendant's first unwanted text message. *Id.* at ¶ 40. Additionally, Plaintiff is the primary caretaker for his children and he received the first text message while he was in the process of picking up his children from school which caused him extreme aggravation. *Id.* at ¶ 41.

Plaintiff is so substantially aggravated by unwanted phone communications like the one herein that he regularly checks the Do Not Call Registry to verify that the 0363 Number continues to be listed, which it has since June 30, 2011. *Id.* at ¶ 43. In addition to the initial time wasted, Plaintiff wasted at least fifteen minutes discussing this text message with and retaining counsel for this case in order to stop Defendant's unwanted calls. *Id*. at ¶ 44.

Plaintiff also wasted time responding "STOP" to the message so that he would no longer receive messages from Defendant. *Id.* at ¶ 45. After he replied "STOP," Plaintiff received another message confirming that he would no longer be contacted. He spent additional time reviewing this reply. *Id.* at ¶ 46. In all, Defendant's violations of the TCPA caused Plaintiff to spend more than fifteen minutes in addressing and attempting to stop Defendant's solicitations. This time was spent while Plaintiff was at his home or with his children and while he could have been pursuing other personal activities. *Id.* at ¶ 47.

Furthermore, Defendant's text messages took up memory space on Plaintiff's cellular telephone, with each message taking up approximately 190 bytes. *Id.* at ¶ 48. The cumulative effect of unsolicited text messages like Defendant's poses a real risk of ultimately rendering the phone unusable for text messaging purposes as a result of the phone's memory being taken up. *Id.* at ¶ 48.

III. LEGAL STANDARD

As the Eleventh Circuit explained in *Lawrence v. Dunbar*, Rule 12(b)(1) challenges to

subject matter jurisdiction can be either "facial" or "factual":

> Facial attacks on the complaint require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.

919 F.2d 1525, 1528-29 (11th Cir. 1990).

Facial and factual attacks are subject to different standards. "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the allegations of the complaint to be true." *Id*. at 1529. Here, Defendant has raised a facial attack to Plaintiff's Complaint. Thus, in ruling on Defendant's Motion to Dismiss, this Court should accept all allegations of Plaintiff's pleading as true.

IV. MEMORANDUM OF LAW

A. ***Salcedo* is a Narrow Decision and Inapplicable to this Case.**

Defendant asserts that the holding in *Salcedo* generally bars text message TCPA cases. *See e.g.* Motion at pg. 22 ("[The Eleventh Circuit's] decision to impose a 'concrete' injury-in-fact requirement for single text message cases was not limited to the particular allegations of that case."). In reality, as this Court recognized in denying Defendant's attempt to prohibit Plaintiff from amending his complaint, "it appears Salcedo was a narrow holding focusing on the particular allegations set forth by the plaintiff in that case." [DE 37] at pg. 10 (*citing Salcedo v. Hanna,* 936 F.3d 1162, 1174 (11th Cir. 2019)).

The Court is correct in its assessment that *Salcedo* is "narrow." *Salcedo*, fairly read, only addressed the specific allegations of the complaint under review. *See, e.g.*, *Salcedo,* 936 F.3d at 1172, ("In sum, we find that history and the judgment of Congress do not support finding concrete injury in **Salcedo's allegations**.") (emphasis added); *see also id.* at 1174 (Jill Pryor, J., concurring in the judgment only) ("I write separately to emphasize my understanding that the majority's holding is narrow and the

conclusion that Salcedo lacks standing is driven by the allegations in his complaint that Hanna sent him only one text message.").

To that effect, in a section titled "Quality, not Quantity," the Court in Salcedo stated, "[t]here is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Salcedo,* 936 F.3d at 1172-1173 (*citing Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). It went on to explain that, "To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes." *Id*. at 1173. In regards to time, the Eleventh Circuit stated, "on this point the judgment of Congress sheds a final ray of light. The TCPA instructs the FCC to establish telemarketing standards that include releasing the called party's line within five seconds of a hang-up, demonstrating that, on the margin, Congress does not view tying up a phone line for five seconds as a serious intrusion." *Id*.

Furthermore, in its opinion, the Eleventh Circuit noted that Salcedo "alleges time wasted only generally," when describing receipt of the text message. *Id*. at 1168. In other words, Salcedo's complaint did not contain "a specific time allegation" regarding how long he spent reading or addressing the text message. *Id*. However, the Eleventh Circuit made clear that demonstrating "more than a few seconds" of "wasted time can state a concrete harm for standing purposes." *Id*. at 1173. In fact, the Eleventh Circuit made clear that such "intangible and ephemeral" harms may be sufficient to support a finding of injury. *Id.*

After the holding in *Salcedo*, Congress amended the TCPA by passing the Pallone-Thune TRACED Act. S. 151, 116th Cong., §10(a) (2019), previously submitted at [DE 35-1]. As this Court rightfully held previously, the TRACED Act does not change its responsibilities under Article III. *See* [DE 37] at pg. 6 (stating, "the TRACED Act does not alter the standing analysis because the exercise of the court's jurisdiction falls within the Constitutional grant of judicial power."). What the TRACED Act does do, however, is show Congress is concerned about the injuries caused by text messages, not

just injuries caused by phone calls. *See, e.g.,* Traced Act, [DE 35-1], at §10(a) (requiring regulations for "a call made or a text message sent in violation of subsection [47 U.S.C. § 227(b)]"). To that end, the current version of the TCPA as amended by the TRACED Act contains a definition for "text message" at 47 U.S.C. § 227(e)(8). This definition, and indeed any mention of text messages in the TCPA, **did not exist at the time** *Salcedo* was decided:

> We first note what Congress has said in the TCPA's provisions and findings about harms from telemarketing via text message generally: **nothing**. The TCPA is completely silent on the subject of unsolicited text messages. Of course, text messaging in its current form did not exist in 1991 when the TCPA was enacted, but Congress has amended the statute several times since then without adding text messaging to the categories of restricted telemarketing.

Salcedo v. Hanna, 936 F.3d 1162, 1168-69 (11th Cir. 2019) (emphasis in original).

While the Court is correct that the TRACED Act does not override its Constitutional obligations, "[it should] consider the judgment of Congress when assessing standing because 'Congress is well positioned to identify intangible harms that meet minimum Article III requirements.'" *Salcedo*, 936 F.3d at 1170 (*quoting Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). The Eleventh Circuit in *Salcedo* did not have the benefit of Congress' judgment when it held that the allegations in that complaint were insufficient. *See Salcedo*, 936 F.3d at 1170 ("The judgment of Congress, then, provides little support for finding that Salcedo's allegations state a concrete injury in fact."). Subsequent to *Salcedo,* Congress has shown that in its judgement text messages are the type of communications that cause the intangible harms required by Article III. This Court can consider that judgment when deciding whether the allegations here are sufficient to show standing.

B. Plaintiff has Alleged Injuries Sufficient for Article III Standing.

Defendant's argument – that it did not harm Plaintiff enough for purposes of Article III standing – has been squarely rejected by the Supreme Court. Specifically, "[t]he Supreme Court has rejected than an injury must be 'significant'; a small injury, 'an identifiable trifle,' is sufficient to confer

standing." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)); *see also Salcedo*. 936 F.3d at 1167 ("A concrete injury need be only an identifiable trifle.") (quotation marks and citation removed). Plaintiff's allegations are more than the "identifiable trifle" required.

First, unlike *Salcedo* where the plaintiff only received a single text message, Plaintiff here received two text messages from Defendant. *See* First Amended Complaint at ¶¶ 18; 29; 46. Defendant, in a blame the victim approach, argues that the Court should ignore the second text message because "confirmatory texts sent in response to opt-out requests do not violate the TCPA." *See Mot.* at pg. 18. Defendant's conclusion that this text is not actionable under the TCPA is incorrect. Defendant relies on *Fenwick v. Orthopedic Specialty Inst. PLLC,* for its argument that the Court should ignore the second text. *Mot.* at pg. 18 (citing *Fenwick v. Orthopedic Specialty Inst. PLLC*, No. 0:19-CV-62290, 2020 U.S. Dist. LEXIS 21566, at *10 (S.D. Fla. Feb. 4, 2020)). *Fenwick*, in turn, relied on *Zemel v. CSC Holdings LLC*, in which the court examined a 2012 FCC declaratory ruling to conclude that "one-time texts confirming a request that no further text messages be sent do[] not violate the [TCPA]." *Zemel v. CSC Holdings LLC*, Civil Action No. 18-2340-BRM-DEA, 2018 U.S. Dist. LEXIS 201917, at *14 (D.N.J. Nov. 29, 2018) (Citing In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C.R. 15391, 15394 (2012)).

However, the FCC made clear in that declaratory ruling that these confirmation text messages do not violate the TCPA **only when the entity sending them already had "prior express consent"** to send messages:

> Our ruling will allow organizations that send text messages to consumers **from whom they have obtained prior express consent** to continue the practice of sending a final, one-time text to confirm receipt of a consumer's opt-out request[.] We emphasize that our ruling applies **only when the sender of text messages has obtained prior express consent, as required by the TCPA and Commission rules**, from the consumer to be sent text messages using an automatic telephone dialing system or "autodialer."

27 F.C.C.R. 15391, 15391 (2012) (emphasis added); see also *id.* at n. 3 (stating, "The Commission requires prior express consent to be obtained in writing for autodialed telemarketing calls made to wireless numbers."). Here, Plaintiff did not give Defendant prior express consent to receive any communications using an autodialer. Amnd. Compl. at ¶ 24. Thus, this second text is actionable under the TCPA, regardless of whether it is just a confirmation of Plaintiff's request to stop communications:

> This argument lacks merit. The "safe harbor" for confirmatory texts on which [defendant] relies is applicable only when a confirmatory message is sent "to consumers from whom [the sender] ha[s] obtained prior express consent" to subsequently "confirm receipt of a consumer's opt-out request." *Soundbite Communications*, 27 FCC Rcd. 15391 (F.C.C.), 2012 FCC LEXIS 4874, 57 Communications Reg. (P&F) 107 (2012). Here, because the amended complaint alleges that [plaintiff] **never** consented to receiving communications from [defendant], this safe harbor does not apply.

Greenley v. Laborers' Int'l Union of N. Am., 271 F. Supp. 3d 1128, 1142 (D. Minn. 2017) (emphasis in original).

Further, the question of whether this second text violates the TCPA is a separate one from whether the Court can consider it for standing. Such "blame-the-victim arguments, although they may work in mitigation of damages, fail in the standing context." *Leung v. XPO Logistics, Inc.*, 164 F. Supp. 3d 1032, 1038 (N.D. Ill. 2015); s*ee also Postle v. Allstate Ins. Co.*, No. 17-cv-07179, 2018 U.S. Dist. LEXIS 64599, at *6 (N.D. Ill. Apr. 17, 2018) ("The alleged harm occurred when Postle received an unsolicited incoming call, for non-emergency purposes, that resulted in him answering the phone and waiting on the line for somebody to speak. Any subsequent action, by Postle or anyone else, does not eliminate that claimed injury.").

Second, Plaintiff's specific allegations of time wasted are far different from the generalized allegations at issue in *Salcedo*. As noted by the Eleventh Circuit, Salcedo "allege[d] time wasted only generally." *Salcedo*, 936 F.3d at 1168. In other words, Salcedo's complaint did not contain "a specific time allegation" regarding how long he spent reading or addressing the text message. *Id.*

However, the Eleventh Circuit made clear that "under our precedent, allegations of wasted time can state a concrete harm for standing purposes." *Id*. at 1173; *see also Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015) (holding that plaintiff suffered an injury in fact when unsolicited faxes electronically occupied plaintiff's telephone line and fax machine for one minute); *Common Cause/Georgia*, 554 F.3d at 1351 (holding that the time it took to get an acceptable photo ID was sufficient to confer standing); *id*. at 1351-52 (holding that requiring someone to show a photo ID to vote is a sufficient injury); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (holding that the diversion of time and resources to counteract an unlawful action can satisfy the injury-in-fact requirement).

In addition to the Eleventh Circuit, courts around the country have similarly held that allegations of wasted time are sufficient to confer standing, particularly in the TCPA context. *See, e.g., Leung v. XPO Logistics, Inc.*, 164 F. Supp. 3d 1032, 1037 (N.D. Ill. 2015) ("Here, Leung alleges that he lost time in responding to XPO's call…That is enough, so XPO's motion must be denied.") (citing *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) ("What did provide standing, we held, is that the plaintiffs had altered their daily commute, thus incurring costs in both time and money, to avoid the unwelcome religious display.")); *Martin v. Leading Edge Recovery Sols., LLC*, 2012 U.S. Dist. LEXIS 112795, 2012 WL 3292838, at *3 (N.D. Ill. Aug. 10, 2012) ("[plaintiffs suffered an injury in fact] because they had to spend time tending to unwanted calls"); *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1146 (C.D. Cal. 2012) ("a plaintiff suffers an injury sufficient to establish Article III 'standing' where she alleges that she 'lost ... time spent responding to the' defendant's wrongful conduct.") (citations omitted)); *Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 U.S. Dist. LEXIS 179155, 2016 WL 7450471, at *4 (E.D. La. Dec. 28, 2016) (noting that "a number of district courts have found that the wasted time associated with receipt of an unlawful fax or telephone call suffices to confer standing to sue under the TCPA").

Here, Plaintiff specifically alleges that he wasted approximately 10 seconds reading Defendant's unwanted first message, wasted time discussing this issue with his attorneys, wasted time responding STOP, and wasted more time reading the unwanted confirmation text. Amd. Compl. at ¶¶40; 44; 45; 46; 47. This time was spent while Plaintiff was heading to pick up his children from school, [2] or at his home or with his children and while he could have been pursuing other personal activities. Id. at ¶ 47. Thus, unlike *Salcedo's* generalized allegations, Plaintiff has specifically demonstrated that he wasted much more than a few seconds in having to deal with Defendant's unwanted solicitations. "This theory of injury is independent of the bare- violation theory at play in *Spokeo*." *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1146 (C.D. Cal. 2012) ("a plaintiff suffers an injury sufficient to establish Article III 'standing' where she alleges that she 'lost ... time spent responding to the' defendant's wrongful conduct.").

Unsurprisingly, Defendant attempts to minimize the fact that its actions resulted in Plaintiff wasting over 15 minutes of his time. *See* Mot. at pgs. 15-20. In doing so, Defendant simply ignores *Salcedo's* guidance that,

> These precedents strongly suggest that concrete harm from wasted time requires, at the very least, more than a few seconds. And on this point the judgment of Congress sheds a final ray of light. The TCPA instructs the FCC to establish telemarketing standards that include releasing the called party's line within five seconds of a hang-up, 47 U.S.C. § 227(d)(3)(B), demonstrating that, on the margin, Congress does not view tying up a phone line for five seconds as a serious intrusion.

Salcedo, 936 F.3d at 1172. *Salcedo* demonstrates that Defendant is wrong in asserting that the time wasted requires "plaintiff's devotion of substantial amounts of time to correcting the alleged issue" in order to rise to the level required for standing. Mot. at pg. 16.

Finally, Defendant's text messages took up memory in Plaintiff's cellular telephone and depleted his battery, exposing Plaintiff to the real risk of ultimately rendering the phone unusable for text

[2] Plaintiff is the primary caretaker for his children and he received the first text message while he was in the process of picking up his children from school. *See* Amd. Compl. at ¶41.

messaging purposes. Amd. Compl. at ¶48. While these may all be small injuries, they are certainly identifiable trifles sufficient to confer standing especially when taken together. In fact, the FTC has found that text message solicitations like the ones sent by Defendant present a "triple threat" of identity theft, unwanted cell phone charges, and slower cell phone performance. *See* https://www.consumer.ftc.gov/articles/0350-text-message-spam#text (last visited Oct. 23, 2019). Meaning that Plaintiff's allegations regarding the risk of harm to her are real and material, which alone are sufficient to establish Article III standing. *See Berry v. Bank of Am., N.A.*, No. 18-cv-60722, 2018 U.S. Dist. LEXIS 106448, at *5 (S.D. Fla. June 25, 2018) (noting that a statutory "violation that causes a 'material risk of harm' could be sufficient to confer Article III standing.") (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)); *Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp. 3d 510, 524 (S.D.N.Y. 2017) (finding that inaccurate reporting of plaintiff's address history that "cast [plaintiff] as itinerant, shiftless, and risky, thereby undermining [plaintiff's] prospects for employment," was sufficient to establish a material risk of harm necessary for Article III standing).

Predictably, Defendant attempts to downplay this harm as well. Mot. at pg. 21. Defendant is incorrect and consistent with the Eleventh Circuit's holding on this issue, the vast majority of courts that have evaluated a claim of depleted memory and/or battery life have found it to be a sufficient basis to support Article III standing. *See Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 2016 WL 3645195, at *3 (N.D. W.Va. 2016) ("all ATDS calls deplete a cell phone's battery, and the cost of electricity to recharge the phone is also a tangible harm. While certainly small, the cost is real, and cumulative effect could be consequential."); *Hamza v. Dunhams Athleisure Corp.*, No. 16-11641, 2017 U.S. Dist. LEXIS 41074, at *10-11 (E.D. Mich. Mar. 22, 2017) ("The majority of cases have recognized a concrete injury-in-fact when a plaintiff alleges an invasion of privacy (and/or minimal costs), such that Article III standing exists."); *Armstrong v. Investor's Bus. Daily, Inc.*, No. CV 18-

2134-MWF (JPRx), 2018 U.S. Dist. LEXIS 216246, at *9 (C.D. Cal. Dec. 21, 2018) (finding standing where the plaintiff alleged, in part, "wear and tear on their cellular telephones, consumption of battery life, [and] lost cellular minutes…"); *Silbaugh v. Censtar Energy Corp.*, No. 1:18 CV 161, 2018 U.S. Dist. LEXIS 162177, at *6 (N.D. Ohio Sep. 20, 2018) ("Courts have also found standing under the TCPA when a Plaintiff alleges monetary losses, opportunity losses (potential for missed calls), stress or wear and tear on the system through unwanted use, and the nuisance of interruptions.") (citing *Progressive Health & Rehab Corp. v. Strategy Anesthesia*, LLC, 271 F.Supp. 3d 941 (S.D. Ohio 2017); *Swetlic Chiropractic & Rehab. Ctr., Inc. v. Foot Levelers, Inc.*, 235 F.Supp. 3d 882, 888 (S.D. Ohio 2017)); *Ramos v. PH Homestead, LLC*, 358 F. Supp. 3d 1355 (S.D. Fla. 2019) (citing *Hossfeld v. Compass Bank*, No. 2:16- cv-2017-VEH, 2017 U.S. Dist. LEXIS 182571, 2017 WL 5068752, at *7 (N.D. Ala. Nov. 3, 2017) (finding particularity established where the plaintiff alleged two autodialed phone calls caused him temporary deprivation of his phone, invasion of privacy, waste of time, and reduced phone battery life)); *Reese v. Marketron Broad. Sols., Inc.*, No. 18-1982, 2018 U.S. Dist. LEXIS 77319 (E.D. La. May 8, 2018) ("Moreover, the injuries plaintiff allegedly suffered—including invasion of privacy, time spent answering and fielding unwanted telemarketing text messages, charges for receiving the messages, wear and tear on her telephone, and loss of battery life—have been held sufficient to satisfy Article III's requirements."). Defendant's response to this harm again overlooks the rulethat a "concrete injury need be only an 'identifiable trifle.'" *Salcedo.* 936 F.3d at 1167

C. *Eldridge* and *Fenwick* are Distinguishable

Defendant points specifically to two recent Southern District of Florida decisions to argue that Plaintiff lacks standing: *Eldridge v. Pet Supermarket, Inc.*, No. 18-22531-CIV-WILLIAMS, 2020 U.S. Dist. LEXIS 56222 (S.D. Fla. Mar. 9, 2020) and *Fenwick v. Orthopedic Specialty Inst., PLLC*, No. 0:19-CV-62290, 2020 U.S. Dist. LEXIS 21566 (S.D. Fla. Feb. 4, 2020).[3] Neither is applicable

[3] The *Eldridge* plaintiff appealed Judge Williams's Order on April 6, 2020. *See Eldridge*, Notice of

here.

First, the plaintiff in *Eldridge* relied on the same general allegations of harm that *Salcedo* found were inadequate. *See Eldridge*, 2020 U.S. Dist. LEXIS 56222, at *12 ("Plaintiff's allegations regarding the injuries he sustained from Defendant's text messages are contained in a single sentence[.]"). This problem is not present here because Plaintiff has alleged detailed facts regarding the exact harms he has sustained.

Second, *Fenwick* is unpersuasive because it is a non-final report and recommendation which was never adopted by the court prior to the plaintiff's voluntary dismissal in that matter. See *Fenwick* at [DE 56] (plaintiff's notice of voluntary dismissal without prejudice). Decisions by a magistrate pursuant to 28 U.S.C. § 636(b) are not final orders and may not be appealed until rendered final by a district court. *See Glover v. Alabama Board of Corrections*, 660 F.2d 120, 122 (5th Cir. 1981). As a result, the *Fenwick* report and recommendation is not an order and it carries no weight, and was incorrectly decided in part for the reasons discussed above.

V. CONCLUSION

Defendant harmed Plaintiff with unsolicited text messages. Plaintiff respectfully requests for this Court to protect consumers like Plaintiff and members of the class, and to interpret *Salcedo* as it was written; narrowly and based upon the specific allegations in the *Salcedo* complaint.

WHEREFORE, Plaintiff respectfully requests an order denying Defendant's Motion to Dismiss.

Dated: April 23, 2020.

Appeal [ECF No. 149], filed Apr. 6, 2020.

Respectfully submitted,

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