IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRENDA DRAKE, *individually and on behalf of all others similarly situated,*	:	
Plaintiff,	:	CIVIL ACTION NO. 1:19-CV-1746-LMM
v.	:	
FIRSTKEY HOMES, LLC,	:	
Defendant.	:	

ORDER

This case comes before the Court on Defendant's Motion for Summary Judgment, or Alternatively, to Dismiss Proposed Class Allegations [29]. After due consideration, the Court enters the following Order:

I. BACKGROUND

Plaintiff Brenda Drake sued Defendant FirstKey Homes, LLC on April 18, 2019, alleging several violations of the Telephone Consumer Protections Act ("TCPA"), 47 U.S.C. § 227, and the Federal Communications Commission ("FCC") rules promulgated under that statute, 47 C.F.R. § 64.1200. Dkt. No. [1] ¶ 1. Plaintiff claims that Defendant violated the TCPA and the FCC rules when it called her using an automatic telephone dialing system and left her a voicemail using an artificial or prerecorded voice, while failing to provide an automated opt-out mechanism. Id. ¶¶ 81–92.

Plaintiff was the subscriber and sole customary user of the Indiana cell phone number (xxx) xxx - 6386 from July 2018 through August 2019. Dkt. No. [41] at 11. This number was assigned to her by her wireless service provider, Cricket Wireless, when she switched from a previous California number. Id. at 12.

Defendant is a real estate services company whose business includes "leasing, rent collection, credit screening, property management, repairs and maintenance, construction, renovation oversight services, and quality control for rental home properties." Dkt. No. [29-2] ¶ 2. Defendant sometimes communicates with its clients through mobile phone numbers that they provide. Id. ¶ 3. Plaintiff claims to have received "at least two" calls from Defendant on her *6386 number, id., a claim Defendant admits. Dkt. Nos. [29-2] ¶¶ 18, 22; [47-1] at 4, Response to ¶ 9. Defendant explains that it called the number in response to a residence-viewing request that someone named Brittany Valentine placed with Defendant through Zillow, submitting the *6386 number as her own. Dkt. No. [29-2] ¶¶ 4–17. Brittany Valentine is not a party to this action, though Plaintiff "suspects that Ms. Valentine may have been a former subscriber to telephone number *6386 because she received calls from several different entities looking for Ms. Valentine." Dkt. No. [41] at 20 n.3.

The first call from Defendant to Plaintiff's number came on January 5, 2019, when Defendant's representative left Plaintiff a personal voice message "identifying herself as [Defendant's] representative, indicating that she was aware that Valentine had toured two properties, providing a toll-free callback number,

and requesting a return call." Dkt. No. [29-2] ¶ 18. Because a natural person made and manually dialed this call, Plaintiff does not argue that it violated the TCPA. Dkt. No. [40] ¶ 18 (admitting the personal, manually dialed nature of the call).

Defendant made the second call on February 14, 2019, and the parties agree that it then left a prerecorded voicemail. Dkt. Nos. [29-2] ¶ 22; [47-1] at 4, Response to ¶ 9 (admitting the prerecorded message). Plaintiff claims to have listened to the entire voicemail, which "was over 30 seconds long," shortly after receiving it. Dkt. No. [41-1] ¶ 11. This is what it said:

> This is a courtesy call from FirstKey Homes. We're sprinkling a little love your way. We're presently offering $500 off of April rent on select homes. What an exciting offer. This promotion is on select homes through February 28th. Please call us today at xxx-xxx-3959. We look forward to helping you select your new home. Thank you for choosing FirstKey Homes.

Id. ¶ 10.

This February 14, 2019 call and prerecorded voicemail form the basis of Plaintiff's three claims for relief: (1) that Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii) when it used an automatic telephone dialing system to call her cell phone without her consent and when it left an artificial or prerecorded voicemail without her consent; (2) that Defendant violated 47 C.F.R. § 64.1200(a)(2) (an FCC regulation) when it autodialed her cell phone and left an artificial or prerecorded voicemail without her consent; and (3) that Defendant violated 47 C.F.R. § 64.1200(b)(3) when it left an artificial or prerecorded

voicemail and failed to provide an automated opt-out mechanism or a toll-free number to reach an automated opt-out mechanism. Dkt. No. [1].

Defendant moves for summary judgment on all claims. Dkt. No. [29-1]. It argues that Plaintiff lacks Article III standing to sue, id. at 18–20, 26–31, that an FCC safe harbor protects it from liability, id. at 21, that the TCPA is unconstitutional, id. at 33–36, and that Plaintiff's class claims should be dismissed, id. at 36–38. On August 12, 2020, Defendant filed a Rule 5.1 Notice of Constitutional Question, Dkt. [30], and on November 8, 2020, the United States Department of Justice filed an intervenor's brief supporting the constitutionality of the TCPA. Dkt. No. [39].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

The moving party bears the initial burden of showing the Court, by reference to materials in the record, that there is no genuine dispute as to any

material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. Id. (citations omitted). All reasonable doubts, however, are resolved in the favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

III. DISCUSSION

The Court must decide whether Plaintiff has produced facts showing a genuine dispute of material fact on each of her claims. However, the parties agree on most of the relevant facts in this case. Defendant admits that it left the prerecorded voice message, but it argues that, for various reasons, Plaintiff's

claims fail. Dkt. No. [29-1]. The Court will address each reason in turn: Plaintiff's standing, the FCC safe harbor, the constitutionality of the TCPA, and Plaintiff's proposed class claims.

A. Standing

Defendant argues that Plaintiff's claims should be dismissed because she has not shown an injury sufficient for standing. "The judicial Power of the United States" extends to "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2. An outgrowth of this constitutional principle is the common-law doctrine of standing, which has "developed . . . to ensure that federal courts do not exceed their authority as it has been traditionally understood." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing Raines v. Byrd, 521 U.S. 811, 818 (1997)). The "irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, a plaintiff must show an "'injury in fact'–an invasion of a legally protected interest which is [] concrete and particularized." Id. (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). "Second, there must be a causal connection between the injury and the conduct complained of." Id. (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)). And third, the injury must be likely to "be 'redressed by a favorable decision.'" Id. at 561. At this stage, Plaintiff carries the burden to show these elements "with the manner and degree of evidence required" at summary judgment. Id. (citations omitted).

1. Injury in Fact

Defendant first argues that Plaintiff cannot show an injury in fact. The Supreme Court and Eleventh Circuit have described injury in fact as the "foremost" of the three elements of standing. See Salcedo v. Hanna, 936 F.3d 1162, 1166 (11th Cir. 2019) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998)). And the Supreme Court held in Spokeo that "Article III standing requires a concrete injury even in the context of a statutory violation." Spokeo, 136 S. Ct. at 1549. A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Id. Courts have come to describe a cause of action relying on a statutory violation alone "a 'bare procedural violation,'" and a bare procedural violation does not confer standing. See Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1268 (11th Cir. 2019) (citing Spokeo, 136 S. Ct. at 1549). Defendant has argued here that Plaintiff cannot show injury in fact because her claim is a bare procedural violation without concrete harm. Dkt. Nos. [29-1] at 29–31; [47] at 11–13.

Plaintiff's claims fall under § 227(b)(1)(A)(iii) of the TCPA. That provision reads as follows:

> It shall be unlawful for any person . . . to make any call (other than a call made for emergency purposes *or made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a cellular telephone service . . . unless such call is made solely to collect a debt owed to or guaranteed by the United States.

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). Plaintiff claims that Defendant violated this provision when, without her consent, Defendant autodialed her and left her a prerecorded voicemail. Dkt. No. [1] ¶¶ 81–92. She also claims that Defendant violated 47 C.F.R. § 64.1200 when it autodialed and left a prerecorded voicemail on her cell phone, and that Defendant violated 47 C.F.R. § 64.1200(b)(3) when it failed to provide her with an automated opt-out mechanism or a toll-free number to reach an automated opt-out mechanism. Id. Because the standing injuries alleged for the three claims present different issues, the Court analyzes them separately.

a. Automatic Opt-Out Claim

Plaintiff claims that Defendant's second call left a prerecorded voicemail and failed to give her an automated opt-out mechanism, either on the voicemail itself or through a call-back system. She alleges this failure was contrary to the plain terms of the FCC's regulations passed under the TCPA. See 47 C.F.R. § 64.1200(b)(3) ("When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.") But Defendant argues that, since it never called her after that second call, Plaintiff was not injured by that call's lack of an opt-out mechanism. See Dkt. No. [29-1] at 29 ("Plaintiff must [] show that she

has been harmed specifically by a lack of an automated opt-out mechanism—which Plaintiff cannot do here, not least because [Defendant] never called her again regardless.").

Plaintiff responds by emphasizing that Defendant violated the plain terms of the FCC's regulations passed under the TCPA. See Dkt. No. [41] at 27–28 (citing 47 C.F.R. § 64.1200(b)(3)). Those regulations require callers to provide an automated opt-out mechanism. See 47 C.F.R. § 64.1200(b)(3) ("All artificial or prerecorded voice telephone messages shall . . . provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request . . . ."). But Plaintiff points to no concrete harm beyond the type of "bare procedural violation" condemned by the Supreme Court and Eleventh Circuit. Cordoba, 942 F.3d at 1268 (citing Spokeo, 136 S. Ct. at 1549).

She cites a case from this district in which a court found standing for an alleged opt-out violation. See Dkt. No. [41] at 30 (citing Liotta v. Wolford Boutiques, LLC, No. 1:16-cv-4634-WSD, 2017 WL 1178083, at *2–3 (N.D. Ga. Mar. 30, 2017)). But unlike Plaintiff here, the Liotta plaintiff claimed concrete harm from the lack of an automated opt-out. See Liotta, 2017 WL 1178083, at *3 ("The specific violation here, Defendant's failure to include an opt-out mechanism with its text messages, resulted in the precise harm the TCPA provisions aimed to prevent, namely the nuisance and invasion of privacy that result from unwanted text messages."). The Liotta plaintiff alleged harm because,

after the no-opt-out text, she "called . . . and attempted to be removed from the recipient list" and because the defendant "caused a[nother] text message advertising its goods to be sent to Plaintiff's cellular telephone." Id. at *1. In contrast, Plaintiff received no further communications from Defendant after it failed to provide her an automated opt-out. For that reason, Plaintiff claims no concrete injury on her opt-out claim, and that claim cannot survive summary judgment. Defendant's Motion for Summary Judgment is **GRANTED** as to Plaintiff's opt-out claim. Dkt. No. [1] ¶¶ 90–92.

b. Auto-dial and Prerecorded-Voicemail Claims

While Plaintiff lacks the concrete injury necessary to bring her opt-out claim, the Court must also consider whether she suffered an injury-in-fact under her "no-consent" claims. Dkt. No. [1] ¶¶ 81–89. These claims are that Defendant violated both the TCPA and corresponding FCC regulations when, without Plaintiff's consent, it autodialed her cell phone once and left one prerecorded voicemail. Id. Plaintiff claims that when she listened to Defendant's prerecorded message, she suffered these "concrete harm[s]":

> [Defendant]'s unwanted calls and prerecorded message were annoying, harassing, aggravating, and frustrating. . . . [Defendant]'s calls and message also invaded Plaintiff's privacy and took up her time and energy. . . . Indeed, [Defendant]'s February 14, 2019 prerecorded message was over 30 seconds long and, during the time Plaintiff listened to the unwanted message, her time, concentration, and telephone were occupied.

Dkt. No. [41] at 17 n.2; see also [41-2] ¶¶ 17–18. Defendant admits that it left Plaintiff a prerecorded voicemail, so the Court must decide whether the voicemail was a concrete injury.

Several Eleventh Circuit cases have analyzed plaintiffs' TCPA-based injuries to determine whether those injuries created standing. In Palm Beach Golf Center-Boca v. Sarris, the Eleventh Circuit held that a plaintiff's receipt of a single fax sent in violation of the TCPA was sufficient injury-in-fact to give that plaintiff Article III standing. 781 F.3d 1245, 1251 (11th Cir. 2015). The Palm Beach plaintiff suffered "concrete and personalized injury" because his fax machine was tied up for one minute. Id. ("Palm Beach Golf has Article III standing . . . because it has suffered a concrete and personalized injury in the form of the occupation of its fax machine for the period of time required for the electronic transmission of the data (which, in this case was one minute)."). The Eleventh Circuit emphasized that plaintiffs have standing "where a statute confers new legal rights" and "the facts establish a concrete, particularized, and personal injury . . . as a result of the violation of the newly created legal rights." Id.

The court examined the legislative history of the TCPA and found "that the TCPA's prohibition against sending unsolicited fax advertisements was intended to protect citizens from the loss of the use of their fax machines during the transmission of fax data." Id. at 1252. The court also noted that Congress provided in the TCPA a private right of action which allows for statutory damages regardless of monetary loss. Id. (citing 47 U.S.C. § 227(b)(3)). While none of the

plaintiff's employees wasted time printing or reading the defendant's fax, "the transmission occupied the telephone line and fax machine of Palm Beach Golf [for one minute]." Id.

Four years after Palm Beach, the Eleventh Circuit held that a plaintiff's receipt of a single unsolicited text message did not give that plaintiff Article III standing. Salcedo, 936 F.3d at 1173. The Salcedo plaintiff alleged that he wasted time "answering or otherwise addressing the message," rendering "both Plaintiff and his cellular phone . . . unavailable for otherwise legitimate pursuits," and "that the message also resulted in an invasion of [his] privacy and right to enjoy the full utility of his cellular device." Id. at 1167.

The Salcedo court distinguished Palm Beach on its facts. See id. at 1167–68. The court noted that, unlike the fax machine in Palm Beach, the Salcedo plaintiff's cell phone was not tied up. Id. at 1168 ("A fax message consumes the receiving device entirely, while a text message consumes the receiving device not at all. A cell phone user can continue to use all of the device's functions, including receiving other messages, while it is receiving a text message."). And while the plaintiff in Palm Beach alleged that its fax machine was busy for one minute, the Salcedo plaintiff "allege[d] time wasted only generally." Id.; see also id. ("In the absence of a specific time allegation, we decline to assume an equivalence to the facts of Palm Beach Golf when receiving a fax message is qualitatively different from receiving a text message."). The Salcedo court added that the plaintiff could not rely on his having suffered "tangible costs such as the consumption of paper

and ink or toner to establish injury in fact." Id. at 1168. And the court noted the absence of cell phones from the TCPA. Id. 1169 ("The TCPA is completely silent on the subject of unsolicited text messages.") "At most, [the court] could take Congress's silence as tacit approval of [] agency action [on text messages]." Id.

The Salcedo court discussed the "time wasted" issue with special focus, since previous cases had held that time wasted was a concrete harm. See id. at 1173 (distinguishing Common Cause/Ga. v. Billups, 554 F.3d 1340, 1351 (11th Cir. 2009) and Pedro v. Equifax, Inc., 868 F.3d 1275, 1280 (11th Cir. 2017)). "These precedents strongly suggest that concrete harm from wasted time requires, at the very least, more than a few seconds." Id. And since the TCPA instructs the FCC to require that callers release a party's line within five seconds of hang-up, "Congress [did] not view tying up a phone line for five seconds as a serious intrusion." Id.

Soon after Salcedo, the Eleventh Circuit held in Cordoba that "receipt of more than one unwanted telemarketing call made in violation of the provisions enumerated in the TCPA is a concrete injury that meets the minimum requirements of Article III standing." Cordoba, 942 F.3d at 1270. The Cordoba court discussed the precedents and found that the "cases strongly suggest that the receipt of more than one unwanted phone call is enough to establish injury in fact. [A] phone call is not much different from a fax–'[e]very call uses some of the phone owner's time and mental energy, both of which are precious.'" Id. at 1269–70 (citing Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303, 305–06 (7th Cir.

2017)). In fact, the Circuit held a phone call in some ways "more intrusive than a fax, since a ringing phone requires immediate attention." Id. at 1270.

The Cordoba court distinguished the calls before it from the text message in Salcedo. The Circuit noted that, unlike text messages, calls tie up a phone. See id. ("Receiving a text message does not occupy the device for any period of time, unlike a fax or a phone call[.]") And the Circuit regarded the ringing of a phone as more intrusive and annoying than "[t]he chirp, buzz, or blink of a cell phone receiving a single text message[.]" Id.

Most recently, the Eleventh Circuit addressed TCPA standing in Glasser v. Hilton Grand Vacations Co., ___ F.3d ___, 2020 WL 415811 (11th Cir. Jan. 27, 2020). The Glasser petitioners had each received "over a dozen unsolicited phone calls to their cell phones," and the Circuit followed Cordoba in finding that the petitioners had standing:

> A real injury remains necessary. But a recent decision, as it happens, resolves the point for the plaintiffs. "The receipt of more than one unwanted telemarketing call," the court concluded, "is a concrete injury that meets the minimum requirements of Article III standing." Cordoba, 942 F.3d at 1270. We appreciate that the point is close, as another decision of the court suggests. See Salcedo v. Hanna, 936 F.3d 1162, 1168 (11th Cir. 2019). But Cordoba resolves it, establishing an Article III injury and giving plaintiffs standing to bring these claims.

Id.

This Court finds that Plaintiff's alleged injury is sufficient for standing. Enduring a prerecorded voicemail for over 30 seconds is more like the unwanted minute-long fax in Palm Beach, the unwanted calls in Cordoba, and the

unsolicited cell phone calls in Glasser, than it is like the single unsolicited text message in Salcedo for the reasons stated below.

The TCPA expressly prohibits the prerecorded voicemail at issue here. See 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful . . . to make any call (other than a call . . . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice[.]"). As with the fax advertising in Palm Beach, the TCPA's legislative history reflects Congress's focus on auto-dial systems. See H.R. Rep. No. 102-317, at 10 (1991) ("In recent years a growing number of telemarketers have begun using automatic dialing systems to increase their number of customer contacts."); id. at 30 ("The Commission shall prescribe technical and procedural standards for automatic telephone dialing systems that are used to transmit any prerecorded telephone solicitation."); see also Cordoba, 942 F.3d at 1270 ("Congress identified telemarketing as a potentially 'intrusive invasion of privacy,' suggesting to us that Congress considered the receipt of an unwanted telemarketing call to be a real injury." (citing Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394)). And as Congress did with the fax advertisements in Palm Beach, it provided a private right of action against auto-dials and prerecorded voice messages and provided statutory damages for violations of that right. 47 U.S.C. § 227(b)(3).

Plaintiff has alleged that she suffered concrete harm due to Defendant's violations of her statutory rights. First, Plaintiff has alleged concrete harm in the form of wasted time. Dkt. No. [41] at 10 n.2 ("[Defendant]'s February 14, 2019

prerecorded message was over 30 seconds long and, during the time Plaintiff listened to the unwanted message, her time, concentration, and telephone were occupied."). The Eleventh Circuit's precedents make clear that wasted time is a concrete harm. See Salcedo, 936 F.3d at 1173 ("To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes.") However, "wasted time requires, at the very least, more than a few seconds." Id. The Salcedo court gleaned congressional intent from 47 U.S.C. § 227(d)(3)(B) to find that "Congress does not view tying up a phone line for five seconds as a serious intrusion." Id. But the Palm Beach court found standing where a plaintiff's fax machine was occupied for "one minute." 781 F.3d at 1251. This Court finds that Plaintiff has alleged a concrete injury of wasted time where she received and listened to a prerecorded voicemail lasting over 30 seconds. Unlike the Salcedo plaintiff, who "allege[d] time wasted only generally," Salcedo, 936 at 1168, Plaintiff alleges a specific and concrete period of time wasted. Id. at 1173 ("[U]under our precedent, allegations of wasted time can state a concrete harm for standing purposes.").

Plaintiff has also alleged concrete harm because her phone was tied up while she was receiving and listening to the voicemail. The Palm Beach court found that occupying a device (in that case, a fax machine) for a substantial period of time created standing. 781 F.3d at 1252. In fact, the fax advertisement at issue in Palm Beach was not "printed or seen by any of [the plaintiff's] employees." Id. But the "transmission [] rendered [the] fax machine 'unavailable

for legitimate business messages while processing . . . the junk fax.'" Id. (citing H.R. Rep. No. 102–317, at 10). Like the plaintiff's machine in Palm Beach, Plaintiff's phone was occupied while Defendant left the voicemail and for the more-than 30 seconds that the voicemail played.[1] And as the legislative history shows a special focus on the tying up of fax machines, so too it shows a concern with the tying up of phones. H.R. Rep. No. 102–317, at 10 ("Once a phone connection is made, automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played[.]").[2] That voice messages occupy a cell phone like a fax occupies a fax machine distinguishes those media from the text message in Salcedo. See Salcedo, 936 F.3d at 1168 ("A cell phone user can continue to use all of the device's functions, including receiving other text messages, while it is receiving a text message.").

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[1] Defendant argues in its reply brief that Plaintiff's phone was not tied up because "mobile phones can receive multiple calls at one time." Dkt. No. [47] at 12 (citing https://support.apple.com/guide/iphone/while-on-a-call-iph3c9951d7/ios). But Defendant has not shown that Plaintiff has a phone with that capacity. Even if it had, Defendant does not argue that Plaintiff's voice mailbox was free while it left the message, nor that Plaintiff could perform other functions while she listened to the voice message. Given Plaintiff's testimony that Defendant left her a 30 second voicemail and that she listened to that voicemail, a reasonable jury could find that her phone was tied up. See Dkt. No. [41-2] ¶ 18 ("During the time it took me to listen to the prerecorded voice message . . . I was effectively unable to do anything else, as my time and concentration were tied up listening to the prerecorded voice message.").

[2] Of course, times have changed since this 1991 House Report. For the most part, auto-dialers can no longer "hold" the lines of called parties. But they can still monopolize devices like Plaintiff's with prolonged voicemails and can consume storage space in called parties' voice mailboxes.

In fact, the Eleventh Circuit has emphasized that "a phone call is not much different from a fax – '[e]very call uses some of the phone owner's time and mental energy, both of which are precious.'" Cordoba, 942 F.3d at 1269–70 (citing Patriotic Veterans, 845 F.3d at 305–06). "Indeed, a phone call is in some ways more intrusive than a fax, since a ringing phone requires immediate attention, and although the recipient of a phone call is not required to bear any printing costs, he may also bear the cost of telephone minutes." Id. While one might argue that the "intrusive" character of calls has to do with their being directed to domestic phone lines, see Salcedo 936 F.3d at 1169, the Eleventh Circuit has recently extended the concern with intrusive calls to cell phones. See Glasser, 2020 WL 415811, at *1. And to some, calls and voice messages received at work may be even more intrusive than those received at home. At work, calls may interrupt the focus and attention required to do one's job. Thus, the Court holds that Plaintiff adequately alleges that she suffered an injury-in-fact when she received and listened to a 30 second voicemail left in violation of the TCPA.

2. Traceability

Defendant also argues that Plaintiff cannot meet her burden on the second element of standing—"causation" or "traceability." See Dkt. No. [29-1] at 18 ("Plaintiff lacks Article III standing to sue [Defendant] [because she] must have suffered an injury 'fairly traceable to the conduct of the defendant.'" (citing Spokeo, 136 S. Ct. at 1547)). Defendant argues that it did not cause Plaintiff's alleged injury because "her purported 'injury' was the result of intervening acts by

[Brittany] Valentine and Plaintiff." Id. Under Defendant's "intervening acts" theory, both Ms. Valentine and Plaintiff broke the causal link between Defendant's acts and Plaintiff's injury.

a. Ms. Valentine's "Intervening Act"

Defendant argues that Ms. Valentine gave Defendant the *6386 number as her own and that she gave her express consent for Defendant to call the number. Id. Defendant reasons that Ms. Valentine therefore "caused Plaintiff harm and must make restitution, not [Defendant]." Id. (citing Goldstein, Garber, & Salama, LLC v. J.B., 797 S.E.2d 87, 89 (Ga. 2017)). Since Ms. Valentine represented that she owned the number and that she would keep her information accurate and up to date, Defendant argues that it reasonably assumed it had consent to call the *6386 number. Id. at 19.

Plaintiff responds that Defendant's third-party-causation argument fails because the TCPA is "essentially a strict liability statute." Dkt. No. [41] at 16. Plaintiff reads Defendant's argument as one that is not really about standing, but rather is about "the strict liability nature of the TCPA." Id. ("In other words, [Defendant] suggests that this Court should not hold it liable for its unwanted calls to Plaintiff because [Defendant] is not the one at fault—Ms. Valentine is.").

The Court disagrees with both parties. Contrary to Plaintiff's argument, Defendant contests her standing, not the nature of liability under the TCPA. Defendant argues that someone else caused Plaintiff's injury, not merely that the TCPA requires a certain level of fault. A plaintiff must show that the defendant

whom she has sued caused her injuries. That requirement is fundamental, and Plaintiff must satisfy it even if the TCPA assigns liability without fault. See Spokeo, 136 S. Ct. at 1547–48 ("Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing.'" (citations omitted)).

But the Court also disagrees with Defendant because Plaintiff's injuries are traceable to Defendant's conduct. Defendant called Plaintiff and left a prerecorded voicemail without her express consent. It might be true that Ms. Valentine misled Defendant into believing that Defendant had consent to call the *6386 number. That a third party contributed to the sequence of events leading to Plaintiff's injury does not excuse Defendant, which contributed, from suit based on standing. See Cordoba, 942 F.3d at 1271 ("We've made it clear that the traceability requirement is less stringent than proximate cause: '[e]ven a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement.'" (citing Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012))); 13A Richard D. Freer & Edward H. Cooper, Federal Practice & Procedure § 3531.5—Causation (3d ed.) ("So long as the defendants have engaged in conduct that may have contributed to causing the injury, it would be better to recognize standing or to deny it on grounds apart from causation."). Accordingly, the Court holds that Plaintiff has adequately shown that her injuries are traceable to Defendant's conduct.

b. Plaintiff's "Intervening Act"

Defendant also argues that Plaintiff's own failure to act caused her injury, severing the link between her injury and Defendant's conduct. Dkt. No. [29-1] at 19. Defendant faults Plaintiff for failing to respond to Defendant's manually dialed call and personal voicemail left on January 5, 2019. Id. at 20. In that call, Defendant's representative identified herself as Defendant's employee and "left a personal voicemail message for Valentine." Id. Defendant argues that Plaintiff should have called Defendant after she received that message to tell Defendant that she was not Valentine and to request no further calls. Id. "In this way, [Defendant argues], Plaintiff caused her own purported injury." Id.

Defendant argues that Cordoba controls on this issue. Dkt. No. [47] at 11 ("Cordoba mandates judgment for First Key."). In Cordoba, the Eleventh Circuit held that putative class plaintiffs lacked standing to sue a company for its failure to maintain an internal do-not-call list because they did not request that the defendant-company put them on its do-not-call list. 942 F.3d at 1271–72. The plaintiff in Cordoba claimed that the defendant failed to maintain an internal do-not-call-list as an FCC regulation required. Id. at 1264 (relying upon 47 C.F.R. § 64.1200(d)). But that regulation only prohibited a caller from calling someone who had *already* asked the caller to put them on its internal do-not-call list. See 47 C.F.R. § 64.1200(d) ("No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons *who request*

not to receive telemarketing calls made by or on behalf of that person or entity.") (emphasis added). In other words, a caller could only violate the regulation if it called someone who had asked to be put on the list.

Since the putative plaintiffs in Cordoba did not request that the defendant put them on its internal list, they had no standing under the do-not-call regulation. Cordoba, 942 F.3d at 1271 ("[I]f an individual . . . was called by [the defendant] and never asked [the defendant] not to call them again, it doesn't make any difference that [the defendant] hadn't maintained an internal do-not-call list.") (emphasis in original). Thus, the plaintiffs' own failures undermined their claims. Id. at 1272 ("There's no remotely plausible causal chain linking the failure to maintain an internal do-not-call list to the phone calls received by class members who never said to [the defendant] they didn't want to be called again."). They "therefore [] lack[ed] Article III standing to sue." Id.

Not so here. Unlike the regulation in Cordoba, Plaintiff's TCPA cause of action requires no proactive step on her part. See generally 47 U.S.C. § 227(b)(1). While the putative plaintiffs in Cordoba hamstrung their own claims by failing to perform a regulatory prerequisite, Plaintiff's inaction had no such effect. Nor does Plaintiff have a duty to prevent Defendant from leaving prerecorded voicemails without her express consent; that is not how the TCPA allocates liability. Cf. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 8004 (July 10, 2015) ("Petitioners ask us to effectively require consumers to opt out of such calls when the TCPA clearly

requires the opposite—that consumers opt in before they can be contacted."). Her ostensible contribution to her injury does not deprive her of standing. 13A Richard D. Freer & Edward H. Cooper, Fed. Prac. & Proc. § 3531.5—Causation (3d ed.) ("Standing is not defeated merely because the plaintiff has in some sense contributed to his own injury. . . . Standing is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain.").[3]

B. FCC Safe Harbor

After contesting Plaintiff's standing, Defendant argues that an FCC "safe harbor" shields the company from liability. Dkt. No. [29-1] at 21. The FCC rule in question (the "2015 Order") addressed, among other things, cases where a caller calls a number that has been reassigned to a new subscriber. See Rules and Regulations Implementing the TCPA, 30 FCC Rcd. at 8006–08. The FCC ruled that the TCPA should not make callers liable for the first call to a reassigned number which they had previously obtained consent to call:

> In balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned, we find that, where a caller believes he has

[3] For these reasons, the Court also rejects Defendant's "zone of interest" argument. Defendant argues that Plaintiff falls outside of the TCPA's protected zone of interest because she did not respond to Defendant's personal voice message by calling Defendant and telling it not to call her. Dkt. No. [29-1] at 24–25. Defendant cites no controlling authority that requires a plaintiff to tell a caller that she is not the intended recipient of its call to sue under the autodialer provision of the TCPA. And the Court disagrees with Defendant's argument that the TCPA saddles called parties with the obligation to correct callers' misinformation.

> consent to make a call and does not discover that a wireless number had been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call, but the caller is liable for any calls thereafter. The caller, and not the called party, bears the burden of demonstrating: (1) that he had a reasonable basis to believe he had consent to make the call, and (2) that he did not have actual or constructive knowledge of reassignment prior to or at the time of this one-additional-call window we recognize as an opportunity for callers to discover reassignment.

Id. at 8007. Defendant argues that this Court should adopt the D.C. Circuit's extension of this rule. See Dkt. No. [29-1] at 22 ("Instead of an arbitrary and inflexible one-call rule, the D.C. Circuit endorsed a 'reasonable reliance' standard, *i.e.*, whether the caller reasonably relied on prior express consent." (citing ACA Int'l v. FCC, 885 F.3d 687, 707 (D.C. Cir. 2018)).

Plaintiff responds that Defendant cannot take advantage of this safe harbor, regardless of whether this Court adopts the D.C. Circuit's standard. Dkt. No. [41] at 19. She argues that the safe harbor "concerned calls to reassigned telephone numbers" and that Defendant offers no evidence "to establish that Ms. Valentine was the subscriber or customary user of telephone number *6386 before it was reassigned to Plaintiff." Id.

Plaintiff is correct: both the FCC's 2015 Order and the ACA International case concerned reassigned numbers. See 30 FCC Rcd. at 8006–08 ("Learning of Reassigned Numbers"); ACA Int'l, 885 F.3d at 705 ("In the event of a reassignment, the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent,

when in fact the number has been reassigned to someone else from whom consent has not been obtained."). Defendant argues in reply that the distinction between reasonable calls made without reassignment and those made after reassignment is "a distinction without a difference." Dkt. No. [47] at 15. It posits that the *6386 number must have been reassigned: "[t]he *6386 number was 'reassigned' to Plaintiff from *someone* when she took the number as her own in or around July 28, 2018." Id. (citing Dkt. No. [41-3]).

But Defendant presents no evidence that the *6386 number was reassigned from Ms. Valentine or anyone else. Since Defendant's authorities involve reassigned numbers, and since Defendant has not shown that the called number was reassigned, Defendant cannot win summary judgment on its safe-harbor defense. See United States v. Four Parcels of Real Property, 941 F.2d 1428, 1428 (11th Cir. 1991) ("When the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact[.]") (emphasis in original).[4]

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[4] Nor will the Court construe the FCC's 2015 Order to extend to "reasonable-reliance" calls not made to reassigned numbers. The FCC's ruling specifically addressed reassigned numbers because callers obtained valid consent only to lose it once the number was reassigned. In other cases (as here), the caller may never have had valid consent in the first place. For example, the caller might have obtained the number "by the independent action of an apparent fraudster." Dkt. No. [47] at 9. Defendant asks this Court to impose the cost of this fraud on recipients of calls, instead of callers. That is not what the TCPA requires. See Rules and Regulations Implementing the TCPA, 30 FCC Rcd. at 8004 ("Petitioners ask us to effectively require consumers to opt out of such calls when the TCPA clearly requires the opposite—that consumers opt in before they can be contacted.")

C. Constitutionality of the TCPA

Defendant next argues that the TCPA is unconstitutional because it contains content-based restrictions and fails strict scrutiny. Dkt. No. [29-1] at 33–36 (citing Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015)). Defendant points to several TCPA provisions to argue that the statute restricts speech based on content: the government-debt exception, the emergency-purposes exception, and a cluster of FCC regulations. Id.[5]

However, Defendant offers no support for its argument that these provisions are content-based distinctions; it simply claims that they are, and then merely states that the TCPA fails to meet strict scrutiny. Dkt. No. [29-1] at 33 (concluding that the TCPA "draws distinctions based on the message a speaker conveys"). Standing on its own, this legal conclusion does not persuade the Court that the TCPA is unconstitutional. And while Defendant elaborates its argument in response to the United States's intervenor brief, the Court will not consider arguments raised for the first time there. The same rationale that prevents the Court from considering arguments raised for the first time in reply applies to Defendant's response to the United States. Cf. Bennett v. Bascom, 788 F. App'x 318, 323–24 (6th Cir. 2019) ("[R]eply briefs . . . do not provide the moving party with a new opportunity to present yet another issue for the court's consideration. Further the non-moving party ordinarily has no right to respond to the reply . . . .

[5] The United States has intervened to argue for the constitutionality of the TCPA. Dkt. No. [39].

As a matter of litigation fairness and procedure, then, we must treat [such issues] as waived.") (citing Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 553 (6th Cir. 2008) (first and last modifications in original).

Notably, Defendant never attacks the provisions at issue in this case: the TCPA's prohibitions on autodials and prerecorded voice messages. Defendant argues that the TCPA "as a whole" is content-based because certain of its provisions—provisions not applicable here—are content-based. Dkt. No. [46] at 15 ("While content-based exceptions to abridgement of speech may render the resulting censorship unconstitutional, it is not the exceptions but the *abridgement itself* that violates the First Amendment."). But Defendant's arguments in its summary judgment brief are legal conclusions because they claim without reasoning that the discreet provisions draw distinctions based on speech.[6] Defendant has not satisfied its burden on summary judgment to demonstrate why the entirety of the TCPA should fall.

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[6] Even if Defendant had adequately challenged the TCPA's provisions, Plaintiff and the United States convincingly argue that the provisions relevant here would stand. Specifically, Plaintiff and the United States argue that the Court may avoid assessing the government-debt exception because it does not apply in this case and is severable from the remainder of the TCPA. See, e.g., Am. Association of Political Consultants, Inc. v. FCC, 923 F.3d 159, 171 (4th Cir. 2019) ("[S]everance of the debt-collection exemption from the balance of the automated call ban will comply with the explicit directive of Congress and with controlling Supreme Court precedent."); Duguid v. Facebook, Inc., 926 F.3d 1146, 1156 (9th Cir. 2019) ("Though incompatible with the First Amendment, the debt-collection exception is severable from the TCPA." (citing Am. Association of Political Consultants, 923 F.3d at 171)); Gallion v. United States, 772 F. App'x 604, 606 (9th Cir. 2019) (same); Sliwa v. Bright House Networks, LLC, 2018 WL 1531913, at *6 (M.D. Fla. Mar. 29, 2018) (noting "the severability of the Government-Debt Exception");

Woods v. Santander Consumer USA Inc., 2017 WL 1178003, at *3 n.6 (N.D. Ala. Mar. 30, 2017) ("[T]he [government-debt] exception [is] severable . . . ." (citing Brickman v. Facebook, Inc., 2017 WL 386238, at *8 (N.D. Cal. Jan. 27, 2017))); see also Regan v. Time, Inc., 468 U.S. 641, 653 (1984) ("[W]e have often refused to resolve the constitutionality of a particular provision of a statute when the constitutionality of a separate, controlling provision has been upheld.") (citations omitted).

And while the Court finds that Defendant has not sufficiently argued that the "emergency-purposes exception" is unconstitutional, 47 U.S.C. § 227(b)(1)(A), (B), the Court emphasizes that other courts have upheld the provision. See Campbell-Ewald Co., 768 F.3d at 871 (holding that § 227(b)(1)(A)(iii) is a valid time-place-and-manner restriction); Maryland v. Universal Elections, Inc., 729 F.3d 370, 376–77 (4th Cir. 2013) (holding the TCPA to be content-neutral and able to withstand intermediate scrutiny); Moser v. FCC, 46 F.3d 970, 973–75 (9th Cir. 1995) (same); Wreyford v. Citizens for Transp. Mobility, Inc., 957 F. Supp. 2d 1378, 1380–82 (N.D. Ga. 2013) (same). Courts have also found that the emergency-purposes exception passes strict scrutiny. See Greenley v. Laborers' Int'l Union, 271 F. Supp. 3d 1128, 1151 (D. Minn. Sept 19, 2017) ("[T]he TCPA survives strict scrutiny because it is narrowly tailored to serve a compelling interest."); Holt v. Facebook, Inc., 940 F. Supp. 3d 1021, 1033 (N.D. Cal. Mar. 9, 2017) ("[T]he TCPA survives strict scrutiny because it furthers a compelling interest and is narrowly tailored to achieve that interest."); Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036, 1049 (N.D. Cal. Jan. 27, 2017) ("Facebook has presented no plausible less restrictive alternative that would at least be as effective in protecting privacy as the TCPA.").

Defendant also attacks as unconstitutional "the myriad other content-based exemptions in the statute and as construed by the FCC . . . ." Dkt. No. [29-1] at 27. However, each of these challenged regulations likely falls outside of this Court's jurisdiction. Congress has vested the courts of appeal with "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [] all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342; 47 U.S.C. § 402(a) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."); see also Self v. Bellsouth Mobility, Inc., 700 F.3d 453, 461 (11th Cir. 2012) ("Because the courts of appeals have exclusive jurisdiction over claims to enjoin, suspend, or invalidate a final order of the FCC, the district courts do not have it.").

Defendant seeks to avoid this jurisdictional ban by arguing that it challenges the TCPA, not the FCC regulations. Dkt. No. [46] at 25 ("[Defendant] does not

D. Proposed Class Claims

Defendant argues that even if the Court rejects its arguments on Plaintiff's individual claims, the Court should strike Plaintiff's proposed class allegations because Plaintiff's proposed class is "not ascertainable." Dkt. No. [29-1] at 38 (citing Warnick v. Dish Network LLC, 304 F.R.D. 303, 306 (D. Colo. Nov. 25, 2014)). Plaintiff seeks to represent the following class:

> **The No-Consent Class**: All persons and entities throughout the United States (1) to whom [Defendant] placed one or more calls, (2) for the purpose of advertising its goods or services, (3) directed to a number assigned to cellular telephone dialing system or an artificial or prerecorded voice, (5) absent prior express written consent, (6) within four years preceding the date of this complaint through the date of class certification.

Dkt. No. [1] ¶ 61. Defendant objects to the "prior express written consent" portion of this class because "its standard business practice is to obtain prior, express, written consent before making a call to any mobile number provided by an actual or prospective customer." Dkt. No. [29-1] at 37. Thus, Defendant argues, Plaintiff could only hope to represent "a class of 'anomalies'" whom Defendant called by

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challenge the various FCC orders; rather, existence of those orders illustrates the content-based nature of the TCPA regulatory scheme as a whole."). However, the Court must "look[] to the 'practical effect' of a proceeding, not the plaintiff's central purpose for bringing suit." Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110, 1120 (11th Cir. 2014) (citing B.F. Goodrich Co. v. Nw. Indus., Inc., 424 F.2d 1349, 1353–54 (3d Cir. 1970) ("The statutory procedure for review is applicable although an order is not directly attacked—so long as the practical effect of a successful suit would contradict or countermand a Commission order.")). As the United States argues, "the practical effect of a ruling that the TCPA is unconstitutional would be the invalidation of the FCC orders promulgated pursuant to one of its provisions." Dkt. No. [39-1].

mistake. Id. (citing Warnick, 304 F.R.D. at 306). And since Defendant raises defenses that would be unique to Plaintiff's claim—that it received Plaintiff's number from a third-party, that Plaintiff should have known that Defendant called the wrong number through its personal message, and that she failed to take action on that basis—Plaintiff would be "an atypical and inadequate class representative." Id.

Plaintiff responds that "many other courts" have certified classes "involving wrong or reassigned numbers" like the class she proposes. See Dkt. No. [41] at 33 n.14 (collecting cases). She also argues that her proposed class does not depend on Defendant's having called a wrong or reassigned number because the "purported consent language" that Defendant relied on to make its calls was "insufficient as a matter of law to constitute prior express written consent." Id. at 33.[7] Plaintiff reasons that she "can readily certify a class of consumers who received prerecorded telemarketing messages in reliance on the invalid consent language." Id.

She also contests Defendant's argument that she would be an atypical class representative. Plaintiff argues that Defendant's argument is "premature" because the parties have not "had an opportunity for full discovery." Id. at 34

[7] Plaintiff does not seek summary judgment against Defendant on this basis. However, she does argue against the efficacy of the contractual consent language in response to Defendant's summary judgment arguments. Dkt. No. [41] 16–18. Defendant replies to that argument, but Defendant did not raise it as a basis for summary judgment, so the Court does not address it here.

(citing Argentine v. Bank of Am. Corp., 2015 WL 12844395, at *1 (M.D. Fla. July 29, 2015); McCabe v. Diamler AG, 948 F. Supp. 2d 1347, 1374 (N.D. Ga. June 7, 2013)). Plaintiff argues that Defendant's argument to strike fails because, having moved to strike the class before a motion for certification, "'the burden is on [Defendant] to show that the alleged class[es] cannot meet the requirements of Rule 23.'" Id. at 32 (citing Lunsford v. Woodforest Nat. Bank, 299 F.R.D. 695, 697 (N.D. Ga. Mar. 12, 2013)) (modifications in Plaintiff's Response Brief).

The Court agrees with Plaintiff. If she can show that the contractual consent was ineffective, she might certify a class on that basis, regardless of whether her own claims are anomalous. Since the consent issue remains unresolved at this time, the Court **DENIES without prejudice** Defendant's Motion to Dismiss Class Allegations.

IV. CONCLUSION

Based upon the foregoing, Defendant FirstKey Homes LLC's Motion for Summary Judgment, or Alternatively, to Dismiss Proposed Class Allegations [29] is **GRANTED in part** and **DENIED in part**.

Defendant FirstKey's Motion for Summary Judgment is **GRANTED** as to Plaintiff's Third Claim for Relief (the Opt-out Claim). Defendant's Motion for Summary Judgment is **DENIED** as to Plaintiff's remaining claims. And FirstKey's Motion to Dismiss Class Allegations is **DENIED without prejudice**.

IT IS SO ORDERED this 20th day of February, 2020.

Leigh Martin May
United States District Judge