UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANTHONY LAWSON,

Plaintiff,

v. Case No.: 6:23-cv-1566-WWB-EJK

VISIONWORKS OF AMERICA, INC.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Dismiss (Doc. 9) and Plaintiff's Corrected Response in Opposition (Doc. 11).[1] For the reasons set forth below, Defendant's Motion will be denied.

I. BACKGROUND

Plaintiff, Anthony Lawson, alleges that in 2020, Defendant, Visionworks of American, Inc., sent him numerous text messages to remind him that he was "overdue for [his] eye exam" and providing a link to schedule an exam. (Doc. 1, ¶ 18). Plaintiff alleges that he attempted to opt-out of the text messages on more than one occasion, but the unwanted messages continued. (*Id.* ¶¶ 19–20). Plaintiff alleges that he did not have an existing plan, subscription, or appointment with Defendant at the time the text

[1] The parties' filings fail to comply with this Court's January 13, 2021 Standing Order. Additionally, Plaintiff's Response in Opposition exceeds the page limitations set forth in Local Rule 3.01. *See* M.D. Fla. R. 3.01(a)–(b) (providing that a motion may be "no longer than twenty-five pages inclusive of all parts" and response may be "no longer than twenty pages inclusive of all parts"). In the interests of justice, the Court will consider the filings, but the parties are cautioned that future failures to comply with all applicable rules and orders of this Court may result in the striking or denial of filings without notice or leave to refile.

messages were sent. (*Id.* ¶ 29). As a result, Plaintiff filed a two-count Class Action Complaint (Doc. 1) alleging violations of the Telephone Consumer Protection Act ("**TCPA**"), 47 U.S.C. § 227 *et seq.*, and its implementing regulations. (*See id.* ¶¶ 47–65).

II. LEGAL STANDARD

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." In determining whether to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1269 (11th Cir. 2009). Nonetheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

Plaintiff alleges that Defendant violated 47 U.S.C. § 227(c)(5). "To state a claim under [§] 227(c)(5) of the TCPA, a plaintiff must allege (1) receipt of more than one

telephone call within any 12-month period (2) by or on behalf of the same entity (3) in violation of the regulations promulgated by the [Federal Communications Commission]." *Wagner v. CLC Resorts & Devs., Inc.*, 32 F. Supp. 3d 1193, 1197 (M.D. Fla. 2014). Defendant does not dispute that Plaintiff has adequately alleged the first two elements.

With respect to the third element, Plaintiff alleges that Defendant violated 47 C.F.R. § 64.1200(c) and (d). Subsection c prohibits entities from making "telephone solicitation[s]" to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry[.]" "The term telephone solicitation 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 . . . " 47 C.F.R. § 64.1200(f)(15). Subsection d of the regulations provides, as relevant, that "[n]o 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." 47 C.F.R. § 64.1200(d). "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)(13).

Defendant argues that Plaintiff's claims must be dismissed because the messages were "informational healthcare messages" to remind Plaintiff that he was overdue for an eye exam, not telephone solicitations or telemarketing within the meaning of the regulations. In support of this argument, Defendant cites a number of non-binding cases and Federal Communications Commission ("**FCC**") guidance regarding exemptions for

healthcare related calls and messages that convey information to the receiver. However, as Plaintiff notes, a number of these cases deal with exemptions for health care related calls applicable to other portions of the TCPA that are not at issue in this case. *See, e.g.*, *Sandoe v. Bos. Sci.Corp.*, No. 18-11826, 2020 WL 94064, at *5 (D. Mass. Jan. 8, 2020); *Jackson v. Safeway, Inc.*, No. 15-cv-4419, 2016 WL 5907917, at *7–9 (N.D. Cal. Oct. 11, 2016). Defendant does not argue that the exemption applies to the messages in this case and, therefore, the Court does not find the cases discussing its application persuasive.

In fact, the cases relied on by Defendant note that the FCC's exemptions, in and of themselves, do "not mean that healthcare-related calls, as a matter of law, are not solicitations under the TCPA." *Dorfman v. Albertsons, LLC*, No. 1:18-cv-94, 2019 WL 5873448, at *3 (D. Idaho Feb. 12, 2019). Rather, the question is whether the content of the call was a pretext for the sale of goods or services. *See Suescum v. Fam. First Life, LLC*, No. 6:21-cv-1769, at *2 (M.D. Fla. Jan. 19, 2023). At this stage of the case, the Court is satisfied that Plaintiff has sufficiently alleged that Defendant's message, which reminded Plaintiff that he was overdue for an appointment and then offered to provide him that service—including steps for taking advantage of that offer—contained adequate indicia of pretext for commercial activity to proceed beyond the pleading stage. Simply put, the message was not purely informational, and Defendant did stand to gain financially from a transaction with Plaintiff if he acted on the message. *See id.*; *see also Less v. Quest Diagnostics Inc.*, 515 F. Supp. 3d 715, 717 (N.D. Ohio 2021); *Savett v. Anthem, Inc.*, No. 1:18-CV-274, 2019 WL 5696973, at *5–7 (N.D. Ohio Nov. 4, 2019) (holding that communications from an insurer were exempt because the insurance company was not selling a product, using the call as a pretext to sell a product in the future, and did not

stand to benefit financially from the recipient); *Dorfman*, 2019 WL 5873448, at *3 (finding that a reminder to pick up a prescription was not a solicitation because "its intent [was] to facilitate a transaction that a consumer had previously agreed to enter into . . . not soliciting the called party to place an order").

In the alternative, Defendant argues that Plaintiff should be estopped from arguing that the messages are telephone solicitations or telemarketing. Plaintiff initially filed suit against Defendant in the Western District of Texas, alleging essentially the same claims now being raised in this case. *See Lawson v. VisionWorks of Am., Inc.*, No. 5:20-cv-1368-DAE, Docket 1, at *5–6, 15–18 (W.D. Tex. Nov. 30, 2020) ("***Lawson I***").[2] Defendant filed a motion to dismiss, raising similar arguments regarding the classification of the messages as telephone solicitations or telemarketing. *Id.*, Docket 8, at *12–13 (W.D. Tex. Jan. 22, 2021). Before the motion could be addressed by the Court, Plaintiff filed an Amended Complaint, removing the claims raised in this case and alleging that the messages were "not deemed telemarketing." *Id.*, Docket 10, at *3, 12–13 (W.D. Tex. Feb. 5, 2021). As a result of the amendment, the court denied Defendant's motion to dismiss as moot without a written order, *see id.* (W.D. Tex. Feb. 8, 2021), and Plaintiff subsequently filed a notice of voluntary dismissal, *id.*, Docket 13 (W.D. Tex. Mar. 16, 2021). Defendant alleges that based on Plaintiff's allegation in the amended complaint in *Lawson I*, Plaintiff is now estopped from arguing that the messages were telemarketing or telephone solicitations.

[2] A district court may take judicial notice of public records, such as pleadings filed in another case, without converting a motion to dismiss into a motion for summary judgment. *Universal Express, Inc. v. U.S. Sec. & Exch. Comm'n*, 177 F. App'x 52, 53 (11th Cir. 2006).

"The purpose of judicial estoppel is 'to protect the integrity of the judicial process by prohibiting parties from changing positions according to the exigencies of the moment.'" *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "[W]hile the circumstances under which a court might invoke judicial estoppel will vary, three factors typically inform the decision: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was mislead and; (3) whether the party advancing the inconsistent position would derive an unfair advantage." *Id.* Here, even if the Court were convinced that the first prong was met—which it is not—the second prong is clearly not met. The *Lawson I* court did not address the merits of the parties' arguments regarding whether the messages were telemarketing or telephone solicitations within the meaning of the TCPA. Thus, neither Plaintiff nor Defendant persuaded the *Lawson I* court to take a position on the issue. Furthermore, the Court finds Defendant's arguments regarding unfair advantage unpersuasive. While Defendant might wish to opt out of this continued litigation with Plaintiff, the Court sees no basis to find that Plaintiff's desire to revive his original claims based on recent changes in controlling precedent governing TCPA claims grants him an unfair advantage. Judicial estoppel does not bar Plaintiff's claims in this case.

Finally, Defendant argues that Plaintiff has not sufficiently alleged a violation of subsection d because Plaintiff did not allege that he precisely followed Defendant's opt out procedures. Subsection d of the regulations provides, as relevant, that "[n]o 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." 47 C.F.R. § 64.1200(d) (2023). The procedures instituted must meet the following relevant minimum standards:

> (3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.
>
> . . .
>
> (6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

Id.

Plaintiff alleges that the messages he received stated that he could "Txt STOP ToOptOut[.]" (Doc. 1, ¶ 18). Plaintiff also alleges that "[o]n multiple occasions" he replied to the messages "with the word STOP" but he continued to receive messages for more than thirty days after. (*Id.* ¶¶ 19–20). To illustrate the contents of the messages and his

responses, Plaintiff provided "a few" examples in the Class Action Complaint. (*Id.* ¶ 18). Therein, Plaintiff responds to the messages by texting "STOP again[.]" (*Id.*).

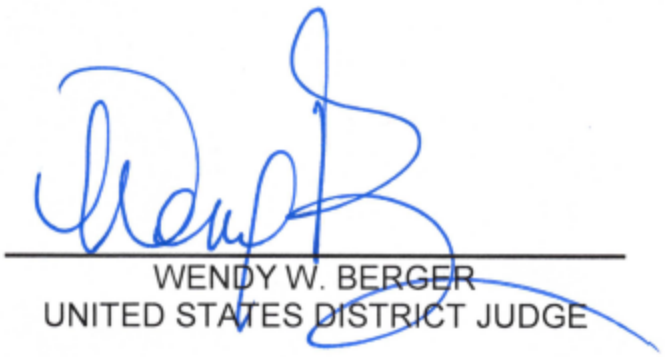
In its Motion, Defendant argues that Count II must be dismissed because Plaintiff's inclusion of the word "again" in his responses failed to follow the opt out instructions and legally negates his attempts to opt out. This argument, however, fails to take all the allegations of the Class Action Complaint as true, which the Court must at this stage of the proceedings. While the screenshots provided include the word "again" in Plaintiff's responses, he alleges that these are only a selection of the messages and responses involved, and he explicitly alleges that he texted the word STOP. (*Id.* ¶ 19). Drawing all reasonable inferences in favor of Plaintiff, it is certainly plausible that at some point he texted only the word STOP in response to Defendant's message before he began adding the word "again," which implies that he had already made the request at least once. Therefore, Defendant's argument as to Count II will also be denied.

IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion to Dismiss (Doc. 9) is **DENIED**.
2. Defendant's Objections to Magistrate Judge's June 28, 2024 Order (Doc. 41) and Time-Sensitive Motion to Stay (Doc. 42) are **DENIED without prejudice**. Defendant may file renewed motions in light of this Order on or before **July 26, 2024**.

DONE AND ORDERED in Orlando, Florida on July 19, 2024.



Copies furnished to:

Counsel of Record