UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 2:23-cv-14337-KMM

MICHAEL SHUTLER,

Plaintiff,

v.

CITIZENS DISABILITY LLC,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant Citizens Disability, LLC's ("Defendant" or "Citizens") Affirmative Motion to Deny Class Certification, (ECF No. 41), and Plaintiff Michael Shutler's ("Plaintiff" or "Shutler") Motion and Memorandum of Law in Support of Class Certification and Appointment of Class Counsel ("Mot.") (ECF No. 59).[1] Both Motions are now ripe for review. For the following reasons, the Court GRANTS Plaintiff's Motion and DENIES Defendant's Motion.

I. BACKGROUND[2]

Citizens Disability, LLC is a disability advocacy group that helps consumers apply for and set up Social Security Disability Insurance benefits. (ECF No. 71) at 6. Citizens is paid contingent on a consumer's successful claim for benefits. *Id.* To Plaintiff, Citizens is a prolific spammer that

[1] Plaintiff filed a response to Defendant's Affirmative Motion to Deny Class Certification (ECF No. 49) and Defendant filed a reply (ECF No. 54). Defendant filed a response to Plaintiff's Motion for Class Certification ("Resp.") (ECF No. 71) and Plaintiff filed a reply ("Reply") (ECF No. 74).

[2] The facts herein are taken from Plaintiff's Class Action Complaint, ("Compl.") (ECF No. 1), and a review of the corresponding record citations and exhibits.

has plagued Plaintiff with a "barrage of telephone spam" to sell its services to consumers. Compl. ¶ 2. Plaintiff claims to be a victim of a "consent farm" called GrantsAssistanceForYou.com, a website that collects consumers' information and sells those leads to organizations such as Citizens. Mot. at 1. Citizens then uses the third-party Pipes.ai calling platform, which makes calls to potential consumers and plays a prerecorded voice when it detects that a live person has answered the call. *Id.* at 3.

Plaintiff, individually and on behalf of all others similarly situated, filed the instant suit against Defendant alleging a violation of the Telephone Consumer Protection Act of 1991 ("TCPA"). Compl. ¶ 1. Specifically, Plaintiff claims that, despite being registered on the national Do Not Call Registry ("DNCR") since February 2023, Defendant initiated unsolicited calls using a prerecorded or artificial voice at least six times to Plaintiff's cellular telephone. *Id.* ¶¶ 11–14.

Plaintiff originally proposed in the Class Action Complaint two classes, a "prerecorded voice class" (consisting of people that received calls with a prerecorded or artificial voice from Defendant) and a "DNCR class" (consisting of people that received telephone solicitations from Defendant while their cellular telephone numbers were on the DNCR). *See id.* ¶ 25. Now, Plaintiff's Motion for Class Certification modifies the proposed classes to just one class. Plaintiff seeks certification of a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. Plaintiff defines the class as:

> All people in the United States (1) who answered one or more prerecorded calls from Citizens, (2) made from the Pipes.ai calling platform, (3) between 11/8/2019 to 10/25/2023, (4) and at the time of the call Citizens' only lead source for the person called was GrantsAssistanceForYou.com.

Mot. at 2. Defendant challenges class certification, arguing, *inter alia*, that the motion is untimely, and that Plaintiff cannot meet the burden to show that common issues predominate amongst the proposed class members. *See generally* (ECF No. 41); Resp.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 governs the certification of class actions. Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ. P. 23(a). In addition to Rule 23(a), the party seeking class certification "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

A district court has broad discretion in determining whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp*., 959 F.2d 1566, 1569 (11th Cir. 1992). Although a district court is not to determine the merits of a case at the certification stage, sometimes "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Mills v. Foremost Ins. Co*., 511 F.3d 1300, 1309 (11th Cir. 2008) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (internal quotation marks omitted)). A class action may only be certified if the court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 have been met. *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984).

III. DISCUSSION

A. Timeliness

In Defendant's Motion to Deny Class Certification, Citizens argues that class certification should be denied because Plaintiff failed to move to certify the case at an early practicable time. (ECF No. 41) at 4–7. Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure prescribes that "[a]t an early practicable time after a person sues . . . as a class representative, the court must

determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). The Court may deny a motion for class certification as untimely. *See Porter v. Collecto, Inc.*, No. 14-21270-CIV, 2015 WL 6777601, at *2 (S.D. Fla. Nov. 2, 2015).

Three days after Citizens filed its Motion to Deny Class Certification, the Court granted in part Plaintiff's Motion to Set Deadline for Class Certification (ECF No. 34) and set a deadline of July 8, 2024 for Plaintiff to move for class certification. *See generally* (ECF No. 42). Plaintiff timely filed the instant Motion in Support of Class Certification and Appointment of Class Counsel. (ECF No. 59). As such, the Court denies Citizens' Motion to Deny Class Certification on the basis of timeliness.

B. Class Definition and Standing

1. Class Definition

"Before analyzing the Rule 23(a) requirements . . . a court must determine whether the class definition is adequate." *O'Neill v. The Home Depot U.S.A., Inc.*, 243 F.R.D. 469, 477 (S.D. Fla. 2006). Certification should be denied where the class definition is "overly broad, amorphous, and vague, or where the number of individualized determinations required to determine class membership becomes too administratively difficult." *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003). Here, Plaintiff seeks recovery for:

> All people in the United States (1) who answered one or more prerecorded calls from Citizens, (2) made from the Pipes.ai calling platform, (3) between 11/8/2019 to 10/25/2023, (4) and at the time of the call Citizens' only lead source for the person called was GrantsAssistanceForYou.com.

Mot. at 2. Defendant takes issue with the proposed class definition, arguing that the class has "numerous failsafe definitional errors." Resp. at 13. A failsafe class "exists if the class is defined in a way that precludes membership unless the liability of the defendant is established." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 693 (S.D. Fla. 2015) (cleaned up). Such a class definition

is improper because a class member either wins or, if they lose, is defined out of the class and is therefore not bound by the judgment. *See id.* at 693 (noting that "case law within this Circuit . . . indicates that a class cannot be certified where the proposed class definition" is a failsafe class). By defining the class as people who received prerecorded calls, Defendant argues that Plaintiff effectively requires the Court to make a substantive merits determination at the time of certification. *See* Resp. at 14.

The Court finds that the proposed class is not failsafe because the scope and size of the class can be resolved without a final determination on the merits. The scope of the proposed class can be determined using objective criteria, including: (1) whether class members received a call from Defendant or Pipes.ai; (2) whether the call used a prerecorded voice; and (3) whether Defendant's lead source for the call recipient was GrantsAssistanceForYou.com. These determinations do not require a legal analysis; rather, class members can be identified using call logs that Citizens has agreed to produce if the Court certifies a class. *See* Mot. at 13.

This brings the Court to the issue of ascertainability: Plaintiff explains that Citizens agreed that if the Court certifies a class, Citizens will produce within ten business days "(i) all call logs made between 11/8/2019 to 10/25/2023 from the Pipes.ai platform where a live person was detected to have answered the call and at the time of the call Citizens' only lead source for the person called was grantsassistanceforyou.com (including subdomains); and (ii) all identifying information Citizens received from the lead source for each person including name, address, city, state, zip, phone number, and email." Mot. at 4; *see also* (ECF No. 59-7) at 2. In response, Defendant argues that it would be "nearly impossible" to ascertain who answered a call because while Citizens has agreed to produce records regarding the lead information supplied by the website operator, that data is not admissible and does not contain information about who answered

the call. Resp. at 16–17. To the extent that Defendant argues the call log would be an unverified hearsay document, the rules of evidence are relaxed "in the context of determining class certification . . . and courts may consider evidence that may not ultimately be admissible at trial." *In re Chiquita Brands Int'l Inc. Alien Tort Statute & S'holders Derivative Litig.*, 331 F.R.D. 675, 680 n.8 (S.D. Fla. 2019). Defendant also cites no authority for the need to authenticate exhibits in support of a class certification motion.

Thus, the Court finds that the definition is concise and specific, and that such a group is readily identifiable.

2. Standing

"It is well-settled in the Eleventh Circuit that prior to the certification of a class, and before undertaking an analysis under Rule 23, the district court must determine that at least one named class representative has Article III standing to raise each class claim." *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 321 F.R.D. 688, 694 (S.D. Fla. 2017); *see also Gardner v. Mutz*, 962 F.3d 1329, 1337 (11th Cir. 2020) ("[T]he plaintiff who lacks standing never had a 'Case' to begin with."). To establish standing, a plaintiff must show (1) an "injury-in-fact," (2) a causal connection between the alleged injury and the defendant's challenged action, and (3) that "the injury will be redressed by a favorable decision." *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (holding that a class action plaintiff must show that he or she has "(1) suffered an injury in fact, that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical").

The Eleventh Circuit has held that in the context of a TCPA claim, the "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 v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019). Here, Plaintiff has adequately demonstrated that he has standing to seek relief in this case: Plaintiff alleges that Defendant made unsolicited robocalls to his cellular telephone number and Plaintiff seeks statutory damages under the TCPA. *See generally* Compl. Defendant does not appear to challenge Plaintiff's standing, but rather states that "Plaintiff provides zero evidence of harm from a single consumer other than Plaintiff." Resp. at 5. But, as the Eleventh Circuit has explained, "at the class certification stage only the *named* plaintiffs need have standing." *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 888 (11th Cir. 2023) (emphasis added); *see also* 1 William B. Rubenstein, Newberg on Class Actions § 2:3 (5th ed. 2016) ("[T]he vast majority of courts continue to heed the basic rule that the standing inquiry focuses on the class representatives, not the absent class members."). To the extent that Defendant argues that all class members must prove their standing before a class could be certified, that argument is wrong (although the Court nonetheless does consider class members' standing in analyzing the Rule 23(b)(3) predominance requirement below).

Accordingly, the Court finds that Shutler, as the sole named plaintiff, has said enough in the Complaint to establish standing.

C. Rule 23(a) Requirements

1. Numerosity

Rule 23 requires a class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As a general rule, a class of less than 21 members is inadequate, and a class of more than 40 members is adequate. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *see also* BRUCE A. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:12 (5th ed. 2021) ("[A] class that encompasses fewer than 20 members will likely not be

certified absent other indications of impracticability of joinder, while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.").

Plaintiff represents that there are more than 100 people who were called from the Pipes.ai platform where a live person answered and at the time of the call, Citizens' only lead source for the person called was GrantsAssistanceForYou.com. Mot. at 5. Defendant does not dispute Plaintiff's argument that Rule 23(a)(1)'s numerosity requirement is satisfied. *See generally* Resp. This demonstrates an adequate number of members in the proposed class. "[A] plaintiff need not show a precise number of members in the class." *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983). Moreover, joinder of a class this size is impracticable. Accordingly, Plaintiff has demonstrated that the proposed class is sufficiently numerous.

2. Commonality

Commonality demands that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This is a "relatively light burden" that "'does not require that all the questions of law and fact raised by the dispute be common' . . . or that the common questions of law or fact 'predominate' over individualized issues." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009) (quoting *Cox*, 784 F.2d at 1557). Rather, "at least one issue affecting all or a significant number of proposed class members" is sufficient. *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001). Allegations of a common course of conduct by a defendant affecting all class members will satisfy the commonality requirement. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 685–86 (S.D. Fla. 2004); *Fabricant*, 202 F.R.D. at 313.

Common issues of fact and law exist here. Specifically, Plaintiff emphasizes that Citizens has already stipulated that "[a]ll calls made from the Pipes.ai platform were made for the same purpose for which Shutler was called." Mot. at 7 (citing (ECF No. 59-7) at 2). Additionally, the

proposed class is limited to people who answered a call and at the time of the call, Citizens' only lead source was GrantsAssistanceForYou.com. *Id.* Thus, Plaintiff contends that the following common questions have common answers that can be proved with common evidence: (1) whether Citizens or Pipes.ai made the calls; (2) whether the purpose of the calls was telemarketing; (3) whether the prerecorded greeting that played when a live person answered a call constitutes a "prerecorded voice" under the TCPA; and (4) whether leads from GrantsAssistanceForYou.com amounted to express consent for Citizens to make the prerecorded calls. *Id.* In response, Defendant argues that there is no admissible evidence to support any of the common issues put forth by Plaintiff.[3] Resp. at 12. For example, Defendant points to Plaintiff's Exhibit D, the Citizens Disability Call Log, which Plaintiff uses to show that of eleven calls made to Plaintiff, two detected a live person and played a prerecorded greeting. *See* Mot. at 3; (ECF No. 59-4).

[3] In conjunction with this argument, Defendant filed a Motion to Strike the Pipes.ai Declaration. (ECF No. 67). Therein, pursuant to Federal Rule of Civil Procedure 12(f), Defendant moves the Court to strike the Declaration of Third Party Pipes.ai (ECF No. 59-3), which was attached to Plaintiff's Motion for Class Certification as Exhibit C. *See generally id.* Defendant argues that it "will be unfairly prejudiced by Plaintiff's eleventh-hour attempt to include an inaccurate declaration," *id.* at 4, and without the declaration, there is little to no evidence to support any of Plaintiff's identified common issues, *see* Resp. at 13.

The Court is persuaded by Plaintiff, who argues that Rule 12(f) is not available to Defendant because Defendant is not moving to strike a pleading. *See* (ECF No. 76) at 1–3; Fed. R. Civ. P. 12(f) ("The court may strike from a *pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.") (emphasis added). Because declarations and affidavits are not pleadings, Defendant's motion to strike is procedurally improper. *See Benson v. Enter. Leasing Co. of Orlando, LLC*, No. 6:20-CV-891-RBD-LRH, 2021 WL 2138779, at *1 (M.D. Fla. Mar. 15, 2021) (refusing to consider improper motion to strike as properly raised objections to declaration in support of a motion for class certification). As such, Defendant's Motion to Strike the Pipes.ai Declaration is denied. To the extent that Plaintiff requests to be awarded reasonable expenses, including attorneys' fees, incurred in responding to the motion to strike, *see* (ECF No. 76) at 5, Plaintiff may file a separate motion for attorneys' fees on or before September 23, 2024.

Finally, the Court notes that even if it could not rely on the disputed Declaration, the Court's ultimate decision on class certification would not change based on a consideration of all the Parties' arguments and the remaining record citations and exhibits.

Defendant argues that the Call Log "cannot be authenticated and may, or may not, be accurate," leaving Plaintiff with no admissible evidence that any calls were made by Citizens of Pipes.ai to class members. Resp. at 12.

The Court is persuaded by Plaintiff, who points out that the disputed Call Log was produced by Defendant during discovery, and Defendant cannot both voluntarily produce documents and then challenge the documents' authenticity. Reply at 2–3; *see also Fox v. Ritz-Carlton Hotel Co., LLC*, No. 17-CV-24284, 2022 WL 2158709, at *7 (S.D. Fla. June 15, 2022) (noting that most of the exhibits challenged for their authenticity were produced by defendant during discovery, "such that a challenge by [defendant] to their authority seems disingenuous"). For these reasons, the Court finds that Plaintiff satisfies the commonality requirement.

3. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical . . . . [T]ypicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Vega*, 564 F.3d at 1275 (citations and quotation marks omitted). Commonality and typicality are related, but "[t]raditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.* (citations and quotation marks omitted). Like commonality, the test for typicality is not a demanding one. *See In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996).

Here, Plaintiff argues that his claims and the proposed class's claims all arise from Defendant's practice of obtaining individuals' information from GrantsAssistanceForYou.com

and subsequent initiation of prerecorded calls to the individuals using the Pipes.ai platform. Mot. at 8. The legal theory for Plaintiff and the proposed class is the same as well, that Defendant violated the TCPA when it made these prerecorded calls without prior express written consent. *Id.* Defendant does not address typicality in its Response. *See generally* Resp. Accordingly, the Court finds that Plaintiff has met his burden of establishing he is typical of the proposed class.

4. Adequacy

Rule 23(a)(4) requires that "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008) (citation omitted). Although "the elements of typicality and adequacy trigger distinct inquiries, the typicality and adequacy analyses under Rule 23(a) tend to merge." *Thorpe v. Walter Inv. Mgmt., Corp.*, No. 1:14-CV-20880-UU, 2016 WL 4006661, at *7 (S.D. Fla. Mar. 16, 2016).

Plaintiff avers that he has "done everything asked of him as named Plaintiff" and his counsel "has no conflicts and will adequately prosecute this matter." Mot. at 9–10. In response, Defendant attacks both Plaintiff and Plaintiff's counsel's adequacy. Defendant argues that Plaintiff is not adequate to represent the class because of his "monetary self-interest," his "propensity to exaggerate harm and injury," and his "efforts to 'cash in' on the phone calls he received lead[ing] to outright fraud." Resp. at 18. According to Defendant, the "ultimate issue of adequacy" is Plaintiff's "weakened cognitive and physical abilities" based on his "admitted brain damage, memory problems, and apparent paranoia." *Id.* at 19. Defendant further argues that Plaintiff's counsel cannot represent the class because (1) Plaintiff's counsel represents seventeen

clients with claims against Citizens, amounting to an obvious conflict of interest; (2) Plaintiff's counsel is a material witness in this case; and (3) Plaintiff's counsel, the attorneys at LawHQ, are class members because they answered some of the calls at issue. *Id.* at 19–20.

As an initial matter, the Court has already addressed many of Defendant's arguments on the adequacy of Plaintiff's counsel when it denied Defendant's Motion to Disqualify Counsel. *See generally* (ECF No. 87). As such, the Court will only address Defendant's first conflict of interest argument here. Defendant offers the Declaration of its counsel, Jenniffer Cabrera, who states that Plaintiff proposed two settlement offers in March and April 2024 involving all seventeen of LawHQ's clients with cases against Citizens. *See* (ECF No. 71-7) ¶¶ 3–4. In his Reply, Plaintiff argues that Defendant "attempts to create the impression of impropriety where none exists," Reply at 10, and offers his own attorney's Declaration, who further describes the Parties' attempts at settlement, *see* (ECF No. 74-4) ¶¶ 4–11. The Court finds nothing unusual or unethical about the Parties' settlement discussions: both Plaintiff's counsel and Defendant's counsel made offers to the other Party to settle all LawHQ's clients' claims, but the Parties could not come to an agreement. *See* (ECF No. 71-7) ¶ 4; (ECF No. 74-4) ¶ 10. On this record, the Court finds that Plaintiff counsel's conduct does not warrant denial of class certification, and based on their extensive experience in litigating TCPA class action lawsuits, *see generally* (ECF No. 59-10), Plaintiff's counsel is adequate under Rule 23(g)(4). *See* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class.").

The Court is also not persuaded by Defendant's attacks on Plaintiff's ability to adequately represent the proposed class. Plaintiff's commitment to representing the proposed class—as evidenced by his compliance with all pretrial requirements including in-person mediation and his testimony about why he wants to pursue this case—confirm that he does not have "so little

knowledge of and involvement in the class action that [he] would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987); *see also* Reply at 8. Therefore, the Court concludes that Plaintiff has demonstrated that he can adequately represent the proposed class as required by Rule 23(a)(4).

D. Rule 23(b)(3) Requirements

In addition to Rule 23(a), Plaintiff seeks certification pursuant to Rule 23(b)(3), which requires additional findings, specifically: "(1) that common questions of law or fact predominate over questions affecting only individual members ('predominance'); and (2) that a class action is superior to other available methods for adjudicating the controversy ('superiority')." *See Vega*, 564 F.3d at 1265. The Court addresses the predominance and superiority requirements in turn.

1. Predominance

"Under Rule 23(b)(3) it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004). Issues requiring generalized proof should predominate over the issues requiring individualized proof. *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989). In essence, the Court must determine "whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Drossin v. Nat. Action Fin. Servs., Inc.*, 255 F.R.D. 608, 616 (S.D.Fla.2009) (quoting *Brown v. SCI Funeral Servs. of Fla.*, 212 F.R.D. 602, 606 (S.D. Fla. 2003)).

The Parties heavily dispute whether the proposed class satisfies the Rule 23(b)(3) predominance requirement. Plaintiff argues that the following common questions of law or fact predominate: (1) whether Citizens or Pipes.ai made the calls; (2) whether the purpose of the calls

was to sell Citizens' services; (3) whether the prerecorded greeting that played when a live person answered a call constituted a prerecorded voice within the meaning of the TCPA; and (4) whether leads from GrantAassistanceForYou.com provided Citizens with prior express written consent to make the calls. Mot. at 12. In response, Defendant argues that (1) Plaintiff cannot show that consent is a common issue because he provides no evidence that the terms on GrantsAssistanceForYou.com remained the same throughout the class period; and (2) the issue of whether consumers were harmed by the calls is an individualized issue, especially in the context of TCPA claims. Resp. at 14–16.

The Court begins by examining whether the issue of consent is fatal to Plaintiff's Motion for Class Certification. In a TCPA case, "[p]ivotal to this analysis [of predominance] is whether Plaintiff has met his burden to show that the issue of consent for the challenged telephone calls can be resolved by common, classwide evidence or whether it is an individualized issue." *Jacobs v. Quicken Loans, Inc.*, No. 15-81386-CIV, 2017 WL 4838567, at *2 (S.D. Fla. Oct. 19, 2017). Defendant cites to *Gene & Gene LLC v. Biopay, LLC*, 541 F.3d 318 (5th Cir.2008), wherein the district court certified a class in a TCPA case even though the defendant noted that individual inquiries concerning consent remained to be decided. The Fifth Circuit reversed, explaining that if "there is no class-wide proof available to decide consent," then "only mini-trials can determine this issue." *Id.* at 329–30. Here, the issue of consent does not present an individualized issue destroying the cohesiveness of the proposed class. The class consists of people who, at the time of the calls, Citizens' only lead source for the person was GrantsAssistanceForYou.com. Mot. at 2. While Defendant argues that consent was given when individuals filled out various forms on GrantsAssistanceForYou.com, that defense is common to Plaintiff and all putative class members. Therefore, if the jury finds that lead information from that website does not amount to prior express

consent, then no class member could have expressly consented to be called—the class will prevail or lose together on its claims without the need for "mini-trials."

To the extent that Defendant argues that Plaintiff has no evidence that the terms of the website remained the same throughout the class period, other courts adjudicating TCPA class actions have considered the issue of who has the burden of proof on consent to be irrelevant in deciding class certification. *See New Concept Dental v. Dental Res. Sys., Inc.*, No. 17-CV-61411, 2020 WL 3303064, at *8 (S.D. Fla. Mar. 3, 2020) (collecting cases). Indeed, the "proper focus instead looks to whether the plaintiff has advanced any feasible method of establishing consent or lack thereof on a classwide basis under the particular facts of the case." *Id.* Because Defendant has agreed to provide call logs where a live person was detected to have answered the call and at the time of the call Citizens' only lead source for the person was GrantsAssistanceForYou.com, the Court concludes that Plaintiff has carried his burden of proof on the element of predominance.

Next, Defendant challenges predominance by arguing that the issue of whether consumers were harmed by the calls is an individualized issue. Resp. at 16. Specifically, Defendant avers that "Plaintiff does not point to a single instance of *any* consumer claiming to have been harmed by calls from Citizens, other than Plaintiff" and Defendant expects "numerous class members" to testify on behalf of Defendant on whether they suffered any harm. *Id.* at 15–16 (explaining that "members of the putative class are scheduled to receive hundreds of thousands of benefits thanks to Citizens' efforts on their behalf").

Although the Court finds that Plaintiff has standing, *see supra* Section III.B.2, the Eleventh Circuit has cautioned that unnamed class members' standing is an important consideration under Rule 23(b)(3)'s predominance factor. "If many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct, then they would

not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Cordoba*, 942 F.3d at 1273. In *Cordoba*, the Eleventh Circuit pointed out that before the district court could award any relief, the district court would have to determine whether each member of the class has standing.

Here, the Court is convinced that the issue of harm does not defeat class certification. The Eleventh Circuit has held that in the context of a TCPA claim, the "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 issue of standing in TCPA cases was further clarified in the *en banc* opinion in *Drazen v. Pinto*, wherein the Eleventh Circuit held that the receipt of even just one unwanted text message causes a concrete injury. 74 F.4th 1336, 1345 (11th Cir. 2023). In holding that standing exists for even one unwanted text message, the appellate court found the concreteness requirement satisfied because an injury existed, albeit one that was smaller in degree. *Id.* at 1345–36. Thus, the Court finds that any class member with even one unwanted phone call from Citizens has standing. *See Culbertson v. Pro Custom Solar LLC*, No. 8:22-CV-2252-CEH-JSS, 2023 WL 5749228, at *4 (M.D. Fla. Sept. 6, 2023) (finding that plaintiff that received only one prerecorded phone call had standing because "to draw the line on whether one or more than one text or call is sufficient to cause harm is a matter of degree, not kind").

To prove a TCPA violation, Plaintiff will have to show: (1) Defendant called the class members' cell phones; (2) without prior express consent; (3) using an "automatic telephone dialing system or an artificial or prerecorded voice." *See* 47 U.S.C. § 227(b)(1)(A)(iii). Although Defendant argues that there are "numerous" class members that benefited from these phone calls and therefore were not harmed, that question of harm does not affect the core elements required to

establish a TCPA violation. The focus of the TCPA is on the way the robocalls were made and the absence of consent, rather than the individual outcomes or perceived benefits of those calls. The TCPA's statutory framework is designed to address the unlawfulness of the unsolicited calls themselves, regardless of the recipient's subjective experience or ultimate benefit from the call. Thus, the Court finds that the possibility that some class members did not subjectively experience harm does not undermine the predominance of the common questions of law and fact related to the elements of the TCPA violation. Accordingly, the predominance requirement is satisfied.

2. Superiority

Finally, Rule 23(b)(3) requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." A court considers the following factors in making this superiority determination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The superiority analysis focuses on "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010) (citation omitted).

Plaintiff argues that a class action is superior to any other method of adjudication here because (1) no class members have any interest in individually controlling the prosecution of separate actions because the costs outweigh the benefits of individual litigation; (2) other TCPA lawsuits against Citizens have resolved, so there is no ongoing litigation potentially involving

members of the proposed class; (3) the class is nationwide so there is no desirability or undesirability of concentrating the litigation in any particular court; and (4) there are no likely difficulties in managing this matter as a class action. Mot. at 13. Defendant does not challenge Plaintiff on superiority. *See generally* Resp. Having found that Plaintiff has satisfied all Rule 23(a) factors and the predominance requirement of Rule 23(b)(3), the Court agrees with Plaintiff that a class action is the superior method of managing this case. *See Kron v. Grand Bahama Cruise Line, LLC*, 328 F.R.D. 694, 702 (S.D. Fla. 2018) (finding that the "large number of claims, along with the relatively small statutory damages, the desirability of adjudicating these claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of these claims, all indicate that a class action would be the superior method of adjudicating Plaintiffs' claims under the TCPA").

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUGED that Plaintiff's Motion and Memorandum of Law in Support of Class Certification and Appointment of Class Counsel (ECF No. 59) is GRANTED. It is FURTHER ORDERED that:

1. The Court CERTIFIES the following class under the TCPA:

   > All people in the United States (1) who answered one or more prerecorded calls from Citizens, (2) made from the Pipes.ai calling platform, (3) between 11/8/2019 to 10/25/2023, (4) and at the time of the call Citizens' only lead source for the person called was GrantsAssistanceForYou.com.

2. The Court APPOINTS LawHQ, P.C. as class counsel;

3. Class counsel shall submit to the Court, on or before September 19, 2024, a proposed schedule for providing the class members with requisite notice, as outlined in Federal Rule of Civil Procedure 23(c)(2);

4. Defendant's Affirmative Motion to Deny Class Certification (ECF No. 41) is DENIED;

5. Defendant's Motion to Strike the Pipes.ai Declaration (ECF No. 67) is DENIED. To the extent that Plaintiff requests to be awarded reasonable expenses, including attorneys' fees, incurred in responding to that motion, *see* (ECF No. 76) at 5, Plaintiff may file a separate motion for attorneys' fees on or before September 23, 2024.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of September, 2024.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record