

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 21-cv-23011-DAMIAN

ALEJANDRO BORGES, *individually,
and on behalf of all others similarly situated,*

Plaintiff,

vs.

SMILEDIRECTCLUB, LLC,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS CLASS ACTION COMPLAINT [ECF NO. 4]**

THIS CAUSE is before the Court on Defendant, SmileDirectClub, LLC's ("Defendant"), Motion to Dismiss Class Action Complaint, filed August 19, 2021, (the "Motion to Dismiss"). [ECF No. 4].¹

THE COURT has carefully considered the Motion to Dismiss, the parties' memoranda [ECF Nos. 18, 21, 41, and 43], the notices of supplemental authority and responses thereto [ECF Nos. 44–48, 53, 55–56, 67, and 69–71], the supplemental briefing ordered by the Court [ECF Nos. 65 and 66], the pertinent portions of the record, and relevant legal authorities. The Court also heard from the parties, through counsel, at hearings held January 18, 2022, and March 21, 2022, and is otherwise fully advised in the premises. For the reasons set forth below, the Motion to Dismiss [ECF No. 4] is denied.

¹ This matter is referred to the undersigned pursuant to the Parties' Consent to Proceed Before United States Magistrate Judge, [ECF No. 58], and Order Referring Case to Magistrate Judge. See ECF No. 59.

I. BACKGROUND

Plaintiff, Alejandro Borges (“Plaintiff”), brought this class action pursuant to the Florida Telephone Solicitation Act (“FTSA”), Section 501.059, *et seq.*, Florida Statutes (2021), as amended by Senate Bill No. 1120, a subsection of Florida’s Consumer Protection laws. *See* ECF No. 1-3 (“Complaint”) at ¶ 1. Plaintiff alleges Defendant is an international orthodontic device company that specializes in teeth alignment products and offers its products to consumers online. *Id.* at ¶ 2. To promote its products and services, Defendant engages in telephonic sales calls to consumers without securing their prior express written consent as required by the FTSA. *Id.* at ¶ 3.

According to the allegations in the Complaint, on or about July 13, 2021, and July 19, 2021, Defendant sent two unsolicited text messages² promoting orthodontic consumer goods or services to Plaintiff’s cellular telephone number. *Id.* at ¶¶ 11–12. Defendant allegedly sent similar unsolicited text messages to other individuals residing in Florida who did not consent to receive text messages from Defendant. *Id.* at ¶¶ 13, 32. Plaintiff alleges that in sending these unsolicited, unconsented to texts, Defendant used “a computer software system that automatically selected and dialed Plaintiff’s and the Class members’ telephone numbers.” *Id.* at ¶¶ 15, 34. Plaintiff also alleges that neither he nor the Class members gave Defendant prior express written consent to send the text messages promoting Defendant’s business in such manner. *Id.* at ¶¶ 16, 32. According to Plaintiff, Defendant’s actions allegedly caused Plaintiff and the Class members harm, including violations of their statutory rights, annoyance, nuisance, and invasion of their privacy. *Id.* at ¶ 4.

² Section 501.059(1)(j) defines telephonic sales calls to include text messages.

Based on these allegations, on July 20, 2021, Plaintiff filed a one-count Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, alleging Defendant “made and/or knowingly allowed telephonic sales calls to be made utilizing an automated system for the selection or dialing of telephone numbers” without obtaining Plaintiff’s and the Class members’ prior express written consent in violation of the FTSA. *Id.* at ¶¶ 33–34. Pursuant to Section 501.059(10)(a) of the FTSA, Plaintiff, on behalf of the Class members and himself, seeks statutory damages and an injunction enjoining Defendant from making further telephonic sales calls without obtaining the called party’s prior express written consent. *Id.* at ¶¶ 5, 35.

On August 18, 2021, Defendant removed the action to this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). [ECF No. 1]. The following day, on August 19, 2021, Defendant filed the Motion to Dismiss now before this Court challenging the FTSA as unconstitutional. [ECF No. 4]. On October 25, 2021, pursuant to 28 U.S.C. § 2403(b) and Federal Rule of Civil Procedure 5.1(b), this Court certified to the Attorney General of the State of Florida that the constitutionality of Section 501.59(8)(a) of the FTSA had been challenged, and the Attorney General declined to respond within the sixty-day period required by the certification. [ECF No. 39].

In the Motion to Dismiss, Defendant argues that the FTSA is unconstitutional for two reasons: (1) it violates the First Amendment to the United States Constitution (and Florida’s free speech guarantee) as an unconstitutional content-based restriction on speech (*i.e.*, the statute singles out telephonic sales calls); and (2) it violates the Due Process Clause of the Fourteenth Amendment (and Florida’s due process guarantee) because it fails to define what constitutes an “automated system for the selection or dialing of telephone numbers,” thereby

making it unconstitutionally vague regarding the type of equipment or system that is prohibited under the statute. Motion to Dismiss at 3–4.³

II. APPLICABLE LEGAL STANDARDS

To adequately plead a claim for relief, Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a complaint based on the plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must present “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 12(b)(6) does not permit dismissal of a well-pled complaint simply because “actual proof of those facts is improbable,” the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.*

When ruling on a motion under Rule 12(b)(6), a court must “view the complaint in the light most favorable to the plaintiff and accept all of the plaintiff’s well-pleaded facts as true.” *Ziyadat v. Diamondrock Hosp. Co.*, 3 F.4th 1291, 1296 (11th Cir. 2021). Still, the court need not take allegations as true if they are merely “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). Additionally, “a district court weighing a

³ The pagination of the Motion cited herein corresponds to that shown on the top right-hand corner created by the Court’s CM/ECF filing system.

motion to dismiss asks not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Twombly*, 550 U.S. at 563 n.8 (citation and internal quotations omitted). “Dismissal pursuant to Rule 12(b)(6) is not appropriate ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) (quoting *Conley*, 355 U.S. at 45–46).

III. DISCUSSION

Although Defendant moves to dismiss the Complaint pursuant to Rule 12(b)(6), Defendant neither contests the sufficiency of the factual allegations nor the plausibility of the claims as alleged in the Complaint. Rather, in the Motion to Dismiss, Defendant asserts constitutional challenges to Section 8(a) of the FTSA and argues that it runs afoul of the First Amendment, as an unconstitutional content-based restriction on speech, and the Due Process Clause of the Fourteenth Amendment, as unconstitutionally vague. Motion to Dismiss at 3–4.

A. *The FTSA*

As noted in the Motion to Dismiss, the FTSA attracted little attention since its enactment in 1987 until the Florida legislature added a private right of action in 2021. *Id.* at 5. For many of the same reasons that Congress enacted the federal Telephone Consumer Protection Act (“TCPA”) in 1991, the Florida legislature introduced CS/SB 1120 to address several concerns raised by consumers regarding unsolicited, automated telephone calls. *See Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020) (noting the TCPA “responded to a torrent of vociferous consumer complaints about intrusive robocalls”); *see also* The Florida Senate, Bill Analysis And Fiscal Impact Statement, S.B. 1120, at 2 (Apr. 19,

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