UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

Case Number: 17-62100-CIV-MORENO

KATIRIA RAMOS, individually and on behalf
of all others similarly situated,

        Plaintiff,

vs.

HOPELE OF FORT LAUDERDALE, LLC
d/b/a PANDORA @ GALLERIA, and
PANDORA JEWELRY, LLC,

        Defendants.

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ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Defendant's Motion for Summary Judgment (D.E. 62), Plaintiff's Motion for Summary Judgment (D.E. 68, 70), Plaintiff's Motion for Class Certification (D.E. 60, 61) and Defendant's Motion to Exclude the Opinions of Plaintiff's Expert Randall Snyder (D.E. 83, 99). The Magistrate Judge filed a Report and Recommendation (D.E. 136) on August 16, 2018. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is AFFIRMED and ADOPTED. Accordingly, it is

ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED. The defining issue in the Report and Recommendation and Plaintiff's principal objection to the

Magistrate's Report is whether the EZ-texting program at issue in this case qualifies as an automatic telephone dialing system as defined by the Telephone Consumer Protection Act and the Federal Communications Commission's orders.   The Court agrees with the Report and Recommendation that *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018) is binding on this Court and that its interpretation of the FCC's orders establishes the standard to determine the issue at hand.   Under *ACA*, the appropriate standard to determine whether the EZ-texting program is an automatic telephone dialing system is whether the program (1) lacks the capacity to randomly or sequentially generate phone numbers, or alternatively, (2) lacks the ability to send messages without human intervention. *ACA*, 885 F.3d at 702; *Swaney v. Regions Bank*, No. 13-00544, 2018 WL 2316452 (N.D. Ala. May 22, 2018) (stating that in *ACA*, the D.C. Circuit invalidated portions of the FCC's 2015 order, but reaffirmed the FCC's 2003 determination that the "defining characteristic of an [automatic telephone dialing system] is the capacity to dial numbers without human intervention") (quoting 2003 FCC Order at 14092).

In this case, it is undisputed that the Defendant's Manager, David Pentecost, signed into the Defendant's system and created a list of customer phone numbers, based on various criteria, such as the date of purchase, amount spent, and the customer's address.   He then removed any landline phone numbers, incapable of receiving a text message, and uploaded an Excel spreadsheet onto the EZ-texting website.   Pentecost then wrote the message, programmed the date and time of delivery, and the cell phones scheduled to receive the message.   He then hit send.   This Court agrees with the Report and Recommendation that this amount of human intervention is sufficient to negate the EZ-texting program as an automatic telephone dialing system within the applicable standard.

Plaintiff's main objection is that even though Pentecost created the list of numbers, drafted the text message, and programmed the timing of delivery, the EZ-texting program had that capacity and therefore, it comes under the purview of the Telephone Consumer Protection Act as an automatic telephone dialing system.   Plaintiff asserts that the record evidence establishes the system's capacity, and, at the very least, creates an issue of fact as to whether the program had this capacity to generate numbers and send the messages.
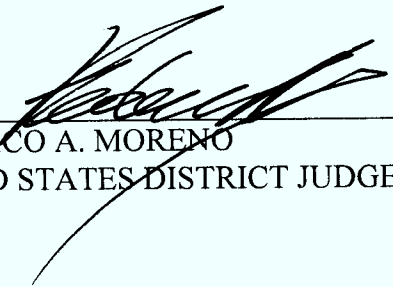
The declaration of Jagannathan Thinkaran, the CEO of CallFire, the company that owns the EZ-texting program, confirms that the program can only be used to send messages to specific identified numbers that have been inputted into the system by the customer, which in this case Pentecost inputted.   Thinkaran adds that the system does not have the ability to send messages automatically or to generate phone numbers.   Plaintiff's objections focus on the testimony of its expert Randall Snyder, who testified that the Rand() function in Excel could be used to generate numbers, but Snyder also testified that he did not test out this function. (D.E. 100-1 at 10-12).   In any event, the *ACA* decision states that the FCC could not expand the statutory definition of an automatic telephone dialing system to include "dial[ing] from an externally supplied set of numbers" such as Excel.   *ACA*, 885 F.3d at 702 (declining to adopt the expansive view of an automatic telephone dialing system espoused in the FCC's 2015 order).   The Court finds that Snyder's testimony is insufficient to create an issue of material fact and that Thinkaran's testimony, coupled with the undisputed evidence of Pentecost's actions in this case, establish that the EZ-program texting system is not an automatic telephone dialing system under the Telephone Consumer Protection Act.   It is also

ADJUDGED that the Plaintiff's Motion for Summary Judgment **(D.E. 68, 70)** is DENIED.   It is also

ADJUDGED that Plaintiff's Motion for Class Certification **(D.E. 60, 61)** is DENIED as moot. It is also

ADJUDGED that the Defendant's *Daubert* motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th of September 2018.

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FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Barry S. Seltzer

Counsel of Record