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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOSEPH BARRETT, et al., on behalf of themnselves and others similarly situated, Plaintiffs, v. VIVINT, INC., et al., Defendants.	:	Case No. 2:19-cv-00568-CW-CMR District Judge Clark Waddoups Magistrate Judge Cecilia M. Romero

PLAINTIFFS' OPPOSITION TO DEFENDANTS VIVINT, INC. AND DSI DISTRIBUTING, INC.'S MOTIONS TO DISMISS AMENDED COMPLAINT OR TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

INTRODUCTION

Since the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the federal courts have virtually unanimously concluded that the receipt of a robocall sent in violation of the TCPA is a concrete injury-in-fact sufficient for a court to exercise its jurisdiction under Article III. Defendants' argument that receipt of a robocall sent in violation of the TCPA is not enough to confer standing to bring a lawsuit for that violation of the TCPA is premised on a single case, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), that has no application here, as

that court's analysis was expressly focused on and limited to text messaging specifically, which the court found to be qualitatively different from a phone call. Plaintiffs here all received illegal phone calls from the Defendants, although in some cases, even after Plaintiffs complained to Vivint to stop contacting them, Vivint continued to send them text messages—including, in Mr. Perrong's case, *after he had already filed this lawsuit*.

Likely recognizing their argument based on *Salcedo* will not carry the day, Defendants incessantly characterize the three Plaintiffs here as "professional plaintiffs" who "operate TCPA businesses," simply because they have filed other TCPA lawsuits in the past. Clearly Defendants are trying their best to analogize this case to *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016), where on a motion for summary judgment, a woman who admitted she was running a TCPA litigation business was found to lack standing, but their problem is that there aren't any facts here for them to make that analogy. Defendants rely on pure speculation, which is insufficient on a motion to dismiss for any party, but especially for a defendant, as plaintiffs are entitled to have their allegations construed in their favor. As evidence of just how speculative Defendants' arguments are here and how far they are willing to go in hopes of dismissing this case, they are actually arguing that Mr. Barrett—*an individual who has only ever filed one other TCPA lawsuit*—is operating a TCPA litigation business because he hired the same attorney as the other Plaintiffs.

The Plaintiffs here didn't want these calls—Vivint ignored Mr. Perrong's and Mr. Cunningham's express instructions to it to stop calling, and Mr. Barrett's number is on the National Do Not Call Registry (as is Mr. Perrong's). Indeed, Vivint's continued calling over consumers' express instructions to stop is support for a separate claim for violation of the

TCPA's Internal Do Not Call Requirements, 47 C.F.R. 64.1200(d), for which courts have widely recognized a private cause of action.

There is also no suggestion that any of the Plaintiffs or class members provided consent to be called. For that reason, Defendants' motions to strike the class allegations must be denied as well. Defendants' argument that class certification will be impossible here is extremely premature. If the Defendants' argument was adopted, no TCPA action could be certified if the defendant vaguely alluded to a possible consent defense at the start of the litigation. But this is simply not the case, as "Class certification is normal in litigation under [the TCPA], because the main questions … are common to all recipients." *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

For the foregoing reasons, Defendants' Motions must be DENIED.

STATEMENT OF FACTS

Plaintiff Barrett received a pre-recorded call on his cellular telephone on July 16, 2019. (Doc. 24, ¶ 35.) Prior to receiving the call, Mr. Barrett's telephone number was on the National Do Not Call Registry for over a year. (*Id.*, ¶ 35.) The call was made with an automatic telephone dialing system ("ATDS") as that term is defined by the TCPA. (*Id.*, ¶ 36.) When Mr. Barrett connected with a live individual, he was informed he was speaking with the "National Solar Program." (*Id.*, ¶ 38.) Mr. Barrett then engaged with the telemarketer in an attempt to identify the actual name of the company. (*Id.*, ¶ 39.) Only after setting an appointment did Mr. Barrett receive a confirmation from a representative that said he was calling from Vivint regarding the call from National Solar Program. (*Id.*, ¶ 40.)

Plaintiff Perrong's telephone number is assigned to a service for which he is charged for the call on a per-minute basis and text message on a per-character basis. (*Id.*, ¶ 46.) The telephone number is used for residential purposes only. (*Id.*, ¶ 48.) On April 4 and June 5, 2019, Mr. Perrong received telemarketing calls from Defendant DSI made using an ATDS. (*Id.*, ¶¶ 50, 52-53.) Mr. Perrong's phone number had been on the National Do Not Call Registry and the Pennsylvania Do Not Call Registry for over a year prior to those calls. (*Id.*, ¶ 47.) The Caller ID for the calls was a "spoofed" number for Mr. Perrong's electric utility, PECO Energy—a deliberate misrepresentation by DSI as to the identity of the caller. (*Id.*, ¶ 54.) A telemarketing sales representative eventually came on the line from DSI and told Mr. Perrong he was calling from Vivint before transferring Mr. Perrong to another representative from Vivint. (*Id.*, ¶¶ 55-57.) Mr. Perrong set an appointment with Vivint to confirm its involvement. (*Id.*, ¶¶ 58-59.)

Later the same day, Mr. Perrong communicated to compliance counsel for Vivint that he was illegally called and wanted to receive no more contacts. (*Id.*, ¶ 60.) Mr. Perrong received a confirmation email and a follow-up on June 10, 2019, but nonetheless, Vivint continued to send him automated calls in the form of text messages regarding Vivint services, sending him text messages on June 12 and June 13. (*Id.*, ¶¶ 62-63.) Incredibly, even after Mr. Perrong filed this lawsuit against Vivint, Vivint sent another text message to Mr. Perrong on September 25, 2019, advertising that if Mr. Perrong was still in contract with his alarm company, Vivint would pay it off and imploring him to sign up for Vivint services. (*Id.*, ¶ 67.)[1]

[1] Vivint characterizes the text messages sent to Mr. Perrong and Mr. Cunningham as being sent by Callfire, but that is not what is alleged in the Amended Complaint. The Amended Complaint alleges that Callfire is only a company that provides the platform for its *user*—here, Vivint—to upload a list of numbers and automatically dial them. (*See* Doc. 24, ¶ 69.)

On February 25, 2019, Plaintiff Cunningham received an automated telemarketing call to his cellular telephone from DSI for Vivint made using an ATDS. (*Id.*, ¶¶ 74-75.) A telemarketing sales representative came on the line from DSI and promoted Vivint's products. (*Id.*, ¶ 77.) The call was made despite Mr. Cunningham previously complaining to Vivint about telemarketing calls, including telemarketing calls from DSI, in 2018. (*Id.*, ¶ 88.) After he complained to Vivint, Vivint informed him in November 2018 that it was going to add his number to its Internal Do Not Call list, which apparently does not exist. (*Id.*, ¶¶ 89, 91.)

Even after Mr. Cunningham informed Vivint again after the February 25, 2019 call that he was not interested, Vivint continued telemarketing to Mr. Cunningham directly—sending him text message advertisements on July 30, 2019 and August 2, 2019. (*Id.*, ¶¶ 79-83.) After receiving the August 2, 2019 text, Mr. Cunningham made an unequivocal request for Vivint to "Stop" texting him, and Vivint acknowledged the request. (*See id.*, ¶¶ 92-93.) Nonetheless, Vivint *still* continued to send text message solicitations to Mr. Cunningham, sending him such a solicitation on September 25, 2019. (*Id.*, ¶ 94.)

None of the Plaintiffs ever consented to receive the calls set forth above, which were cold calls made in an attempt to generate new customers for Vivint. (*Id.*, ¶ 6.) Due to the fact that telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers *en masse*, the Plaintiffs bring this action on behalf of nationwide classes of other persons who received illegal telemarketing calls from or on behalf of Vivint. (*Id.*) Plaintiffs and the other call recipients were harmed by the calls. They were temporarily deprived of legitimate use of their phones because their phone lines were tied up during the telemarketing calls, and their privacy was improperly invaded. (*Id.*, ¶ 95.) The calls injured Plaintiffs and the

other call recipients because they were frustrating, obnoxious, annoying, were a nuisance, and disturbed the solitude of Plaintiffs and the class. (*Id.*) The calls also injured Plaintiffs because in many cases, Plaintiffs were charged per minute or per character for the messages. (*Id.*)

LAW AND ARGUMENT

I. Plaintiffs have standing.

A. Plaintiffs have alleged concrete injuries.

To have standing under Article III of the Constitution, a plaintiff must allege a "concrete" injury in fact. *See Spokeo*, 136 S. Ct. at 1548. "Concrete" means only that the alleged injury must be "real" and "not abstract"; i.e., "it must actually exist." *Id. Spokeo* confirmed that "intangible" injury, and even a "risk of harm," may be "concrete" and "real" for purposes of Article III. *Id.* at 1549.

Since *Spokeo,* district courts have repeatedly held that plaintiffs who allege under the TCPA that automated or prerecorded telephone calls invade their privacy or are a nuisance, or who complain that the calls have occupied their phone lines preventing legitimate communications, have established Article III standing.[2]

In fact, the Third Circuit Court of Appeals recently held:

> [W]e conclude that the injuries alleged by Susinno are concrete for two reasons. First, Congress squarely identified this injury. The TCPA addresses itself directly to single prerecorded calls from cell phones, and

[2] *See, e.g., Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) ("While class members did not necessarily pick up or hear ringing every call at issue in this case, each call created, at a minimum, a risk of an invasion of a class member's privacy" for purposes of Article III standing); *Cabiness v. Educ. Fin. Sols.*, No. 16-cv-01109-JST, 2016 WL 5791411 (N.D. Cal. Sept. 1, 2016); *Juarez v. Citibank, N.A.*, No. 16-CV-01984-WHO, 2016 WL 4547914, at *3 (N.D. Cal. Sept. 1, 2016); *Caudill v. Wells Fargo Home Mtg., Inc.*, No. 5:16–066, 2016 WL 3820195, at *2 (E.D. Ky. July 11, 2016).

> states that its prohibition acts "in the interest of [ ] privacy rights." 47 U.S.C. § 227(b)(2)(C). The congressional findings in support of the TCPA likewise refer to complaints that "automated or prerecorded telephone calls are a nuisance [and] … an invasion of privacy." Pub. L. 102-243, § 2. We therefore agree with Susinno that in asserting "nuisance and invasion of privacy" resulting from a single prerecorded telephone call, her complaint asserts "the very harm that Congress sought to prevent," arising from prototypical conduct proscribed by the TCPA.
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> Traditionally, a plaintiff's "privacy is invaded" for the purpose of an intrusion upon seclusion claim by telephone calls "only when [such] calls are repeated with such persistence and frequency as to amount t o… hounding." Intrusion upon Seclusion, Restatement (Second) of Torts § 652B, cmt d (1977). The Second Restatement suggests that because "two or three" calls would not be "highly offensive to the ordinary reasonable [person]," they traditionally would provide no cause of action. *Id.* Yet when Congress found that "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients," *Van Patten*, 847 F.3d at 1043, it sought to protect the same interests implicated in the traditional common law cause of action. Put differently, Congress was not inventing a new theory of injury when it enacted the TCPA. Rather, it elevated a harm that, while "previously inadequate in law," was of the same character of previously existing "legally cognizable injuries." *Spokeo*, 136 S. Ct. at 1549. *Spokeo* addressed, and approved, such a choice by Congress.

Susinno v. Work Out World Inc., 862 F.3d 346, 351-52 (3d Cir. 2017). Likewise, in *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017), the Ninth Circuit explained: "[B]oth history and the judgment of Congress play important roles in supporting our conclusion that a violation of the TCPA is a concrete, *de facto* injury. … The TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent. Congress identified unsolicited contact as a concrete harm and gave consumers a means to redress the harm." *Id.* at 1043.

As explained below, Plaintiffs allege they suffered at least three concrete injuries that have been recognized under the common law, or by Congress: (1) invasion of privacy and a

nuisance; (2) occupation of Plaintiffs' cellular telephone; and (3) economic harm from the use of phone. Each injury alone is sufficient in and of itself to establish Article III standing.

1. *Defendants' calls invaded Plaintiffs' privacy and were a nuisance.*

Nuisance and invasion of privacy are the precise harms that Congress sought to prevent in enacting the TCPA. *See* 47 U.S.C. § 227 (Congressional Findings). *See also Owens Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819-20 (8th Cir. 2012) ("[T]he ordinary meaning of the term 'right of privacy' easily includes violations of the type of privacy interest protected by the TCPA.").

When Congress established the TCPA in 1991, it did so to protect consumers from the "nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate." *In re Rules & Regulations Implementing the TCPA*, 30 FCC Rcd. 7961, 7979 (2015). Robocalls are, as the Act's sponsor put it, "the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821–30, 822 (1991) (Statement of Sen. Hollings). And, "like the buckets enchanted by the Sorcerer's Apprentice, [they] continue until stopped by their true master." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012). *See also LaVigne v. First Cmty. Bancshares, Inc.*, No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992, at *7 (D.N.M. Oct. 19, 2016) ("The TCPA codifies the application of a long-recognized common law tort of invasion of privacy, and the Court would add the tort of nuisance as well, for a particularly intrusive type of unwanted conduct: unauthorized 'robocalls.'").

Spokeo also recognized that an injury would satisfy Article III's "concreteness" requirement if the injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. Invasion of privacy is just such a harm long recognized by the common law. Almost all states recognize invasion of privacy as a common law tort. *See* Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May 2015) (state-by-state survey; "Currently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute"). In enacting the TCPA, Congress repeatedly recognized that telemarketing calls violate consumers' privacy rights. The right to privacy is also protected under the Constitution. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003). Here, Plaintiffs filed this lawsuit to combat the proliferation of intrusive, nuisance telemarketing practices that violate their own and class members' privacy rights, and Plaintiffs therefore allege a concrete "injury in fact" sufficient to satisfy Article III's standing requirements. (*See* Doc. 24, ¶¶ 1-7.)

2. *Defendants harmed Plaintiffs by occupying their telephone lines.*

One purpose of the TCPA is to "keep[] telephone lines from being tied up." *Am. States Ins. Co. v. Capital Assocs.*, 392 F.3d 939, 942 (7th Cir. 2004). Just as the privacy interests identified in the TCPA are grounded in the common law tort of invasion of privacy, the harm caused by unwanted robocalls to cell phones has a close relationship to the harm recognized by the ancient common law tort "trespass to chattels." *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *6 (N.D.W. Va. June 30, 2016). Indeed, courts have repeatedly held that the electronic intrusion upon another person's computerized electronic equipment, even if

temporary, constitutes trespass to chattels. *See, e.g., Czech v. Wall St. on Demand,* 674 F. Supp. 2d 1102, 1122 (D. Minn. 2009) (declining to dismiss cell phone owner's trespass to chattels claim against sender of unwanted text messages).

In *Mey*, the court found trespass to chattels to be "a close analog for a TCPA violation" and held that the defendant's occupation of the plaintiff's telephone line was a concrete injury sufficient to establish Article III standing for the plaintiff's TCPA claim. 2016 WL 3645195, at *6. The *Mey* court thus denied the defendant's motion to dismiss for lack of standing, explaining that "the TCPA can be viewed as merely applying this common law tort to a 21st-century form of personal property and a 21st-century method of intrusion." *Id.* This Court should reach the same result here. As in *Mey,* Plaintiffs received illegal automated and prerecorded telemarketing on their telephones, which occupied the lines and prevented Plaintiffs from engaging in legitimate communications. (*See* Doc. 24, ¶ 95.)

The fact that Plaintiffs needed to spend time on the phone investigating the parties responsible for the calls does not change anything either. In this regard, Defendants make a dangerous argument that, if accepted, would eviscerate the TCPA's protections. Defendants argue that Plaintiffs should have realized within a few seconds that the call they received was an unsolicited robocall and that if Plaintiffs would have immediately hung up the phone within under 5 seconds, the calls would only have occupied their phone lines for an amount of time Defendants claim is not sufficient to confer standing. In addition to the erroneous assertion that occupation of a phone line for 5 seconds is not a concrete injury, as described above, following this line of reasoning would make it nearly impossible to enforce the TCPA. Under Defendants' logic, if the consumer immediately hangs up, the call does not last long enough to be actionable,

but if they stay on the line long enough for the occupation of the phone line to be actionable, they should have hung up because they should have realized they received an unsolicited robocall. Either way, Defendants can robocall consumers without their consent with impunity.

Defendants' proposed 5-second rule is even more unworkable because of the inherent challenges in identifying a company responsible for violating the TCPA, as many telemarketers, including Defendants, fail to identify themselves or misrepresent their identity. For example, Mr. Barrett *still* has been unable to identify the entity called "National Solar Program" that placed the call to him[3] and was only able to identify Vivint by staying on the line and feigning interest in the sales pitch. (*See* Doc. 24, ¶¶ 38-40.) Similarly, DSI "spoofs" the caller ID information in order to misrepresent to consumers it is their local utility calling. (*See id.*, ¶ 54.)

In the face of these challenges, Plaintiffs do not lose standing where they engage with the caller to try to ascertain their identity. *See, e.g., Cunningham v. Rapid Response Monitoring Servs.*, 251 F. Supp. 3d 1187, 1194-96 (M.D. Tenn. 2017). In *Rapid Response*, another case involving Mr. Cunningham, the court found that Mr. Cunningham had standing where, similar to Plaintiffs here, he feigned interest to identify the caller, rejecting the defendants' arguments that for that reason, the calls were "not truly unwanted" and plaintiff "welcomed the calls." *Id.* at 1196. The Court should reach the same conclusion here.

3. *Plaintiffs suffered concrete harm in the form of economic damages from the use of their telephone lines.*

Finally, as a result of Defendants' unlawful telemarketing calls, Plaintiffs sustained tangible economic harm. The calls at issue to Mr. Perrong were placed to his telephone number

[3] Vivint has not even identified the entity in its Initial Disclosures.

for which he is charged for the call on a per-minute basis and text message on a per-character basis and, as such, clearly resulted in real economic harm. (Doc. 24, ¶ 47). The calls at issue to Plaintiffs Barrett and Cunningham were received on cellular phones used by and paid for by Plaintiffs. The FCC has long recognized that the recipient of telemarketing calls is "charged" for such calls, even if the phone subscribes to a plan that charges a flat monthly rate.[4] By paying for their monthly cell phone bills on which they received the telemarketing calls at issue, Plaintiffs each suffered a tangible injury in fact sufficient to satisfy Article III's standing requirement. *See Warnick v. DISH Network, LLC,* No. 12-cv-01952-WYD-MEH, 2014 U.S. Dist. LEXIS 138381, at *43-46 (D. Colo. Sept. 30, 2014) (rejecting argument that because plaintiff did not have a pay per call plan he did not suffer any injury as a result of the calls at issue); *Soppet*, 679 F.3d at 638 (consumers ultimately bear the costs of calls to cell phones violating the TCPA regardless of "whether they pay in advance or after the minutes are used").

The invasion of privacy and the allegation that the illegal calls cost Plaintiffs and the class money—financial harm—are not speculative future injuries or injuries based on the violation of rights provided in a statute. *See, e.g., Jamison v. Esurance Ins. Servs., Inc.,* No. 3:15-cv-2484-B, 2016 WL 320646, *3 (N.D. Tex. Jan. 27, 2016).

B. *Salcedo* is inapposite.

The only case upon which Defendants rely to argue that receipt of a robocall in violaiton of the TCPA is insufficient to confer standing to bring a lawsuit under the TCPA, *Salcedo*, 936

[4] *See In re Rules and Regulations Implementing the TCPA of 1991,* 18 FCC Rcd. 14014, 14115 (2003); *In re Rules and Regulations Implementing the TCPA of 1991*, 23 FCC Rcd. 559, 562 (2007); *In re Rules and Regulations Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1839–40 (2012); *Fini v. DISH Network L.L.C.*, 955 F. Supp. 2d 1288, 1297 (M.D. Fla. 2013); *Lee v. Credit Mgmt.*, 846 F. Supp. 2d 716, 729 (S.D. Tex. 2011).

F.3d 1162, is inapposite. *Salcedo* did not address telephone calls; its holding was instead limited to the receipt of a *text message*. *Id.* at 1170 (explaining how the court "focused our own analysis *on text messaging specifically*") (emphasis added). This distinction was critical to the court's conclusion.

First, *Salcedo* began its *Spokeo* analysis by looking to the judgment of Congress and noted that **Congress had not addressed text messaging at all**:

> We first note what Congress has said in the TCPA's provisions and findings about harms from telemarketing via text message generally: *nothing*. The TCPA is completely silent on the subject of unsolicited text messages.

936 F.3d at 1168-1169. The court found that "Congress's legislative findings about telemarketing suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA." *Id.* at 1169. It thus concluded that "[t]he judgment of Congress, then, provides little support for finding that Salcedo's allegations state a concrete injury in fact." *Id.* at 1170. This alone distinguishes *Salcedo*. Whereas Congress was silent on text messaging (given that they did not exist in 1991), it expressly identified harms resulting from automated and prerecorded telephone calls and placed specific restrictions on automated and prerecorded calls to redress those harms. Telephone Consumer Protection Act, P.L. 102-243, § 2, 105 Stat. 2394, at ¶¶ 13-14. Plaintiffs allege those precise harms here and "need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549; *see also Romero v. Dep't Stores Nat'l Bank*, 725 Fed. App'x 537, 539 (9th Cir. 2018); *Susinno*, 862 F.3d at 351.

Second, *Salcedo* compared receiving a text message to receiving a fax and found that there are qualitative differences between the two, but these differences do not exist when

comparing faxes to phone calls. The *Salcedo* court found that "[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." *Salcedo*, 936 F.3d at 1168. The same cannot be said about phone calls, as a user cannot "continue to use all of the device's functions" or "receive other [phone calls]" while their phone is occupied by an incoming phone call. *Id.*

Third, *Salcedo* similarly found that there were qualitative differences between the harm associated with the receipt of a single text message and the harms that have traditionally supported tort claims for intrusion upon seclusion and trespass to chattels, but again those differences do not exist when compared to the receipt of a phone call. *Salcedo* found that the receipt of a text message is a "fleeting infraction" that is "isolated, momentary, and ephemeral." *Id.* at 1171-2. As the court put it, "[t]he chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face." *Id.* at 1172. The same cannot be said about the harms alleged here. A prerecorded telephone call is not akin to an "ephemeral" "chirp, buzz, or blink"—it wastes more of the recipient's time and, as discussed above, deprives the recipient of the legitimate use of their phone in a way that text message does not. As numerous courts have held, the receipt of a *telephone call* alleged to violate the TCPA is a harm closely related to the harm traditionally underlying various torts. *See Golan v. FreeEats.com, Inc.,* 930 F.3d 950, 959 (8th Cir. 2019); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 653-54 (4th Cir. 2019); *Romero*, 725 Fed. App'x at 539; *Susinno*, 862 F.3d at 351-52.

C. A Plaintiff is not stripped of the TCPA's protections because they have enforced the TCPA previously.

Notwithstanding the language of the statute, Defendants contend that Plaintiffs are "professional plaintiffs" and therefore should be stripped of the TCPA's protections. However, Plaintiffs' activities as consumer advocates empowered by the congressionally-conferred private right of action to enforce the TCPA support only one conclusion: that Plaintiffs, as private citizens motivated to fight back against illegal telemarketers, are precisely the sort of plaintiffs Congress intended the TCPA to protect, and fit squarely within the TCPA. Indeed, "[n]othing in the Constitution ... requires a plaintiff to be a naïf. Litigation is not college athletics: there is no 'amateurs only' rule." *Cunningham v. Rapid Response Monitoring Servs.*, 251 F. Supp. 3d at 1195. *See also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) ("What the district judge did not explain, though, is why 'professional [plaintiff]' is a dirty word. It implies experience, if not expertise. The district judge did not cite a single decision supporting the proposition that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders."); *Abramson v. Oasis Power LLC*, No. 2:18-cv-00479, 2018 U.S. Dist. LEXIS 129090, at *16 (W.D. Pa. July 31, 2018) ("As other courts addressing this issue have agreed, a citizen's decision to aggressively enforce his rights under the TCPA should not negate otherwise valid privacy interests").

In support of their contention that this litigation should be dismissed now, even before Plaintiffs can pursue discovery, Defendants cite to *Stoops,* 197 F. Supp. 3d 782. With good reason, federal courts have been skeptical of defendants attempting to paint TCPA cases with a broad-brush invoking *Stoops*. *See, e.g., Jones v. Revenue Assistance Corp.*, No. 14-10218-GAO, 2016 U.S. Dist. LEXIS 136993, at *16-17 (D. Mass. Aug. 31, 2016) ("Although Defendant argues that Plaintiff's only source of income since 2012 has been lawsuits, unlike the plaintiff in

Stoops, Jones has not admitted that he "files TCPA actions as a business."); *Evans v. Nat'l Auto Div., L.L.C.*, No. 15-8714, 2016 U.S. Dist. LEXIS 123660, at *8 (D.N.J. Sept. 12, 2016) ("As a consumer complaining of receiving intrusive telemarketing calls, Plaintiff falls directly within the zone of interests protected by the TCPA. … *Stoops* is distinguishable from this case on the grounds that the plaintiff in that case acknowledged that she only purchased cell phones in order to file TCPA lawsuits."). In fact, as one federal court stated when distinguishing *Stoops*:

> It is true that the plaintiff has brought a number of TCPA cases. It is further true that she has telephone answering and recording equipment which is more sophisticated than that of the average consumer. It is not true that she seeks to receive such calls. She does nothing to attract the calls; in fact, her telephone number is listed on the National Do Not Call Registry. Rather, she uses her equipment to record and document TCPA calls when they do occur.
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> This does not deprive the plaintiff of standing any more than the purchase of a burglar alarm would indicate that the homeowner wanted her house to be broken into.
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> This Court declines to follow *Stoops*. This plaintiff did not try to receive calls from other states. She secured equipment to document calls that came to her home. While POS is understandably frustrated by Ms. Mey's efficacy, she is doing exactly what Congress intended —enforcing the law.

Mey v. Venture Data, LLC, 245 F. Supp. 3d 771 (N.D.W. Va. 2017).

Just like Ms. Mey, Plaintiffs Barrett and Perrong placed their phone numbers on the National Do Not Call Registry and do not want these unwelcomed calls but will not vacillate in filing a claim against companies who illegally contact them, and this is exactly what the TCPA was intended for. Prior to any of the calls at issue in this lawsuit, Plaintiff Cunningham even previously complained to Vivint about a series of calls on its behalf, including from DSI, and directed Vivint to put him on its Internal Do Not Call list. (*See* Doc. 24, ¶ 88.) But Vivint continued calling him anyway, and then even continued to contact him after he made another

unequivocal request to "Stop" sending him texts. (*See id.*, ¶¶ 92-94.) Likewise, Mr. Perrong was also sent multiple text messages after he complained to Vivint about its illegal automated telemarketing to him and told Vivint he did not want to receive any more contacts. (*Id.,* ¶¶ 62-67.) Those text messages even included a solicitation for him to sign up for Vivint's services sent *after this lawsuit was filed.* (*Id.*, ¶ 67.) Plaintiffs tried everything in their power—from demanding Vivint to stop contacting them to filing a lawsuit in federal court against Vivint—but Vivint continued to harass them. Plaintiffs were not seeking out these calls. To the contrary, the calls went directly against their express instructions to "Do Not Call" and "Stop," and none of the Plaintiffs consented to the calls in the first place.

Closely analogous to this lawsuit is *Abramson v. CWS Apt. Homes, LLC*, No. 16-426, 2016 U.S. Dist. LEXIS 146627 (W.D. Pa. Oct. 24, 2016), where the Plaintiff filed a putative class action under the TCPA for a single automated telemarketing call, and the defendant asserted that Mr. Abramson, following the *Stoops* decision in the same district that *Stoops* was decided, did not suffer an injury in fact as he had filed more than 300 lawsuits to vindicate his rights under the TCPA. In denying the motion to dismiss, the court found:

> Abramson suffered a concrete harm analogous to the common law tort of invasion of privacy. … Abramson alleges CWS sent him the offending text message despite his lack of consent to receive telemarketing and his lack of business dealings with CWS. Abramson also claims he never provided CWS with his cell phone number. These facts adequately demonstrate Abramson suffered a concrete injury akin to a violation of his privacy interests.

Id. at *6-7. The facts are the same for Plaintiffs here; they received automated solicitation calls despite never doing business with the Defendants and never providing them with their phone numbers.

Defendants' incessant characterizations of Plaintiffs as "operating TCPA litigation businesses" are simply not sufficient to dismiss the case. As an initial matter, the notion that despite *only previously filing one TCPA lawsuit*, Mr. Barrett's claim should be dismissed because he is a professional plaintiff running a TCPA litigation business is a gigantic stretch. Defendants' explanation is that Mr. Barrett hired the same attorney as the other Plaintiffs, but obviously an individual's choice of legal counsel cannot deprive them of standing. Clearly Vivint already had a motion to dismiss based on the "professional plaintiff" argument written (*see* Doc. 23), and Vivint decided to refile it against Mr. Barrett, whether the arguments actually applied to him or not, in hopes of dismissing the entire case.

But even with regard to Mr. Cunningham and Mr. Perrong, both of whom have substantial experience enforcing the TCPA, there is simply nothing here to support the characterization they are "operating TCPA litigation businesses" other than the fact they have filed numerous lawsuits.[5] Defendants are just trying to parrot the language in *Stoops* without any sort of factual record to show that the extreme circumstances in that case, decided on summary judgment, are applicable here. Indeed, Plaintiffs' allegations, required to be taken as true at this stage, set forth that—unlike Ms. Stoops, who admitted that the sole purpose she maintained over 35 cell phones was to support her TCPA "business"—the numbers are used for residential

[5] With respect to Mr. Perrong, Defendants also point to a recently-filed Counterclaim against him for fraud alleging he input his information into a website to be called, but that Counterclaim is subject to a motion to dismiss, as among other reasons, the defendants could not even come forward with information as to when this purported website visit occurred. More importantly, the entire Counterclaim has been revealed to be a farce, as the other co-defendant (who did not join in the Counterclaim) has asserted a cross-claim against the purported source that gathered Mr. Perrong's purported consent from the website, alleging that company failed to gather consent and that its explanation for not doing so "[s]tretch[ed] credulity." *Perrong v. Golden Rule Ins. Co.*, No. 1:19-cv-01940-TWP-DML, Doc. 50, at ¶ 19 (S.D. Ind. Nov. 25, 2019).

purposes only and that they are not associated with any business. (*See* Doc. 24, ¶¶ 48-49, 72-73; *Stoops*, 197 F. Supp. 3d at 796, 798.) Rather than accepting these allegations as true, Defendants ignore them and make a naked assertion of their own on a Rule 12(b) motion that Plaintiffs (including Mr. Barrett, who isn't even argued to have more than one phone number) maintain their phone numbers "solely for the purpose of soliciting and receiving allegedly actionable calls." (*See* Doc. 29, p. 5.) Defendants cannot rely on their own speculation to dismiss this case, particularly where it directly conflicts with Plaintiffs' factual allegations.

II. Plaintiffs have stated claims for violation of the TCPA's do not call provisions related to internal do not call lists.

There is a private right of action under 47 U.S.C. § 227(c) for violations of 47 C.F.R. § 64.1200(d). The FCC has stated:

> [S]ection 227(c)(5) ... empowers 'any person' to sue for damages and injunctive relief for do-not-call violations 'by or on behalf of' a company. **In accordance with this statutory provision, the Commission's company-specific do-not-call rules provide** 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).

In re Dish Network, 28 FCC Rcd. 6574, ¶ 29 (2013) (emphasis added). Of course, the FCC's statement was nothing groundbreaking. Section 227(c) contains a private right of action for "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection," and those persons may bring an action to recover $500 to $1,500 per call. 47 U.S.C. § 227(c)(5). The only question that matters then is whether § 64.1200(d) was prescribed under § 227(c).

While the language quoted above directly answers this question in the affirmative, it is not the only proof of that fact. To summarize:

- Prior to the initial creation of § 64.1200(d) (then § 64.1200(e)), the FCC quoted § 227(c)(1)(A) and stated that it had identified five potential mechanisms to comply, one of which was company specific do-not-call lists. *In re TCPA of 1991*, 7 FCC Rcd. 2736, 2742, ¶¶ 27, 32 (Apr. 17, 1992).
- In the ensuing rulemaking, the FCC specifically identified § 227(c)(5) as the enforcement mechanism for violations of the company specific do-not-call list. *In re Rules and Regulations Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, ¶ 24 (1992).
- In 1995, the FCC reiterated that the company-specific do-not-call rules then at § 64.1200(e) were prescribed under § 227(c). *In re Rules and Regulations Implementing the TCPA of 1991,* 10 FCC Rcd. 12391, 12394, ¶ 5 (1995).
- In 2003, the FCC amended the company-specific rules, identifying them as then-codified at § 64.1200(e) (which it had enacted under § 227(c)). *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014 n.272 (July 3, 2003).
- The modifications it made to those rules can only be found in § 64.1200(d).
- Throughout the 2003 amendment, the FCC refers to the amended company-specific do-not-call rules as being found at § 64.1200(d). *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014 nn.291, 301, 351, 401.
- The only place the specified company-specific do-not-call requirements are currently found is § 64.1200(d).

Vivint contends that "most courts to address the issue have concluded § 64.1200(d) contains 'technical and procedural standards' promulgated pursuant to 47 U.S.C. § 227(d), not protections of subscriber privacy rights under 47 U.S.C. § 227(c)"; however, this statement is highly misleading if not outright false. Even accepting the reasoning of these cases, the three cases Vivint cites for this proposition all analyzed § 64.1200(d)(*4*) specifically and did not consider the other provisions of § 64.1200(d). *See Burdge v. Ass'n Health Care Mgmt.*, No. 1:10-cv-00100, 2011 U.S. Dist. LEXIS 9879, at *8 (S.D. Ohio Feb. 2, 2011) ("The Court finds that the regulations regarding identification and the provision of a telephone number or address found in 64.1200(d)(4) are technical and procedural in nature and were promulgated pursuant to section 227(d) of the TCPA."); *Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 U.S.

Dist. LEXIS 118774, at *17-19 (D. Md. Sept. 1, 2016) (finding *Burdge* persuasive, "the Court concludes that Worsham does not possess a private right of action as to an alleged violation of 47 C.F.R. § 64.1200(d)(4)"); *Braver v. NorthStar Alarm Servs., LLC*, No. CIV-17-0383-F, 2019 U.S. Dist. LEXIS 118080, at *33-35 (W.D. Okla. July 16, 2019) (expressly following *Burdge* and *Worsham* to find that § 64.1200(d) was promulgated under § 227(d) because "like the claims involved in the current action, *Burdge* included claims that the caller had not given the required identifying information [required under 64.1200(d)(4)]" and proceeding to exclusively analyze § 64.1200(d)(4), finding § 64.1200(d)(4)'s regulations regarding identifying information governed similar matters as those addressed in § 227(d), while doing no analysis of the other subsections of § 64.1200(d)).

Section 64.1200(d)(4) deals *only* with proper identification of sellers and telemarketers on a telemarketing call. Accordingly, at most, the cases cited by Vivint stand for the proposition that receipt of a telemarketing call in which the telemarketer does not properly identify itself is not enough for a private cause of action. Plaintiffs here, however, do not allege a violation of § 64.1200(d)(4). They allege violations of § 64.1200(d)(1) (maintaining a written policy, available on demand, for maintaining a do-not-call list), (2) (training personnel on the existence and use of the do-not-call list), (3) (honoring do-not-call requests within a reasonable time), and (6) (maintaining records of a consumer's request not to receive further telemarketing calls). (*See* Doc. 24, ¶ 25.)

In contrast to Vivint's limited authority under § 64.1200(d)(4), however, most courts have found that the regulations in § 64.1200(d) were promulgated under § 227(c), which provides for a private right of action. *See Drew v. Lexington Consumer Advocacy, LLC*, No. 16-

cv-00200-LB, 2016 U.S. Dist. LEXIS 52385, at *16-18 (N.D. Cal. Apr. 18, 2016) ("47 C.F.R. § 64.1200(c) and (d) are regulations promulgated under § 227(c)."); *Allard v. SCI Direct, Inc.*, No. 16-cv-01033, 2017 U.S. Dist. LEXIS 107106, at *16-17 (M.D. Tenn. July 10, 2017) ("47 U.S.C. § 227(c) instructs the FCC to regulate unwanted telemarketing calls. 47 C.F.R. § 64.1200(d) fulfilled Congress's legislative purpose by providing rules regarding the company-specific do-not-call list."); *Wagner v. CLC Resorts & Devs., Inc.*, 32 F. Supp. 3d 1193, 1197-98 (M.D. Fla. 2014) ("Wagner's allegation that Passport violated 47 C.F.R. § 64.1200(d), supports his claim under Section 227(c)(5) of the TCPA."); *Sieleman v. Freedom Mortg. Corp.*, No. 17-13110 (JBS/JS), 2018 U.S. Dist. LEXIS 129698, at *4 n.3 (D.N.J. Aug. 2, 2018) ("Pursuant to that requirement [in § 227(c)(1)(A)], the FCC promulgated 47 C.F.R. § 64.1200(d)…."); *Nece v. Quicken Loans, Inc.*, No. 8:16-cv-2605-T-23TBM, 2017 U.S. Dist. LEXIS 106098, at *4-6 (M.D. Fla. Jan. 3, 2017) ("Quicken argues that the TCPA provides no private right of action to enforce 47 C.F.R. § 64.1200(d)(4)…. But Count III alleges several violations of Section 64.1200(d)…. Section 227(c) provides Nece a cause of action."); *Simmons v. Charter Communs., Inc.*, 222 F. Supp. 3d 121, 127, 131 (D. Conn. 2016) (private right of action permitted under 227(c) for violations of 64.1200(d).).

III. Defendants' speculation as to consent does not merit striking the class claims.

"Although the United States Court of Appeals for the Tenth Circuit has not articulated a standard for evaluating preemptive motions to deny class certification, courts within the Tenth Circuit 'have held motions to strike class allegations to a high standard of proof.'" *Anderson Living Tr. v. WPX Energy Prod., LLC*, No. CIV 12-0040 JB/KBM, 2016 U.S. Dist. LEXIS 131119, at *22 (D.N.M. Aug. 27, 2016) (quoting *Wornicki v. Brokerpriceopinion.com, Inc.*, No.

13-cv-03258-PAB-KMT, 2015 U.S. Dist. LEXIS 36985, at *11 (D. Colo. Mar. 23, 2015).) "Most recently, … [the District of Colorado] stated that, to prevail on a motion to strike class allegations, 'a defendant must demonstrate from the face of plaintiffs' complaint that it will be **impossible to certify the classes** alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.'" *Anderson*, 2016 U.S. Dist. LEXIS 131119, at *22-23 (citation omitted) (emphasis added) (citing *Wornicki,* 2015 U.S. Dist. LEXIS 36985, at *11).

District courts and appellate courts in other circuits have agreed on this standard in the context of TCPA cases. *See Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93-95 n.30 (3d Cir. 2011) (holding that a court may deny class certification before discovery only if the "complaint itself demonstrates that the requirements for maintaining a class action cannot be met" and explaining that "in the specific context of claims filed under the TCPA statute, it is difficult to resolve without discovery whether there are factual issues regarding class members' business relationships with defendants or whether they consented"); *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016) (holding in a TCPA case that "the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)" and that "allowing such speculation to dictate the outcome of a class-certification decision would afford litigants in future cases wide latitude to inject frivolous issues to bolster or undermine a finding of predominance.").

Defendants' motion focuses on one theoretical defense to Plaintiffs' claims to assert that the action in its entirety is incapable of being maintained as a class action. In support of Defendants' sweeping conclusion that certification is impossible and that class allegations should be stricken, it simply argues that consent could be an issue in a TCPA case. However, there is

nothing here to suggest that, contrary to Plaintiffs' allegations, any of the Plaintiffs here consented to be called, or that Defendants even have a non-frivolous consent defense to assert.

The cases cited by Defendants are inapplicable to the facts alleged in this case and the case's current procedural posture. All of Defendants' case law except one case was decided after the pleading stage (after discovery to determine whether there was a viable consent defense, what the consent evidence consisted of, and the extent to which individual inquiries would be required), and the one case decided at the pleading stage, *Pepka v. Kohl's Dep't Stores, Inc.*, No. CV-16-4293-MWF (FFMx), 2016 U.S. Dist. LEXIS 186402 (C.D. Cal. Dec. 21, 2016), involved a proposed class of consumers who had *revoked consent* and then continued to receive calls. *See id.* at *4. The court found that a class of consumers who had revoked consent would involve highly individualized questions as to whether each class member revoked consent and how the revocation occurred. *See id.* at *10. Here, however, there is no indication that *anyone* consented, much less revoked consent, nor do the class definitions raise that issue. As alleged in the Amended Complaint, Defendant's automated marketing scheme applies generally to the classes and common questions of law and fact predominate, including as to consent. If Defendants intend to come forward with evidence to meet their burden that the calls were made with prior express written consent, something that the Amended Complaint specifically avers to the contrary, such arguments can be appropriately addressed at the class certification stage.

IV. Plaintiffs have sufficiently pled numerosity.

Finally, Defendants attempt to grasp at straws by asserting that even though this case is being brought by *three* named Plaintiffs in three different states, the Amended Complaint does not allege sufficient facts to support a plausible allegation that there is sufficient numerosity to

maintain a class action. However, in this regard, Plaintiffs have alleged that Defendants engaged in a nationwide telemarketing campaign consisting of unsolicited cold calls and texts using automated dialing equipment. (*See* Doc. 24, ¶¶ 6-7.) Plaintiffs further alleged that due to the nature of such telemarketing campaigns, which "generally place calls to hundreds of thousands or even millions of potential customers *en masse*," there is sufficient numerosity to maintain a class action. (*See id.*, ¶¶ 6-7, 122.) There is no requirement that the named Plaintiffs have to specifically identify other unnamed class members to plausibly allege that there are others similarly situated to the Plaintiffs—the general nature of Vivint's nationwide automated cold-calling campaigns as alleged here, combined with the fact that three named Plaintiffs from across the country have already been identified so far without even conducting any discovery, supply the factual basis for such an allegation. Those circumstances distinguish this case from *Daisy Inc. v. Pollo Operations, Inc.*, No. 2:14-cv-564-FtM-38CM, 2015 U.S. Dist. LEXIS 39265 (M.D. Fla. Mar. 27, 2015), where the plaintiff just set forth a formulaic recitation of the elements of a class action without any facts for the court to infer that there were other similarly situated individuals. *See id.* at *12-14.[6] Accordingly, Plaintiffs have alleged a class action is an appropriate remedy for Defendants' wide-scale illegal telemarketing.

CONCLUSION

For the foregoing reasons, Defendants' Motions should be DENIED.

[6] The court did, however, grant the plaintiff leave to amend the complaint to set forth such a factual basis. *Id.* at *14-15.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will automatically provide notice to all counsel of record by electronic means.

/s/ Jonathan P. Misny
Jonathan P. Misny