

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTINA MELITO, CHRISTOPHER  
LEGG, ALISON PIERCE, and WALTER  
WOOD, individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

AMERICAN EAGLE OUTFITTERS, INC., a  
Delaware corporation, AEO  
MANAGEMENT CO., a Delaware  
corporation, and EXPERIAN MARKETING  
SOLUTIONS, INC.,

Defendants.

NO. 1:14-cv-02440-VEC

**PLAINTIFFS' RESPONSE TO  
EXPERIAN MARKETING SOLUTIONS,  
INC.'S MOTION TO DISMISS  
PLAINTIFFS' CONSOLIDATED THIRD  
AMENDED COMPLAINT PURSUANT  
TO RULE 12(B)(1) OF THE FEDERAL  
RULES OF CIVIL PROCEDURE**

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## I. INTRODUCTION

Third-party defendant Experian Marketing Solutions, Inc. (“Experian”) challenges the power of the Court to decide this case, repeatedly arguing that the Telephone Consumer Protection Act (“TCPA”) claims Plaintiffs bring in this action are “bare procedural violations” without ever attempting to explain why this is the case. Plaintiff does not assert a procedural violation, much less one bare of any concrete interest. To the contrary, the Supreme Court has explicitly held that the TCPA “enacted detailed, uniform, federal *substantive* prescriptions.” *Mims v. Arrow Financial Services*, 132 S. Ct. 740, 743 (2012) (emphasis added). Because Defendants violated Plaintiffs’ private, substantive rights under the TCPA, Plaintiffs have standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (“A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.”) (Thomas, J. concurring).

Further, given that the “concrete injury” requirement has been well established doctrine for half a century (*see Schleisinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974)), Experian apparently believes the Supreme Court’s decision in *Spokeo* dramatically altered the power of the federal judiciary. But *Spokeo* did not break any new ground. It cited long established case law and held that the Ninth Circuit’s “standing analysis was incomplete” because it “did not address . . . the concreteness requirement” and therefore remanded to the Ninth Circuit for that determination. *Spokeo*, 136 S. Ct. at 1545. The majority opinion “[took] no position as to whether the Ninth Circuit’s ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.” *Id.* Thus, the holding of *Spokeo* has no impact here except to the extent that it confirms long established standing requirements that favor Plaintiffs.

As detailed below, Plaintiffs suffered the type of concrete harms required (both before and after *Spokeo*) for Article III standing. Plaintiffs were harmed because the calls at issue were

an invasion of privacy, an intrusion onto their telephone lines, a nuisance, and a waste of time. These are the exact harms that Congress sought to prevent in enacting the TCPA. *See* Pub. L. 102-243, § 2, 105 Stat. 2394 (1991).

## II. STATEMENT OF FACTS

This case arises under the TCPA, 47 U.S.C. § 227, a federal statute enacted in response to widespread public outrage over the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012). The Supreme Court explicitly held that “[t]he Act bans certain practices invasive of privacy.” *Id.* at 744. “Month after month, unwanted robocalls and texts, both telemarketing and informational, top the list of consumer complaints received by the [Federal Communications] Commission.” *See In re Rules & Regulations Implementing the [TCPA] of 1991*, 30 F.C.C.R. 7961, 7964, ¶ 1 (July 15, 2015). The TCPA is designed to protect consumer privacy by, among other things, prohibiting the making of autodialed text message calls to cellular telephones without the prior express consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A).

In this action, Plaintiffs Christina Melito, Christopher Legg, Alison Pierce, and Walter Wood allege that they each received unsolicited and unwanted text messages on their cellular telephones sent by or on behalf of Defendants American Eagle Outfitters, Inc., AEO Management Co., and Experian Marketing Solutions, Inc. (collectively, “Defendants”) without Plaintiffs’ prior express consent or after any prior consent had been explicitly revoked. Plaintiff Melito alleges that “[b]eginning in or around February 2014, Melito received numerous Spam Texts from, or on behalf of, AEO on her cellular telephone” despite “not provid[ing] prior express consent” to receive such text messages. Consolidated Third Amended Class Action Complaint (“TAC”), Dkt. No. 119, ¶¶ 45, 49. Plaintiff Legg alleges that “[m]ultiple text messages were sent to Legg offering him discounts if he shopped at AEO online.” *Id.* ¶ 54.

Legg alleges that he replied to several such text messages “with the instruct to stop sending him texts,” but that further texts were sent even after he gave such instruction. *Id.* ¶¶ 56-62. Plaintiff Pierce alleges that she initially provided consent to AEO for the receipt of text messages to her cellular telephone, but that she subsequently “attempted to opt-out of receiving Spam Texts from AEO by texting ‘STOP’ in response to the Spam Texts.” *Id.* ¶¶ 66-68. However, the Spam Texts continued. *Id.* ¶¶ 68-69. Plaintiff Wood alleges that “Defendants began transmitting Spam Texts to Wood’s cellular telephone” even though “Wood did not provide prior express consent ... to receive the Spam Texts.” *Id.* ¶¶ 73, 81. As a result of these text messages, Plaintiffs bring TCPA claims against Defendants.

### III. AUTHORITY AND ARGUMENT

Contrary to Experian’s argument, Plaintiffs suffered concrete harms that are sufficient to satisfy the injury-in-fact requirement, and specifically the concrete injury requirement, under the Supreme Court’s recent ruling in *Spokeo*. For this reason, the Court should deny Experian’s Rule 12(b)(1) motion to dismiss. In the alternative, should the Court grant Experian’s motion, Plaintiffs respectfully request leave to amend their complaint to provide additional factual allegations regarding the harms they suffered in order to further demonstrate their standing to bring this action.

#### A. Standing After *Spokeo*

In *Spokeo*, the Supreme Court addressed the injury-in-fact requirement for Article III standing. The Supreme Court’s decision did not change the law of standing. Instead, the Supreme Court confirmed the long-established principle that “standing consists of three elements.” *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

decision.” *Id.* The Supreme Court further confirmed that to establish injury in fact—the element primarily at issue in *Spokeo*—a plaintiff must “allege an injury that is both ‘concrete’ and ‘particularized.’” *Id.* at 1545 (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (emphasis added in *Spokeo*)).

According to the Supreme Court, a “particularized” injury “must affect that plaintiff in a personal and individual way.” *Spokeo*, 136 S. Ct. at 1548. The Court agreed with the Ninth Circuit that the *Spokeo* plaintiff had suffered a particularized injury because he claimed that the defendant—an alleged credit-reporting agency—“violated *his* statutory rights,” and his “interests in the handling of his credit information are *individualized rather than collective*.” *Id.* (quoting *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014)) (emphasis in original).

Further, *Spokeo* confirmed that a “concrete” injury “must actually exist.” *Id.* However, a “concrete” injury may be “intangible.” *Id.* at 1549. *Spokeo* indicated two approaches for establishing that an intangible injury is “concrete.” “In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Id.* First, courts should consider whether an alleged intangible harm “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* (citing *Vermont Agency of Nat’l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)). A plaintiff may therefore demonstrate that she suffered a concrete injury by showing that her injury is analogous to a harm traditionally recognized at common law.

Second, Congress may identify and “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.” *Id.* (citation and internal quotation marks omitted). Congress “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before” because

Congress “is well positioned to identify intangible harms that meet minimum Article III requirements.” *Id.*

The Court noted that merely asserting a “bare procedural violation, divorced from any concrete harm,” will not satisfy the concreteness requirement. *Id.* However, this observation has little application to TCPA claims. Such claims are not based on “bare procedural violations,” but rather on substantive statutory prohibitions on certain actions that cause harm to call recipients. And even for procedural rights, a “risk of real harm” can satisfy Article III. *Id.* The Court stated: “[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.” *Id.* (emphasis in original).

In *Spokeo*, the defense bar sought a ruling that would have changed the law and eviscerated causes of action seeking statutory damages. But the Supreme Court did no such thing. Instead, it issued a narrow ruling remanding the case to the Ninth Circuit solely on the basis that it had failed to address the extent to which Robins’ injuries were “concrete” as opposed to merely “particularized.” *Id.* at 1545. The Supreme Court explicitly took no position on whether Robins’ injuries were in fact concrete for standing purposes. *Id.* at 1550. *Spokeo* thus creates no new law. As Justice Alito noted, “[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized.” *Id.* at 1548 (emphasis in original).

**B. Plaintiffs Suffered Harms That Are Sufficient to Satisfy Article III Standing After *Spokeo*.**

Here, Plaintiffs suffered “particularized” injuries that are also “concrete.” Thus, Plaintiffs have satisfied the “injury in fact” requirement for Article III standing.

1. Plaintiffs suffered “particularized” injuries.

*Spokeo* confirmed that injury in fact must be “particularized” in that it “must affect the plaintiff in a personal and individual way.” 136 S. Ct. at 1548. In other words, standing requires that the plaintiff “has suffered some actual or threatened injury.” *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Here, Defendants sent text messages to Plaintiffs’ telephones in violation of the TCPA. See TAC, ¶¶ 45-84. The unlawful telemarketing text messages that caused harm were received by Plaintiffs individually and, as a result, Plaintiffs suffered those resulting harms. Because Plaintiffs and class members suffered such harms individually, the injury is particularized.

2. Plaintiffs suffered “concrete” injuries.

An injury is concrete when it is real or *de facto*, *i.e.*, not abstract. *Spokeo*, 136 S. Ct. at 1548. However, it need not be substantial. *Sierra Club v. U.S. Army Corp. of Eng’rs*, 645 F.3d 978, 988 (8th Cir. 2011) (“Injury in fact necessary for standing ‘need not be large[;] an identifiable trifle will suffice.’”) (citation omitted). As the Supreme Court has explained:

“Injury in fact” reflects the statutory requirement that a person be “adversely affected” or “aggrieved,” and it serves to distinguish a person with a direct stake in the outcome of a litigation -- even though small -- from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker v. Carr*, 369 U.S. 186; a \$ 5 fine and costs, see *McGowan v. Maryland*, 366 U.S. 420; and a \$ 1.50 poll tax, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663. ....

As Professor Davis has put it: “The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, *Administrative Law Treatise* §§ 22.09-5, 22.09-6 (Supp. 1970).

*United States v. Students Challenging Reg. Agency Procs.*, 412 U.S. 669, 689, fn.14 (1973); see also *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1251 (11th Cir. 2015) (finding

that a TCPA plaintiff suffered a concrete injury because his fax line was tied up for one minute).

Concrete also does not mean monetary or economic. *See, e.g., id.; Students Challenging Reg. Agency Procs.*, 412 U.S. at 689, n.14; *see also Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 620-21 (8th Cir. 2015) (“[P]laintiffs who fail to allege actual damages nonetheless satisfy both the injury in fact and redressability requirements of Article III standing by suing for statutory damages.”); *Martin v. Leading Edge Recovery Solutions, LLC*, No. 11 C 5886, 2012 WL 3292838, at \*3 (N.D. Ill. Aug. 10, 2012) (noting in a TCPA case that “[d]efendants have cited no case holding that monetary loss or emotional distress is a prerequisite for Article III standing”).

In *Spokeo*, the Supreme Court provides courts with several tools to use in determining whether a plaintiff’s alleged intangible harm is “concrete.” *See* 136 S. Ct. at 1549. *Spokeo* confirms that the required injury can be intangible and can amount to nothing more than a “risk” of real harm. *Spokeo*, 136 S.Ct. at 1549. An intangible harm is concrete if it has a “close relationship to a harm” that provided a basis for a lawsuit at common law, or if it is a harm identified by Congress:

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. [citation omitted]. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.

*Id.* at 1549. In fact, *Spokeo* goes even further, recognizing that the alleged violation of the statute itself can supply the requisite injury. *Id.* at 1549 (recognizing that the violation of a “right granted by statute can be sufficient in some circumstances to constitute injury in fact” and stating

that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before”).

Here, Plaintiffs have suffered concrete harm under *Spokeo*. Plaintiffs have suffered harm in the form of invasion of privacy, intrusion upon their cellular telephones, waste of time, and nuisance. Each of these intangible harms has a “close relationship” to a harm traditionally recognized at common law. Further, the legislative history of the TCPA demonstrates that Congress sought to “elevate to the status of legally cognizable injuries” the privacy and nuisance harms that the TCPA seeks to prevent. As a result, these harms are sufficient to confer standing under *Spokeo*.

- a. *The invasion of privacy caused by the unlawful text message calls gives Plaintiffs Article III standing.*

The first type of harm Plaintiffs suffered is invasion of their privacy rights. Invasion of privacy is an intangible harm that is recognized by the common law. American courts have long recognized that “[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.” Restatement (Second) Torts § 652A (1977). Nearly every state currently recognizes invasion of privacy in its tort law. *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) (concluding after state survey that “[c]urrently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute”). The right to privacy is also protected under the Constitution. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The Supreme Court and circuit courts have recognized that “[t]he [Telephone Consumer Protection] Act bans certain practices invasive of privacy.” *Mims*, 132 S. Ct. at 744; *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.”); *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 377 (4th Cir. 2013) (recognizing that the TCPA “protects residential privacy”). In addition, courts have recognized direct application of common law invasion of privacy claims to unwanted telephone calls. *See, e.g., Charvat v. NMP, L.L.C.*, 656 F.3d 440, 452–453 (6th Cir. 2011) (Ohio law) (repeated telemarketing calls may be invasion of privacy); *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.*, 249 F.3d 389, 394 (5th Cir. 2001) (Tex. law) (finding that repeated telephone calls support a claim for invasion of privacy). Indeed, the TCPA can be seen as merely liberalizing and codifying the application of this common law tort to particularly intrusive types of unwanted telephone calls. While the common law tort may require different elements than the TCPA, the Supreme Court’s focus in *Spokeo* was not on the elements of the cause of action, but rather on whether the harm was of a type that traditionally provides a basis for a common law claim. Invasion of privacy is such a harm.

In addition to satisfying *Spokeo*’s concrete injury requirement because of a close relationship to a recognized common law harm, the harm resulting from the invasion of privacy caused by unwanted telephone calls was explicitly recognized by Congress as a harm the TCPA sought to prevent. In enacting the TCPA, Congress repeatedly referenced its purpose to protect consumers’ privacy rights. The congressional findings accompanying the TCPA stress the purpose of protecting consumers’ privacy:

(5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy* and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of *intrusive, nuisance calls* to their homes from telemarketers.

\*\*\*

(9) Individuals' *privacy rights*, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that *protects the privacy of individuals* and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be *a nuisance and an invasion of privacy*.

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(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this *nuisance and privacy invasion*.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are *a nuisance and an invasion of privacy*, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls *are a nuisance, are an invasion of privacy*, and interfere with interstate commerce.

Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (emphasis added); *see also In re Rules & Regulations Implementing the [TCPA] of 1991*, 30 F.C.C.R. 7961, 7967, ¶ 4 (July 15, 2015)

("Congress enacted the TCPA in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety."). And the Act's sponsor, Senator Hollings, stated that "[c]omputerized calls are 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. 30,821–22 (1991).

Plaintiffs suffered an invasion of their privacy rights with each unlawful text message sent to their cellular telephone in violation of the TCPA. Plaintiffs allege that they received autodialed text messages, despite not providing AEO with prior express consent to send such messages or after any such consent was explicitly revoked. *See* TAC ¶¶ 45-84. Because the invasion of privacy harm caused by these calls is both traditionally recognized at common law and is the very harm that Congress sought to prevent in enacting the TCPA, Plaintiffs easily satisfy the concrete injury requirement for Article III standing as articulated in *Spokeo*.

- b. *The intrusion upon and occupation of Plaintiffs' telephone caused by the unlawful text messages give Plaintiffs Article III standing.*

The second type of harm Plaintiffs suffered is intrusion upon and occupation of their cellular telephones. The harm recognized by the ancient common law claim of trespass and, more specifically, trespass to chattels—the intentional dispossession of chattel, or the use of or intermeddling with a chattel that is in the possession of another—is a close analog for the harm caused by the unlawful text messages Plaintiffs received. *See* Restatement (Second) of Torts § 217 (1965). Common-law courts recognized an action for trespass to chattels for temporary dispossession of personal objects “although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor,” and “he is not deprived of the use of the chattel for any substantial length of time.” Restatement (Second) of Torts § 218 cmt. D (1965). This is similar to the more widely familiar concept of trespass, which requires nothing more than “plac[ing a] foot on another’s property” to constitute harm and thus confer standing on the property owner to bring a trespass claim. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

Multiple courts have held that temporary electronic intrusion upon another person’s electronic equipment constitutes trespass to chattels. *See, e.g., Register.com, Inc. v. Verio, Inc.*,

126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000) (finding that intruding electronically into business's database causes harm by reducing the system's capacity and that "mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels"), *aff'd* 356 F.3d 393 (2d Cir. 2004); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va. 1998) (granting summary judgment against spammer on trespass to chattels claim because the plaintiff's "possessory interest in its computer network ha[s] been diminished by the bulk e-mailing"); *CompuServe, Inc. v. CyberPromotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (issuing preliminary injunction against spammer on theory of trespass to chattels); *Microsoft Corp. v. Does 1-18*, 2014 WL 1338677, at \*9-10 (E.D. Va. Apr. 2, 2014) ("The unauthorized intrusion into an individual's computer system through ... unwanted communications supports [a claim for trespass to chattels]."). Courts have also found this tort theory applicable to unwanted text and voice messages. *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); *Amos Fin., L.L.C. v. H & B & T Corp.*, 2015 WL 3953325, at \*8 (N.Y. Sup. Ct. June 29, 2015) (occupying memory of answering machine and interfering with unencumbered access to phone would have been trespass to chattels if proven).

Plaintiffs here suffered harms analogous to the interference with property recognized in the common law claim for trespass to chattels. Plaintiffs' cellular telephones received and stored the unwanted text messages, taking up Plaintiffs' personal cell phone memory unless and until Plaintiffs affirmatively deleted such messages. As a result, Plaintiffs suffered concrete harm of a type traditionally recognized at common law and recognized by Congress and courts as a harm the TCPA sought to address. Plaintiffs therefore have standing to pursue their TCPA claims.

- c. *The nuisance, interruption, and waste of time caused by the unlawful calls give Plaintiffs Article III standing.*

Plaintiffs also suffered a third type of intangible injury in the form of nuisance, interruption, and waste of time. The interruption caused by a text message alert, causing a person to divert his attention from whatever he is doing to pick up his phone, read the text message, and possibly respond to it, is wasteful of the precious resource of time and constitutes a nuisance. The first post-*Spokeo* decision to address whether a mere allegation of a TCPA violation satisfies Article III's requirement of "injury in fact" holds that wasting the recipient's time is a concrete injury that satisfies Article III:

Here, the court is satisfied that Plaintiffs' allegations demonstrate "concrete injury" as elucidated in *Spokeo*. In *Spokeo*, the "injury" Plaintiffs incurred was arguably merely procedural and thus non-concrete. In contrast, the TCPA... violations alleged here, if proven, required Plaintiffs to waste time answering or otherwise addressing widespread robocalls. The use of the autodialer, which allegedly enabled Defendants to make massive amounts of calls at low cost and in a short period of time, amplifies the severity of this injury. As Congress and Washington State's legislature agreed, such an injury is sufficiently concrete to confer standing.

*Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at \*5 (W.D. Wash. May 25, 2016). This decision is consistent with pre-*Spokeo* decisions recognizing that lost time is an injury-in-fact in TCPA and other cases. See *Leung v. XPO Logistics, Inc.*, --- F. Supp. 3d ----, No. 15 C 03877, 2015 WL 10433667, at \*4 (N.D. Ill. Dec. 9, 2015) ("Leung alleges that he lost time in responding to XPO's call. ... That is enough, so XPO's motion [to dismiss TCPA claims] must be denied."); *Martin*, 2012 WL 3292838, at \*3 (finding plaintiffs suffered injury under TCPA in part "because they had to spend time tending to unwanted calls"); *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1146 (C.D. Cal. 2012) ("[A] plaintiff suffers an injury sufficient to establish Article III standing where she alleges that she lost time spent responding to the

defendant’s wrongful conduct and the lost time is at least indirectly attributable to the defendant’s actions.”).

When it enacted the TCPA, Congress emphasized the nuisance aspect of automated calls, showing that it considered the interruptions they cause and the time they waste to be one of the harms the TCPA sought to remedy. As detailed above, Congress repeatedly identified such calls as a “nuisance.” *See* Pub. L. 102-243, § 2, 105 Stat. 2394 (1991). Senator Hollings’ colorful comments illustrate this harm: “They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed.” 137 Cong. Rec. 30,821–22 (1991). Congress was also mindful of protecting consumers from the burdens of dealing with unwanted calls, finding that “[t]echnologies that might allow consumers to avoid receiving such calls ... place an inordinate burden on the consumer.” Pub. L. 102–243, § 2, 105 Stat. 2394 (1991).

As a result of Defendants’ text message calls, Plaintiffs suffered the very nuisance, interruption, and waste of time harms that Congress identified and that courts have found sufficient to support Article III standing. These concrete harms are not “bare procedural violations.” Rather, Plaintiffs’ time was wasted in reading the Spam Texts, and the interruption caused by these unwanted texts constituted a nuisance. These harms, recognized at common law and by multiple courts, are sufficient to establish Plaintiffs’ standing.

- d. *Plaintiffs suffered tangible harms as a result of the use of their cellular telephone plans to receive and respond to the unlawful text messages.*

Finally, not only have Plaintiffs suffered concrete but “intangible” harms, Plaintiffs also sustained “tangible” economic harm as a direct result of Defendants’ illegal telemarketing practices. The calls at issue were received on personal cell phones used by and paid for by Plaintiffs. *See* TAC ¶¶ 41, 45, 54, 67, 73. The FCC has long recognized that the recipient of telemarketing calls to a cell phone is monetarily “charged” for such calls, even if the recipient

subscribes to a plan that charges a flat monthly rate for the plan. See *In re Rules & Regulations Implementing the [TCPA] of 1991*, 18 F.C.C.R. 14014, 14115, ¶ 165 (July 3, 2003); *In re Rules & Regulations Implementing the [TCPA] of 1991*, 23 F.C.C.R. 559, 562, ¶ 7 (Jan. 4, 2008); *In re Rules & Regulations Implementing the [TCPA] of 1991*, 27 F.C.C.R. 1830, 1839–40, ¶ 25 (Feb. 15, 2012); see also *Lee v. Credit Mgmt., LP*, 846 F. Supp. 2d 716, 729 (S.D. Tex. 2012) (“Lee has stated that he pays a third-party provider for cellular phone services. Normally, this is sufficient to show that an individual was charged for the calls.”); *Fini v. DISH Network L.L.C.*, 955 F. Supp. 2d 1288, 1297 (M.D. Fla. 2013). Because Plaintiffs paid monthly cell phone bills for the phone lines on which they received the texts, Plaintiffs have suffered a tangible injury in fact. See *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012) (finding that consumers ultimately bear the costs of calls to cell phones regardless of “whether they pay in advance or after the minutes are used”). This tangible harm confers standing under *Spokeo*.

e. *The violation of Plaintiffs’ substantive rights under the TCPA confers standing.*

The alleged violations of Plaintiffs’ rights under the TCPA are sufficient in and of themselves to constitute a concrete injury. *Spokeo* reaffirms that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)); see also *Rogers v. Capital One Bank (USA), N.A.*, No. 1:15-CV-4016-TWT, 2016 WL 3162592, at \*2 (N.D. Ga. June 7, 2016) (“Congress may, by statute, transform a previously non-concrete injury into one that is concrete and therefore sufficient to confer

standing.”) (citing *Spokeo*).<sup>1</sup> Moreover, in evaluating the procedural requirements of the Fair Credit Reporting Act, *Spokeo* noted that an alleged violation of a *procedural* right, by itself, may or may not meet the injury requirement, depending on the circumstances. *Spokeo*, 136 S.Ct. at 1549 (“[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”) (italics in original). The Court limited its comments to procedural rights because the case before it presented an alleged violation of procedural rights under the Fair Credit Reporting Act. *See id.* at 1545 (citing, *inter alia*, 15 U.S.C. §1681e (“Compliance Procedures”)). Accordingly, the *Spokeo* majority did not discuss violations of *substantive* rights.

Justice Thomas’s concurrence fills this gap, confirming that in the context of substantive or “private” rights, the violation alone is enough to meet the concrete injury requirement:

Common-law courts imposed different limitations on a plaintiff’s right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more. “Private rights” are rights “belonging to individuals, considered as individuals.” 3 W. Blackstone, Commentaries \*2 (hereinafter Blackstone). .... In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another’s property, the property owner needed to show nothing more to establish a traditional case or controversy.

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<sup>1</sup> Congress has the power to define injuries because “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amount of data’ bearing upon” legislative questions. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (citation omitted); *see also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (“When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference...”).

A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. See *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 373–374, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); *Tennessee Elec. Power Co. v. TVA*, 306 U. S. 118, 137–138, 59 S. Ct. 366, 83 L. Ed. 543 (1939) (recognizing that standing can exist where “the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”).

*Spokeo*, 136 S.Ct. at 1551 and 1553 (Thomas, J., concurring).

The *Havens Realty* case Justice Thomas cites is particularly instructive. In it, a unanimous Supreme Court ruled that the violation of the plaintiff’s statutory right not to be lied to about available housing met the “injury in fact” requirement even if the plaintiff had no intention of doing business with the defendant and interacted with the defendant *fully expecting* it to violate her rights:

As we have previously recognized, “[the] actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’” *Warth v. Seldin*, *supra*, at 500, quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1973). Accord, *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J., concurring). Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions. That the tester may have approached the real estate agent *fully expecting* that he would receive false information, and *without any intention* of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).

*Havens Realty Corp.*, 455 U.S. at 373-74 (emphasis added). Needless to say, a person who interacts with a firm having no intention of doing business with it, and expecting the firm to lie, suffers no harm beyond the statutory violation. Nevertheless, in the context of substantive rights,

the Court ruled nothing more is required to meet Article III. *See Havens Realty Corp.*, 455 U.S. at 373-74.<sup>2</sup>

In addition, the Eleventh Circuit recently cited both *Havens Realty* and *Spokeo* to hold that a debt collector's violation of a debtor's statutory right to under the Fair Debt Collection Practices Act, by itself, was enough to meet the concrete injury requirement. *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at \*3 (11th Cir. July 6, 2016). Noting that right was substantive, the Court ruled that "Congress has created a new right—the right to receive the required disclosures in communications governed by the FDCPA—and a new injury—not receiving such disclosures." *Id.*

Unlike the procedural requirements at issue in *Spokeo*, as noted above, Plaintiffs' rights under the TCPA are substantive. *See Mims*, 132 S.Ct. at 751 ("[Congress] enacted detailed, uniform, federal *substantive* prescriptions and provided for a regulatory regime administered by a federal agency.") (italics added). Accordingly, violations of those rights are themselves sufficient to constitute a concrete injury.

**C. Post-*Spokeo* Decisions Support Plaintiffs' Position That They Have Standing.**

In the weeks since the Supreme Court decided *Spokeo*, multiple district courts have decided the standing issue. In *Mey v. Got Warranty Inc.*, the court cited the "intangible" injuries of invasion of privacy, trespass to chattels, and nuisance harms resulting from telemarketing calls as a basis for finding standing to bring TCPA claims. 5:15-CV-101, 2016 WL 3645195, at \*8 (N.D. W. Va. June 30, 2016) (rejecting motion to dismiss under *Spokeo*). The *Mey* court noted

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<sup>2</sup> No subsequent Supreme Court case questions or limits *Havens Realty*. To the contrary, later Supreme Court authority is consistent with it. In *Lujan v. Defenders of Wildlife*, cited by *Spokeo*, the Supreme Court expressly describes the required "injury in fact" as "*an invasion of a legally protected interest* which is (a) concrete and particularized [citations] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (italics added, citations omitted).

that *Spokeo* did not change existing law on standing, but “confirm[ed] that either tangible or intangible injuries can satisfy the requirement of concreteness.” *Id.* at \*2, citing *Spokeo*, 136 S. Ct. at 1549. The court emphasized that invasion of privacy conferred standing because the common law “recognizes as actionable the harm caused by invasion of privacy” and because “Congress identified it as a legally cognizable harm” in enacting the TCPA. *Id.* at \*4. The *Mey* court also recognized that “the mere invasion of the consumer’s electronic device can be considered a trespass to chattels.” *Id.* at \*5. Finally, the *Mey* court found that “the illegal calls caused . . . intangible harm” because they “required the plaintiff to tend to them and wasted the plaintiff’s time.” *Id.* at \*6.

Other decisions post-*Spokeo* have confirmed that one or more of the harms identified in *Mey* are sufficiently concrete to confer standing. *See Appstack*, 2016 WL 3030256, at \*5 (finding that plaintiffs had standing because the defendant’s actions “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”); *Thomas v. FTS USA, LLC*, Case No. 3:13-cv-00825-REP, 2016 WL 3653878, at \*4 (E.D. Va. June 30, 2016) (finding invasion of privacy sufficient harm to confer standing under the FCRA); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 WL 3513782, at \*7-8 (3d Cir. June 27, 2016) (finding that plaintiffs had standing due to invasion of privacy resulting from disclosure of legally protected information); *Boelter v. Hearst Commc’ns, Inc.*, 15 Civ. 3934 (AT), 2016 WL 3369541, at \*3 (S.D.N.Y. June 17, 2016) (finding standing where defendants disclosed private information in violation of a federal statute and thereby “deprived [p]laintiffs of their right to keep their information private”); *Bona Fide Conglomerate, Inc. v. SourceAmerica*, No.: 3:14-cv-00751-GPC-DHB, 2016 WL 3543699, at \*8 (S.D. Cal. June 29, 2016) (finding violation of privacy rights a sufficient harm to confer standing after *Spokeo*).

These decisions finding standing after *Spokeo* are in accord with many district court decisions decided pre-*Spokeo* finding that unwanted calls cause concrete harm sufficient to confer standing to bring TCPA claims. *See, e.g., Torres v. National Enterprise Systems, Inc.*, No. 12 C 2267, 2012 WL 3245520, at \*2 (N.D. Ill. Aug. 7, 2012) (“Torres alleges that the Phone Calls were a nuisance and that they invaded her privacy. Article III standing can be premised upon such non-monetary and non-physical injuries. . . . Causing a nuisance to Torres and invading her privacy would be an injury to Torres.”); *Schumacher v. Credit Prot. Ass’n*, No. 4:13-cv-00164-SEB-DML, 2015 WL 5786139, at \*5 (S.D. Ind. Sept. 30, 2015) (finding that the plaintiff’s “TCPA-created right to privacy was invaded by repeated automated calls” and that this was sufficient to confer standing); *Ikuseghan v. MultiCare Health Sys.*, No. C14-5539 BHS, 2015 WL 4600818, at \*2 (W.D. Wash. July 29, 2015) (finding invasion of privacy caused by unwanted calls sufficient to confer standing to bring TCPA claims).

In contrast to the above-cited cases, both of the post-*Spokeo* cases Experian relies on are clearly inapposite. In *Sartin v. EKF Diagnostics, Inc.*, the court determined that the plaintiff had failed to plead sufficient facts to support concrete harm, but dismissed the complaint without prejudice, finding that the “failure to adequately allege a concrete injury in fact may reflect mere pleading defect, rather than a more fundamental problem with his claims.” No. 16-1816, 2016 WL 3598297, at \*4 (E.D. La. July 5, 2016). In other words, the court did not find that the plaintiff didn’t suffer concrete harm as a result of the defendant’s TCPA violations; rather, the court determined that such harms were merely insufficiently alleged. Plaintiffs believe that standing is not a pleading requirement and that the underlying harms incurred as a result of the TCPA violations in this case are sufficiently clear from the factual allegations contained in the complaint. However, should the Court conclude that *Spokeo* requires that the invasion of

privacy, trespass to chattels, and nuisance harms Plaintiffs suffered be explicitly pleaded, Plaintiffs respectfully request the opportunity to amend their complaint to allege these harms, just as the *Sartin* court permitted.

*Stoops v. Wells Fargo Bank, N.A.* is even less useful to Experian. In *Stoops*, the court first noted that multiple courts in the Third Circuit had held that “a plaintiff demonstrates a violation of privacy interests, and therefore an injury-in-fact, after receiving automated calls.” No. 3:15-83, 2016 WL 3566266, at \*9 (W.D. Penn. June 24, 2016). The court then determined that the plaintiff did not have standing, but only because “the facts of the instant case have not arisen in other TCPA actions because Plaintiff has admitted that she files TCPA actions as a business.” *Id.* at \*9. In other words, the court’s ruling was limited to the unique factual situation where the plaintiff had “more than 40 cell phone numbers” and where she testified that she “ha[s] a business suing offenders of the TCPA.” *Id.* at \*10. However, the court suggests that in the typical situation, unwanted telephone calls are an invasion of privacy and a nuisance. *Id.* at \*11.

**D. By Asserting Subject Matter Jurisdiction Over *Campbell-Ewald*, the Supreme Court Necessarily Determined That TCPA Claims May Satisfy the Concrete Harm Requirement for Article III Standing.**

Any assertion that *Spokeo* divests federal courts of jurisdiction over TCPA claims is directly at odds with the Supreme Court’s decision in *Campbell-Ewald v. Gomez*, a case decided earlier in the same term. 136 S. Ct. 663 (2016). It is axiomatic that a federal court may not adjudicate an action which does not present a “case or controversy” within the meaning of Article III of the United States Constitution. *Id.* at 669. Further, “[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.” *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). Therefore, if subject matter jurisdiction was truly lacking under the TCPA due to the lack of a concrete injury,

the Supreme Court should have dismissed *Campbell-Ewald* as non-justiciable. It did not do so. In fact, Justice Roberts noted the Court's agreement that the receipt of unwanted telephone calls was indisputably an injury in fact. *Campbell-Ewald*, 136 S. Ct. at 679 (C.J., Roberts dissenting) ("All agree that at the time Gomez filed suit, he had a personal stake in the litigation. In his complaint, Gomez alleged that he suffered an injury in fact when he received unauthorized text messages from Campbell. To remedy that injury, he requested \$1500 in statutory damages for each unauthorized text message."). By exercising jurisdiction over the TCPA claims asserted in *Campbell-Ewald*, the Court necessarily was satisfied that there was a case or controversy within the meaning of Article III.

**E. If the Court Finds that Plaintiffs' Allegations Are Insufficient, Leave to Amend Is Appropriate.**

Plaintiffs believe that standing is not a pleading requirement and that the underlying harms incurred as a result of the TCPA violations in this case are sufficiently clear from the factual allegations contained in the complaint. For example, the Court in *Appstack* addressed the post-*Spokeo* standing issue *sua sponte* and concluded that the plaintiffs had standing to bring TCPA claims. *See Appstack*, 2016 WL 3030256, at \*5. The court looked not at whether Plaintiffs had explicitly alleged each underlying harm, but rather at whether the factual allegations regarding the TCPA violations demonstrated that the plaintiffs had suffered a concrete harm. *Id.*; *see Spokeo*, 136 S. Ct. at 1547 (requiring a plaintiff "at the pleading stage" to "clearly allege facts *demonstrating* each element" of Article III standing) (emphasis added). For this reason, Plaintiffs do not believe that amendment of the TAC is necessary to establish standing. However, should the Court conclude that *Spokeo* requires that the invasion of privacy, trespass to chattels, and nuisance harms Plaintiffs suffered be explicitly pleaded, Plaintiffs respectfully request the opportunity to amend their complaint to allege these harms. As detailed

above, such harms are sufficient to establish concrete injury. As a result, amendment of the complaint will not be futile.

#### IV. CONCLUSION

For the reasons detailed above, Plaintiffs have Article III standing to bring the TCPA claims alleged. The calls Plaintiffs received invaded their privacy, intruded on their cellular telephones, and wasted their time. These harms establish that Plaintiffs suffered “concrete” harm under *Spokeo*. As a result, Plaintiffs respectfully request that the Court deny Experian’s motion to dismiss. In the alternative, Plaintiffs request leave to amend their complaint to explicitly allege the harms they suffered as a result of Defendants’ TCPA violations, as detailed above.

RESPECTFULLY SUBMITTED AND DATED this 12th day of July, 2016.

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