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VIA ECF

May 24, 2016

Clerk of Court  
Second Circuit Court of Appeals  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

Re: *Paul Sterling v. Mercantile Adjustment Bureau, LLC*  
U.S. Court of Appeals, Second Circuit, Case No. 14-1247

To Clerk of Court:

I am writing in response to this Court's text order, dated May 3, 2016, requesting further briefing on the issue of whether Plaintiff-Appellee has suffered a sufficient injury-in-fact sufficient to establish Article III standing under the United States Constitution. (Docket 84).

The Supreme Court has recently outlined the requirements to establish that an "injury in fact" has occurred to confer Article III standing in the federal courts. *Spokeo, Inc. v. Robins*, No. 13-1339, \_\_\_ U.S. \_\_\_, 2016 WL 2842447 (May 16, 2016). Specifically, the Court found that to meet the "injury in fact" threshold, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.*, at \*6 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-577, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

In order to meet the "concrete" requirement, a plaintiff must show a tangible or intangible injury that must be "real," and not "abstract." *Spokeo, supra*, at \*7. Here, the Plaintiff alleged the following concrete injuries in his complaint:

1. That Defendant called Plaintiff an excessive number of times. (A-9, ¶ 22).
2. That Plaintiff asked the Defendant to stop calling his cell phone on multiple occasions. (A-9, ¶¶ 24, 26).
3. Notwithstanding those requests, Defendant continued to call Plaintiff's cell phone using an automated telephone dialing system. (A-9, ¶¶ 26, 27; A-10, ¶ 34; (A-11, ¶ 39).

4. That as a result of Defendant's acts, Plaintiff became nervous, upset, anxious, and suffered from emotional distress. (A9-¶ 29, A-11, ¶ 40).
5. That the natural consequence of Defendant's acts were to harass, oppress, and abuse the Plaintiff. (A 10, ¶ 32).
6. That as a result of Defendant's TCPA violations, the Defendant disturbed Plaintiff's peace and tranquility at home and elsewhere. (A 11, ¶ 39).

In the Report and Recommendation of the Magistrate Judge, the court noted that Congress had determined that 'Unrestricted telemarketing can be an intrusive invasion of privacy,' that '[m]any consumers are outraged over the proliferation of intrusive nuisance [telemarketing] calls to their homes,' and that automated or prerecorded telephone calls made to private residences were found by Congress to be rightly regarded by recipients as an invasion of privacy. (A-29) (*citing* TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745, 181 L. Ed. 2d 881 (2012)). Thereafter, the parties stipulated that Plaintiff had suffered damages for the purposes of any appeal. (A. 36-38, ¶ 6). That stipulation was ultimately adopted by the district court. (A. 6, text order at docket entry 58).

The invasions of privacy and intrusions into seclusion that Congress sought to address have long been recognized in the common law as legally protected interests. *Griswold v. Connecticut*, 381 U.S. 479, 484-485, 85 S. Ct. 1678, 1696, 14 L. Ed. 2d 510 (1965); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 488-489, 95 S. Ct. 1029, 1046, 43 L. Ed. 2d 328 (1975); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012); W. Prosser, *Law of Torts* § 117, at 854-55 (5<sup>th</sup> ed. 1984); *Restatement (Second) of Torts* § 652A-B.

Plaintiff alleges that Defendant's robocalls caused him emotional distress by disturbing his peace and tranquility at home and elsewhere, and by making him nervous, upset, and anxious. Emotional injuries, such as those suffered by the Plaintiff, have long been recognized as providing the basis for a lawsuit. *Carey v. Piphus*, 435 U.S. 247, 264, 98 S. Ct. 1042, 1052, 55 L. Ed. 2d 252 (1978). This circuit has recognized the availability of damages for emotional distress in the context of civil rights actions. *Patrolmen's Benevolent Ass'n. of City of New York v. City of New York*, 310 F.3d 43, 56 (2d Cir.2002). Thus, as required by *Spokeo*, the TCPA addresses "a harm that has been traditionally been regarded as providing for a lawsuit in English or American Courts." *Spokeo*, 2016 WL 2842447, at\*7.

The TCPA imposes liability on a caller even when the called party was not present when the call was initiated; i.e. even if he did not hear his phone ring. 47 U.S.C. §227.(b)(1)(A) ("It shall be unlawful for any person to . . . make any call . . ."). The Defendant may argue that the calls that were not heard by Plaintiff did not cause him to suffer and "concrete injury." Accordingly, they may argue that a remand is necessary to determine which calls were heard, and which calls were not.

But a remand is not necessary because for three reasons. First, Plaintiff could reasonably become upset to learn some time after a robocall was made that the calling party is attempting to violate his privacy, and reasonably fear that such calls would continue – even if he did not hear his phone ring at the time the call was made.

Second, the simple act of calling Plaintiff using an automated telephone dialing system creates a *risk* that Plaintiff will hear the call and become upset. The *Spokeo* Court noted that where a statute attempts to prevent a risk of harm, the violation of a statute can be sufficient, in and of itself, to create an injury-in-fact. *Spokeo*, 2016 WL 2842447, at \*8. The risk of harm described in *Spokeo* has been found to exist where a defendant’s unlawful behavior will *likely* occur or continue, and that the threatened injury is impending. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170, 120 S. Ct. 693, 698-99, 145 L. Ed. 2d 610 (U.S.S.C. 2000). Here, after receiving a call that he did not answer, the Plaintiff would undoubtedly expect the calls to continue until they reached him.

Third, *the Defendant stipulated that Plaintiff was damaged by the robocalls he received, and that those damages were valued at \$12,500.* (A. 36-38, ¶ 6). Were this case remanded, Defendant would be bound to agree that Plaintiff’s damages are properly valued at \$12,500.

The “particularization” requirement enunciated in *Spokeo* is easily met here. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Spokeo*, 2016 WL 2842447, at \*6. Plaintiff clearly alleged that the calls caused him emotional distress.

In sum, in enacting the TCPA, Congress determined that ‘Unrestricted telemarketing can be an intrusive invasion of privacy,’ that ‘[m]any consumers are outraged over the proliferation of intrusive nuisance [telemarketing] calls to their homes,’ and that automated or prerecorded telephone calls made to private residences were found by Congress to be rightly regarded by recipients as an invasion of privacy. (A-29) (*citing* TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745, 181 L. Ed. 2d 881 (2012)). The harms sought to be addressed by the TCPA are well-grounded in common law. Further, the victims of these violations of privacy have suffered concrete injuries. Accordingly, it is respectfully submitted that Plaintiff meets the injury-in-fact requirement of Article III of the United States Constitution.

Respectfully submitted,

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