

analysis was “incomplete” because it did not separately consider whether the plaintiff’s injury was “concrete.” *Id.* It remanded with directions for the Ninth Circuit to answer that question. *Id.*

The Supreme Court gave the Ninth Circuit guidance, holding that “concrete” means “real,” and not “abstract.” *Id.* at 1548. The Court held that “tangible” injuries are “easier to recognize” as being “real” and “not abstract,” but “intangible injuries can nevertheless be concrete,” as well. *Id.* at 1549. In determining whether an *intangible* injury is concrete, the Court identified two factors: (1) whether in “historical practice” the “alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit” and (2) the “judgment” of Congress, since “Congress is well positioned to identify intangible harms that meet minimum Article III requirements.” *Id.*

By passing FCRA, the Court held, Congress “sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.” *Id.* at 1550. And so the Court directed the Ninth Circuit to consider whether the intangible “procedural violations” in *Spokeo* “entail[ed] a degree of risk sufficient to meet the concreteness requirement.” *Id.* The Court took “no position as to whether the Ninth Circuit’s ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.” *Id.*

II. This Court should follow the overwhelming judicial consensus that TCPA violations constitute “concrete” injury under *Spokeo*.

Following *Spokeo*, the federal courts have almost universally found Article III “concrete” injury in TCPA cases. Most of these cases involved telephone calls or texts, including decisions from district courts in the Third Circuit in *Leyse v. Bank of Am.*, No. 11-7128 (SDW)(SCM), 2016 WL 5928683, at *5 (D.N.J. Oct. 11, 2016), and *Abramson v. CWS Apartment Homes, LLC*, 2016 WL 6236370, at *2 (W.D. Pa. Oct. 24, 2016). There are many more such decisions from

district courts across the country.¹ Although not a TCPA case, the Third Circuit found *Spokeo* easily satisfied in the context of “unauthorized disclosures of information” in *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016).

With respect to post-*Spokeo* TCPA cases involving fax advertisements, as opposed to calls or texts, the courts have also found “concrete” injury. In *Fauley v. Drug Depot, Inc.*, --- F. Supp. 3d ---, 2016 WL 4591831, at *3 (N.D. Ill. Aug. 31, 2016), the court denied a Rule 12(b)(1) motion to dismiss, holding the plaintiff adequately alleged “loss of paper and toner consumed in the printing of the fax, loss of use of his telephone line and fax machine during receipt of the unsolicited fax, and loss of time receiving, reviewing, and disposing of the fax,” finding these allegations “sufficiently ‘real’ to meet the concreteness requirement under *Spokeo*.”

In *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, --- F.R.D. ---, 2016 WL 5390952, at *5, n.3 (N.D. Ill. Sept. 27, 2016), the court granted class certification in a TCPA fax case, finding *Spokeo* satisfied and holding that “[v]iolation of the TCPA is a concrete harm.”

The most thorough application of *Spokeo* in a TCPA fax case thus far is *Brodsky v. HumanaDental Ins. Co.*, 2016 WL 5476233, at *11 (N.D. Ill. Sept. 29, 2016), where the district court held that unwanted faxes cause “tangible” injuries, such as occupation of the fax line and

¹ *E.g.*, *Holderread v. Ford Motor Credit Co.*, 2016 WL 6248707, at *3 (E.D. Tex. Oct. 26, 2016); *Griffith v. ContextMedia, Inc.*, 2016 WL 6092634, at *1 (N.D. Ill. Oct. 19, 2016); *LaVigne v. First Cmty. Bancshares, Inc.*, 2016 WL 6305992, at *4–5 (D.N.M. Oct. 19, 2016); *Dolemba v. Ill. Farmers Ins. Co.*, 2016 WL 5720377, at *3 (N.D. Ill. Sept. 30, 2016); *Juarez v. Citibank, N.A.*, 2016 WL 4547914, at *3 (N.D. Cal. Sept. 1, 2016); *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536, at *2 (E.D. Cal. Aug. 23, 2016); *Aranda v. Caribbean Cruise Line, Inc.*, 2016 WL 4439935, at *5–6 (N.D. Ill. Aug. 23, 2016); *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *6 (N.D. Ill. Aug. 19, 2016); *Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, 2016 WL 4179150, at *5–6 (N.D. Ill. Aug. 8, 2016); *Ung v. Universal Acceptance Corp.*, 2016 WL 4132244, at *2 (D. Minn. Aug. 3, 2016); *Krakauer v. Dish Network, LLC*, 168 F. Supp. 3d 843, 845 (M.D.N.C. 2016); *Cour v. Life360, Inc.*, 2016 WL 4039279, at *1 (N.D. Cal. July 28, 2016); *Caudill v. Wells Fargo Home Mtg., Inc.*, 2016 WL 3820195, at *2 (E.D. Ky. July 11, 2016); *Mey v. Got Warranty, Inc.*, 2016 WL 3645195, at *3 (N.D.W.Va. June 30, 2016); *Rogers*

fax machine. The district court also held faxes cause “intangible,” yet “concrete,” injury under *Spokeo* where (1) the cause of action “has a basis in ‘historical practice,’ insofar as it is roughly analogous to a claim at common law for conversion” and (2) where Congress’s “judgment” was that a private right of action was needed “to protect citizens from the loss of the use of their fax machines during the transmission of fax data.” *Id.* (quoting *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260 (11th Cir. 2015) (holding Article III satisfied in TCPA fax case pre-*Spokeo*)).

In this case, Plaintiff’s Complaint alleges that “on or about February 21, 2013, Defendants transmitted by telephone facsimile machine an unsolicited facsimile to Plaintiff.” (Compl. ¶ 19). The Complaint attaches “[a] copy of the facsimile” as Exhibit A. (*Id.*) It alleges Defendants sent this advertisement “to the telephone lines and facsimile machines of Plaintiff and members of the Plaintiff Class.” (*Id.* ¶ 38). It alleges the faxes “used the Plaintiff’s and the other class members’ telephone lines and fax machine[s],” that they “cost the Plaintiff and the other class members time” that “otherwise would have been spent on the Plaintiff’s and the other class members’ business activities,” and that they “unlawfully interrupted the Plaintiff’s and other class members’ privacy interests in being left alone.” (*Id.* ¶ 43).

Like the plaintiff in *Brodsky*, Plaintiff has alleged “tangible” injuries, which are presumed to be “concrete” under *Spokeo*. 2016 WL 5476233, at *11. Plaintiff has also alleged “intangible” injury, as in *Fauley*, 2016 WL 4591831, at *3, and *Physicians Healthsource*, 2016 WL 5390952, at *5, n.3, and the at least 16 other post-*Spokeo* TCPA cases involving telephone calls or texts, cited above. *Spokeo* is easily satisfied here.

v. Capital One Bank (USA), N.A., 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016); *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *6 (W.D. Wash. May 25, 2016).

The only fax case Plaintiff's counsel is aware of to dismiss on *Spokeo* grounds is *Sartin v. EKF Diagnostics, Inc.*, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016), where the plaintiff merely alleged that he suffered the injuries "contemplated by Congress and the [FCC]." The plaintiff failed to explain what injuries "lawmakers 'contemplated' when enacting the TCPA," and the court held his "vague reference to Congress and the FCC" was insufficient. *Id.*

The *Sartin* plaintiff argued in his response to the motion to dismiss that he "wasted valuable time in reviewing the fax, time that was taken away from his medical practice," but the court held he could not "raise new factual allegations or assert new claims" in a brief. *Id.* at *4. The court therefore granted the plaintiff leave to amend, holding the deficiency "may reflect mere pleading defect, rather than a more fundamental problem with his claims." *Id.* The plaintiff filed an amended complaint, and PACER reflects that the defendant's renewed motion to dismiss is pending as of the filing of this brief.

Unlike the plaintiff in *Sartin*, Plaintiff in this case has pleaded the specific injuries contemplated by Congress in passing the fax-advertising provisions of the TCPA, namely that Defendants' fax "shift[ed] some of the costs of advertising from the sender to the recipient," and that it "occupie[d] the recipient's facsimile machine," which is an independent "concrete" injury. *Sarris*, 781 F.3d at 1252 (quoting H.R. Rep. No. 102-317, at 10 (1991)); *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 631 (6th Cir. 2015) (same).

In sum, the Court has subject-matter jurisdiction over Plaintiff's claims under *Spokeo*, and it should deny Defendants' Rule 12(b)(1) motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/Matthew N. Fiorovanti