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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 Jeremy Klein, *on behalf of himself and all*  
20 *others similarly situated,*

21 Plaintiff,

22 v.

23 Hyundai Capital America d/b/a  
24 Hyundai Motor Finance,

25 Defendant.

26 Case No.: 8:16-cv-01469-JLS-JCG

27 **MEMORANDUM OF POINTS AND**  
28 **AUTHORITIES IN SUPPORT OF**  
**THE MOTION OF DEFENDANT**  
**HYUNDAI CAPITAL AMERICA**  
**D/B/A HYUNDAI MOTOR FINANCE**  
**TO DISMISS PLAINTIFF'S**  
**AMENDED COMPLAINT FOR LACK**  
**OF STANDING OR, IN THE**  
**ALTERNATIVE, TO STAY**  
**PROCEEDINGS**

3376768v1

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE  
AMENDED COMPLAINT FOR LACK OF STANDING OR, IN THE ALTERNATIVE, TO STAY  
PROCEEDINGS

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# MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

Hyundai Capital America d/b/a Hyundai Motor Finance (“Hyundai”) moves the Court pursuant to Federal Rule of Civil Procedure 12(b)(1) for dismissal of Plaintiff’s amended complaint, in its entirety, with prejudice. Plaintiff alleges that Hyundai violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”). Plaintiff attempts to fortify the vague averments of his original complaint—that Hyundai caused him to be “annoyed, frustrated, distracted, distressed, and inconvenienced,” by making telephone calls to him—but the supplemental allegations of the amended complaint are insufficient to withstand a subject-matter jurisdiction challenge.

Plaintiff’s alleged injuries fall into one of four categories: (1) “annoyance” injuries; (2) “tangible harm” injuries; (3) invasion-of-privacy injuries; and (4) trespass-to-chattels injuries. Like the original complaint, the amended complaint fails to demonstrate that any of the harms Plaintiff claims to have experienced are in any way related to Hyundai’s alleged use of an automatic telephone dialing system (“ATDS”), as opposed to a manually-dialed telephone, to call him. The “annoyance” and “tangible harm” injuries—to the extent they represent the type of harm that is, at least hypothetically, “concrete” enough to confer Article III standing—fail because Plaintiff has not alleged facts sufficient to tie those alleged injuries to a specific call or

1 calls. Furthermore, Plaintiff’s “invasion of privacy” and “trespass-to-chattels”  
2 “injuries” are not injuries at all—they are torts, of which injury is simply an element.

3 Plaintiff accordingly lacks Article III standing to prosecute this action because  
4 he has not demonstrated in his pleadings that Hyundai’s alleged violation of the  
5 TCPA caused him a “concrete” injury-in-fact. The Court should therefore dismiss  
6 the amended complaint for lack of subject-matter jurisdiction.  
7

8 Alternatively, should the Court determine that Plaintiff has established Article  
9 III standing to pursue this action, Hyundai moves the Court to stay these proceedings  
10 pending the outcome of *ACA International v. FCC, et al*, No. 15-1211 (D.C. Cir. July  
11 10, 2015) (the “ACA Action”). The D.C. Circuit’s decision on ACA International’s  
12 petition in that matter will likely bear on legal issues central to this case, and this Court  
13 possesses inherent power to stay this matter until the D.C. Circuit renders that  
14 decision.  
15  
16  
17

## 18 STATEMENT OF FACTS<sup>1</sup>

19 Plaintiff is an individual and resident of the State of Washington. (Am. Compl.  
20 ¶ 5). Plaintiff alleges that, although he “does not own a Hyundai vehicle, has not  
21 inquired about purchasing a Hyundai vehicle, and is not interested” in purchasing a  
22  
23  
24

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25 <sup>1</sup> Hyundai accepts the facts as pled in Plaintiff’s complaint as true for purposes of this  
26 motion only and specifically reserves the right to challenge Plaintiff’s version of the  
27 facts at later stages of this litigation, should the Court deny Hyundai’s motion to  
dismiss the complaint.

1 Hyundai vehicle, Hyundai has during the last several years<sup>2</sup> placed automated calls to  
2 his cellular telephone ending in 5457 using an ATDS. (Am. Compl. ¶¶ 3-4, 9, 11).  
3 Plaintiff further alleges that he did not provide Hyundai with prior express consent to  
4 make calls to his cellular telephone and that Hyundai continued to place calls to his  
5 cellular phone using an ATDS despite his request that such calls stop. (Am. Compl. ¶  
6 4).  
7

8 Plaintiff claims that Hyundai's conduct violated 47 U.S.C. § 227(b)(1)(A) and  
9 caused him a laundry list of attenuated harms, including:  
10

- 11 (1) **The "Annoyance" Injuries**: general annoyance, frustration,  
12 distraction, distress, and inconvenience (Am. Compl. ¶ 16); "great  
13 disruption and inconvenience" while he was using his cell phone  
14 for personal calls (*id.*); "frustration and emotional drain" (¶ 19);  
and wasted time (¶ 20).
- 15 (2) **The "Tangible Harm" Injuries**: headaches (¶ 17).
- 16 (3) **The Invasion-of-Privacy Injuries**: calls to him while he was at  
17 work, causing loss of focus and productivity (¶ 16); and calls to him  
18 while at home home, causing loss of sleep (¶ 18).
- 19 (4) **The Trespass-to-Chattels Injuries**: depletion of his cell phone  
20 battery, requiring him to charge the battery more often and,  
21 therefore, to incur fees with his electrical provider (¶ 21).

22 Plaintiff also states that "[t]he telephone number called by Hyundai was and is  
23 assigned to a cellular telephone service pursuant to 47 U.S.C. § 227(b)(1)," but does  
24

---

25 <sup>2</sup> The original complaint alleged that Hyundai made calls to Plaintiff for "the last four  
26 years." (Compl. ¶ 9). Why Plaintiff's pleadings have become less specific in this  
27 regard is unclear.

1 not aver that he was actually charged for any of the calls Hyundai allegedly placed to  
2 the cellular telephone number ending in 5457. (Compl. ¶ 22).

3 Plaintiff filed his complaint with this Court on August 9, 2016. [Dkt. No. 1].  
4 Plaintiff served Hyundai with the complaint on August 17, 2016. On September 14,  
5 2016, Hyundai timely filed a motion to dismiss Plaintiff's complaint or, alternatively,  
6 to stay this action pending the outcome of the ACA Action. [Dkt. No. 13]. On  
7 October 6, 2016, Plaintiff responded by amending his complaint and opposing  
8 Hyundai's motion to stay the case. [Dkt. No. 17]. Hyundai withdrew its September  
9 14, 2016, motion to dismiss or stay the original complaint and now timely responds to  
10 Plaintiff's amended complaint with this motion to dismiss Plaintiff's amended  
11 complaint or, alternatively, to stay the case pending the outcome of the ACA Action.  
12 Fed. R. Civ. P. 15(a)(3).  
13  
14  
15

## 16 ARGUMENT

### 17 I. Legal Standard

#### 18 A. Article III Standing

19 Article III of the United States Constitution “confines federal courts to  
20 adjudicating actual ‘cases’ and ‘controversies.’” *Allen v. Wright*, 468 U.S. 737, 750  
21 (1984). The standing doctrine is but one of the “doctrines that cluster about Article  
22 III,” but “is perhaps the most important” of them. *Id.* (quoting *Vander Jagt v. O’Neill*,  
23 699 F.2d 1166, 1178-79 (D.C. Cir. 1983)). Justice Scalia explained that “[t]hough  
24 some of its elements express merely prudential considerations that are part of judicial  
25  
26  
27

1 self-government, the core component of standing is an essential and unchanging part  
2 of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504  
3 U.S. 555, 560 (1992) (citing *Allen*, 468 U.S. at 751). “In essence the question of  
4 standing is whether the litigant is entitled to have the court decide the merits of the  
5 dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

7 The Supreme Court articulated the “irreducible constitutional minimum of  
8 standing,” which consists of three elements: (1) the plaintiff must have suffered an  
9 injury-in-fact (i.e., one that is “concrete and particularized” or “actual and imminent,  
10 not conjectural or hypothetical”); (2) which injury is “fairly traceable to the challenged  
11 action of the defendant;” and (3) is capable of redress by “a favorable decision” from  
12 the court. *Lujan*, 504 U.S. at 560-61 (internal quotation and citations omitted).

15 The Supreme Court recently revisited the “injury-in-fact” predicate in *Spokeo v.*  
16 *Robins*, 136 S. Ct. 1540 (2016), specifically the “concrete” nature of an injury sufficient  
17 to establish a plaintiff’s Article III standing. Justice Alito, writing for the majority,  
18 made clear that “[a] ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.  
19 When we have used the adjective ‘concrete,’ we have meant to convey the usual  
20 meaning of the term—‘real,’ and not ‘abstract.’” *Id.* at 1548 (quoting for the definition  
21 of “concrete” Black’s Law Dictionary 479 (9th ed. 2009); Webster’s Third New  
22 International Dictionary 472 (1971); Random House Dictionary of the English  
23 Language 305 (1967)). The *Spokeo* Court further explained that “[c]oncrete’ is

1 not...necessarily synonymous with ‘tangible.’” *Id.* at 1549. Indeed, “Congress may  
2 ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were  
3 previously inadequate in law.” *Id.* (citing *Lujan*, 504 U.S. at 578). Intangible, but  
4 nonetheless “concrete,” injuries-in-fact can even arise from “the real risk of harm....”  
5  
6 *Id.* (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013)).

7 A plaintiff cannot, however, “allege a bare procedural violation, divorced from  
8 any concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* (citing  
9 *Summers v. Earth Island Institute*, 555 U.S. 448, 496 (2009)). In the context of consumer  
10 litigation under statutes such as the Fair Credit Reporting Act (“FCRA”), a plaintiff  
11 “cannot satisfy the demands of Article III by alleging a bare procedural violation. A  
12 violation of one of the FCRA’s procedural requirements may result in no harm.” *Id.* at  
13  
14 1550.

15  
16 **B. Rule 12(b)(1)**

17 Federal Rule of Civil Procedure 12(b)(1) allows a party to assert the defense of  
18 lack of subject-matter jurisdiction by motion. Fed. R. Civ. P. 12(b)(1). “Because  
19 standing...pertain[s] to federal courts’ subject matter jurisdiction, [it] is properly raised  
20 in a Rule 12(b)(1) motion to dismiss.” *Chandler v. State Farm Mut. Auto Ins. Co.*, 598  
21 F.3d 1115, 1122 (9th Cir. 2010) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th  
22 Cir. 1989); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A subject-matter  
23 jurisdiction challenge may take the form of either a facial or factual attack. *Safe Air for*  
24  
25  
26  
27

1 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A party asserting a facial  
2 challenge moves for dismissal on the grounds that the averments of the complaint  
3 “are insufficient on their face to invoke federal jurisdiction.” *Id.* A factual attack  
4 challenges the veracity of the allegations themselves. *Id.*

6 Here, Hyundai asserts a facial challenge to subject-matter jurisdiction.  
7 Accordingly, the Court “must adopt as true all material allegations in the complaint,  
8 and must construe the complaint in the nonmovant’s favor. The Court may not  
9 speculate as to the plausibility of the plaintiff’s allegations.” *Chandler*, F.3d at 1121  
10 (citing *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002); *see also Leite*  
11 *v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (noting that standard applied to facial  
12 jurisdictional challenges mirrors 12(b)(6) standard).

15 **C. Stay of Proceedings**

16 The trial courts possess inherent authority to manage their dockets and  
17 conserve judicial economy. *See Landis v. North American Co.*, 299 U.S. 248, 254-55  
18 (1936). This inherent power includes the ability to stay a case pending the outcome of  
19 separate proceedings that may affect the case’s outcome. *See Leyva v. Certified Grocers of*  
20 *California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (citations omitted) (“A trial court  
21 may, with propriety, find it is efficient for its own docket and the fairest course of  
22 action for the parties to enter a stay of an action before it, pending resolution of  
23 independent proceedings which bear upon the case. This rule applies whether the  
24  
25  
26

1 separate proceedings are judicial, administrative, or arbitral in character and does not  
2 require that the issues in such proceedings are necessarily controlling of the action  
3 before the court.”).

4 “When considering a motion to stay proceedings...a district court may  
5 consider factors such as any potential prejudice to the non-moving party, hardship or  
6 inequity to the moving party if the proceedings are not stayed, and the interest of  
7 judicial economy and efficiency.” *Mangani v. Merck & Co.*, No. 2:06-cv-00914, 2006  
8 WL 2707459, at \*1 (citing *Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D. Cal.  
9 1997)). A trial court’s decision to stay proceedings pursuant to its inherent authority  
10 is reviewed for an abuse of discretion. *Clinton v. Jones*, 520 U.S. 681, 707 (1997); *United*  
11 *States v. Pend Oreille County Pub. Util. Dist. No. 1*, 135 F.3d 602, 614 (9th Cir. 1998).

## 12 **II. Plaintiff Lacks Article III Standing to Prosecute This Action.**

13 It is Plaintiff’s burden to establish each of the standing predicates. *Lujan* at  
14 561; *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). Plaintiff has pled a bare  
15 procedural violation of the TCPA, divorced from any concrete harm. He has  
16 therefore failed to demonstrate that he suffered an injury-in-fact sufficient to confer  
17 standing and his complaint fails as a matter of law.

### 18 **A. Application of Spokeo to Alleged Violations of the TCPA**

19 The plaintiff in *Spokeo* alleged that the defendant disseminated inaccurate credit  
20 information about him in violation of the duties imposed on the defendant as a  
21 “credit reporting agency” under the FCRA to “follow reasonable procedures to assure  
22

1 maximum possible accuracy” in making consumer reports. *Spokeo* at 1545. Although  
2 the alleged conduct constituted a violation of the FCRA, the Supreme Court  
3 specifically rejected the notion that the violation alone was sufficient to confer  
4 standing upon the plaintiff:  
5

6 In the context of this particular case, these general principles tell us two  
7 things: On the one hand, Congress plainly sought to curb the  
8 dissemination of false information by adopting procedures designed to  
9 decrease that risk. On the other hand, Robins cannot satisfy the  
10 demands of Article III by alleging a bare procedural violation. A  
11 violation of one of the FCRA's procedural requirements may result in no  
12 harm. For example, even if a consumer reporting agency fails to provide  
13 the required notice to a user of the agency's consumer information, that  
14 information regardless may be entirely accurate. In addition, not all  
inaccuracies cause harm or present any material risk of harm. An  
example that comes readily to mind is an incorrect zip code. It is difficult  
to imagine how the dissemination of an incorrect zip code, without  
more, could work any concrete harm.

15 *Id.* at 1550.

16 The TCPA prohibits telephone calls “(other than a call made for emergency  
17 purposes or made with the prior express consent of the called party) using any  
18 automatic dialing system or an artificial or prerecorded voice...to any telephone  
19 number assigned to a...cellular telephone service....” 47 U.S.C. § 227(b)(1)(A)(iii). In  
20 enacting the TCPA, Congress created a private right of action to (1) enjoin violations  
21 of the Act; (2) to “recover for actual monetary loss from such a violation, or to  
22 receive \$500 damages for each such violation, whichever is greater;” or (3) both. 47  
23 U.S.C. § 227(b)(3)(A)-(C). The *Spokeo* decision makes clear that a violation of the  
24  
25  
26  
27

1 TCPA does not, *per se*, constitute a concrete injury sufficient for a plaintiff to  
2 demonstrate Article III standing. *Spokeo* at 1549 (emphasis added and citation  
3 omitted) (“Congress’ role in identifying and elevating intangible harms does not mean  
4 that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute  
5 grants a person a statutory right and purports to authorize that person to sue to  
6 vindicate that right. *Article III standing requires a concrete injury even in the context of a*  
7 *statutory violation.* For that reason, Robins could not, for example, allege a bare  
8 procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact  
9 requirement of Article III.”)

12 The Southern District of California recently examined a consumer-plaintiff’s  
13 standing in a TCPA action alleging a very similar violation to the one alleged in this  
14 case. In *Romero v. Department Stores National Bank*, \_\_\_F.3d\_\_\_, 2016 WL 4184099, at  
15 \*1 (S.D. Cal. Aug. 5, 2016), Judge Bencivengo considered whether the consumer-  
16 plaintiff had Article III standing to pursue a TCPA claim where the consumer-  
17 plaintiff alleged that the defendants “called her over 290 times using an automated  
18 telephone dialing system (‘ATDS’) over the course of six months between July and  
19 December 2014.” *Id.* The consumer-plaintiff in *Romero* specifically alleged the  
20 following:  
21  
22  
23

24 Plaintiff answered only three of these telephone calls: one in July, one in  
25 September, and one in December. According to Plaintiff, on each of  
26 these occasions she asked Defendants to stop calling her. Defendants  
27 did not call Plaintiff again after the last call Plaintiff answered in

1 December 2014. In January 2015, Plaintiff filed this lawsuit, asserting  
2 claims for violation of California’s Rosenthal Fair Debt Collection  
3 Practices Act...intrusion upon seclusion, negligent infliction of  
emotional distress, and violation of the [TCPA].

4 According to the complaint, “Defendant’s unlawful conduct caused  
5 Plaintiff severe and substantial emotional distress, including physical and  
6 emotional harm, including but not limited to: anxiety, stress, headaches  
7 (requiring ibuprofen, over the counter health aids), back, neck and  
8 shoulder pain, sleeping issues (requiring over the counter health aids),  
9 anger, embarrassment, humiliation, depression, frustration, shame, lack  
of concentration, dizziness, weight loss, nervousness and tremors, family  
and marital problems that required counseling, amongst other injuries  
and negative emotions.”

10 *Id.*

11  
12 The *Romero* court dismissed the non-TCPA claims on the defendants’ motion  
13 for summary judgment before addressing the TCPA claims. *Id.* On the defendants’  
14 motion to dismiss the TCPA claims, Judge Bencivengo, relying on the Supreme  
15 Court’s decisions in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) and *Lewis v.*  
16 *Casey*, 518 U.S. at 358 n.6, noted that “[e]ach alleged [TCPA] violation is a separate  
17 claim, meaning that Plaintiff must establish standing for each violation, which in turn  
18 means that Plaintiff must establish an injury in fact caused by each individual call. In  
19 other words, for each call Plaintiff must establish an injury in fact as if that was the  
20 only TCPA violation alleged in the complaint.” *Id.* at \*3. Judge Bencivengo found the  
21 *Romero* plaintiff lacked standing for the reasons discussed in further detail *infra*.

1           **B. The Amended Complaint Does Not Establish Plaintiff's Standing**  
2           **Because it Does Not Connect any of the Alleged Injuries to**  
3           **Hyundai's Alleged Use of an ATDS, or Connect any Particular**  
4           **Phone Call to a Specific Injury.**

5           Plaintiff has the burden of demonstrating that he has standing to prosecute  
6           each individual TCPA violation. *Lujan* at 561; *Lewis* at 357-58 n.6; *Cuno* at 352.  
7           Plaintiff fails to carry his burden. As a threshold matter, Plaintiff does not plead how  
8           his alleged injuries are connected with Hyundai's alleged use of an ATDS to call him,  
9           rather than a manually-dialed telephone. This alone warrants dismissal for lack of  
10          standing under Rule 12(b)(1). *See Romero* at \*5; *Ewing v. SQM US, Inc.*,  
11          \_\_\_F.Supp.3d\_\_\_, No. 3:16-cv-1609-CAB-JLB, 2016 WL 5846494, at \*2 (S.D. Cal.  
12          2016) (Bencivengo, J.).

13          Plaintiff fails to state the specific number of calls he allegedly received. He  
14          similarly fails to plead which of the alleged calls he heard ring, or which he answered.<sup>3</sup>  
15          Plaintiff does not allege that any particular call or calls caused him any of the four  
16          types of injuries he has alleged, let alone *how* the calls caused these harms. This makes  
17          it impossible for Plaintiff to link any particular call with any specific injury. In a vain

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19          <sup>3</sup> Plaintiff claims that “[o]n at least one occasion, Plaintiff answered Hyundai’s call...”  
20          and that “[a]t least one of Hyundai’s calls came while Plaintiff was on a personal call  
21          on his cell phone,” but offers no facts from which the Court or Hyundai might  
22          determine whether there was one call or multiple calls. (Am. Compl. ¶¶ 14, 16). Did  
23          Plaintiff answer Hyundai’s alleged call while he claims to have been on the other line  
24          on a personal call? Did that same call take place while Plaintiff was at work? (Am.  
25          Compl. ¶ 16). Neither the original nor the amended complaint offers any insight on  
26          these points. To the extent Plaintiff suggests that he is unsure of how many calls he  
27          received from Hyundai, his claim that he suffered a concrete injury is fatally  
28          undermined. *See Romero* at \*3.

1 attempt to contrive Article III standing where no concrete injury-in-fact exists,  
2 Plaintiff also incorporates alleged injuries, including invasion of privacy and trespass  
3 to chattels, into the amended complaint that have been specifically rejected by  
4 California's district courts as insufficient to confer standing.  
5

6 Because none of Plaintiff's newly-alleged injuries are "concrete," he is left  
7 without standing to prosecute this action. *See Spokeo* at 1549.  
8

9 **1. Plaintiff's amended complaint fails because he has not tied**  
10 **any of the alleged harms to Hyundai's alleged use of an**  
11 **ATDS.**

12 Plaintiff has not demonstrated in the amended complaint that any of his alleged  
13 injuries were caused by Hyundai's alleged use of an ATDS to call him. That is,  
14 Plaintiff has set forth no facts in his amended complaint to demonstrate how any of  
15 his injuries are attributable to Hyundai's alleged use of an ATDS instead of a manual-  
16 dial telephone.  
17

18 The Southern District of California, in dismissing a consumer-plaintiff's  
19 TCPA claims on the defendants' Rule 12(b)(1) motion, recently explained that the  
20 amended complaint did "not adequately allege standing because it does not, and  
21 cannot, connect [plaintiff's claimed harm] with the alleged TCPA violation—  
22 Defendants' use of an ATDS to dial his cellular telephone number. Put differently,  
23 Plaintiff does not, and cannot allege that Defendants' use of an ATDS to dial his  
24 number caused him [the alleged harm] that he would not have [experienced] had  
25  
26

1 Defendants manually dialed his number, which would not have violated the 'TCPA.'"  
2 *Ewing* at \*2. In short, the consumer-plaintiff "would have been no better off had  
3 Defendants dialed his number manually (in which case they would have refrained  
4 from violating the 'TCPA)." *Id.* at \*3; *see also McNamara v. City of Chicago*, 138 F.3d  
5 1219, 1221 (7th Cir. 1998).

7 The *Romero* court similarly held that, in order to establish Article III standing,  
8 the plaintiff needed to tie her alleged injuries to the "Defendants' use of an ATDS to  
9 have called her." *Id.* at \*5 ("Plaintiff does not offer any evidence demonstrating that  
10 Defendants' use of an ATDS to dial her number caused her greater lost time,  
11 aggravation, and distress than she would have suffered had the calls she answered  
12 been dialed manually, which would not have violated the TCPA."). Because she did  
13 not do that, the *Romero* plaintiff's claims failed as a matter of law. *Id.*

16 Here, Plaintiff fails to tie any of his alleged injuries to the fact that Hyundai  
17 allegedly placed calls to him using an ATDS. Plaintiff's abstract injuries, as pled in the  
18 complaint, therefore do not meet the "concreteness" threshold set forth by the  
19 Supreme Court in *Spokeo* and his claims should accordingly be dismissed with  
20 prejudice.

23 **2. Plaintiff's complaint fails because he has not connected the**  
24 **allegedly-violative call (or calls) to a specific injury.**

25 Had Plaintiff established in his amended complaint that any of his claimed  
26 injuries were attributable to Hyundai's use of an ATDS, he would still lack standing

1 because he has not connected any of those alleged harms to a particular call, or calls,  
2 Hyundai allegedly made to him. In *Romero*, the district court held that a “[p]laintiff  
3 must establish an injury in fact caused by each individual call.” *Id.* at \*3; *see also*  
4 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Lewis v. Casey*, 518 U.S. 343, 358  
5 n. 6 (1996). Acknowledging the possibility that “lost time, aggravation, and distress”  
6 *may* constitute an injury-in-fact sufficient for standing, the *Romero* court held that the  
7 “Plaintiff’s failure to connect any of these claimed injuries in fact with any (or each)  
8 specific TCPA violation alone is fatal to Plaintiff’s standing argument.” *Id.* at \*4.  
9

11 Plaintiff asserts nearly-identical claims under the “Annoyance” and “Tangible  
12 Harm” categories described *supra*. As with the plaintiff in *Romero*, Plaintiff here has  
13 not linked these alleged injuries to a specific alleged violation of the TCPA. And  
14 even if Plaintiff could surmount his failure to connect any individual TCPA claim with  
15 any specific injury, his complaint would still fail because he has not alleged whether he  
16 received one call or multiple calls, or which of those calls he heard ring or actually  
17 answered.<sup>4</sup>  
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22 <sup>4</sup> Plaintiff vaguely alleges that “on at least one occasion” he answered a phone call  
23 from Hyundai. (Am. Compl. ¶ 14). He offers no other details about the call and the  
24 naked averment constitutes nothing more than a formulaic recitation of the elements  
25 of a claim and is insufficient under Rule 8. *See Bell Atlantic Corp. v. Twombly*, 550 U.S.  
26 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, Plaintiff’s  
27 failure to plead facts to show that any of the injuries he allegedly suffered by  
answering the phone call were attributable to Hyundai’s alleged use of an ATDS  
dooms his claim. *Romero* at \*4.

1 As Judge Bencivengo held in *Romero*:

2 For Plaintiff to have suffered “lost time, aggravation, and distress,” she  
3 must, at the very least, have been aware of the call when it occurred.  
4 Accordingly, because Plaintiff has not, and likely could not, present  
5 evidence of an injury in fact as a result of calls placed by Defendants to  
6 Plaintiff’s cell phone of which Plaintiff was not aware, Plaintiff lacks  
standing to assert a claim for a TCPA violation based on any of these  
calls.

7 [...]

8 No reasonable juror could find that one unanswered telephone call could  
9 cause lost time, aggravation, distress, or any injury sufficient to establish  
10 standing. When someone owns a cell phone and leaves the ringer on,  
11 they necessarily expect the phone to ring occasionally. Viewing each call  
12 in isolation, whether the phone rings as a result of a call from a family  
13 member, a call from an employer, a manually dialed call from a creditor,  
14 or an ATDS dialed call from a creditor, any “lost time, aggravation, and  
15 distress,” are the same. Thus, Defendants’ TCPA violation (namely, use  
16 of an ATDS to call Plaintiff) could not have caused Plaintiff a concrete  
injury with respect to any (and each) of the calls that she did not answer.  
Accordingly, Plaintiff lacks Article III standing for her TCPA claims  
based on calls she heard ring but did not answer.

17 *Id.* at \*4.

18 In short, Plaintiff’s alleged injuries are not “*de facto*” or “real,” but completely  
19 abstract, separated from any particular alleged violation of the TCPA. Plaintiff has  
20 therefore failed to demonstrate that he has standing to prosecute this action and his  
21 complaint should be dismissed with prejudice.  
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1 as the call depleted his phone’s battery, requiring him to recharge it.

2 [...]

3 As with the charge Plaintiff allegedly incurred because of the call, these  
4 injuries are not connected to Defendants’ alleged use of an ATDS to dial  
5 his number. “A plaintiff who would have been no better off had the  
6 defendant refrained from the unlawful acts of which the plaintiff is  
7 complaining does not have standing under Article III of the Constitution  
8 to challenge those acts in a suit in federal court.” Here, Mr. Ewing would  
9 have been no better off had Defendants dialed his number manually (in  
10 which case they would have refrained from violating the TCPA). He  
11 would have had to expend the same amount of time answering and  
12 addressing Defendants’ manually dialed telephone call and would have  
13 incurred the same amount of battery depletion. Further, that the use of  
14 an ATDS may have allowed Defendants to place a greater number of  
15 calls more efficiently did not cause any harm to Plaintiff.

16 In sum, to use the language from *Spokeo*, Plaintiff’s alleged concrete  
17 harm (and the harm he argued in his opposition but did not allege in the  
18 FAC) was divorced from the alleged violation of the TCPA.

19 *Id.* at \* 2-3 (citing *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir. 1998);  
20 *Silba v. ACT, Inc.*, 807 F.3d 169, 174–75 (7th Cir. 2015)). The rejection of this type of  
21 theory is consistent with the Supreme Court’s holdings in *Lujan v. Defenders of Wildlife*  
22 and *Spokeo*, in which the Court made clear that an injury must be “real and immediate,  
23 not conjectural or hypothetical,” to satisfy the Article III standing requirements. 504  
24 U.S. at 579 (internal quotation marks and citation omitted); 136 S. Ct. at 1548 (citing  
25 *Lujan*).

26 Plaintiff’s alleged “Invasion-of-Privacy” and “Trespass-to-Chattels” injuries are  
27 not injuries at all and do not establish that Plaintiff has Article III standing to

1 prosecute his TCPA claims. Neither claimed injury confers Plaintiff with standing for  
2 the additional reason that he failed to plead that either “injury” resulted from  
3 Hyundai’s alleged use of an ATDS.

4  
5 **4. Although the Romero and Ewing decisions are not binding, they are both persuasive and correct.**

6 Based on the binding precedent set forth in *Spokeo*, as soundly interpreted and  
7 applied to the TCPA by Judge Bencivengo in *Romero* and *Ewing*, the Court should  
8 dismiss Plaintiff’s complaint with prejudice for lack of Article III standing. In so  
9 doing, the Court should reject the flawed reasoning employed by the district courts  
10 that have, post-*Spokeo*, considered calls received by a plaintiff in the aggregate rather  
11 than individually, as well as the “circular” reasoning of those courts that have found  
12 that “a plaintiff who receives a call on his cell phone that violates the TCPA has  
13 suffered a concrete injury simply because the call violated the TCPA.” *Romero* at \*6  
14 (holding that “if the defendant’s actions would not have caused a concrete, or *de facto*,  
15 injury in the absence of a statute, the existence of the statute does not automatically  
16 give a Plaintiff standing,” and citing *Caudill v. Wells Fargo Home Mort., Inc.*, No. 5:16-cv-  
17 066+-DCR, 2016 WL 3820195 (E.D. Ky. Jul. 11, 2016); *Mey v. Got Warranty, Inc.*,  
18 \_\_\_F.3d\_\_\_, No. 5:15-cv-101, 2016 WL 3645195 (N.D.W.V. Jun. 30, 2016); *Booth v.*  
19 *Appstack*, No. C13-1533-JLR, 2016 WL 3030256, at \*5 (W.D. Wash. May 25, 2016);  
20 *Rogers v. Capital One Bank (USA), N.A.*, \_\_\_F.Supp.3d\_\_\_, No. 1:15-cv-4016-TWT,  
21 2016 WL 3162592, at \*2 (N.D. Ga. Jun. 6, 2016)).

1 The germane question is whether Plaintiff has established a concrete injury  
2 caused by each of the unspecified number of calls he received, not whether the  
3 allegedly-violative calls, considered in the aggregate, constitute a concrete injury. *See*  
4 *Romero*, 2016 WL 4184099 at \*3 (“the Court must determine whether Plaintiff has  
5 evidence of an injury in fact specific to each individual call, and not in the aggregate  
6 based on the total quantity of calls.”); *Cf. Hewlett v. Consolidated World Travel, Inc.*, 2016  
7 WL 4466536, at \*1 (E.D. Cal. Aug. 23, 2016). Because Plaintiff has not connected  
8 each individual call to a concrete injury—indeed, has not even pled how many calls he  
9 allegedly received from Hyundai—Plaintiff’s complaint fails as a matter of law.

12 **III. If The Court Determines That Plaintiff Has Standing, It Should Stay**  
13 **This Case Pending the Outcome of The ACA Action.**

14 On February 11, 2015, ACA International (“ACA”)<sup>5</sup> filed a petition for  
15 rulemaking with the Federal Communications Commission (“FCC”) concerning the  
16 FCC’s interpretation of the TCPA. On July 10, 2015, after considering ACA’s  
17 petition, as well as the petitions of numerous other parties seeking clarifications of, or  
18 rulemakings on, the TCPA the FCC entered an order entitled “Declaratory Ruling and  
19 Order,” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of*  
20 *1991*, under its docket numbers GC Docket No. 02-278 and WC Docket 07-135. On  
21 July 13, 2015, ACA filed an amended petition for review of the FCC’s Declaratory  
22 Ruling and Order with the D.C. Circuit. *See ACA International v. Fed. Comm. Comm’s*,

26 <sup>5</sup> ACA International is trade organization representing the interests of credit and  
27 collection professionals. *See* <http://www.acainternational.org/about.aspx>

1 No. 15-1211, Doc. No. 1562251 (D.C. Cir. July 10, 2015). The matter is currently set  
2 for hearing on October 19, 2016. *Id.*

3 In its petition for review ACA challenged the FCC's interpretation of the  
4 TCPA, arguing that its interpretation of key phrases and components of the statute  
5 was arbitrary, capricious, an abuse of its discretion, and a violation of "a caller's  
6 constitutional rights of due process and freedom of speech...." *See ACA International*  
7 *v. Fed. Comm. Comm's*, No. 15-1211, Doc. No. 1567590 (D.C. Cir. July 10, 2015). ACA  
8 specifically challenges the FCC's definition of an "automatic telephone dialing  
9 system," as well as "its treatment of 'capacity'" and of "predictive dialers" within that  
10 definition. *See ACA International v. Fed. Comm. Comm's*, No. 15-1211, Doc. No.  
11 1567590, at p. 2 (D.C. Cir. Aug, 12 2015). ACA further challenges "[t]he  
12 Commission's treatment of 'prior express consent....'" *Id.* at p. 4.

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16 Moreover, as Judge Snyder recently observed, "[t]he FCC was sharply divided  
17 on many of these issues." *Fontes v. Time Warner Cable Inc.*, No. CV14-2060-CAS(CWx),  
18 2015 WL 9272790, at \*3 (C.D. Cal. Dec. 17, 2015). Enveloped within that divide is  
19 the Commission's ultimate conclusion that "the term 'called party' should be defined  
20 as 'the subscriber, i.e., the consumer assigned the telephone number dialed and billed  
21 for the call, or the non-subscriber customary user of a telephone number included in a  
22 family or business calling plan.' *Id.* \*2 (citing *In re Rules and Regulations Implementing the*  
23 *Telephone Consumer Protection Act of 1991* at ¶ 73). The effect of this portion of the  
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1 ruling is that, “subject to one limited exception, ‘calls to reassigned wireless numbers  
2 violate the TCPA when a previous subscriber, not the current subscriber or customary  
3 user, provided the prior express consent on which the call is based.’” *Id.* Judge Snyder  
4 stayed the *Fontes* matter pending the outcome of the ACA Action. *Id.* at \*4 (“The  
5 Court finds that under the circumstances in this case, it is prudent to stay this case  
6 pending resolution of the Court of Appeals review of the FCC’s Declaratory Ruling...  
7 in light of the close divide amongst the FCC commissioners and the fact that at least  
8 one commissioner believes the FCC’s ruling is “flatly inconsistent with the TCPA,”  
9 there is a legitimate possibility that the Court of Appeals may overturn that ruling.  
10 Accordingly, the proper interpretation of the TCPA remains unclear.”).

11  
12  
13  
14 If the Court finds that Plaintiff has Article III standing sufficient to prosecute  
15 this action, then the outcome of this case will depend in large part on the definition of  
16 an ATDS and “capacity,” as well as the TCPA’s treatment of predictive dialers and  
17 consumers’ prior express consent to receive calls to their cellular telephone. The  
18 “reassigned number” safe harbor may prove to be of particular importance, given  
19 Plaintiff’s allegation that the alleged callers in this case were attempting to reach an  
20 individual named “Christine.” Core issues in this case lie at the heart of ACA’s  
21 petition for review of the FCC’s Declaratory Ruling presently pending in the D.C.  
22 Circuit.

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25 Neither the parties nor the Court will be prejudiced by a stay of this action  
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By: /s/ Patrick D. Newman

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