UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 2:19-cv-00403-SPC-MRM

DARYL TEBLUM,
individually and on behalf of all
others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

PHYSICIAN COMPASSIONATE CARE LLC d/b/a DOCMJ,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant Physician Compassionate Care d/b/a DocMJ ("DocMJ") hereby moves to dismiss Plaintiff Daryl Teblum's ("Teblum") *First Amended Class Action Complaint* ("FAC") [DE 38].

As shown, Teblum has not—and cannot—establish Art. III standing to maintain this putative class action under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. Based on binding Eleventh Circuit precedent, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), *reh'g denied*, 2019 U.S. App. LEXIS 32559 (Oct. 30, 2019), Teblum's receipt of a single text is insufficient to establish such standing. Even assuming the truth of Teblum's allegations, he has neither alleged—nor suffered—a "concrete" harm traceable to DocMJ's conduct. And the "qualitative nature" of Teblum's alleged harm is markedly inferior to the type of harm rejected by *Salcedo* and by subsequent district and appellate courts in the Eleventh Circuit and elsewhere. The FAC should be dismissed.

MEMORANDUM OF LEGAL AUTHORITY

I. BACKGROUND.

On June 14, 2019, Teblum filed this putative class action alleging that DocMJ had violated the TCPA by purportedly transmitting a ***single***, unsolicited text message without his "prior express written consent." [DE 1 ¶¶ 27, 33, 65-68.] Teblum generally asserted that this "text message caused [him] actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion," and that the text message "also inconvenienced [him] and caused disruption to his daily life." [*Id.* ¶ 50.]

On July 30, 2019, DocMJ answered the *Complaint*, [DE 18], and raised numerous affirmative defenses—including that this Court lacked subject matter jurisdiction over Teblum's claims because he "has not alleged nor suffered a particularized, concrete harm, fairly traceable to DocMJ's alleged conduct, to satisfy Article III standing." [DE 18 at p.31.] DocMJ also asserted, as a separate affirmative defense, that Teblum—and any member of the putative class—lacked standing because they have not incurred a loss. [*Id.*][1]

On August 28, 2019, the Eleventh Circuit issued its seminal *Salcedo* decision. The facts of *Salcedo* are identical to the facts alleged here. Importantly, *Salcedo* held the plaintiff lacked standing to bring a TCPA claim where he had alleged the receipt of only a

[1] On July 26, 2019, this Court ordered a stay of discovery in its *Order Granting in Part and Denying in Part DocMJ's Motion to Stay Proceedings* (the "July 26 Order"), finding good cause existed to stay discovery for a period of 90 days while the FCC issued its forthcoming guidance on the definition of an "automatic telephone dialing system" ("ATDS"). [DE 17.] The July 26 Order further provided that DocMJ "may renew its motion to extend the stay after the expiration of the 90 days, if appropriate." *Id.* DocMJ filed its *Renewed Motion to Extend Court-Issued Limited Stay of Discovery* on October 22, 2019, [DE 30], which this Court granted on October 25, 2019, extending the stay until January 22, 2020. [DE 31]. DocMJ then filed its *Second Renewed Motion to Extend Court-Issued Limited Stay of Discovery* on January 17, 2020, [DE 30], which this Court granted on January 22, 2020. [DE 34]. Discovery is thus stayed until April 21, 2020.

single text message. In reaching its conclusion, the Eleventh Circuit explained that while Congress creates a statutory right and a private right of action, it does ***not*** automatically create standing—as Art. III requires a "concrete" injury even for a statutory violation.

Based on *Salcedo,* DocMJ moved for entry of judgment on the pleadings, [DE 24], and Teblum subsequently moved for leave to amend his *Complaint* [DE 25]. On March 26, 2020, this Court granted Teblum's request to amend (the "March 26 Order"), [DE 37], and entered an Order denying, as moot, DocMJ's *Motion for Judgment on the Pleadings.* [DE 39]. As part of the March 26 Order, this Court observed that DocMJ's arguments regarding the legal infirmities inherent in Teblum's allegations are "more appropriately raised on a timely motion to dismiss the next iteration of the complaint." [DE 37 at 11.]

A. Teblum's Amended Allegations.

Teblum filed the FAC on March 26, 2020. [DE 38]. In a transparent attempt to distinguish *Salcedo*, Teblum inserted previously undisclosed allegations regarding his purported "harm." Specifically, Teblum now estimates he spent "approximately ten seconds" reading the text at issue. [*Id*. ¶ 40.] And he further asserted that he received the text while "in the process of picking up his children from school which caused him extreme aggravation." [*Id*. ¶ 41.] Teblum also asserted that he responded to this text with a "STOP" request and then received an "auto-reply" text confirming his opt out. [*Id*. ¶ 29.] In sum, Teblum claims he "wasted" more than 15 minutes speaking with counsel about the text; texting "STOP"; and reviewing the confirmatory opt-out. [*Id*. ¶¶ 44-47.] Notably, Teblum obscures his location when he received the text (versus when he performed other tasks) by claiming "[t]his time was spent while [he] was at his home or with his children." [*Id*. ¶ 47.]

II. LEGAL STANDARD.

A. Federal Rule of Civil Procedure 12(b)(1).

Federal Rule 12(b)(1) governs challenges to a court's subject matter jurisdiction. "The burden of proof on a motion to dismiss for lack of subject-matter jurisdiction is on the party asserting jurisdiction." *Murphy v. Secly, U.S. Dep't of Army*, 769 F. App'x 779, 782 (11th Cir. 2019). Thus, ***Teblum*** bears the burden of establishing, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction. *See Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1085 (11th Cir. 2010). Moreover, "[a] dismissal for lack of standing is akin to a dismissal for lack of subject-matter jurisdiction" under Rule 12(b)(1). *Worthy v. City of Phenix City, Alabama*, 930 F.3d 1206, 1213 (11th Cir. 2019) (citation omitted); *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n. 42 (11th Cir. 1991) ("Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction") (citation omitted).

Complaints are subject to a either a facial or a factual attack under Rule 12(b)(1). *See Stalley v. Orlando Regional Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (2008). In resolving a facial attack, the court merely looks at the complaint to see if the plaintiff has sufficiently alleged a basis for subject matter jurisdiction, accepting all allegations as true. *McElmurray v. Consol. Gov't of August-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). Alternatively, a factual attack uses materials external to the pleadings, such as affidavits or testimony, to challenge the existence of subject matter jurisdiction. *Id*.

Regardless of the type of attack, "[t]he 'triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement[.]'"

Stalley, 524 F.3d at 1232 (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 (11th Cir. 2004)). "[F]irst and foremost, there must be alleged . . . an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id*. Where a plaintiff has not suffered an injury-in-fact, Art. III standing is lacking, and federal courts do not have jurisdiction over the complaint. *See id*. at 1233.

Here, Teblum lacks standing to assert his claims based on a facial attack of the amended allegations in the FAC; thus, this case should be dismissed under Rule 12(b)(1).

B. The Telephone Consumer Protection Act.

"Because it found that residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance and an invasion of privacy, in 1991 Congress enacted the TCPA to restrict interstate telemarketing." *Salcedo*, 936 F.3d at 1166 (citing *Telephone Consumer Protection Act of 1991*, S. 1462, 102d Cong., Pub. L. No. 102-243, § 2, ¶ 10 (1991)) (internal quotations omitted). As *Salcedo* observed, "the statute has been silent as to text messaging, for that medium did not exist in 1991. But under its TCPA rulemaking authority, the FCC has applied the statute's regulations of voice calls to text messages." *Id.*[2] Critically, Congress did ***not*** target all calls to cellphones; rather, Congress enacted the TCPA to prevent clear and specific harms caused by only certain types of unsolicited phone calls.[3]

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[2] In his *Notice of Supplemental Authority*, Teblum previously argued the "TCPA is no longer silent on the subject of unsolicited text messages" based on the passage of the Pallone-Thume TRACED Act, S. 151, 116th Cong., §10(a) (2019). [DE 35 at 1]. In the March 26 Order, however, this Court correctly observed that "the TRACED Act does not alter the standing analysis[.]" [DE 37 at 6.]

[3] Indeed, Congress targeted calls that "wake us up in the morning; [] interrupt our dinner at night; [] force the sick and elderly out of bed; [and] hound us until we want to rip the telephone right out of the wall," as well as calls preventing people who "suffer[] an emergency illness . . . [from] call[ing] 911 because the telephone line was tied up by a computerized message." 137 Cong. Rec. 30821-30822 (1991); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 384 (2012) (citation omitted).

C. The Eleventh Circuit's *Salcedo* Decision.

The *Salcedo* court considered the following issue:

> Is receiving a single unsolicited text message, sent in violation of a federal statute, a concrete injury in fact that establishes standing to sue in federal court? To answer that question, we have examined the statute, our precedent, and—following the Supreme Court's guidance—history and judgment of Congress, and ***we conclude that the allegations in this suit do not establish standing***.

936 F.3d at 1165 (emphasis added).

Salcedo alleged the receipt of a single text caused him to waste time answering and addressing the message, and that both he and his cellphone were unavailable for other legitimate pursuits. *Id*. at 1167. Salcedo further alleged the text "resulted in an invasion of [his] privacy and right to enjoy the full utility of his cellular device." *Id*. Based on such claims, the district court held Salcedo had standing; the Eleventh Circuit reversed. *Id*.

In so ruling, the Eleventh Circuit observed "[n]ot every right created by Congress or defined by an executive agency is automatically enforceable in the federal courts." *Id.* at 1166. "To protect [the] separation of powers, we must assure ourselves that our exercise of jurisdiction falls within the Constitution's grant of judicial power." *Id*. In discussing the requirements of standing, the panel observed "an injury in fact must be concrete." *Id.* at 1167 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). "A 'concrete' injury must be 'de facto'; that is, it must actually exist, as opposed to being hypothetical or speculative." *Id*. (internal quotations omitted). Moreover, while "[a] concrete injury need be only an 'identifiable trifle,'" *id*. (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)), "sometimes plaintiffs allege intangible injuries that we cannot so easily identify."

Id. In such situations, courts must look to "'history and the judgment of Congress' for guidance." *Id*. (citing *Spokeo*, 136 S. Ct. at 1549). "But an act of Congress that creates a statutory right and a private right of action to sue does not automatically create standing; 'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id*. The "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id*. (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 497, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)). Based on this analysis, the panel noted it must decide "whether Salcedo's allegations are real and concrete as opposed to figmentary." *Id*. at n.4.

The court next examined Eleventh Circuit precedent to conclude Salcedo's claims were "qualitatively different" from those cases in which other plaintiffs had standing to sue for a single TCPA violation involving robocalls to a residential line and/or a junk fax. *Id*. at 1168. There, plaintiffs had incurred tangible costs—such as use of paper, ink, or toner, thus qualifying as an injury-in-fact. *Id*. Conversely, Salcedo could not allege such a harm because he did not incur any tangible costs in receiving a text. *Id*. And while he generally alleged some carriers charge recipients for texts, Salcedo did not allege he ***personally*** incurred such costs. *Id*. Nor did Salcedo claim he was somehow deprived of his cellphone; rather, his device remained fully operational despite him receiving the single text. *Id*.

Third, the *Salcedo* court considered Congress's judgment in enacting the TCPA to determine whether it supported the conclusion Salcedo had not suffered a concrete injury. *Id*. at 1168. Congress's legislative findings regarding telemarketing suggested that receiving a text message is, again, "qualitatively different" from the harms Congress sought to prevent. *Id*. at 1169. In enacting the TCPA, Congress sought to protect privacy within

the sanctity of the home. *Id*. But cellphones are taken outside of the home; users can also silence their phone to minimize such disruption. *Id*. Moreover, Salcedo never alleged that he received the text message at home. *Id*. at 1170. Thus, Congress's judgment similarly did not support the finding that Salcedo experienced a concrete injury in fact. *Id*.

Fourth, the *Salcedo* court studied whether the intangible harm alleged by Salcedo bore a close relationship to other harms that traditionally provide a basis for a claim. *Id.* at 1170-71. Notably, Salcedo's allegations "f[e]ll short" of the substantial interference present in actionable torts, as the alleged harm was "isolated, momentary, and ephemeral." *Id*. at 1171. Because the alleged conduct did not bear a sufficiently close relationship to generally recognized torts, the Eleventh Circuit concluded "Salcedo's allegations did not state a concrete harm that meets the injury-in-fact requirement of Article III." *Id*. at 1172.

III. ARGUMENT.

A. Teblum Lacks Art. III Standing to Assert a Claim under the TCPA.

In the March 26 Order, this Court determined that the allegations in the FAC were "not necessarily futile." [DE 37 at 11.] In so ruling, this Court observed that it "appear[ed]" Teblum's allegations "implicate[d] the concerns contemplated by . . . *Salcedo* . . . relating to privacy interests." *Id*. at 10. And noted that Teblum's allegations "display[ed] that he wasted sufficient time to create a concrete harm." *Id*. at 11. As discussed below, upon closer inspection, and without the benefit of the liberal standard applicable to motions for leave to amend, Teblum's allegations—including with respect to an invasion of privacy and wasted time—fail to present a "concrete" harm under Art. III. This lack of a "concrete" harm means federal courts do not have jurisdiction over this case.

B. Teblum Has Not Suffered an Invasion of Privacy Sufficient to Constitute a Cognizable Injury-in-Fact.

Even with the benefit of *Salcedo*'s guidance, Teblum still cannot establish he suffered an "invasion of privacy" constituting a cognizable injury-in-fact. By Teblum's own admission, he was not at home when he received the text. [DE 38 ¶ 41.] And assuming the truth of Teblum's allegation that he was "in the process of" picking up his children from school when he received the text,[4] this too is an insufficient "invasion of privacy." *Id*. Permitting such cursory allegations would nullify constitutional standing requirements.

More than that, *Salcedo* specifically rejected this exact contention—*i.e*., that an "intangible and ephemeral" "invasion of privacy" qualitatively constitutes a cognizable injury-in-fact in TCPA text messaging cases. 936 F.3d at 1178. In *Salcedo*, the Eleventh Circuit held receiving a single unsolicited text does ***not*** generate a "concrete injury in fact that establishes standing to sue in federal court." *Id*. at 1165. In reaching this conclusion, the *Salcedo* court analyzed: (a) the legislative history of the TCPA and the judgment of Congress; (b) historical torts that provide access to federal courts; and (c) the U.S. Supreme Court's *Spokeo* decision—which held a plaintiff may not rely on mere statutory violations to establish standing—to determine the "brief, inconsequential annoyance" of a single text is not a "real but intangible harm" Congress intended the TCPA to remedy. *Id*. at 1169, 1172. In other words, a TCPA violation limited to a single text may be "[a]nnoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." *Id*. at 1172. That rationale applies equally here under identical circumstances.

[4] The screenshot of Teblum's cellphone reveals he received the text at 2:03 pm on Tuesday, May 7, 2019. [DE 38 ¶ 18.] As discussed *infra*, this was likely before most schools let out for the day.

In analyzing the legislative history of the TCPA and the judgment of Congress, the Eleventh Circuit found the privacy concerns undergirding the TCPA's prohibition on residential telemarketing—*i.e.*, the loss of privacy in one's home—are qualitatively different from the loss of privacy caused by the receipt of a single unsolicited text message. The Eleventh Circuit further explained that the TCPA's "privacy and nuisance concerns about residential telemarketing are less clearly applicable to text messaging," whereby a single unwelcome text will not always involve an intrusion into the privacy of the home in the same way that a "voice call to a residential line necessarily does." *Id.* at 1169.

Salcedo also looked to tort law for guidance regarding certain "intangible harms" of the kind alleged here by Teblum. *Id.* at 1171. Rejecting the proposition that "allegations of invasions of privacy" and "intrusion upon seclusion" fit the bill, *Salcedo* held the receipt of a single text message falls short of the "substantial" and "strongly objectionable" conduct that is "highly offensive to a reasonable person"—which is traditionally required to recognize an intangible harm. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B).

Significantly, *Salcedo* also added that the "requirement that the interference be 'substantial' and 'strongly object[ionable]' instructs us that a plaintiff might be able to establish standing where an intrusion on his privacy is ***objectively serious and universally condemnable***." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (no liability for one, two, or three phone calls; liability would be imposed "only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff")) (emphasis added). Under this rubric, the Eleventh Circuit held "Salcedo's allegations fall short of this degree of harm. We do not see this type of objectively intense

interference where the alleged harm is isolated, momentary, and ephemeral." *Id.* Analyzing the torts of trespass, nuisance, and conversion, *Salcedo* found the receipt of one text "is precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing." *Id*. at 1171-72.

The *Salcedo* court next rejected Salcedo's argument that his cellphone was part of his private affairs—as the Restatement contemplated a different category of intrusion into private affairs, such as eavesdropping, wiretapping, and rifling through personal documents. "Simply sending one text message to a private cell phone," the court noted, "is ***not*** closely related to the severe kinds of actively intermeddling intrusions that the intentional tort contemplates. *Id*. at 1171 (emphasis added). Such reasoning "would equate opening your private mail—a serious intrusion indeed—with mailing you a postcard." *Id.*

The Eleventh Circuit then explained that, taken together, Salcedo had failed to show a concrete injury sufficient to confer Art. III standing as a matter of law:

> In sum, we find that history and the judgment of Congress do not support finding concrete injury in Salcedo's allegations. Salcedo has not alleged anything like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone. Nor has he alleged that his cell phone was searched, dispossessed, or seized for any length of time. ***Salcedo's allegations of a brief, inconsequential annoyance are categorically distinct from those kinds of real but intangible harms. The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts. All told, we conclude that Salcedo's allegations do not state a concrete harm that meets the injury-in-fact requirement of Article III***.

Id. at 1172 (emphasis added).

Salcedo is both binding and instructive here. In this case, Teblum also claims he received a single unsolicited text on his cellphone. [DE 38 ¶ 18.] And Teblum also did not receive the text while enjoying the "sanctity of his home," which is where Congress was concerned with preventing "intrusions." *Salcedo*, 936 F.3d at 1171. Nor did Teblum receive the text while "enjoying dinner at home with his family" or have his "domestic peace shattered by the ringing of the telephone." *Id*. at 1172. The absence of such allegations confirms the Eleventh Circuit's observation that texts are less intrusive than at-home telephone calls. *Id*. at 1169 ("cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion."). Thus, the "chirp, buzz, or blink" of Teblum's cellphone "receiving a single text" is simply "not a basis for invoking the jurisdiction of the federal courts." *Id*. at 1172.

Here, Teblum was in public when he received the single text in the middle of the afternoon. [DE 38 ¶¶ 18, 41.] Any expectation of "privacy" in that moment was thus at its lowest possible point. Importantly, courts—including the U.S. Supreme Court—have made a clear distinction between the privacy expected in one's home vis-à-vis in public. *U.S. v. Knotts*, 460 U.S. 276, 281 (1983) ("one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."). The alleged privacy intrusion—assuming there was one—is not the type Congress intended to protect via the TCPA. *Salcedo*, 936 F.3d at 1170; *see also Zemel v. CSC Holdings LLC*, 2017 U.S. Dist. LEXIS 63398, at *14 (D.N.J. Apr. 26, 2017) (granting dismissal and observing that "three text messages sent throughout a short period of time and in just one day is not what Congress intended to prevent.").

Further, Teblum's vague contention that he received the text while "***in the process*** of picking up his children from school," [DE 38 ¶ 41] (emphasis added), does not support his claim to standing. Noticeably absent are any factual allegations Teblum was either at home or in the actual presence of his children[5] when the text arrived; thus, it cannot be said the text "shattered" his "domestic peace." *Id*. at 1172. Such allegations are properly categorized as nothing more than a "brief, inconsequential annoyance." *Id*. at 1171.

Moreover, any intrusion into Teblum's privacy was not "objectively serious and universally condemnable." Nor could a single text come anywhere close to "amount[ing] to a course of hounding the plaintiff"—as required by both *Salcedo* and the Restatement.

Two recent decisions by the Southern District of Florida reinforce this conclusion. First, in *Eldridge v. Pet Supermarket, Inc.*, 2020 WL 1475094 (S.D. Fla. Mar. 10, 2020), the court, applying *Salcedo*, refused to credit plaintiff's allegations of a loss of privacy arising from the receipt of ***five*** unauthorized texts. *Id*. at *5. In doing so, *Eldridge* noted that—as in *Salcedo*—the plaintiff there "ha[d] not alleged that he was in his home when he received [the] message[s]," or "anything like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone," or any similar scenarios. *Id*. (citing *Salcedo*, 936 F.3d at 1170, 1172). Similarly, *Eldridge* held the loss of privacy from receiving one unwanted text per month over a three-month period did not rise to the level of being such an "objectively serious and universally condemnable" intrusion to resemble the injury actionable under intrusion upon seclusion. *Id*. (citing

[5] Even if Teblum's children were present when he received the text, such an idiosyncratic factor that considers the recipient's vicinity to children would result in an arbitrary and unworkable test for Art. III standing. As would whether the recipient was the "primary caretaker" of said children.

Salcedo, 936 F.3d at 1171). Thus, *Eldridge* held *Salcedo* compelled it to conclude the plaintiff's alleged "invasion of privacy" injury—as well as his other claimed injuries—did not state a cognizable concrete injury-in-fact. *Id.*; *see also Zemel*, 2017 U.S. Dist. LEXIS 63398, at *13-14 ("Plaintiff also alleges he suffered 'actual harm, including aggravation, nuisance, and invasion of privacy that necessarily accompanies the receipt of unsolicited text messages.' This allegation is nothing but a bare conclusory assertion. Plaintiff has failed to demonstrate how three text messages, one which was initiated by Plaintiff when he responded 'Help' to the initial text message, are a nuisance or an invasion of his privacy. This, too, is insufficient to surpass the concrete requirement for an injury-in-fact.").

The same conclusion was reached in *Fenwick v. Orthopedic Specialty Institute, PLLC*, 2020 WL 913321 (S.D. Fla. Feb. 4, 2020). There, the plaintiff received two back-to-back identical texts advertising a free lecture promoting the defendant's stem cell treatment services. As here, the plaintiff in *Fenwick* similarly asserted that the texts caused her actual harm, including—among other things—an "invasion of privacy." *Id.*

In granting dismissal, *Fenwick* noted "Congress was concerned about 'intrusive invasion[s] of privacy' into the home when it enacted the TCPA," and that "[Congress's] privacy and nuisance concerns about residential telemarketing are ***less clearly applicable to text messaging***." *Id.* at *3 (citing *Salcedo*, 936 F.3d at 1169-70) (emphasis added). *Fenwick* further noted *Salcedo* also found "[s]imply sending one text message to a private cell phone is not closely related to the severe kinds of actively intermeddling intrusions that the traditional tort [of intrusion upon seclusion] contemplates." *Id.* (citing *Salcedo*, 936 F.3d at 1171). Thus, *Fenwick* held plaintiff's allegations of invasion of privacy (as

well as her other allegations) aligned with the kinds of harm *Salcedo* evaluated, and, ultimately, found insufficient to constitute an injury-in-fact. *Id.* (citing *Salcedo*, 936 F.3d at 1168-73). Teblum's fundamentally flawed "privacy" allegations fail for the same reason.

C. Teblum's "Wasted Time" Allegations Also Do Not Establish Standing.

Teblum's next attempt to allege a "concrete" harm by estimating that he spent "approximately ten seconds reviewing [DocMJ's] unwanted text message" similarly fails to establish a "concrete" harm resulting in Art. III standing. [DE 38 ¶ 40.] Indeed, this argument fares no better under *Salcedo*, which distinguished prior cases on this exact point:

> To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes. We have found standing where the harm was, for example, time wasted traveling to the county registrar's office, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); and correcting credit reporting errors, *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017). ***These precedents strongly suggest that concrete harm from wasted time requires, at the very least, more than a few seconds***.

Salcedo, 936 F.3d at 1173 (emphasis added).

In *Common Cause/Georgia*, the Eleventh Circuit held that requiring plaintiffs who were registered voters to "make a special trip to the county registrar's office that is not required of voters who have driver's licenses or passports" constituted a significant impediment to the exercise of the civil right to vote. 554 F.3d at 1351. The Eleventh Circuit explained plaintiffs had established a sufficiently concrete injury because the challenged policy erected barriers that had impeded the exercise of their fundamental rights. *Id.* at 1351-52. And further, that plaintiffs had to expend significant amounts of time traveling to the county's registrar office to exercise that well-recognized, fundamental right. *Id.*

In *Pedro*, plaintiff was an authorized user of her parents' credit card. 868 F.3d at 1278. When her parents passed away, the credit cards for which plaintiff had been an authorized user defaulted. *Id*. Consequently, a credit-reporting agency dropped her credit score by 100 points. *Id*. A second agency also lowered her credit score. *Id*. After investigation, plaintiff determined the default on her parents' credit cards caused the credit drop. *Id*. The plaintiff then spent time complaining to the credit card company and credit-reporting agencies. *Id*. But the agencies still would not remove the delinquent account from her credit report. *Id*. The plaintiff then spent further time requesting that the credit-reporting agency delete the account, at which point her credit returned to its prior excellent level. *Id*. As a result, the Eleventh Circuit held the plaintiff had alleged a concrete injury because defendant's reporting of inaccurate information has a close relationship to defamation (a well-recognized tort) ***and*** because the plaintiff alleged that she "lost time . . . attempting to resolve the credit inaccuracies" that "affected her personally." *Id*. at 1280.

Here, the alleged time wasted by Teblum does not bear any resemblance to the significant time the plaintiffs in *Billups* and *Pedro* spent trying to remove the barriers imposed on exercising the right to vote or correcting a credit score that dropped by 100 points—both of which concerned invasions of well-recognized rights. Neither of those claimed injuries could have been remedied absent each plaintiff's devotion of substantial amounts of time to correcting the alleged issue. And in both cases, the time was spent remedying a harm of a qualitative nature historically recognized as an Art. III injury.

Conversely, here, the receipt of a single text does not have a close relationship with ***any*** harm traditionally recognized as forming the basis of a suit. *Salcedo*, 936 F.3d at 1171-

72. Here, Teblum merely spent time reading the ***28-word*** text and responding with a "STOP" message of his own—which cannot plausibly be alleged to have taken more than "a few seconds." [DE 38 ¶¶ 18, 40, 45.] And even if it did, the "brief, inconsequential annoyance" of reading and responding to a text is not the type of "real but intangible harm" Congress intended the TCPA to remedy. *Salcedo*, 936 F.3d at 1173. The "approximately ten seconds" Teblum claims he spent still fails to pass *Salcedo*'s "a few seconds" threshold.

A related point about the "unique[ness]" of text messages with respect to allegations of "wasted time" bears mentioning. Two-and-a-half months after *Salcedo*, the Eleventh Circuit reaffirmed its decision in *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019). Like *Salcedo*, *Cordoba* was also a TCPA case. But unlike *Salcedo*—which dealt with unsolicited texts—the Eleventh Circuit in *Cordoba* instead analyzed Art. III standing for unsolicited phone calls. Importantly, the *Cordoba* court noted that:

> This Court's recent decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), that the receipt of a single unsolicited text message does not qualify as an injury in fact does not change our analysis. In *Salcedo*, ***we focused heavily on the unique features of text messages***.

Id. at 1270 (emphasis added). Indeed, this Court made the same observation in its March 26 Order, noting that "*Cordoba* does not undermine the analysis in *Salcedo* for establishing standing for an unsolicited ***text message***." [DE 37 at 6 (citing *Cordoba*, 942 F.3d at 1266) (emphasis supplied)]. In *Salcedo*, the Eleventh Circuit observed that "[t]he TCPA . . . demonstrate[s] that, on the margin, Congress does not view trying up a phone line for five seconds as a serious intrusion." 936 F.3d at 1173. Thus, as a baseline, tying up a ***cellphone*** for five seconds should also not be considered a "serious intrusion." And considering the

"unique features of text messages"—including how recipients unilaterally choose to spend as much or as little (or even no) time reviewing texts—Eleventh Circuit precedent dictates that spending "approximately ten seconds" reading a text is also not a "serious intrusion."

Teblum's other claim about spending "additional time" reviewing DocMJ's reply text "confirming that he would no longer be contacted" is also categorically precluded from constituting a "concrete" harm. [DE 38 ¶¶ 45-46]. Such confirmatory texts sent in response to opt-out requests do not violate the TCPA. *Fenwick*, 2020 WL 9133321, at *4.[6]

Finally, Plaintiff's conclusory allegation that he "wasted at least fifteen minutes discussing this text message with and retaining counsel for this case in order to stop [DocMJ's] unwanted calls" cannot establish a cognizable injury-in-fact. Any time spent in this fashion is not of the same "qualitative injury" as the plaintiffs in *Billups* and *Pedro*. [DE 38 ¶ 44.] More importantly, time spent with counsel has no relationship to the harm

[6] Courts and the FCC have both universally concluded that a text which confirms an opt-out request "is permissible under the TCPA." *See Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 (3d Cir. 2013) (noting the "FCC concluded that a text message confirming an opt-out request is permissible under the TCPA.") (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391, 15394 ¶ 7, 15398 ¶ 15 (Nov. 26, 2012) ("one-time texts confirming a request that no further text messages be sent do[ ] not violate the [TCPA].")); *see also Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030, at *7 (S.D. Cal. June 18, 2012) ("Defendant argues that the legislative history of the TCPA indicates that the statute cannot be read to impose liability for a single, confirmatory opt-out message. The Court agrees. The Court concludes that the TCPA does not impose liability for a single, confirmatory text message.")); *Derby v. AOL, Inc.*, 2015 WL 3477658, at *6 (N.D. Cal. June 1, 2015); *Freidman v. Massage Envy Franchising, LCC*, 2013 WL 3026641, at *4 (S.D. Cal. June 13, 2013) ("One message seeking clarification is not a 'proliferation of intrusive, nuisance calls' that the TCPA sought to prevent."); *Ryabyshchuck v. Citibank (S. Dakota) N.A.*, 2012 WL 5379143, at *3 (S.D. Cal. Oct. 30, 2012); *Zemel v. CSC Holdings LLC*, 2018 WL 6242484, at *5 (D.N.J. Nov. 29, 2018). Assuming the truth of the facts alleged in the FAC, Teblum's claim can thus only be interpreted as being based on a single unsolicited text. [DE 38 ¶ 29.] *Eldridge*, 2020 WL 1475094, at *3 ("only conduct that violates the TCPA confers standing"). Tellingly, Teblum only refers to the May 7 text as "telemarketing" in the FAC; there is no such reference to the May 10 text as being "telemarketing." [*Compare* DE 38 ¶ 19 *with* ¶ 29.] This silence speaks volumes.

Congress sought to address via the TCPA. "[The Court's] responsibility to ensure that plaintiffs allege a real injury in fact requires us to look closely at their allegations in light of the statute, our precedent, history, and the judgment of Congress." *Salcedo,* 936 F.3d at 1173. The plaintiff in *Salcedo* also unquestionably retained counsel, yet this fact was not significant to the court's analysis. And nowhere in the TCPA did Congress seek to protect consumers from spending time with counsel to pursue litigation. *See Johnston v. Midland Credit Mgmt.*, 229 F. Supp. 3d 625, 631 (W.D. Mich. 2017), *reconsideration denied*, 2017 WL 5178070 (W.D. Mich. Jan. 1 2017) (citing *Yucaipa Am. All. Fund I, L.P. v. Ehrlich*, 204 F. Supp. 3d 765, 777 (D. Del. 2016), *aff'd sub nom.*, 716 F. App'x 73 (3d Cir. 2017) ("Regarding plaintiffs' argument that the complaint pleads 'concrete financial loss' in the form of 'millions in attorneys' fees and costs,' this alleged injury does not confer [] standing either.")). In other words, Congress simply did not "squarely identif[y] that injury, unlike the receipt of more than one unsolicited telephone ***call***." *Cf. Cordoba,* 942 F.3d at 1270 ("Congress "squarely identified" the harm from the receipt of "more than one unwanted telemarketing call" as a "concrete injury that meets the minimum requirements of Article III standing") (quoting *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017)) (quotations omitted).

Teblum—like the plaintiff in *Salcedo* who tried to recite the language in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, DDS, PA*, 781 F.3d 1245, (11th Cir. 2015), to state a claim—is attempting, but has nevertheless failed, to end-run around *Salcedo*. This Court should "look past this conclusory recitation to the factual substance" of Teblum's allegations. *Salcedo*, 936 F.3d at 1168. Whether Teblum, after receiving the

text, allegedly spent fifteen minutes interacting with his attorney does not constitute the type of "wasted time" sufficient for an injury-in-fact under *Salcedo*. This voluntary act was entirely of Teblum's own making. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

Ultimately, then, Teblum's alleged "wasted time" injury cannot constitute a cognizable injury-in-fact. Taken together, Teblum's allegations are utterly lacking in facts that could result in a finding the text caused him any actionable harm. As *Salcedo* concluded, regardless of Teblum's vague, idiosyncratic and/or conclusory allegations, the fleeting annoyance of a single text is not a basis for invoking federal court jurisdiction.

D. Teblum's Remaining Allegations Also Fail to Confer Standing.

The March 26 Order primarily focused on Teblum's allegations regarding a purported "invasion of privacy" and "wasted time." As shown, neither claim can support the determination of a "concrete" harm. As a final matter, the remaining allegations in the FAC—which this Court did not see a need to even address—also cannot confer standing.

Specifically, another area where the FAC falls woefully short is with respect to the "cost" Teblum was charged to receive the text. On what is now Teblum's second opportunity to allege a "concrete" injury, Teblum has again failed to allege he was charged for receiving any text from DocMJ. So too has Teblum failed to allege he was somehow "deprived" of the use of his cellphone due to his receipt of the text. *Rebuild Nw. Fla., Inc. v. FEMA*, 2019 U.S. Dist. LEXIS 170483, at *12 (N.D. Fla. Sep. 30, 2019) ("A speculative, as opposed to concrete, injury is not grounds for standing."). The only conclusion is

Teblum was neither charged nor deprived of his cellphone. Both factors were important to the lack of a tangible harm in *Salcedo*. 936 F.3d at 1168, 1172 (noting Salcedo had "not alleged specifically that [the] text cost him any money" nor that he was not "deprived" of his chattel for a "substantial time"). And both factors are noticeably absent here as well.

At best, Teblum alleges that the texts took up "190 bytes" of memory space each in his cellphone. [DE 38 ¶ 48.] But Teblum does not explain whether that is a substantial amount of memory space—it is not.[7] Nor does Teblum identify any charge he incurred based on the use of his cellphone's memory space. Thus, Teblum fails to allege ***any*** "cost" that could factor into a finding of a "concrete" injury—or that is not entirely "de minims" and thus inconsequential. *Zemel*, 2017 U.S. Dist. LEXIS 63398, at *10-11 (citing *Olmos v. Bank of Am., N.A.*, 2016 WL 3092194, at *4 (S.D. Cal. June 6, 2016) (finding fact "that [p]laintiff received two short text messages insufficient to convey standing because the loss of battery life and bandwidth as a result of these two messages was de minimis")).

Moreover, Teblum's detached assertion that he "is so substantially aggravated by unwanted phone calls that he regularly checks the Do Not Call Registry to verify that the 0363 Numbers continues to be listed" is a total non-sequitur. [DE 38 ¶ 43.] This case consists of one count for an unsolicited text; there is no alleged violation of the Do Not Call Registry. Teblum's separate, voluntary conduct again has no bearing here. *Taylor v.*

[7] For comparison, "[a] byte is eight bits. It is the amount of memory space needed to store one character." *Rowe Int'l Corp. v. Ecast, Inc.*, 500 F. Supp. 2d 891, 902 n.2 (N.D. Ill. 2007). "A bit contains either a logical '1' or '0.'" *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 861 n.5 (Fed. Cir. 1993). Assuming Teblum had a standard cellphone with 32 gigabytes of storage (or 32,000,000,000 bytes) the combined 380 bytes (3,040 bits) would take up about 0.0000011875% of his storage space; this amount of data is so infinitesimally small as to be almost non-existent.

Fred's, Inc., 285 F. Supp. 3d 1247, 1265 (N.D. Ala. 2018) (court declined to find standing where plaintiff "has not linked her other intangible injuries to any ***real*** or non-speculative increase in the risk of harm that [the statute] seeks to prevent") (emphasis supplied).

Lastly, Teblum's own actions[8] further undercut his claim that the text harmed him in a way that is anything other than "figmentary." *See Salcedo*, 936 F.3d at 1167 n.4.

IV. CONCLUSION.

The Eleventh Circuit in *Salcedo* took a definitive stand against the untoward expansion of the TCPA. Its decision to impose a "concrete" injury-in-fact requirement for single text message cases was not limited to the particular allegations of that case. But even if *Salcedo* were so limited, the instant allegations fall far short of the benchmark for "concrete" harm established by the Eleventh Circuit. Because Teblum has not alleged any "concrete" injury-in-fact traceable to DocMJ's alleged conduct, he is unable to meet the "irreducible constitutional minimum" to establish Article III standing as a matter of law. *Lujan*, 504 U.S. at 560. For this reason, the FAC should be dismissed under Rule 12(b)(1).

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Respectfully submitted,

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[8] Teblum waited a significant amount of time to opt-out from receiving further texts. As alleged in the *Complaint* and FAC, the first text was received on May 7, 2019. [DE 1 ¶ 27; DE 38 ¶ 18.] Yet Teblum waited ***three business days***—or until May 10, 2019—to text "STOP." [DE 1 ¶ 27; DE 38 ¶ 18.] This unexplained delay demonstrates Teblum was ***not*** so severely disturbed that he immediately opted-out; rather, he continued to leave open the possibility of receiving further texts (including when he could have again been "in the process of" picking up his kids). [DE 38 ¶ 41.]

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this date via U.S. mail and/or some other authorized manner for those counsel or parties below, if any, who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Maria K. Vigilante
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