UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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

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

Plaintiff,

CLASS ACTION

JURY TRIAL DEMANDED

v.

PHYSICIAN COMPASSIONATE CARE LLC d/b/a DOCMJ,

Defendant.
_____/

PLAINTIFF'S SUPPLEMENTAL BRIEFING REGARDING THE EFFECT OF *DRAZEN V. PINTO*

Plaintiff Daryl Teblum, pursuant to the Court's Text Order dated July 29, 2022, (Doc. 85), hereby provides supplemental briefing addressing: (1) the effect, if any, *Drazen v. Pinto,* No. 21-10199, 2022 U.S. App. LEXIS 20766 (11th Cir. July 27, 2022), or any case cited therein, has on this case; and (2) whether the Court still possesses jurisdiction over this action.

Plaintiff respectfully submits that the Court retains jurisdiction because each member of Plaintiff's proposed class has standing, even if they received a single text message. First, the parties in *Drazen* did not brief the standing issue and were unable to raise any of the arguments raised here. *See Drazen,* 2022 U.S. App. LEXIS 20766 at *9 ("The parties did not brief the issue before us, apparently assuming the class

definition passed Article III standing muster.").

Second, *Drazen* relied on *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) for its conclusion that "the class definition cannot stand to the extent that it allows standing for individuals who received a single text message from [the defendant]." *Drazen,* 2022 U.S. App. LEXIS 20766 at *17. However, *Drazen* failed to consider subsequent United States Supreme Court precedent that calls into question *Salcedo's* holding.

Salcedo was decided on August 28, 2019. On April 1, 2021, the Supreme Court issued its decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). At issue in *Duguid* were text messages, which, like here, the plaintiff alleged violated the TCPA because they were sent using an "automatic telephone dialing system" ("ATDS") and without the requisite consent. *See id.* at 1168. In *Duguid,* the Supreme Court analyzed the merits question at issue of what type of equipment qualifies as an ATDS. *See id.* at 1165. Importantly, by reaching this merits question, the Supreme Court—although implicitly—determined that it had jurisdiction under Article III, and that the plaintiff had standing, for TCPA violations due to text messages. *See Texas v. United State*s, 549 F. Supp. 3d 572, 594 n.23 (S.D. Tex. 2021) ("In a recent opinion, Justice Alito confirmed that the Supreme Court ***implicitly found standing by the fact that it had ruled on the merits***.") (emphasis added) (citing *California v. Texas*, 141 S. Ct. 2104, 2124 n.2, 210 L. Ed. 2d 230 (Alito, J., dissenting) ("Although our opinion did not address the issue, ***we are required to consider Article III standing in every case that comes before us***.") (emphasis added) (citing *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 95, 118

S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

In *Steel Co.*, the Supreme Court explained that,

> "***Without jurisdiction the court cannot proceed at all in any cause***. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869). "On every writ of error or appeal, ***the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes***. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, supra, 177 U.S. 449 at 453. ***The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception***." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884).

Steel Co., 523 U.S. at 94-95 (emphasis added). This accords with *Drazen's* reasoning that, "we start with the basic question of whether we have subject-matter jurisdiction in this case." *Drazen*, 2022 U.S. App. LEXIS 20766, at *9.

Thus, when the Supreme Court analyzed the merits question presented in *Duguid*, it necessarily first determined that the plaintiff had Article III standing from having received text messages alleged to have violated the TCPA. This determination that Article III standing existed aligns with every other Circuit Court of Appeals to examine the question of TCPA text message standing, and calls into question *Salcedo's* holding. *See Cranor v. 5 Star Nutrition, L.L.C.,* 998 F.3d 686, 693 (5th Cir. 2021); *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 460 (7th Cir. 2020) (Barrett, J.); *Melito v. Experian Mtkg. Sols., Inc.*, 923 F.3d 85, 92-93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017). Because the parties in *Drazen* did

not brief the standing issue, they were unable to present the Eleventh Circuit with the effect *Duguid* had on *Salcedo*, and the *Drazen* court did not independently analyze the issue.

Further, in *Drazen* the Eleventh Circuit explained that "[t]o satisfy the concrete injury requirement for standing, a plaintiff alleging a statutory violation must demonstrate that history and the judgment of Congress support a conclusion that there is Article III standing." *Drazen*, 2022 U.S. App. LEXIS 20766, at * 12 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05, 2208 (2021)). And, in *Salcedo*, the Eleventh Circuit explained that "Article III standing is not a 'You must be this tall to ride' measuring stick. 'There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be.'" 936 F.3d at 1173 (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). The Supreme Court in *Duguid,* by determining the merits question presented, necessarily first determined that history and the judgment of Congress supported Article III standing in TCPA text message matters. And as *Salcedo* explained, that an individual only received one text message is of no import because "there is no minimum quantitative limit required to show injury". 936 F.3d at 1173. What matters instead is history and the judgment of Congress.

As a result, Plaintiff respectfully submits that the Court has jurisdiction and that Plaintiff and the class have standing—even if they only received a single text message.

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Respectfully submitted,

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