IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ABANTE ROOTER & PLUMBING, INC., individually and on behalf of a class of all persons and entities similarly situated, Plaintiff, v. OH INSURANCE AGENCY and ALLSTATE INSURANCE COMPANY, Defendants.	Case No. 15-cv-9025 Judge Jorge L. Alonso

ORDER

For the following reasons, Allstate Insurance Company's Motion to Dismiss [102] and Oh Insurance Agency's Motion to Dismiss [96] are denied. Defendants' answers to Abante's Amended Class Action Complaint [86] are due by March 20, 2018. A status hearing is set for March 27, 2018 at 9:30 a.m.

STATEMENT

Plaintiff, Abante Rooter and Plumbing, Inc., brings this putative class action against defendants Oh Insurance Agency ("Oh Insurance") and Allstate Insurance Company ("AIC"). Abante complains that the defendants violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by using an autodialer to make unsolicited and pre-recorded sales calls to the cellular phones of Abante and others in the class it proposes to represent. [Dkt 86.] Abante alleges it received two such calls: one that went to voice-mail, and another that was answered by its principal Fred Heidarpour. It complains that the calls interrupted Abante's business, annoyed its principal, and seized and trespassed upon the use of its cell phones and of others who received similar calls.

Before the Court are the defendants' motions to dismiss. [Dkt 96, 102.] Defendants argue that subject matter jurisdiction is lacking because Abante has not alleged a concrete injury as is required to establish Article III standing under *Spokeo v. Robins*, 136 S.Ct 1540 (2016), and because AIC's offer of judgment and deposit of $15,000 into an escrow account for Abante with a trusted intermediary moots Abante's claims under *Campbell-Ewald v. Gomez*, 136 S.Ct 663 (2016). The Court addresses each issue in turn.

Standing

Defendants argue that Abante lacks standing to bring the claims it asserts because it has failed to allege a concrete injury. As to the specific harms Abante has alleged, defendants say, they were actually borne by Mr. Heidarpour and not Abante, and in any case, are too insignificant to give rise to a federal claim. For its part, Abante argues that it has demonstrated standing, because it alleges the precise intangible harm Congress sought to prevent in enacting the FTCA, and because it also alleges concrete harm including temporary seizure and trespass to its cellular phone line, invasion of its principal's privacy causing him annoyance, and the interruption of the operation of its business.

The jurisdiction of federal courts is limited to "cases" and "controversies" as described in Article III, Section 2 of the Constitution. "There is no case or controversy if the plaintiff lacks standing to challenge the defendant's alleged misconduct." *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 587 (7th Cir. 2016). To establish Article III standing, "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The plaintiff has the burden of establishing these elements "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to state a claim. *Id.* To demonstrate standing, the plaintiff's "complaint must contain sufficient factual allegations of an injury resulting from the defendants' conduct, accepted as true, to state a claim for relief that is plausible on its face." *Diedrich*, 839 F.3d 588 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Spokeo instructs that "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct at 1548 (quoting with alteration *Lujan*, 504 U.S. at 560). "A 'concrete' injury must be '*de* facto'; that is, it must actually exist." *Spokeo*, 136 S.Ct at 1548. "'Concrete'" is not, however, necessarily synonymous with 'tangible.'" *Id.* at 1549. "Although tangible injuries are perhaps easier to recognize, . . . intangible injuries can nevertheless be concrete." *Id.* In determining whether an intangible harm constitutes a sufficiently concrete injury, "both history and the judgment of Congress play important roles." *Id.*

Several district courts within this circuit have held post-*Spokeo* that an alleged TCPA violation gives rise to a concrete injury under Article III. *See, e.g., McCombs, D.P.M., LLC*, No. 15 C 10843, 2017 WL 1022013 (N.D. Ill. March 6, 2017); *Cholly v. Uptain Group, Inc.*, No. 15 C 5030, 2017 WL 449176 (N.D. Ill. Feb. 1, 2017); *Aranda v. Caribbean Cruise Line, Inc.*, 202 F. Supp. 3d 850, (N.D. Ill. 2016); *Dolemba v. Ill. Farmers Ins. Co.*, 213 F. Supp. 3d 988, 993-94 (N.D. Ill. 2016). This court agrees with and adopts the reasoning of those decisions. As the court explained in *Aranda*:

> Unlike the statute at issue in *Spokeo* . . . , the TCPA section at issue does not require the adoption of procedures to decrease congressionally-identified risks. Rather, section 227 of the TCPA prohibits making certain kinds of telephonic contact with consumers without first obtaining their consent. It directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect by enacting the TCPA. There is no gap — there are not some kinds of violations of section 227 that do not result in the harm Congress intended to curb, namely, the receipt of unsolicited telemarketing calls that by their nature invade the privacy and disturb the solitude of their recipients.

Aranda, 202 F. Supp. 3d at 857.

To be sure, "[C]ongress' judgment that there should be a legal remedy for the violation of a statue does not mean each statutory violation creates Article III injury." *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016) (no standing for Fair and Accurate Credit Transactions Act plaintiff who alleged defendant had not truncated credit card receipt but failed to allege any concrete injury flowing from the violation). "A violation of a statute that causes no harm does not trigger a federal case. That is one of the lessons of *Spokeo*." *Id.* at 727 n. 2. "The violation of a procedural right granted by statute," however, "can be sufficient in some circumstances to constitute injury in fact." *Spokeo*, 136 S.Ct at 1549. In these cases, the plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* A statutory violation alone gives rise to concrete harm where "the violation present[s] an appreciable risk of harm to the underlying concrete interest that Congress sought to protect in enacting the statute." *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 887 (7th Cir. 2017) (no standing where plaintiff alleged Fair Credit Reporting Act violation "completely removed from any concrete harm or appreciable risk of harm").

Here, Abante alleges a concrete harm to the interest Congress sought to protect in enacting the TCPA. Moreover, unlike the plaintiff in *Meyers* or *Groshek*, Abante also alleges particularized injury in addition to the statutory violation. Abante's alleged injuries include trespass and occupation of its cell phone line, interruption of its business, and distraction of its principal, who devoted time to the defendants' unwanted calls instead of to Abante's business. These allegations suffice under *Spokeo*. *See, e.g.*, *Cholly*, 2017 WL 449176 at *2; *Aranda*, 202 F. Supp. 3d at 857; *Dolemba*, 213 F. Supp. 3d at 992-94; *see also Leung v. XPO Logistics, Inc.*, 164 F. Supp. 3d 1032, 1037 (N.D. Ill. 2015) (citing *Freedom From Religion Foundation v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (lost time is an injury in fact).

Oh Insurance's arguments notwithstanding, Abante's allegations are not of injuries suffered only by Mr. Heidarpour, but instead also by Abante. Abante alleges that the unwelcome calls interrupted the operation of *Abante's* business and occupied its worker, Mr. Heidarpour. The waste of Mr. Heidarpour's time when he was working for Abante is a waste of the resources of Abante, and Abante alleges the calls distracted Mr. Heidarpour from the operation of Abante's business. Specifically, Abante alleges: "The efficient and effective operation of its business was affected by Defendant's calls, which not only temporarily seized and trespassed upon the use of Plaintiff's cell phone in the calls themselves, but required its principal to waste time addressing

the calls instead of other activities. [Dkt 86 ¶ 35.][1] Whether the calls also disrupted Mr. Heidarpour's privacy, as the defendants emphasize the allegations suggest, is beyond the point.

Defendants' additional arguments that Abante has no right to privacy because it is a corporation and not a natural person, or that Abante would otherwise be unable to prevail on common law claims similar to those prohibited by the TCPA similarly miss the mark. Abante's claimed injuries have a close relationship to common law causes of action for invasion of privacy, nuisance and trespass to chattels, even if they would not give rise to a those claims under common law. No more is required.

To determine standing, *Spokeo* explains, "Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S.Ct at 1549. A close relationship does not require that congressionally-established causes of action also give rise to causes of action under common law; rather, it requires only that "newly established causes of action protect essentially the same interests that traditional causes of action sought to protect." *Susinno v. Work Out World, Inc.*, 862 F.3d 346, 350 (3rd Cir. 2017); *accord McCombs, LLC*, 2017 WL 1022013 at *3 ("[A] statutory violation that invokes the type of intangible injury recognized at common law or elevated by Congress to *de facto* status is sufficient in itself to satisfy Article III"). "[T]he TCPA can be seen as merely liberalizing and codifying the application of a common law tort to particularly invasive type of unwanted telephone call." *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 645 (W. Va. 2016). "While the common law tort may require different elements than the TCPA, the Supreme Court's focus in *Spokeo* was not on the elements of the cause of action but rather on whether the harm was of a type that traditionally provides a basis for a common law claim." *Id*. As Abante notes, Congress specifically considered complaints from businesses as well as individual consumers in crafting the TCPA, and it extended its protections to both.

Likewise, the Court is unconvinced that because Abante alleges it received only two calls (again, one that went to voice-mail and one that Mr. Heidarpour answered), it alleged at most a *de minimis* injury insufficient to confer standing. The Third Circuit Court of Appeals rejected a similar argument in *Susinno v. Work Out World, Inc.*, 862 F.3d 351-52, finding a concrete injury under the TCPA based on one prerecorded call. In enacting the TCPA, it explained, Congress "was not inventing a new theory of injury," but rather, "elevat[ing] a harm that, 'while previously inadequate in law,' was of the same character of previously existing 'legally cognizable injuries.'" *Susinno v. Work Out World, Inc.*, 862 F.3d 345, 351-52 (3rd Cir. 2017) (quoting *Spokeo*, 136 S.Ct at 1549). This Court agrees.

[1] Oh Insurance also argues that Abante "fails to show how the 'efficient and effective operation of its business" was affected by the calls, but Plaintiff neither need prove its claims at this juncture nor allege the details Oh Insurance suggests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 570 (complaint must contain "enough facts to state a claim for relief that is plausible on its face"); *Ashcroft v. Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

One final note bears mentioning. During the briefing on the motions, Abante submitted evidence it says show the number of automated telemarketing calls Oh Insurance made using the same equipment as was used to call Abante during the proposed class period. [Dkt 130.] Defendants correctly argue that whether and at what volume calls were made to putative class members goes to whether class treatment is appropriate; it has no bearing on whether Abante alleges a concrete injury to it or whether its own claims are moot. [Dkt 143, 144.] Abante appears to concede as much, in noting that it submitted the material "out of an excess of caution." [Dkt 127 at 1 n. 1.] The issues raised by the instant motions must be considered prior to consideration of any class claims, and Abante's standing has been demonstrated on its own. *See Meyers*, 843 F.3d at 726.

Mootness

AIC also seeks dismissal on the basis of its unaccepted offer of judgment and deposit of funds into an escrow account for Abante's benefit at the Bank of New York Mellon prior to certification of any putative class claims. According to AIC, the Supreme Court's recent decision in *Campbell-Ewald v. Gomez*, 136 S.Ct 663 (2016), compels a finding that Abante's claims are moot because AIC provided a payment of more than the maximum statutory damages on Abante's claim ($15,000, comprising $5,000 for plaintiff's alleged TCPA statutory damages, and $10,000 for its attorneys' fees and costs), and its offer includes a promise of injunctive relief. Because Abante's claims are moot, AIC adds, it lacks standing to represent a class.

Abante, on the other hand, insists that under *Campbell-Ewald* a settlement cannot be forced upon a named plaintiff in a putative class case by a deposit of funds that the plaintiff has not accepted. According to Abante, there is no logical distinction between an unaccepted offer of judgment and an unaccepted tender of funds, and neither moots its claims. To hold otherwise, it urges, would countenance the use of individual offers to thwart class litigation.

In *Campbell-Ewald*, a putative TCPA class case, the Supreme Court held that "an unaccepted settlement offer or [Rule 68] offer of judgment does not moot a plaintiff's case." *Campbell-Ewald*, 136 S.Ct. at 672. Instead, a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and that, "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*, 136 S.Ct at 669. Notwithstanding a defendant's individual settlement offer, the Court admonished, "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."

The Court reached its decision by application of "basic principles of contract law." *Campbell-Ewald*, 136 S.Ct. at 671. An unaccepted settlement offer simply has no force, the Court explained, and like other unaccepted contract offers, "it creates no lasting right or obligation." *Id*. at 666. This is necessarily so, the Court reasoned, because the plaintiff remains empty-handed, the defendant continues to oppose the claim on the merits, and both parties retain the same stake in the litigation as they had at the outset. *Id*. at 670-71. The Court explicitly reserved judgment, however, on "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the

court then enters judgment for the plaintiff in that amount." Id. at 672. It is this open issue that AIC seizes upon in urging a finding of mootness here.

AIC's motion is denied. Since the briefing on the motion, the Seventh Circuit has issued a series of decisions applying the reasoning of *Campbell-Ewald* to circumstances similar to those presented here. One of those cases, *Fulton Dental v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017), reversed a District Court decision heavily relied on by AIC in its briefing. Considering the issue left open by *Campbell-Ewald*, the Seventh Circuit held in *Fulton Dental* that a settlement offer and deposit of an amount into the court's registry that would fully satisfy the plaintiff's claims did not moot them. *Id.* at 545. The Seventh Circuit saw "no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through Rule 67," as was the case there. *Id.* "In either case," the court explained, "all that exists is an unaccepted contract offer, and as the Supreme Court recognized, an unaccepted offer is not binding on the offeree." *Id.*

Because the offer and deposit had not mooted the plaintiff's claims in *Fulton Dental*, the Seventh Circuit held, "the door [was] still open to a motion for class certification." *Id.* at 546. Noting that although the "safest way to preserve the option of serving as a class representative is to file a prophylactic motion for class certification at the time the lawsuit is filed," the Court reasoned, "there is no reason to think that this is the only time when a certification motion is proper." *Id.* In the end, it explained, "It is enough for present purposes to reconfirm that as long as the proposed class representative has not lost on the merits before a class certification motion is filed, it is not barred from seeking class treatment." *Id.*

The Seventh Circuit reiterated the point in *Conrad v. Boiran, Inc.*, 869 F.3d 536, 538 (7th Cir. 2017), holding that "an unaccepted offer cannot moot a case." In *Conrad*, a putative class action, the defendant also urged a finding of mootness based on its deposit of more than the named plaintiff's maximum recoverable damages with the court's registry and the denial of the plaintiff's class certification motion. The Court held otherwise, explaining its reluctance to adopt a rule whereby a settlement is forced on an unwilling plaintiff who might have "rational" reasons to pursue even "negative-value cases," such as that "the party hopes to establish an important principle through the case." *Id*. at 539. It again employed similar contract reasoning in *Laurens v. Volvo Cars of N. America*, 868 F.3d 622, 628 (7th Cir. 2017), to find that a prelitigation offer of a full refund had not mooted a putative class action named plaintiff's claims. *Id.* (observing historical rule that "Plaintiffs . . . could even reject tender, which was an offer to pay the entire claim before suit was filed, accompanied by actually producing the sum at the time of tender in an unconditional manner." (internal quotations and citations omitted)).

Just as the offer and payment into the court registry in *Fulton Dental* did not moot the plaintiff's claims in that case, neither did AIC's offer of judgment and deposit of funds into an escrow account moot the claims here. Although *Fulton Dental* involved the court's registry and AIC has deposited funds into an escrow account, this is a distinction without a difference. "At common law, . . . 'a plaintiff was entitle to deny that the tender was sufficient to satisfy his demand and accordingly go to trial.'" *Fulton Dental*, 860 F.3d at 545 *(*citing *Campbell-Ewald*, 136 S.Ct at 675 (Thomas, J., concurring). Abante may do the same.

The Court has statutory and inherent powers to sanction, deny recovery, or shift fees to address unreasonable litigation. "Forced settlements, as the law now stands, are not an option." *Fast v. Cash Depot, Ltd.*, No. 16-C-1637, 2017 WL 5158693 at *7 (E.D. Wisc. Nov. 7, 2017) (applying *Fulton Dental* to find putative FLSA collective action named plaintiff's claims not mooted by defendant's delivery of checks to plaintiff of what defendant contended was full value of claims).

Further, the Court notes that by the escrow agreement's own terms, the bank is not empowered to release the funds without an order of the court directing it to do so. [*See* dkt 103-2 at 5.] But if Abante's claims are moot by the actions of AIC as it insists, then the court may not enter such an order. As the Seventh Circuit observed in *Fulton Dental*, "once the case is moot, the court lacks power to enter any judgment on the merits." *Fulton Dental*, 860 F.3d at 543. *See also Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) (rejecting argument that unaccepted offer of judgment mooted case and explaining, "[A] district court cannot enter judgment in a moot case. All it can do is dismiss for lack of a case or controversy."). As soon as the payment was made, under AIC's theory, "the case would have gone up in smoke, and the court would have lost the power to enter the decree." *Chapman*, 796 F.3d at 787.

Finally, just as the Seventh Circuit could "not say as a matter of law that the unaccepted offer was sufficient to compensate plaintiff Fulton for its loss of the opportunity to represent the putative class." *Fulton Dental*, 860 F.3d at 547, neither may this Court say as much as to Abante. The parties expend much energy in arguing which happened first, Abante's class certification motion, or AIC's offer of judgment and deposit of funds into the escrow account, as well as the related issue of whether the offer of judgment applied to Abante's claims against AIC or an affiliated company, The Allstate Corporation, who was dismissed by Abante when it amended its complaint to name AIC instead. [*See* dkt 86.] The Seventh Circuit rejected this sort of race-to-the-court analysis in *Fulton-Dental*, *id.* at 546, and these arguments accordingly fall by the wayside. Abante has not lost its putative class claims on the merits, and because its own claims remain live, it is entitled to test them for their worth.

CONCLUSION

For all of the reasons discussed above, Allstate Insurance Company's Motion to Dismiss [102] and Oh Insurance Agency's Motion to Dismiss [96] are denied. Defendants' answers to Abante's Amended Class Action Complaint [86] are due by March 20, 2018. A status hearing is set for March 27, 2018 at 9:30 a.m.

Date: 2/20/2018

Jorge L. Alonso
United States District Judge