

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

JOYCE CONIGLIO,

Plaintiff,

v.

CASE NO. 8:16-cv-44-T-23TBM

IQUAL CORPORATION,

Defendant.

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**ORDER**

Delinquent on a mortgage, Joyce Coniglio requested a loan modification from her loan servicer, Nationstar Mortgage. In the written request for mortgage assistance, Coniglio provided a cell phone number, which Nationstar disclosed to investor Fannie Mae. After determining that Coniglio might benefit from credit counseling, Fannie Mae disclosed Coniglio's cell phone number to iQual, which provides a credit-counseling service to a delinquent borrower at no cost to the borrower (Fannie Mae pays iQual for the service). From mid-October to December 2014, iQual called Coniglio's cell phone several dozen times to offer the free credit-counseling service. Coniglio sues (Doc. 26) iQual for violating the TCPA, and iQual moves (Doc. 38) for summary judgment.

## DISCUSSION

### 1. Coniglio satisfies the Article III standing requirements.

Citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), iQual argues that the absence of a compensable injury requires the dismissal of this action. But, unlike the “bare procedural violation” in *Spokeo*, the TCPA provides a cause of action for a compensable harm — the nuisance caused by a telemarketer’s unwanted call. According to Coniglio’s unrefuted testimony, iQual’s calls bothered Coniglio, who describes the calls as a “nuisance”, an “interruption”, and an “invasion of privacy.”<sup>1</sup> (Coniglio Depo. at 25) Although Coniglio concededly suffered no monetary loss because of the calls (Coniglio Depo. at 54), the wasted time and the nuisance from unwanted calls are compensable injuries. See, e.g., *Dolemba v. Ill. Farmers Ins. Co.*, 2016 WL 5720377 at \*2 (N.D. Ill. Sept. 30, 2016) (Durkin, J.) (citing *Aranda v. Caribbean Cruise Line, Inc.*, 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016) (Kennelly, J.); *Mey v. Got Warranty, Inc.*, 193 F.Supp.3d 641, 643–50 (N.D.W. Va. 2016) (Bailey, J.).

Also, iQual requests dismissal because Coniglio purportedly fails to show evidence of causation, that is, evidence that iQual’s use of an automated dialer injured Coniglio. iQual cites *Romero v. Dept. Stores Nat’l Bank*, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (Bencivengo, J.), *appeal filed, case no. 16-56265*, which

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<sup>1</sup> Also, iQual argues for dismissal because the plaintiff declined to answer the phone calls and never heard ringing from several calls. But even if unanswered, a call interrupts a recipient who checks the phone to decide whether to answer, and listening to an unwanted voicemail wastes the recipient’s time.

dismisses a TCPA action because the plaintiff proffered no evidence that the use of an automated dialer (which is unlawful) caused more harm than a manually-dialed call (which is lawful). But *Romero* infringes Congress's prerogative to decide whether a compensable injury warrants redress. See *Spokeo*, 136 S. Ct. at 1549 (explaining that "a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified") (italics original) (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998)). Congress decided that an auto-dialed call but not a manually-dialed call warrants redress, and the argument adopted by *Romero* and raised by iQual subverts Congress's power to elevate "to the status of legally cognizable injur[y]" a "*de facto* injur[y] that [was] previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

## **2. iQual fails to show that Coniglio expressly consented to an auto-dialed call.**

Section 227(b)(1)(A) of the TCPA bans an auto-dialed call to a cell phone unless the recipient expressly consented to the call. Under a 2012 FCC Ruling, 27 F.C.C.R. 1830 (2012), "prior express consent" requires "prior express written consent." Under 47 C.F.R. § 64.1200(f)(8), "prior express written consent" means an agreement that "clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system." But under a 2008 FCC Ruling, providing a phone number to a creditor "reasonably evidences" a person's prior express consent to a call "regarding the debt." 23 F.C.C.R. 559 at \*\*3 (2008).

Because Congligio's request for mortgage assistance included Coniglio's cell phone number, iQual argues that Coniglio expressly consented in writing to an auto-dialed call from iQual. (Doc. 38 at 12–15) As a condition of requesting the loan modification, Coniglio agreed to “submit to credit counseling if it is determined that [Coniglio's] financial hardship is related to excessive debt.” Also, Coniglio agreed in the request for mortgage assistance that:

I understand that my Servicer will collect and record personal information that I submit in this RMA and during the evaluation process, including, but not limited to, my name, address, telephone number, social security number, income, payment history, disclosure of my personal information and the terms of any MHA notice, plan or agreement to the U.S. Department of Treasury and its agents, Fannie Mae and Freddie Mac in connection with their responsibilities under MHA, companies that perform support services in conjunction with MHA, any investor, insurer, guarantor, or servicer that owns, insures, guarantees, or services my first lien or subordinate lien (if applicable) mortgage loan(s) and to any HUD-certified housing counselor.”

(Doc. 38-10 at 7) Finally, Coniglio agreed as part of the loan application that her mortgage servicer could “disclose [Coniglio's phone number] . . . to companies that perform marketing services on our behalf or to other financial institutions with which we have joint marketing agreements.” (Coniglio Depo. at 76) The provisions evince Coniglio's agreement to the collection, recording, and disclosure of her cell phone number. But agreeing to the disclosure of a phone number is not agreeing to accept an auto-dialed call, and the agreements fail to evince Coniglio's express consent to an auto-dialed call. *See Black's Law Dictionary* at 620 (8th ed. 2004) (defining “express” as “clearly and unmistakably communicated; directly stated”).

Citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014) and a 2008 FCC Ruling, iQual argues that Coniglio consented to iQual's calls by disclosing her phone number to the mortgage servicer and permitting the mortgage servicer to disclose the number to others. In *Mais*, the plaintiff agreed during a hospital admission that the hospital could "use and disclose" the plaintiff's phone number for billing. *Mais*, 768 F.3d at 1124. When the plaintiff failed to pay a debt to a radiologist, the radiologist's debt collector repeatedly called the plaintiff about the debt. *Mais* holds that the 2008 FCC Ruling, which permits a creditor to call a debtor "regarding the debt," exculpates the defendant from liability under the TCPA for auto-dialing the plaintiff to collect a debt. 768 F.3d at 1124. In contrast, iQual called Coniglio not to collect a debt but rather to solicit a service.<sup>2</sup> Although tangentially "connected" (Doc. 38 at 14) to the mortgage debt, a solicitation for a credit-counseling service is not a call "regarding the debt," and the 'creditor exception' in the 2008 FCC Ruling cannot shield iQual from liability.

iQual raises two more unpersuasive arguments. First, iQual argues that Coniglio failed to "opt out" of iQual's calls. (Doc. 38 at 8) But the recipient of an auto-dialed call need not "opt out" of an auto-dialed call to prevail on a TCPA claim. As explained above, the caller must show the recipient's "express consent" to the call, and iQual fails to exclude the possibility that iQual auto-dialed Coniglio without

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<sup>2</sup> Even Fannie Mae's corporate representative agrees that Fannie Mae did not contract with iQual to collect on debts owed to Fannie Mae. (Doc. 38-2 at 28 (Vaughn))

Coniglio's express consent. Second, iQual argues that Fannie Mae provided iQual with Coniglio's number and permitted iQual to call Coniglio. (Doc. 38 at 5) Again, the TCPA requires that the recipient of an auto-dialed call expressly consent to the call. As explained above, the mortgage application and the request for mortgage assistance fail to establish clearly Coniglio's consent to an iQual call.

### CONCLUSION

Coniglio, who suffered a nuisance from iQual's auto-dialed calls, meets the standing requirements under Article III. Because iQual fails to exclude the possibility that iQual auto-dialed Coniglio without Coniglio's express consent, iQual's motion (Doc. 38) for summary judgment is **DENIED**.

The action is set on the August trial calendar. No later than **JULY 27, 2017**, the parties must submit a joint trial brief, a concise joint statement of the action, and proposed jury instructions, verdict forms, and voir dire. No later than **JUNE 16, 2017**, the parties must mediate before Peter Grilli.

ORDERED in Tampa, Florida, on March 7, 2017.



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STEVEN D. MERRYDAY  
UNITED STATES DISTRICT JUDGE