UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ABDERRAOUF BOUKARDOUGHA,

Plaintiff,

v. **Case No: 6:23-cv-450-PGB-LHP**

AFNI INC.,

Defendant.
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ORDER

This cause comes before the Court on Plaintiff Abderraouf Boukardougha's ("**Plaintiff**") Motion to Remand (Doc. 9 (the "**Motion**")) and Defendant AFNI Inc.'s ("**Defendant**") response in opposition (Doc. 15 (the "**Response**")). Upon consideration, the Motion is due to be denied.[1]

I. BACKGROUND

This lawsuit arises from an alleged dispute involving Defendant's attempts to collect a third-party's debt from Plaintiff. (*See generally* Doc. 1-1 (the "**Complaint**")).

Sometime in or around January 2023, Defendant called Plaintiff in an attempt to collect debt from an individual named Mathiew. (*Id.* ¶ 22). In response,

[1] In addition to remand, Plaintiff requests the Court award respective attorney's fees and costs pursuant to 28 U.S.C. § 1447(c). (Doc. 9, pp. 6–8). However, the Court denies Plaintiff's request for associated attorney's fees and costs as it is unwarranted here.

Plaintiff told Defendant he "[did] not know anyone by the name of Mathiew and to 'stop calling.'" (*Id.* ¶ 23). However, on February 8, 2023, after Plaintiff had explicitly warned Defendant he was not familiar with anyone named "Mathiew" and to "stop calling," Defendant called Plaintiff for a second time to try and collect the debt. (*Id.* ¶ 24). Accordingly, Defendant engaged in conduct that resulted in the "natural consequence of which is to harass, oppress, or abuse" Plaintiff. (*Id.* ¶¶ 33–35).

Ultimately, on February 15, 2023, Plaintiff initiated this lawsuit in state court, alleging violations of the Fair Debt Collection Practices Act ("**FDCPA**"), 15 U.S.C. § 1692d, and seeking "statutory and actual damages." (*Id.* ¶¶ 33–36). Defendant then timely removed the case to this Court. (Doc. 1). Shortly thereafter, Plaintiff filed the instant Motion, arguing the case must be remanded for lack of federal subject matter jurisdiction. (Doc. 9). Defendant responded in opposition (Doc. 15), and the matter is now ripe for review.

II. STANDARD OF REVIEW

Article III, Section 2 of the United States Constitution limits federal courts' jurisdiction to actual cases and controversies. Standing is part of this limitation as a "threshold jurisdictional question" that must be resolved before a court can turn to a claim's merits. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005). In fact, it determines the very "power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Courts determine standing at the time of filing. *Bochese*, 405 F.3d at 976.

Motions to dismiss that assert a lack of standing equate to "challenge[s] to the [c]ourt's subject matter jurisdiction properly considered under Rule 12(b)(1)."[2] *Davis v. Portfolio Recovery Assocs., LLC*, No. 20-CV-1063, 2021 WL 4133733, at *3 (M.D. Fla. Sept. 10, 2021).[3] "Typically, where standing is lacking, a court must dismiss the plaintiff's claim without prejudice. This is not so, however, in the removal context." *McGee v. Solic. Gen. of Richmond Cnty.*, 727 F.3d 1322, 1326 (11th Cir. 2013). Pursuant to 28 U.S.C. § 1447(c) and the law regarding removal, when a plaintiff lacks standing, remand is appropriate—not dismissal. *See id.*; 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). However, while the ultimate procedure may differ in the removal context, the Court's analysis under Rule 12(b)(1) remains the same.

Rule 12(b)(1) challenges to subject matter jurisdiction come in two forms: "facial attacks" and "factual attacks." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990). For facial attacks, the court looks to the face of the

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[2] "Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (quoting *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991)).

[3] Subject matter jurisdiction must exist at the time the action is commenced, and the party who invokes a federal court's subject matter jurisdiction bears the burden of establishing the propriety of exercising that jurisdiction. *See Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all of the decisions of the former Fifth Circuit that were handed down prior to October 1, 1981).

complaint and determines whether the plaintiff has sufficiently alleged standing. *Stalley*, 524 F.3d at 1232–33.[4] In doing so, the court is limited to the complaint's allegations and attached exhibits, which the court must accept as true. *See, e.g.*, *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251–54 (11th Cir. 2007) (considering exhibits attached to the compliant when ruling on a facial attack to subject matter jurisdiction). On the other hand, factual attacks challenge the existence of subject matter jurisdiction irrespective of what the complaint alleges. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260–61 (11th Cir. 1997). Accordingly, courts may consider information outside of the pleadings—including testimony, affidavits, and other evidence—and may make factual findings to resolve the motion. *McElmurray*, 501 F.3d at 1251.

III. DISCUSSION

Plaintiff moves to remand the case for failure to establish subject matter jurisdiction. (*See generally* Doc. 9). Specifically, Plaintiff argues she merely seeks statutory damages and as such, her injury does not satisfy the "concreteness" requirement for Article III standing. (*Id.*). Simply put, the Court disagrees and will delineate its reasoning below.

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[4] Although Plaintiff does not explicitly state the form of attack, this Motion presents a clear facial attack on the Complaint. (*See* Doc. 9). Accordingly, "[w]hen defending against a facial attack, [plaintiffs have] 'safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised,' and 'the court must consider the allegations in the plaintiff's complaint as true.'" *Stalley*, 524 F.3d at 1233 (quoting *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007)).

A plaintiff must have standing for this Court to have subject matter jurisdiction under Article III. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Accordingly, courts must address standing prior to reaching the merits of a claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) ("Article III jurisdiction is always an antecedent question . . . ."). Historical precedent has "established that the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan*, 504 U.S. at 560). To establish standing, a plaintiff must allege: (1) injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely the injury will be redressed by a favorable ruling. *See Lujan*, 504 U.S. at 560; *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013). "In plainer language, the plaintiff needs to show that the defendant harmed him, and that a court decision can either eliminate the harm or compensate for it." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020).

The dispute at hand surrounds the existence of the first element, injury in fact. (*See generally* Docs. 9, 15).[5] To establish injury in fact, a plaintiff must demonstrate "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*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). "Concrete" injuries consist of those that are "real, and not abstract." *Id.* Particularization, however, requires a plaintiff be affected "in a personal and

[5] As such, the Court will limit its analysis to the dispositive issue.

individual way." *Id.* "Each subsidiary element of injury—a legally protected interest, concreteness, particularization, and imminence—must be satisfied. *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 997 (11th Cir. 2020). That being said, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (citations and quotations omitted).

Historically, both tangible and intangible injuries have qualified as concrete. "The most obvious [concrete injuries] are traditional tangible harms, such as physical harms and monetary harms." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *see Spokeo*, 578 U.S. at 340; *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1243 (11th Cir. 2022). While "tangible injuries are perhaps easier to recognize," various intangible harms can nevertheless be concrete as well. *Spokeo*, 578 U.S. at 340; *TransUnion*, 141 S. Ct. at 2204.

"In determining whether an intangible harm constitutes [a sufficiently concrete] injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 578 U.S. at 340. For the historical assessment, courts consider whether the alleged intangible harm bears "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 341; *see TransUnion*, 141 S. Ct. at 2200; *Trichell*, 964 F.3d at 998. Moreover, courts weigh congressional judgment in assessing injury in fact. Congress is "well positioned to identify intangible harms that meet minimum

Article III requirements" and thus, may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law." *Spokeo*, 578 U.S. at 341 (quoting *Lujan*, 504 U.S. at 578); *see TransUnion*, 141 S. Ct. at 2205. That being said, "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 578 U.S. at 341. "A bare procedural violation, divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III." *Id.*; *see also Hunstein*, 48 F.4th at 1239. In other words, "an injury in law is not an injury in fact" under Article III. *E.g.*, *TransUnion*, 141 S. Ct. at 2205.

Accordingly, in the case at bar, Plaintiff's sole argument appears to be that he suffered an injury in law—not in fact—and thus, does not satisfy the "concreteness" requirement for Article III standing. (*See* Doc. 9). However, upon consideration of Plaintiff's Complaint and his respective allegations, such an argument is largely contradictory and wholly unpersuasive. (*See* Doc. 1-1).

In Plaintiff's Complaint, Plaintiff alleges that Defendant called him—after Plaintiff had already told Defendant to stop—in an attempt to collect a debt, which resulted in violations of the FDCPA's prohibition on "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d; (Docs. 1-1, 9). Consequently, Plaintiff requested statutory and actual damages, both explicitly and inherently by way of the demanded amount. (*See* Doc. 1-1, ¶ 36 (indicating the amount in controversy

as "greater than $8,000 but not to exceed $50,000" and requesting "statutory and *actual* damages as provided by 15 U.S.C. § 1692k") (emphasis added)).

Now, however, in the instant Motion, Plaintiff takes a step back—only stating that his Complaint asserts a right to statutory damages and thus, arguing he "simply does not plead damages of the type that would catalyze [a federal court's] jurisdiction." (Doc. 9, pp. 2, 5). Alas, Plaintiff glosses over the fact that his Complaint *also* requests actual damages, a type that—assuming otherwise sufficient—surely does catalyze the Court's jurisdiction. (*See* Doc. 1-1, ¶ 36).

Defendant argues to the contrary that Plaintiff has sufficiently alleged a concrete injury-in-fact by one, explicitly requesting actual and statutory damages and two, by implication of the alleged offense itself. The Court agrees. *See Kamara v. Medicredit, Inc.*, No. 21-CV-23110, 2022 WL 180289, at *3 (S.D. Fla. Jan. 20, 2022) ("Plaintiff [sought] actual damages in the [original complaint], which constitute allegations of an injury-in-fact for standing purposes.").

Irrespective of Plaintiff's explicit demand for actual damages, which arguably establishes jurisdiction itself, Plaintiff's entire case hinges on allegations that Defendant violated the FDCPA by calling Plaintiff, after being told to stop, resulting in conduct that is harassing and abusive. (*See generally* Doc. 1-1). Accordingly, Plaintiff inherently pleads an intangible injury in the form of answered, but unwanted, phone calls and the associated consequences. (*See id.*).

In determining whether the aforementioned intangible injury constitutes a concrete, and thus cognizable, injury in fact, the Court considers history and

congressional judgment. *See Spokeo*, 578 U.S. at 340. With regards to the relevant historical analysis, courts have routinely identified the receipt of unsolicited phone calls as bearing a close relationship to the traditional tort of intrusion upon seclusion.[6] *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1269–70 (11th Cir. 2019); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351–52 (3d Cir. 2017). And, as for congressional intent, the FDCPA's legislative history clearly indicates that Congress intended to prohibit "harassing or anonymous telephone calls" and "in general terms any harassing, unfair, or deceptive collection practice." S. REP. NO. 95-382, at 4 (1977). At this stage, allegations of a debt collector continuing to call an individual, who has previously answered and informed the debt collector to stop, fall squarely into the aforementioned proscription. (*See* Doc. 1-1).

Moreover, in the analogous context of the Telephone Consumer Protection Act ("**TCPA**"), 47 U.S.C. § 227, the Eleventh Circuit affirmed that "receipt of a single unsolicited call to a cell phone . . . constitute[s] an injury in fact." *Cordoba*, 942 F.3d at 1270 (agreeing with the Third Circuit's decision in *Susinno* that the TCPA squarely identified "[t]he receipt of more than one unwanted telemarketing call . . . [as] a concrete injury that meets the minimum requirements of Article III standing"); *Trichell*, 964 F.3d at 999 (highlighting that "the receipt of unwanted

[6] The Court notes that "[t]he Eleventh Circuit maintains that Congress was concerned with the harm posed by unwanted telephone calls, not text messages." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020); *compare Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) (holding plaintiff did not have standing in a suit involving an unsolicited text message), *with Cordoba*, 942 F.3d at 1270 (deciding the receipt of unwanted phone calls equated to a concrete injury in fact).

phone calls is a concrete injury" because of the burden the calls impose). Considering similarities in the overarching purposes of the FDCPA and TCPA, the Court finds no reason why "[t]he receipt of a single unsolicited call to a cell phone" should not also classify as a concrete injury in fact under the FDCPA. *See Cordoba*, 942 F.3d at 1270.

All things considered, the Court finds that Plaintiff's mere allegations, whether intended or not, demonstrate a concrete injury in fact, thus establishing Article III standing. As such, remand is not warranted.

IV. CONCLUSION

For the aforementioned reasons, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion to Remand (Doc. 9) is **DENIED**.

DONE AND ORDERED in Orlando, Florida on July 20, 2023.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties