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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MICHAEL CAPLAN,

Plaintiff(s),

v.

BUDGET VAN LINES, INC.,

Defendant(s).

Case No. 2:20-CV-130 JCM (VCF)

ORDER

Presently before the court is defendant Budget Van Lines’s (“Budget”) motion to dismiss. (ECF No. 14). Plaintiff Michael Caplan (“Caplan”) filed a response (ECF No. 24), to which Budget replied (ECF No. 28).

Also before the court is Budget’s motion to strike the class allegations from Caplan’s complaint. (ECF No. 15). Caplan filed a response (ECF No. 25), to which Budget replied (ECF No. 29).

I. Background

This putative class action arises from a dispute over a series of electronic communications. Caplan was a resident of Jupiter, Florida, preparing to move to Knoxville, Tennessee. (ECF No. 14 at 4). To prepare for his move, he sought out quotes for movers and found Budget. *Id.* Budget is a broker who provides quotes for various moving services. (ECF No. 1 at 2). Caplan visited Budget’s website and at least partially completed a form to compile quotes for moving services. (ECF No. 24 at 2). Caplan alleges that he never submitted the form to Budget. *Id.*

Soon after, Caplan received an allegedly prerecorded voicemail in which “Jeff with Budget Van Lines” solicited him to contact Budget for more information about moving services.

James C. Mahan
U.S. District Judge

1 (ECF No. 1 at 3). Caplan received another similar voicemail two days later. *Id.* Through online
2 research, Caplan discovered that other individuals reported receiving identical voicemail
3 messages. *Id.* Caplan now alleges these voicemail messages were violations of the Telephone
4 Consumer Protection Act (“TCPA”). (*Id.*)

5 **II. Legal Standard**

6 *A. Rule 12(b)(1)*

7 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*,
8 437 U.S. 365, 374 (1978). “A federal court is presumed to lack jurisdiction in a particular case
9 unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of Colville*
10 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must
11 exist at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F.
12 Supp. 2d 949, 952 (D. Nev. 2004).

13 Federal Rule of Civil Procedure 12(b)(1) allows defendants to seek dismissal of a claim
14 or action for a lack of subject matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if
15 the complaint, considered in its entirety, fails to allege facts on its face sufficient to establish
16 subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,
17 546 F.3d 981, 984–85 (9th Cir. 2008).

18 Although the defendant is the moving party in a 12(b)(1) motion to dismiss, the plaintiff
19 is the party invoking the court’s jurisdiction. As a result, the plaintiff bears the burden of
20 proving that the case is properly in federal court to survive the motion. *McCauley v. Ford Motor*
21 *Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298
22 U.S. 178, 189 (1936)). More specifically, the plaintiff’s pleadings must show “the existence of
23 whatever is essential to federal jurisdiction, and, if [plaintiff] does not do so, the court, on having
24 the defect called to its attention or on discovering the same, must dismiss the case, unless the
25 defect be corrected by amendment.” *Smith v. McCullough*, 270 U.S. 456, 459 (1926).

26 In moving to dismiss under Rule 12(b)(1), the challenging party may either make a
27 “facial attack,” confining the inquiry to challenges in the complaint, or a “factual attack”
28 challenging subject matter on a factual basis. *Savage v. Glendale Union High Sch.*, 343 F.3d

1 1036, 1039 n. 2 (9th Cir. 2003). For a facial attack, the court assumes the truthfulness of the
2 allegations, as in a motion to dismiss under Rule 12(b)(6). *Trentacosta v. Frontier Pac. Aircraft*
3 *Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). By contrast, when presented as a factual
4 challenge, a Rule 12(b)(1) motion can be supported by affidavits or other evidence outside of the
5 pleadings. *United States v. LSL Biotechs.*, 379 F.3d 672, 700 n. 14 (9th Cir. 2004) (citing *St.*
6 *Clair v. City of Chicago*, 880 F.2d 199, 201 (9th Cir. 1989)).

7 *B. Rule 12(b)(6)*

8 A court may dismiss a complaint for “failure to state a claim upon which relief can be
9 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
10 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
11 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
12 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
13 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
14 omitted).

15 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
16 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
17 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
18 omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
20 when considering motions to dismiss. First, the court must accept as true all well-pled factual
21 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
22 truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by
23 conclusory statements, do not suffice. *Id.* at 678.

24 Second, the court must consider whether the factual allegations in the complaint allege a
25 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
26 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
27 the alleged misconduct. *Id.* at 678.

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1 Where the complaint does not permit the court to infer more than the mere possibility of
2 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.”
3 *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the
4 line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at
5 570.

6 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
7 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

8 First, to be entitled to the presumption of truth, allegations in a
9 complaint or counterclaim may not simply recite the elements of a
10 cause of action, but must contain sufficient allegations of
11 underlying facts to give fair notice and to enable the opposing
12 party to defend itself effectively. Second, the factual allegations
that are taken as true must plausibly suggest an entitlement to
relief, such that it is not unfair to require the opposing party to be
subjected to the expense of discovery and continued litigation.

13 *Id.*

14 **III. Discussion**

15 *A. Motion to Dismiss*

16 There are two salient issues in the instant motion. First, is whether Caplan has standing
17 to bring this claim. Second is whether ringless voicemail messages (“RVMs”) are “calls” under
18 the TCPA.

19 Budget argues that this court should dismiss Caplan’s claims because Caplan consented
20 to receiving the calls, therefore negating the injury-in-fact required for Article III standing. (*See*
21 ECF No. 14). Caplan challenges that factual assertion by claiming he did not consent. (*See* ECF
22 No. 24).

23 Courts in the Ninth Circuit have not held that lack of consent is a requisite element of a
24 TCPA claim. Consent is an affirmative defense to the merits of Caplan’s claim, not a bar to his
25 constitutional standing. *See Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1042–43
26 (9th Cir. 2017); *Grant v. Capital Mgmt. Servs. L.P.*, 449 Fed. App’x 598, 600 n.1 (citing 23
27 F.C.C.R. 559, 565 (Dec. 28, 2007)). Therefore, Budget’s argument that Caplan lacks standing as
28 a result of his purported consent is misplaced. Caplan “need not allege any additional harm

1 beyond the one Congress has identified” when bringing a TCPA claim. *Van Patten*, 847 F.3d at
2 1043.

3 The second issue is whether RVMs constitute calls under the TCPA. RVM technology
4 allows a message to be placed in a recipient’s voicemail without the recipient’s phone ever
5 ringing. (See ECF No. 14 at 2). The two incident “calls” Caplan claims violated the TCPA were
6 RVMs. See *id.* at 3. Budget essentially argues that because there is no actual call or
7 communication between the two parties, RVMs are not calls. See *id.* Caplan argues that leaving
8 a voicemail is still an attempt to communicate, regardless of whether his phone actually rings.
9 (See ECF No. 24).

10 This appears to be an issue of first impression before this court. The TCPA provides as
11 follows:

12 It shall be unlawful for any person within the United States, or any
13 person outside the United States if the recipient is within the
United States-

14 (A) to make any call (other than a call made for emergency
15 purposes or made with the prior express consent of the called
party) using any automatic telephone dialing system or an artificial
16 or prerecorded voice-

17 ...

18 (iii) to any telephone number assigned to a paging service,
19 cellular telephone service, specialized mobile radio service,
or other radio common carrier service, or any service for
20 which the called party is charged for the call

21 47 U.S.C. § 227. Courts in other jurisdictions have ruled that RVMs are calls under the TCPA.
22 See, e.g., *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018). While
23 the Ninth Circuit has yet to address RVMs specifically, it has ruled that methods of
24 communication other than traditional phones calls, like text messages, are calls within the scope
25 of the TCPA. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

26 The *Satterfield* court reasoned that the TCPA was designed to stop invasions of privacy
27 arising from any attempt to get in contact with the recipient related to their phone number; thus,
28 an unsolicited text message would qualify as a call that the statute sought to prevent. *Id.* at 954.
The *Satterfield* court construed the TCPA as primarily designed to prevent nuisance and invasion

1 of privacy. *Id.* In addition, the TCPA is a remedial statute, and “should be construed broadly to
2 effectuate its purposes.” *Saunders*, 319 F. Supp. 3d at 911. Under that definition, RVMs are
3 also calls under the TCPA.

4 Budget attempts to distinguish RVMs from phone calls, text messages, and traditional
5 voicemails by asserting that RVMs are not delivered over the cell phone carrier’s network,
6 making them more akin to the broader “information services” category of communication not
7 regulated by the TCPA. (*See* ECF No. 14 at 14). The FCC has previously extended the TCPA’s
8 coverage to include internet-to-phone text messaging, finding that a focus on the means used to
9 initiate the communication “would elevate form over substance, thwart Congressional intent that
10 evolving technologies not deprive mobile customers of the TCPA’s protections, and potentially
11 open a floodgate of unwanted text messages to wireless customer.” *In the Matter of*
12 *Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8019 (2015).

13 This court finds that the TCPA is applicable to RVMs for the same reason. Focusing on
14 the method of delivery, as Budget would have the court do, elevates form over substance. At
15 bottom, RVMs are still a nuisance delivered to the recipient’s phone by means of the phone
16 number. RVMs are calls as defined by the TCPA. The court denies Budget’s motion to dismiss.

17 *B. Motion to Strike*

18 In the alternative, Budget moves to strike the class allegations from Caplan’s complaint
19 on the grounds of overbreadth and Caplan’s inadequacy as a class representative. (*See* ECF No.
20 15).

21 Rule 12(f) of the Federal Rules of Civil Procedure provides that “the court may order
22 stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or
23 scandalous matter.” Fed. R. Civ. Pro 12(f). “Immaterial matter is that which has no essential or
24 important relationship to the claim for relief” and “[i]mpertinent matter consists of statements
25 that do not pertain, and are not necessary, to the issues in question.” *Fantasy, Inc. v. Fogerty*,
26 984 F.2d 1524, 1527 (9th Cir. 1993) (internal citations omitted), *rev’d on other grounds* 510 U.S.
27 517 (1994). “The function of a 12(f) motion to strike is to avoid the expenditure of time and
28 money that must arise from litigating spurious issues by dispensing with those issues prior to

1 trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Generally, federal
2 courts disfavor motions to strike unless it is clear that the matter to be stricken could have no
3 possible bearing on the subject matter of the litigation. *Germaine Music v. Universal Songs of*
4 *Polygram*, 275 F.Supp.2d 1288, 1300 (D. Nev. 2003) (internal citations omitted).

5 Budget’s arguments are largely recitations of its motion to dismiss, which the court
6 rejected above. (See ECF No. 15). Caplan’s consent is a question of fact appropriately
7 addressed at a later stage of litigation. It requires neither dismissal nor striking of the class
8 allegations. While this court can strike class allegations for insufficiency, it does so when
9 Plaintiff’s allegations fail from a pleading perspective, not from a class competency perspective.
10 See *Schemkes v. Jacob Transp. Servs., LLC*, No. 2:12-cv-1158-JCM-CWH, 2013 WL 271636, at
11 *3 (Jan. 23, 2013).

12 The instant suit is distinguishable from the limited authority Budget cites. In one
13 instance, the court struck class allegations from a wages suit in which some prospective class
14 members were paid on a different wage scale. See *Sandoval v. Ali*, 34 F. Supp. 3d. 1031, 1044
15 (C.D. Cal. 2014). In another, the class allegation included all purchasers of a car, whether they
16 had experienced an alleged defect or not. See *Kas v. Mercedes-Benz USA, LLC*, 2011 WL
17 13238744, at *4 (C.D. Cal. Aug. 23, 2011).

18 To avoid overbreadth, “class membership must fit the theory of legal liability.” *Torres v.*
19 *Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016). Here, Caplan’s proposed class
20 extends to people in an identical factual scenario. (See ECF No. 25 at 5). The proposed class fits
21 within the same theory of legal liability Caplan advances himself. See *id.* Therefore, the court
22 will not exercise its discretion to strike the class definition on the grounds of overbreadth.

23 To the extent the Budget’s motion does not rely on argument from its motion to dismiss,
24 it relies on argument that the class cannot be certified under Rule 23. (See ECF No. 15). A
25 motion to strike class allegations at the pleading stage is not the proper procedural vehicle to
26 eliminate those claims. It is “the functional equivalent of denying a motion to certify a case as a
27 class action.” *Bates v. Bankers Life & Cas. Co.*, 848 F.3d 1236, 1238 (citing *In re Bremis Co.*,

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1 279 F.3d 419, 421 (7th Cir. 2002)). Budget can raise these arguments regarding Caplan's
2 adequacy as a class representative in response to Caplan's inevitable Rule 23 motion.

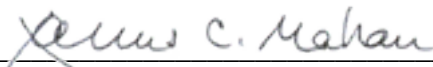
3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Budget's motion to
6 dismiss (ECF No. 14) be, and the same hereby is, DENIED.

7 IT IS FURTHER ORDERED that Budget's motion to strike (ECF No. 15) be, and the
8 same hereby is, DENIED.

9 DATED July 31, 2020.

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11 _____
12 UNITED STATES DISTRICT JUDGE
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