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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, et al.,
Plaintiffs,
v.
NORMANDIN'S, et al.,
Defendants.

Case No. [5:14-cv-03007-EJD](#)
**ORDER GRANTING DEFENDANT
ONECOMMAND, INC.'S MOTION TO
DISMISS**
Re: Dkt. No. 130

Plaintiffs allege that Defendants Normandin’s and OneCommand, Inc. placed automated calls to their cell phones in violation of the Telephone Consumer Protection Act (“TCPA”). OneCommand moves to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of standing. Because Plaintiffs fail to allege a concrete injury, OneCommand’s motion will be GRANTED.

I. BACKGROUND

Defendant Normandin’s operates a car dealership in San Jose, California. Second Am. Class Action Compl. (“SAC”) ¶ 15, Dkt. No. 127. OneCommand, Inc., sells advertising services to car dealerships. *Id.* ¶¶ 17–18. Normandin’s hired OneCommand to place automated calls to current and potential customers. *Id.* ¶ 19–21.

1 Plaintiffs Alan Brinker, Austin Rugg, and Ana Sanders allege that OneCommand called
2 them on behalf of Normandin’s. Brinker alleges that he received one call consisting of a recorded
3 message telling him that he “may have missed routine maintenance” for his vehicle. Id. ¶¶ 27–29.
4 Rugg and Sanders received “approximately five or six” calls with similar messages. Id. ¶¶ 38–40,
5 51–53. All three were customers of Normandin’s before they received the calls. SAC ¶¶ 37, 50;
6 Def. OneCommand’s Mot. to Dismiss (“MTD”) at 3, Dkt. No. 130. Before receiving calls from
7 Normandin’s, Rugg (but not the others¹) added his phone number to the National Do-Not-Call
8 Registry (“NDNCR”). SAC ¶ 36.

9 Plaintiffs claim that they were injured because the calls violated their privacy and were
10 “annoying and harassing.” Id. ¶¶ 32, 45, 57. They allege no other injuries.

11 Brinker, Rugg, and Sanders allege that Normandin’s and OneCommand violated the
12 TCPA’s prohibition on calls made with an automatic telephone dialing system (“ATDS”) or an
13 artificial or prerecorded voice. Id. ¶¶ 69–76; 47 U.S.C. § 227(b)(1)(A) (“It shall be unlawful . . . to
14 make any call . . . using any automatic telephone dialing system or an artificial or prerecorded
15 voice . . . to any telephone number assigned to a . . . cellular telephone service . . .”).

16 Rugg alleges additional TCPA violations on the basis that his phone number was on the
17 NDNCR. SAC ¶¶ 77–84; 47 U.S.C. § 227(c)(5) (“A person who has received more than one
18 telephone call within any 12-month period by or on behalf of the same entity in violation of the
19 regulations prescribed under this subsection may [pursue an action].”); 47 C.F.R. § 64.1200(c)
20 (“No person or entity shall initiate any telephone solicitation to . . . [a] residential telephone
21 subscriber who has registered his or her telephone number on the national do-not-call
22 registry . . .”).

23 Plaintiffs also seek to bring claims on behalf of two classes: the “Cell Phone Class,” which
24 includes those who received calls from Normandin’s and OneCommand; and the “National Do-

26 ¹ According to Plaintiffs’ opposition brief, Brinker also added his number to the NDNCR before
27 receiving calls from Normandin’s. Dkt. No. 132 at 2. This allegation does not appear in the
28 complaint, and the two causes of action for violation of 47 C.F.R. § 64.1200(c) (relating to
numbers on the NDNCR) mention Rugg but not Brinker. SAC ¶¶ 77–84.

1 Not-Call Class,” which includes call recipients whose numbers appear on the NDNCR. Id. ¶¶ 61–
2 68.

3 OneCommand now moves to dismiss under Fed. R. Civ. P. 12(b)(1) on the basis that
4 Plaintiffs have not alleged injuries sufficient to confer Article III standing.

5 **II. LEGAL STANDARD**

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

7 Dismissal under Fed. R. Civ. P. 12(b)(1) is appropriate if the complaint fails to allege facts
8 sufficient to establish subject-matter jurisdiction. Savage v. Glendale Union High Sch., 343 F.3d
9 1036, 1039 n.2 (9th Cir. 2003). The Court “is not restricted to the face of the pleadings, but may
10 review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the
11 existence of jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). The
12 nonmoving party bears the burden of establishing jurisdiction. Chandler v. State Farm Mut. Auto.
13 Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).

14 **B. Article III Standing**

15 To have standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly
16 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a
17 favorable judicial decision.” Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The plaintiff
18 bears the burden of proving these elements. Id.

19 The plaintiff’s injury must be “particularized” and “concrete.” Id. at 1548. To be
20 particularized, it “must affect the plaintiff in a personal and individual way.” Id. To be concrete, it
21 must be real, not abstract. Id. at 1548–49. A concrete injury can be tangible or intangible. Id. A
22 statutory violation alone is not enough; the plaintiff must also allege a concrete harm. Id. at 1549
23 (a plaintiff cannot “allege a bare procedural violation, divorced from any concrete harm, and
24 satisfy the injury-in-fact requirements of Article III”).

25 If the plaintiff lacks Article III standing, then the case must be dismissed for lack of
26 subject-matter jurisdiction. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101–02 (1998).

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1 without consideration of the purpose of the call, does not cause any injury that is traceable to the
2 conduct for which the TCPA created a private right of action, namely the use of an ATDS to call a
3 cell phone”).

4 Here, Brinker alleges that he received a single call.² SAC at ¶¶ 27–28; Def.’s Reply in
5 Support of Mot. to Dismiss (“Reply”) at 3, Dkt. No. 134 (citing Brinker’s deposition testimony, in
6 which he said he received “just one robocall”). The call went to voicemail; he then listened to the
7 message, called to confirm that Normandin’s left the message, and hung up. MTD at 3 (citing
8 Brinker’s deposition testimony).

9 Rugg and Sanders each received “approximately five or six” calls with similar messages.
10 SAC ¶¶ 38–40, 51–53. From the allegations, it is unclear whether Rugg and Sanders answered the
11 calls, whether they heard the phone ring, or when the calls occurred. The time period is also
12 vague, but it appears that all of the calls occurred in 2014. Pl.’s Opp. to Def.’s Mot. to Dismiss at
13 2, Dkt. No. 132. Despite these ambiguities, Rugg and Sanders allege that they were aware of
14 having received these messages. SAC ¶¶ 40, 53 (alleging that Rugg and Sanders received
15 prerecorded messages with “words to the effect” that their vehicles were overdue for service).

16 The Court finds that Plaintiffs’ injuries are too minimal to establish standing. If the calls
17 violated Plaintiffs’ privacy and caused annoyance or harassment, the injuries are nominal: Brinker
18 alleges that he received a single call, which he did not answer; and Rugg and Sanders allege that
19 they each received “approximately five or six” calls in 2014—or, roughly one call every two
20 months. *Id.* ¶¶ 32, 45, 57 (alleging injury); *id.* ¶¶ 27–29, 38–40, 51–53 (describing calls received).
21 These injuries are not sufficiently concrete. See *Vasquez v. LA Cty.*, 487 F.3d 1246, 1250 (9th
22 Cir. 2007) (“the standing doctrine . . . requires a plaintiff to personally suffer some actual or
23 threatened harm as a result of defendant’s putatively illegal conduct”); *Romero*, 2016 WL
24 4184099, at *4 (“No reasonable juror could find that one unanswered telephone call could cause
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26 ² Records produced during discovery show that Brinker received five prerecorded calls, Rugg
27 received four, and Sanders received five. Dkt. No. 132 at 2; SAC ¶¶ 27–29, 38–40, 51–53.
28 However, according to the allegations in the SAC, Brinker was only aware of one call.

1 lost time, aggravation, distress, or any injury sufficient to establish standing.”); Smith, 2016 WL
2 4618780, at *4 (“Any depletion of Plaintiff’s battery, or aggravation and nuisance, resulting from
3 only one call, is a de minimis injury.”); Juarez, 2016 WL 4547914, at *3 (although the plaintiff
4 established that a series of 42 calls caused concrete injury, “[t]his does not mean any violation of
5 the TCPA will necessarily give rise to Article III standing”).

6 **IV. CONCLUSION**

7 Because Plaintiffs fail to allege injuries sufficient to establish Article III standing,
8 OneCommand’s motion to dismiss is GRANTED without leave to amend. The Clerk shall close
9 this file.

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11 **IT IS SO ORDERED.**

12 Dated: February 17, 2017

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15 EDWARD J. DAVILA
16 United States District Judge

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