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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KERRY O’SHEA, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

AMERICAN SOLAR SOLUTION, INC.,

Defendant.

Civil No. 14cv894 L (RBB)

**ORDER DENYING MOTION TO
DISMISS COMPLAINT [ECF No. 14]**

Defendant Green Solar Technologies, Inc., fka American Solar Solution, Inc., moves to dismiss the complaint for lack of venue under Federal Rule of Civil Procedure 12(b)(3). Plaintiff Kerry O’Shea opposes the motion. Defendant has not filed a reply memorandum. The Court considers this motion on the papers submitted and without oral argument.

I. FACTUAL BACKGROUND

In his complaint, plaintiff alleges that defendant directed mass transmission of unsolicited phone calls to cell phones nationwide in order to promote its business. The phone calls were made, according to plaintiff, in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §§ 227 *et seq.*

Plaintiff contends that from December 2013, through the present, he received unsolicited autodialed phone calls on his wireless phone from defendant. Although instructing the defendant to stop calling to place him on the company’s internal “Do Not Call List,” and advising

1 defendant that his cellular phone number was on the Federal Do Not Call Registry, plaintiff
2 continued to receive unsolicited phone calls. As a result, plaintiff, and a purported class, filed the
3 action in this district. As noted above, defendant moves to dismiss the complaint for improper
4 venue.

5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure 12(b)(3) allows a defendant to move to dismiss an action
7 for improper venue. On a Rule 12(b)(3) motion, “the pleadings need not be accepted as true, and
8 the court may consider facts outside of the pleadings,” but the court must draw all reasonable
9 inferences and resolve all factual conflicts in favor of the non-moving party. *Murphy v.*
10 *Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004).

11 Under 28 U.S.C. § 1391(b),

12 “[a] civil action may be brought in-

13 (1) a judicial district in which any defendant resides, if all defendants are residents of the
14 State in which the district is located;

15 (2) a judicial district in which a substantial part of the events or omissions giving rise to
16 the claim occurred, or a substantial part of property that is the subject of the action is
17 situated; or

18 (3) if there is no district in which an action may otherwise be brought as provided in this
19 section, any judicial district in which any defendant is subject to the court's persona
20 jurisdiction with respect to such action.

21 28 U.S.C. § 1391(b).

22 “For all venue purposes . . . an entity with the capacity to sue and be sued in its common
23 name under applicable law, whether or not incorporated, shall be deemed to reside, if a
24 defendant, in any judicial district in which such defendant is subject to the court's personal
25 jurisdiction with respect to the civil action in question...” 28 U.S.C. § 1391(c)(2). “Plaintiff has
26 the burden of showing that venue was properly laid in [the district in which the plaintiff filed].”
27 *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.1979).

28 **III. DISCUSSION**

As defendant correctly notes, once a motion to dismiss based on improper venue is filed,
it is the plaintiff’s burden to establish that venue is proper in the district in which it was filed. In

1 support of its motion, defendant contends that American Solar does not maintain a permanent
2 office in the County of San Diego and further states Green Solar Technologies, Inc., is located in
3 Los Angeles County. Defendant also asserts that it is not a resident of San Diego County
4 because it does not maintain an office in San Diego and does not conduct telemarketing business
5 in San Diego County.

6 Plaintiff argues and provides evidence that defendant has an office in San Diego and
7 thereby resides in the district; operates a highly interactive website that specifically targets San
8 Diego residents; and conducts substantial business in San Diego. Additionally, plaintiff contends
9 a substantial part of the events giving rise to the claim occurred in this district which makes
10 venue proper here. Finally, plaintiff asserts with significant evidence that defendant has
11 substantial or continuous and systematic contacts with the forum state thus subjecting defendant
12 to the court's general personal jurisdiction. *See* 28 U.S.C. 1391(b)(3) (providing for venue in
13 "any judicial district in which any defendant is subject to the court's personal jurisdiction ...").

14 Although permitted to file a reply to plaintiff's opposition, defendant has not done so and
15 the time to do so has lapsed. Failure to file a reply may be construed as a waiver under the Civil
16 Local Rules. Even if the Court does not consider defendant's lack of a reply a waiver, the
17 evidence submitted by plaintiff is uncontroverted. As a result, plaintiff has met its burden of
18 demonstrating that the court has personal jurisdiction over defendant. Thus, venue is
19 appropriately laid in this district.

20 Accordingly, defendant's motion to dismiss for lack of venue is **DENIED**. Defendant
21 shall answer the complaint on or before March 12, 2015.

22 **IT IS SO ORDERED.**

23 DATED: February 26, 2015

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25 
M. James Lorenz
United States District Court Judge

26 COPY TO:

27 HON. RUBEN B. BROOKS
28 UNITED STATES MAGISTRATE JUDGE
ALL PARTIES/COUNSEL

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