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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIK KNUTSON,

Plaintiff,

v.

BLUE LIGHT SECURITY, INC.,

Defendant.

Case No.: 17cv134-LAB (JMA)

**ORDER GRANTING IN PART
MOTION TO DISMISS OR STAY**

Plaintiff Erik Knutson filed this putative class action, bringing claims under the Telephone Consumer Protection Act (TCPA). He alleged that Defendant used an auto-dialer to place an unsolicited call to his cell phone, for which he was charged.

The parties filed two joint motions for an extension of time for Defendant Blue Light Security, Inc. to answer. Before the Court ruled on those, however, Blue Light filed a motion to dismiss the complaint or stay the case. The joint motions (Docket nos. 5 and 7) are **GRANTED** and Blue Light’s motion to stay or dismiss is accepted as filed. See Fed. R. Civ. P. 12(a)(4)(A) (providing that if a motion is served under the date for filing a responsive pleading is extended to 14 days after notice of denial of the motion).

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1 Blue Light has moved to dismiss for lack of jurisdiction and for failure to state
2 a claim, or in the alternative, to stay pending a decision by the D.C. Circuit that
3 could clarify the law. Its motion is supported by a request for judicial notice of court
4 records.

5 **Request for Judicial Notice**

6 Knutson opposes notice, arguing that the documents cannot be considered,
7 because doing so would amount to making findings of fact that have no place in
8 ruling on a Rule 12(b)(6) motion. But adjudicative facts, including court records,
9 can be judicially noticed. *See Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d
10 1111 at 1116 (C.D. Cal. 2010) (citing authority). And matters properly subject to
11 judicial notice can be considered when ruling on a 12(b)(6) motion to dismiss.
12 *Swartz v. KMPG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court may treat such
13 documents as “part of the complaint, and thus may assume that its contents are
14 true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States v.*
15 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

16 The one exhibit that cannot properly be judicially noticed is Exhibit I, which
17 is an online ad for Knutson’s real estate business.

18 The request is **GRANTED** as to the judicial records, but **DENIED** as to
19 Exhibit I.

20 **Legal Standards for Rule 12(b)(6) Motions**

21 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint.
22 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a motion to
23 dismiss, the Court accepts all allegations of material fact in the complaint as true
24 and construes them in the light most favorable to the non-moving party. *Cedars–*
25 *Sinai Medical Center v. National League of Postmasters of U.S.*, 497 F.3d 972,
26 975 (9th Cir. 2007).

27 A complaint must “give the defendant fair notice of what the . . . claim is and
28 the grounds upon which it rests” and its factual allegations must “raise the right to

1 relief above a speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
2 (2007). The complaint must contain enough factual allegations that, accepted as
3 true, would state a claim for relief that is “plausible on its face.” *Ashcroft v. Iqbal*,
4 556 U.S. 662, 678 (2009). The Court need not accept conclusions of law as true,
5 however, even if cast as factual allegations. *Id.* at 678. A claim may be dismissed
6 under Rule 12(b)(6) either for lack of a cognizable legal theory or failure to allege
7 sufficient facts to support a cognizable legal theory. *Taylor v. Yee*, 780 F.3d 928,
8 935 (9th Cir. 2015).

9 **Standing**

10 The motion to dismiss argues Knutson lacks either Article III or prudential
11 standing. The Court is required to address jurisdictional issues such as standing,
12 before proceeding to the merits. See *Steel Co. v. Citizens for a Better Environ.*,
13 523 U.S. 83, 93–94 (1998). Because Article III standing is jurisdictional, the Court
14 must raise and address issues that call its jurisdiction into question, even if not
15 briefed by the parties. See *Alabama Legislative Black Caucus v. Alabama*, 135 S.
16 Ct. 1257, 1269–70 (2015); *Safari Club Int’l v. Rudolph*, 862 F.3d 1113, 1117 n.1
17 (9th Cir. 2017).

18 At a minimum, constitutional standing consists of three elements: 1) an injury
19 in fact that is 2) fairly traceable to the defendant’s challenged conduct, and that is
20 3) likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504
21 U.S. 555, 560 (1992). In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), the Supreme
22 Court recently clarified the injury-in-fact requirement, explaining that a “bare
23 procedural violation, divorced from any concrete harm” did not amount to a
24 cognizable injury. *Id.* at 1549. In *Van Patten v. Vertical Fitness Group, LLC*, 847
25 F.3d 1037, 1042–43 (9th Cir. 2017), the Ninth Circuit applied *Spokeo* to a TCPA
26 claim, and held that — in that case, at least — the invasion of privacy, intrusion,
27 and nuisance of pre-recorded and auto-dialed calls made to consenting
28 consumers can amount to a cognizable injury. Any dispute about whether a plaintiff

1 consented to receive calls goes to the merits, however, rather than the standing.
2 *Id.* at 1043–48. That being said, receiving unsolicited calls or texts does not
3 necessarily result in economic loss. *See id.* at 1049.

4 Some courts in this circuit have determined that a TCPA violation, on its own,
5 does not necessarily result in a cognizable injury. *See Nghiem v. Dick’s Sporting*
6 *Goods, Inc.*, 222 F. Supp. 3d 805, 810 (C.D. Cal. 2016) (surveying cases). Some
7 have held that the nuisance or irritation of a single call is a de minimis injury that
8 does not give rise to standing, but this does not appear to be good law after *Van*
9 *Patten*. *See Romero v. Dept. Stores Nat’l Bank*, ___ Fed. Appx. ___, 2018 WL
10 1079728 at *1 (9th Cir. Feb. 28, 2018) (reversing district court’s holding that de
11 minimis irritation would not support Article III standing). Other courts, after *Van*
12 *Patten*, have held that de minimis economic damages such as diminution in battery
13 life, use of device storage, and diminution of a phone’s usefulness as the result of
14 a single download, text, or call do not amount to an injury in fact. *See Holt v.*
15 *Facebook*, 240 F. Supp.3d 1021, 1035–36 (N.D. Cal., 2017) (surveying cases).

16 **Discussion**

17 The complaint alleges that Blue Light placed an auto-dialed call to Knutson,
18 and that shortly after he answered, a live operator¹ spoke to him. (Compl., ¶¶ 14,
19 16–20.) It also alleges that Knutson pays for incoming calls. (*Id.*, ¶¶ 21, 39.) The
20 allegations can fairly be read to claim that Knutson prepays minutes on his phone,
21 and phone calls such as the one at issue here count against that time. The
22 complaint alleges that the call amounted to a nuisance and an invasion of his
23 privacy. (*Id.*, ¶ 28.) It also alleges Knutson did not provide his prior express
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27 ¹ The complaint elsewhere mentions a “pre-recorded” voice (Compl., ¶ 28), but
28 this appears to be a scrivener’s error. The earlier allegations describe in detail a
conversation with a live operator.

1 consent for such a call, and had no existing business relationship with Blue Light.
2 (*Id.*, ¶¶ 22–23.)

3 The Ninth Circuit’s recent reversal of *Romero* forecloses many of Blue Light’s
4 arguments. Though the allegations are not as clear as they might be, it appears
5 Knutson is alleging the call depleted his prepaid minutes, which is generally
6 considered an economic injury. See *Thomas v. Dun & Bradstreet Credibility Corp.*,
7 100 F. Supp. 3d 937, 947 (C.D. Cal. 2015) (citing *In re Rules and Regulations*
8 *Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R.
9 14014, 14115 (2003)). This by itself would constitute an injury in fact.

10 In the absence of an economic injury, the Court would be required to raise
11 and consider Blue Light’s contentions that Knutson invites and welcomes calls
12 such as the one Blue Light placed. *Van Patten* makes clear that a consumer who
13 in fact suffers irritation, invasion of privacy, or an unwanted intrusion has suffered
14 the kind of concrete injury that the TCPA is intended to protect against, and that a
15 plaintiff need not allege any more than this to plead standing. 847 F.3d at 1043
16 (quoting *Spokeo*, 136 S. Ct. at 1549) (“A plaintiff alleging a violation under the
17 TCPA ‘need not allege any *additional* harm beyond the one Congress has
18 identified.”) While most calls that violate the TCPA will no doubt cause irritation,
19 invasion of privacy, or unwanted intrusion, it does not necessarily follow that every
20 call will do so.

21 If, as Blue Light posits, Knutson actively invites calls from the public about
22 his real estate business by posting his phone number online and soliciting business
23 inquiries, it is unlikely he can plausibly claim that one such call requesting
24 information about a real estate matter (see Compl., ¶ 17) led to any of the
25 intangible injuries the TCPA was intended to protect against. But because he can
26 establish standing through an economic injury, the Court need not reach this issue

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1 at this time. That being said, if Knutson moves for class certification,² or if it turns
2 out that Knutson did not suffer an economic injury, the Court might be required to
3 revisit this issue.

4 **Failure to State a Claim**

5 This part of the motion focuses on the nature of the call, and whether
6 Knutson consented. The motion refers to Exhibit I which, as noted, the Court
7 cannot consider when ruling on a Rule 12(b)(6) motion. But the complaint, and
8 Knutson's characterization of it, provide information about the call and its content.

9 According to the complaint, the caller, who identified herself as "Chrystal,"
10 told Knutson she knew he had recently sold a home, and offered him a \$200 gift
11 card for the contact information of the home buyers. (Compl., ¶ 17.) Knutson
12 asked Chrystal a call-back number, which she provided. (*Id.*, ¶ 18.) Knutson's
13 opposition explains that the caller was asking for the personal contact information
14 of Knutson's clients in order to market a security system to them. (Docket no. 13
15 at 23:1–5.)

16 Knutson relies on the TCPA's requirement that a caller obtain prior written
17 consent before placing text messages or phone calls that include advertisements
18 or constitute telemarketing. 47 C.F.R. § 64.1200(a)(2). The TCPA's regulations
19 further define what telemarketing means, and who qualifies as a telemarketer.
20 Knutson's theory is that Blue Light was acting as a telemarketer for purposes of
21 the call it placed to him, and therefore that prior written consent was required.

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25 ² It is not clear whether Knutson's interests and injuries align with those of class
26 members. By way of example, the putative class members consist of people
27 contacted for purposes of marketing home security systems. (Compl., ¶ 37.)
28 Knutson was contacted about providing the names of his clients to Blue Light and
was offered an incentive for doing so. (*Id.*, ¶ 17.) Knutson's injuries may also not
align if some or all of them suffered intangible injuries but he did not suffer.

1 Blue Light may have been a telemarketer with respect to putative class
2 members, if it tried to sell them home security systems by phone. But Knutson
3 does not allege that they tried to or were attempting to sell him a security system
4 or anything else. Instead, he asserts they were trying to buy information from him
5 about people he had just sold a home to, so that they could sell a security system
6 to those people. His theory, apparently, is that because the call placed to him was
7 part of a plan to market security systems, it amounted to a telemarketing call.

8 Knutson has misconstrued the provisions he relies on as being aimed at the
9 strategies and behavior of telemarketers in a general sense. He cites the definition
10 of “telemarketer” as if to suggest that any call a telemarketer places amounts to
11 telemarketing. The text makes clear, however, that it provides for liability if
12 someone places a particular kind of call — “any telephone call that includes or
13 introduces an advertisement or constitutes telemarketing. . . .” § 64.1200(a)(2).
14 It defines “advertisement” and “telemarketing” as well:

15 The term advertisement means any material advertising the
16 commercial availability or quality of any property, goods, or services.

17 § 64.1200(f)(1).

18 The term telemarketing means the initiation of a telephone call or
19 message for the purpose of encouraging the purchase or rental of, or
20 investment in, property, goods, or services, which is transmitted to any
21 person.

22 § 64.1200(f)(12). Notably, neither of these includes offers to buy something (in this
23 case information).

24 Blue Light may have been a telemarketer for purposes of other calls, but the
25 call Knutson describes in the complaint did not include advertising or constitute
26 telemarketing, as the regulation defines those terms. The regulation’s wording
27 makes plain that it is aimed at calls that include or introduce advertisements, or
28 constitute telemarketing, and not calls that are related in some attenuated way to
advertising or telemarketing the caller intends to conduct in the future.

1 Furthermore, the complaint does not allege that Blue Light was seeking
2 Knutson's client's contact information so that he could call them. If Blue Light
3 contacted them some other way, the TCPA would not be implicated in this
4 transaction at all.

5 The putative class members might have TCPA claims, if Blue Light called
6 them to advertise or market security systems to them. But because Blue Light did
7 not engage in advertising or telemarketing when it called Knutson, he has not pled
8 a claim. See *Thomas v. Dun & Bradstreet Credibility Corp.*, 100 F. Supp. 3d 937,
9 942 (C.D. Cal. 2015) (noting that most federal courts read 47 U.S.C. § 227(b)(1)
10 to limit standing to a "called party").

11 The issue of whether Blue Light's call was auto-dialed is not amenable to
12 resolution on a motion to dismiss.

13 Although the Court did not rely on Exhibit I when making its rulings, Knutson
14 should consider this exhibit when and if he decides to amend. Assuming that
15 Knutson in fact did invite the public to call him about real estate matters, he should
16 consider whether he can allege an absence of the requisite consent. The Court
17 mentions this, not in order to forecast its likely holding, but to encourage the parties
18 to consider this issue earlier rather than later.

19 **Motion to Stay**

20 In the event the Court denied the motion to dismiss, Blue Light asked the
21 Court to stay the action pending a decision by the D.C. Circuit that might clarify
22 what constitutes an auto-dialed call. Because the complaint is being dismissed,
23 no stay is needed. In addition, a review of the docket suggests that the D.C. Circuit
24 could rule at any time.

25 The issue of whether Blue Light's call to Knutson was auto-dialed might
26 surface again later — for example, if Knutson amends and relies on a provision
27 that applies to calls either auto-dialed or using an artificial or recorded voice, such
28 as § 64.1200(a)(2). That could be an issue here, because the call described in the

1 complaint did not appear to use an artificial or recorded voice, which would mean
2 Knutson would have to proceed on the theory that the call was auto-dialed.

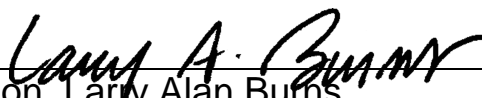
3 **Conclusion and Order**

4 Although Knutson has no claim under the provisions he cites, the Court
5 cannot say with certainty that he has no claim under some other provision, or that
6 he could not amend successfully if given the opportunity. The Motion to Dismiss
7 is therefore **GRANTED IN PART**. The complaint is **DISMISSED WITH LEAVE TO**
8 **AMEND**. If Knutson believes he can successfully amend, he should seek leave
9 by *ex parte* application (without obtaining a hearing date) for leave to amend that
10 complies with Civil Local Rule 15.1. His application must be filed within **28**
11 **calendar days of the date this order is issued**. If Knutson files such an
12 application, Blue Light may file an opposition within **14 calendar days of the date**
13 **that application is filed**. No reply should be filed without leave. The Court will
14 set a hearing if appropriate; otherwise, the matter will be deemed submitted on the
15 papers.

16 The motion to stay is **DENIED AS MOOT**.

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18 **IT IS SO ORDERED.**

19 Dated: March 5, 2018

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22 Hon. Larry Alan Burns
23 United States District Judge
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