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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARIEL SHUCKETT, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

DIALAMERICA Marketing, Inc.; and AS
America, Inc., d/b/a AMERICAN
STANDARD Brands; and
PROSPECTSDM, Inc.,

Defendants.

CASE NO. 17cv2073-LAB (KSC)

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT [Dkt. 108]**

Defendant DialAmerica, a telemarketing company working on behalf of codefendant American Standard, made one unanswered phone call to Plaintiff Ariel Shuckett that she claims violated the Telephone Consumer Protection Act (“TCPA”). DialAmerica and American Standard now move for summary judgment, arguing that Shuckett cannot establish Article III standing to sue, prove a TCPA violation occurred, or fit the definition of her own class. For the reasons below, the Court agrees in part and **GRANTS** DialAmerica and American Standard’s Motion for Summary Judgment. Dkt. 108.

FACTUAL BACKGROUND

Beginning in July 2017, Shuckett received roughly 40 prerecorded telemarketing calls from a company soliciting on behalf of American Standard, even though she had not given American Standard (or any other company named in her eventual suit) permission

1 to call. Dkt. 111-2 at ¶¶ 8-10. Believing that DialAmerica was the source of these calls,
2 Shuckett filed suit against the company and American Standard on October 9, 2017,
3 alleging that the calls violated the TCPA. Dkt. 1 at ¶ 24. DialAmerica subsequently
4 informed Shuckett that all of the calls referenced in the lawsuit were made by a different
5 American Standard contractor, ProspectsDM, and that DialAmerica had only called her
6 number once, on the day after the original lawsuit was filed. Dkt. 60-2 at ¶ 5; Dkt. 67 at
7 ¶¶ 28-30; Dkt. 108-2 at 14. Although the parties dispute whether Shuckett noticed
8 DialAmerica's call at the time it was placed, it's undisputed this single call went
9 unanswered. Dkt. 108-2 at 20.

10 Shuckett has since settled her claims against ProspectsDM and released
11 American Standard as to calls made by that company. Dkt. 108-2 at 22-24. She
12 continues, however, to pursue her claim against DialAmerica and American Standard,
13 and both companies now move for summary judgment.¹

14 LEGAL STANDARD FOR SUMMARY JUDGMENT

15 Summary judgment is appropriate where "there is no genuine issue as to any
16 material fact and . . . the moving party is entitled to summary judgment as a matter of
17 law." Fed. R. Civ. P. 56(a). It is the moving party's burden to show there is no factual
18 issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party
19 meets this requirement, the burden shifts to the non-moving party to show there is a
20 genuine factual issue for trial. *Id.* at 324. The non-moving party must produce admissible
21 evidence and cannot rely on mere allegations. *Estate of Tucker ex rel. Tucker v.*
22 *Interscope Records, Inc.*, 515 F.3d 1019, 1033 n.14 (9th Cir. 2008). This can be done by
23

24 ¹ Shuckett argues that DialAmerica's Joint Statement of Undisputed Facts, Dkt. 108-3,
25 should be stricken because it was not signed by both parties, in violation of the Court's
26 Civil Standing Order 3(c). The Court is satisfied that DialAmerica's exhibits show they
27 made a good-faith effort to comply with the Standing Order but were unable to do so
28 because Shuckett's counsel did not fully cooperate. Dkt. 113-1. Shuckett's request to
strike DialAmerica's submission is **DENIED**. In any event, all necessary facts can be
drawn from other parts of the existing record.

1 presenting evidence that would be admissible at trial, see *Orr v. Bank of Am., NT & SA*,
2 285 F.3d 764, 773 (9th Cir. 2002), or by pointing to facts or evidence that could be
3 presented in admissible form at trial. See *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th
4 Cir. 2003). But evidence that is not admissible and could not be presented at trial in
5 admissible form is not enough to resist summary judgment. See *Orr*, 285 F.3d at 773.

6 The Court does not make credibility determinations or weigh conflicting evidence.
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rather, the Court determines
8 whether the record “presents a sufficient disagreement to require submission to a jury or
9 whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52.
10 Not all factual disputes will serve to forestall summary judgment; they must be both
11 material and genuine. *Id.* at 247-49. Factual disputes whose resolution would not affect
12 the outcome of the suit are irrelevant to the consideration of a motion for summary
13 judgment. *Id.* at 248.

14 **DISCUSSION**

15 **1. Shuckett Lacks Article III Standing.**

16 DialAmerica first argues that summary judgment is warranted because Shuckett’s
17 alleged harm—one missed telemarketing call—does not give rise to Article III standing.
18 Although it’s a close call, the Court agrees.

19 Article III standing exists only if the plaintiff (1) suffered an injury-in-fact, (2) that is
20 fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
21 redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 1540, 1547
22 (2016). The plaintiff, as the party invoking federal jurisdiction, bears the burden of
23 establishing these elements. *Id.* A plaintiff bringing a claim based on a statutory violation
24 cannot satisfy the injury-in-fact requirement if they merely allege a procedural violation
25 that is divorced from any concrete harm. *Id.* at 1549.

26 As the parties are well aware, this isn’t the first time the issue of Shuckett’s
27 standing has been litigated in this case. In its Order Denying DialAmerica’s Motion to
28

1 Dismiss, the Court analogized Shuckett's missed call to a text message and found that
2 Shuckett had standing to sue:

3 In *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037
4 (9th Cir. 2017), for example, the Ninth Circuit held that the
5 receipt of a text message gave rise to standing under the
6 TCPA, noting that "[u]nsolicited telemarketing phone calls or
7 text messages, by their nature, invade the privacy and disturb
8 the solitude of their recipients." *Id.* at 1043. There is no
9 meaningful difference between an unanswered phone call
10 and a text message. Neither requires an outlay of time or
11 energy, but both "disturb the solitude of their recipients." *Id.*
12 The invasion of privacy caused by unwanted telemarketing
13 calls is not diminished simply because a plaintiff chooses to
14 decline the call.

15 Dkt. 92 at 3-4. Based on this passage, Shuckett contends that the issue is settled and
16 that DialAmerica cannot argue again that she lacks standing. While the Court shares
17 Shuckett's concerns about relitigating already-decided issues, standing is unique in that
18 courts have a continuing, independent obligation to determine whether subject matter
19 jurisdiction exists at all times. *Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1031 (9th Cir.
20 2013). The Court must consider challenges to Shuckett's standing raised at any stage of
21 litigation, even if the issue has been litigated previously. Indeed, standing is not a static
22 determination, and the plaintiff "bears the burden of proof to establish standing 'with the
23 manner and degree of evidence required at the successive stages of the litigation.'" *Washington Env'tl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "While 'at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice,' in responding to a summary judgment motion, 'the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.'" *Id.* (internal alterations omitted).

26 Although the Court previously determined that Shuckett's missed call was a
27 sufficiently concrete harm to permit her to bring suit, that finding was based on the
28 premise that she was aware of the missed call at the time it occurred. Whether she was

1 aware of the call or not is important because, as other courts in this circuit have noted, an
2 unnoticed call may “violate the TCPA but not cause any concrete injury.” *Juarez v.*
3 *Citibank, N.A.*, 2016 WL 4547914, at *3 (N.D. Cal. 2016); see also *Lemieux v. Lender*
4 *Processing Ctr.*, 2017 WL 1166430, at *4 (S.D. Cal. 2017) (“[A] bare allegation of a
5 violation of the TCPA could be an insufficient allegation of injury to establish standing,
6 such as when a telephone call is unheard or unanswered . . .”). Signaling the centrality
7 of this question to whether Shuckett has standing, the Court noted in its previous order
8 that “[h]ad the call [to Shuckett] gone entirely unnoticed, perhaps this would be a different
9 case.” Dkt. 92 at 4. Now at summary judgment, the evidence submitted by DialAmerica
10 suggests that the call did go unnoticed and that this is, in fact, “a different case.”

11 First, DialAmerica argues, Shuckett’s Verizon billing statement shows that her
12 phone registered no “talk activity” on October 10, 2017 at 12:02 p.m., the time at which
13 DialAmerica called her. Dkt. 108-2 at 47. This demonstrates, at a minimum, that the call
14 went unanswered. More importantly, Shuckett testified at her deposition that she had no
15 present recollection of her phone ringing on October 10, 2017. *Id.* at 16-18. It’s altogether
16 unsurprising that someone would be unable to recall an isolated phone call more than
17 one year earlier, but this testimony is notable because Shuckett lacks any other evidence
18 demonstrating that she was aware of the call at the time. DialAmerica points out, for
19 example, that Shuckett produced numerous screenshots showing missed calls from
20 Defendant ProspectsDM, see *id.* at 11-12, 29-41, but she has submitted none showing a
21 missed call from DialAmerica. In fact, despite being aware that her cell phone would
22 automatically delete her call history after some amount of time, she failed to properly
23 preserve screenshots or other evidence demonstrating that she had received a missed
24 call from DialAmerica on October 10, 2017. *Id.* at 26. While not dispositive, this failure
25 to preserve evidence supports an inference that the evidence would have been
26 unfavorable to her. See *Singh v. Gonzalez*, 491 F.3d 1019, 1024 (9th Cir. 2007).

27 Shuckett has also failed to submit any affirmative evidence demonstrating that she
28 suffered a concrete injury as a result of DialAmerica’s lone call. This is critical here

1 because Shuckett, as “the party invoking federal jurisdiction, bears the burden of
2 establishing standing.” Spokeo, 136 S.Ct. at 1547. Shuckett’s evidence consists
3 primarily of two items. First, she has submitted a phone record, obtained through
4 subpoena, showing that DialAmerica initiated a 14-second call to Shuckett on October
5 10, 2017. Dkt. 111-4. Second, she has offered testimony about what she was doing on
6 that date. See Dkt. 111-2 at ¶ 18. Specifically, her declaration states that she was
7 working as a doctor at the Linda Vista Clinic at the time the call was placed. Id. While
8 she does not recall receiving a phone call on that date, she states that she would have
9 been aware of the call because, as a doctor, she must “keep her telephone on at all times”
10 in order to respond to emergencies. Id. at ¶ 12. If she is with a patient when she receives
11 a call, she will either silence the phone or hand it to a nurse to respond. Id.

12 Even viewing Shuckett’s evidence in the light most favorable to her, the Court finds
13 that she has not met her burden of demonstrating that she suffered concrete harm from
14 DialAmerica’s call. While a missed call may be sufficient to confer standing if the plaintiff
15 can demonstrate that he or she was aware of the call and it caused nuisance, it is not
16 sufficient for a plaintiff to allege simply that he or she would have been aware of the call
17 given what they were doing on that day. The injury that gives rise to standing must be
18 “actual[,] . . . not conjectural or hypothetical.” Lujan, 504 U.S. at 560. Shuckett’s evidence
19 here only supports a finding of conjectural or hypothetical injury, and that does not give
20 the Court subject-matter jurisdiction. For example, without a more detailed account of the
21 events, it’s impossible for the Court to know whether the phone was Shuckett’s
22 possession or a nurse’s possession at the time the call came in. If the latter, was Shuckett
23 actually aware of the call and did it cause her an injury? Further, without screenshots or
24 other evidence that the call manifested itself in some way on her phone, another
25 possibility is that DialAmerica made the call—a fact that’s demonstrated by the Verizon
26 cell tower records, Dkt. 111-4—but that it never reached Shuckett’s phone. In that case,
27 she’s suffered no harm at all because she never “received” a call. The point here is not
28 to downplay the harm associated with robodialing or to nitpick the details of Shuckett’s

1 story. The point is simply that Shuckett bears the burden of demonstrating that she
2 suffered a concrete, non-conjectural injury. Without something more definitive than what
3 she has provided, she cannot meet that burden.

4 In short, the Court finds that summary judgment is warranted because Shuckett
5 lacks standing to pursue her claims against DialAmerica and American Standard.

6 **2. DialAmerica's Remaining Arguments Are Moot.**

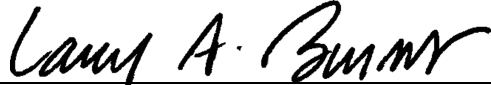
7 DialAmerica also argues that even if Shuckett has standing, summary judgment is
8 warranted because (1) she cannot show DialAmerica violated the TCPA and (2) she is
9 not a member of the class she purports to represent. Having concluded that Shuckett
10 lacks standing, the Court finds it unnecessary to reach either argument here.

11 **CONCLUSION**

12 DialAmerica and American Standard² are entitled to summary judgment because
13 Shuckett lacks Article III standing. The Court does not reach the merits of DialAmerica's
14 remaining arguments. DialAmerica's Motion for Summary Judgment, which American
15 Standard has joined, is **GRANTED**. Dkt. 108. In light of this ruling, Shuckett's Motion to
16 Strike and Motion for Class Certification are **DENIED AS MOOT**. Dkts. 100, 109. The
17 Clerk is directed to enter judgment in favor of DialAmerica and American Standard and
18 to close the case.

19 **IT IS SO ORDERED.**

20 Dated: July 29, 2019

21 
22 **HONORABLE LARRY ALAN BURNS**
23 Chief United States District Judge

24
25 _____
26 ² As discussed above, Shuckett released American Standard as to calls made by former-
27 codefendant Prospect DM, so the only call relevant to American Standard at this stage is
28 the one made by DialAmerica on its behalf. To the extent Shuckett lacks standing to sue
DialAmerica over that one phone call, she likewise lacks standing to sue American
Standard.