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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DAVID BAESEL, individually and on
12 behalf of all others similarly situated,
13 Plaintiffs,
14 v.
15 MUTUAL OF OMAHA MORTGAGE,
16 INC., a Delaware corporation
17 Defendant.

Case No.: 20cv0886 DMS(AGS)

**ORDER DENYING DEFENDANT'S
MOTION TO CHANGE VENUE**

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19 This case comes before the Court on Defendant's motion to change venue to the
20 United States District Court for the Middle District of Florida. Plaintiff filed an opposition
21 to the motion, and Defendant filed a reply. For the reasons set out below, the motion is
22 denied.

23 **I.**

24 **BACKGROUND**

25 Plaintiff David Baesel is a resident of Parker, Florida. Defendant Mutual of Omaha
26 Mortgage, Inc. is a Delaware corporation with headquarters in San Diego, California.
27 Plaintiff alleges that on April 29, 2014, he registered his cell phone number on the National
28 Do Not Call Registry. (Compl. ¶30.) He further alleges that in January of 2020, he began

1 receiving unsolicited phone calls on his cell phone. (*Id.* ¶32.) Plaintiff received one call
2 on January 15, 2020, and two calls in February 2020. (*Id.* ¶33.) Plaintiff did not answer
3 these calls and no messages were left. (*Id.* ¶34.) On March 5, 2020, Plaintiff received
4 another call from the same number. (*Id.* ¶35.) Plaintiff did not answer that call, but he did
5 receive a prerecorded message from an agent named Kevin asking him to return the call.
6 (*Id.*) Plaintiff received another call on March 17, 2020, which he again did not answer,
7 and for which he received another message identical to the one he received on March 5.
8 (*Id.* ¶36.) The same thing happened on April 15, 2020. (*Id.* ¶37.)

9 Plaintiff alleges his attorneys investigated the number from which these calls
10 originated and discovered that Defendant was the source of the calls. (*Id.* ¶39.) Plaintiff
11 alleges he does not have a relationship with Defendant and he has not consented to
12 receiving calls from Defendant. (*Id.* ¶40.) He alleges Defendant’s “unauthorized telephone
13 calls harmed [him] in the form of annoyance, nuisance, and invasion of privacy, and
14 disturbed [his] use and enjoyment of his phone, in addition to the wear and tear on the
15 phone’s hardware (including the phone’s battery) and the consumption of memory on the
16 phone.” (*Id.* ¶42.)

17 As a result of these calls, Plaintiff filed the present case against Defendant. In his
18 Class Action Complaint, he alleges two claims under the Telephone Consumer Protection
19 Act, 47 U.S.C. § 227, one on behalf of a class of consumers who did not consent to receive
20 calls from Defendant and the other on behalf of a class of consumers who received calls
21 from Defendant even though their numbers were on the Do Not Call Registry. In response,
22 Defendant filed the present motion.¹

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27 ¹ Defendant has also filed a motion to dismiss for lack of standing, a motion to strike the
28 class allegations from the Complaint and a motion to stay discovery pending a ruling on
the other motions. The Court will issue separate orders on those pending motions.

II.
DISCUSSION

In a strange set of circumstances, Plaintiff, a resident of Florida, filed the present case in this District. Defendant, who is headquartered in this District, now moves to transfer this case to Florida, in particular, the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. § 1404(a). This statute provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought ...” 28 U.S.C. § 1404(a). The moving party bears the burden of establishing these factors weigh in favor of transfer. *Shropshire v. Fred Rappoport Co.*, 294 F.Supp.2d 1085, 1095 (N.D. Cal. 2003) (citing *Decker Coal v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)); *Florens Container v. Cho Yang Shipping*, 245 F.Supp.2d 1086, 1088 (N.D. Cal. 2002) (citing *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979)).

A. Convenience of Parties²

The first factor mentioned in the statute is the convenience of the parties. Notably, neither side directly addresses this factor. Perhaps this is because both California and Florida would be convenient to both parties based on Plaintiff’s residence in Florida but his filing here, and Defendant’s headquarters here but its preference to litigate the case in Florida. Based on these facts and the parties’ filings, it appears both this Court and the Middle District of Florida would be convenient for both parties. Accordingly, this factor is neutral.

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² The parties do not appear to dispute this action could have been filed in the United States District Court for the Middle District of Florida, which is a prerequisite for transfer under § 1404(a). Therefore, the Court turns to the first factor, the convenience of the parties.

1 **B. Convenience of Witnesses**

2 The next factor set out in the statute is the convenience of witnesses. “To
3 demonstrate inconvenience of witnesses, the moving party must identify relevant
4 witnesses, state their location and describe their testimony and its relevance.” *Carolina*
5 *Casualty Co. v. Data Broadcasting Corp.*, 158 F.Supp.2d 1044, 1049 (N.D. Cal. 2001)
6 (citing *Royal Queentex Enterprises Inc. v. Sara-Lee Corp.*, No. C-99-4787 MJJ, 2000 WL
7 246599, at *6 (N.D. Cal. Mar. 1, 2000)).

8 Here, Defendant identified only one witness, Kevin Mapes, who is an employee of
9 Defendant and the person who placed the calls to Plaintiff’s phone. Defendant states Mr.
10 Mapes is located in Florida, therefore it would be more convenient for him if the case were
11 litigated there. Plaintiff does not dispute Mr. Mapes’s location or that it would be more
12 convenient for Mr. Mapes if the case were litigated in Florida. Accordingly, this factor
13 weighs in favor of transfer.

14 **C. Other Factors**

15 In addition to the factors set out in the statute, case law sets out other factors for
16 determining whether the “interests of justice” warrant a change in venue. Those factors
17 are:

- 18 (1) the location where the relevant agreements were negotiated and executed,
19 (2) the state that is most familiar with the governing law, (3) the plaintiff’s
20 choice of forum, (4) the respective parties’ contacts with the forum, (5) the
21 contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the
22 differences in the costs of litigation in the two forums, (7) the availability of
compulsory process to compel attendance of unwilling non-party witnesses,
and (8) the ease of access to sources of proof.

23 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). The first factor is
24 not relevant to this case, and the second factor is neutral as both California and Florida
25 would be equally familiar with the federal law governing Plaintiff’s claims. The other
26 factors are discussed below.

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1 1. Plaintiff's Choice of Forum/The Parties' Contacts with the Forum/Contacts
2 Relating to Plaintiff's Claims in the Chosen Forum

3 The first three factors for consideration are Plaintiff's choice of forum, the parties'
4 contacts with the forum and the contacts between Plaintiff's claims and the chosen forum.
5 Although the plaintiff's choice of forum is generally entitled to deference, *Allstar*
6 *Marketing Group, LLC v. Your Store Online, LLC*, 666 F.Supp.2d 1109, 1131 (C.D. Cal.
7 2009), Defendant argues that deference is diminished here because of the class action
8 nature of Plaintiff's case. "Although great weight is generally accorded plaintiff's choice
9 of forum, when an individual brings a derivative suit or represents a class, the named
10 plaintiff's choice of forum is given less weight." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th
11 Cir. 1987) (citations omitted). In judging the weight to be accorded to the plaintiff's choice
12 of forum in a class action, "consideration must be given to the extent of [the parties']
13 contacts with the forum, including those relating to [the plaintiff's] cause of action." *Id.*
14 (citing *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968)). "If the
15 operative facts have not occurred within the forum and the forum has no interest in the
16 parties or subject matter, [the plaintiff's] choice is entitled to only minimal consideration."
17 *Id.* (citing *Pence*, 403 F.2d at 954).

18 Here, Plaintiff does not appear to have any contacts with this forum. As for contacts
19 in this District relating to Plaintiff's claims, Defendant asserts there are none as the calls at
20 issue were made and received by persons in Florida on Florida-based equipment. Plaintiff
21 does not dispute these facts, which do reduce the deference accorded to his choice of forum.
22 Instead, Plaintiff argues he is "seeking to represent a class of individuals throughout the
23 United States who received calls anywhere and everywhere in the country." (Opp'n to
24 Mot. at 5.) But this argument cuts both ways. If the offending conduct occurred all over
25 the country, it is unclear why venue should lie in this District as opposed to any other,
26 especially when Plaintiff is not a resident of this District and the facts underlying his
27 individual claim occurred elsewhere.

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1 On the other hand, Plaintiff points out that Defendant’s headquarters are situated in
2 this District, and he argues venue is proper here “because the wrongful conduct giving rise
3 to this case was directed to Plaintiff from this District.” (Compl. ¶4.) Defendant appears
4 to dispute that the calls Plaintiff received are “indicative of a corporate directive from
5 [Defendant’s] leadership[,]” and in support, it cites the Declaration of Brian Sturgener,
6 Defendant’s Senior Vice President of Strategy. (Reply at 6.) Mr. Sturgener declares that
7 Defendant maintains offices “in a number of states across the United States,” and that
8 “[e]ach office maintains a separate physical location and utilizes its own telephone dialing
9 equipment to contact its clients and potential clients.” (Decl. of Brian Sturgener in Supp.
10 of Mot. ¶6.) However, Mr. Sturgener does not address Plaintiff’s allegation about a
11 company-wide policy of unlawful telemarketing practices. Absent evidence controverting
12 that particular allegation, Plaintiff is entitled to rely on that allegation to establish venue in
13 this District. *See Allstar Marketing*, 666 F.Supp.2d at 1129 (holding “plaintiffs may rely
14 on the allegations in their complaint to establish venue to the extent those allegations are
15 not controverted by defendant’s evidence.”) That allegation, coupled with Defendant’s
16 headquarters in this District, provide a basis for this Court to take an interest in this case,
17 and a counterbalance to the lack of contacts between Plaintiff and his individual claim and
18 this District. Thus, contrary to Defendant’s argument, the Court finds Plaintiff’s choice of
19 forum is entitled to the usual deference in this case.

20 2. Differences in Costs of Litigation in Two Fora/Ease of Access to Sources of
21 Proof

22 Defendant acknowledges that the differences in the cost of litigation in each forum
23 is not especially significant “due to electronic discovery,” but argues nonetheless that it
24 would be more cost-effective to litigate this case in Florida because that is where Plaintiff
25 and Mr. Mapes reside, and it is where the telephone equipment used to make the calls to
26 Plaintiff’s phone is located. (Reply at 8.) Plaintiff points out, however, that Mr. Sturgener
27 resides in this District, and that other defense witnesses may reside here as well. Plaintiff
28 also asserts that to the extent access to Defendant’s physical documents is necessary, those


1 documents are likely to be maintained at Defendant's headquarters, which are in this
2 District. Plaintiff also points out that given the COVID-19 pandemic, many depositions
3 are being taken remotely, which would reduce any disparities between the costs of
4 litigation in the two Districts. Given all of these factors, the Court agrees with Plaintiff
5 that any difference in costs is likely to be negligible, and that the ease of access to sources of
6 proof will be similar whether the case remains in this District or is transferred to Florida.
7 Accordingly, these factors are neutral.³

8 **III.**
9 **CONCLUSION**

10 As discussed above, most of the relevant factors in this case are neutral. One factor,
11 the convenience of witnesses, weighs in favor of transfer, but only with respect to Mr.
12 Mapes. Another factor, Plaintiff's choice of forum, weighs against transfer. On balance,
13 the factors are essentially even, and Defendant has not shown otherwise. Accordingly,
14 Defendant's motion to change venue is denied.

15 **IT IS SO ORDERED.**

16 Dated: October 19, 2020

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18 Hon. Dana M. Sabraw
19 United States District Judge
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27 ³ Defendant concedes that the last factor, availability of compulsory process to compel
28 attendance of unwilling non-party witnesses is neutral. (Mot. at 7.) Accordingly, the Court
will not further address that factor.