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JUSTIN NEFF,

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Plaintiff,

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v.

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TOWBIN DODGE LLC and CDK
GLOBAL LLC,

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Defendants.

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No. 2:20-cv-00261-JAM-DMC

**ORDER DENYING DEFENDANTS' MOTION
TO DISMISS FOR LACK OF VENUE AND
GRANTING DEFENDANTS' MOTION FOR
TRANSFER**

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This matter is before the Court on Towbin Dodge and CDK Global's ("Defendants") Motion to Dismiss and Motion to Change Venue. Towbin's Mot., ECF No. 19; CDK's Mot., ECF No. 20.

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Justin Neff ("Plaintiff") filed an opposition, ECF No. 21, to

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which Defendants replied, ECF No. 26-27. After consideration of

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the parties' written arguments on the motions and relevant legal

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authority, the Court DENIES Defendants' Motion to Dismiss and

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GRANTS Defendants' Motion to Transfer Venue.¹

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for September 29, 2020.

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1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Towbin Dodge is a Dodge car dealership in Henderson, Nevada.
3 First Amended Complaint ("FAC") ¶¶ 7-11, ECF No. 15. CDK Global
4 provides sales and marketing services to car dealerships. FAC
5 ¶ 12. Plaintiff claims Towbin hired CDK to perform marketing
6 services on its behalf. See FAC ¶ 12. Plaintiff allegedly
7 received three autodialed calls and one text message from
8 Defendants after they obtained his contact information from
9 Cars.com. FAC ¶¶ 24-33. As a result, Plaintiff brought this
10 action on behalf of himself and those similarly situated, under
11 the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227,
12 FAC ¶ 37, which prohibits sending unsolicited, autodialed text
13 messages and calls to cellular telephones. Id.
14 § 227(b)(1)(A)(iii). Defendants then brought this Motion to
15 Dismiss for Improper Venue and, in the alternative, Motion to
16 Change to Venue to the District of Nevada. Towbin's Mot. 1-2;
17 CDK's Mot. 1.

18 II. OPINION

19 A. Proper Venue

20 1. Legal Standard

21 A civil action may be brought in: (1) a judicial district
22 in which any defendant resides, if all defendants are residents
23 of the State in which the district is located; or (2) a judicial
24 district in which a substantial part of the events or omissions
25 giving rise to the claim occurred. 28 U.S.C. § 1391(b). In
26 determining a 12(b)(3) motion to dismiss for improper venue, the
27 court must draw all reasonable inferences in favor of the non-
28 moving party. Murphy v. Schneider National, Inc., 362 F.3d

1 1133, 1138 (9th Cir. 2004).

2 2. Analysis

3 The parties agree venue is not proper in the Eastern
4 District of California under § 1391(b)(1), as neither Defendant
5 is a resident of California. See FAC ¶¶ 7-10; Towbin's Mot. 1;
6 CDK's Mot. 1. The parties do dispute, however, whether venue is
7 proper in the Eastern District under § 1391(b)(2), that is,
8 whether a substantial part of the events or omissions giving
9 rise to Plaintiff's claim occurred here. See FAC ¶ 9; Towbin's
10 Mot. 4-5; CDK's Mot. 2.

11 First, Defendants argue that venue is not proper in the
12 Eastern District because Plaintiff did not clearly allege that
13 he received the communications in this district. Towbin's Mot.
14 4; CDK's Mot. 2. In his complaint, Plaintiff states that venue
15 is proper here because "Plaintiff resides in this District, and
16 because the wrongful conduct giving rise to this case was
17 directed to Plaintiff on Plaintiff's California area code cell
18 phone number in this District." FAC ¶ 10 (emphasis added).
19 While the Court agrees that Plaintiff's allegations are not
20 entirely clear, the Court must draw all reasonable inferences in
21 favor of the Plaintiff. As such, the fact that Plaintiff
22 resides in this district and received the calls to his cell
23 phone here, suggests that he was in this district when he
24 received the alleged communications from Defendants. See FAC
25 ¶ 10. Thus, the Court finds that Plaintiff has alleged he
26 received the communications in this district.

27 Second, Defendants argue that even if Plaintiff did receive
28 the alleged communications in the Eastern District, that would

1 not support venue under § 1391(b)(2), as the receipt of the
2 communications is not a substantial part of the events giving
3 rise to his TCPA claim. Towbin's Mot. 5-6; CDK's Mot. 2.
4 Defendants argue that because the TCPA only prohibits persons
5 from sending autodialed communication and does not make illegal
6 the receipt of autodialed communication, the events giving rise
7 to Plaintiff's claim arose in Nevada, where the alleged
8 communications were sent. Towbin's Mot. 5. To support this
9 argument Defendants cite to numerous cases involving TCPA claims
10 where venue was found to be proper in the district in which the
11 communications were sent. Towbin's Mot. 5-6; CDK's Mot. 2.

12 However, just because a substantial part of the events
13 occurred in Nevada "does not mean that a substantial part of the
14 events did not also take place in California where the phone
15 call was directed and where the harm was inflicted."
16 Schlesinger v. Collins, No. 19-CV-03483-EMC, 2019 WL 4674396, at
17 *3 (N.D. Cal. Sept. 25, 2019); see also S.F. Residence Club,
18 Inc. v. Leader Bulso & Nolan, PLC, No. C-13-0844 EMC, 2013 WL
19 2050884, at *5 (N.D. Cal. May 14, 2013) (noting that there may
20 be more than one district in which a substantial part of the
21 events giving rise to the claim occurred, and that venue would
22 be proper in each district). Courts in TCPA cases have
23 consistently found venue to be proper under § 1391(b)(2) where
24 the call was received. See Schlesinger, at *3; see also Schick
25 v. Resolute Bank, No. CV-19-02218-PHC-DLR, 2019 WL 8014435, at
26 *1 (D. Ariz. Nov. 13 2019); Sapan v. Dynamic Network Factory,
27 Inc., No. 13-CV-1966-MMA (WVG), 2013 WL 12094829, at *3 (S.D.
28 Cal. Nov. 25, 2013). Because Plaintiff's injury, receipt of the

1 communications, occurred in the Eastern District, a substantial
2 part of the events giving rise to his claim occurred here. As
3 such, venue is proper in the Eastern District of California.

4 B. Transfer

5 1. Legal Standard

6 "For the convenience of parties and witnesses, in the
7 interest of justice, a district court may transfer any civil
8 action to any other district or division where it might have
9 been brought." 28 U.S.C. § 1404(a). When determining whether
10 transfer is proper, courts employ a two-step analysis. Park v.
11 Dole Fresh Vegetables Inc., 964 F. Supp. 2d 1088, 1093 (N.D.
12 Cal. 2013). First, the court must determine whether the case
13 could have been brought in the forum the moving party seeks to
14 transfer the case to. Id.

15 If the moving party makes this showing then the district
16 court has discretion to change venue based on "individualized,
17 case-by-case consideration of convenience and fairness." Id.
18 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29
19 (1988)). Under § 1404(a) the court should consider the
20 convenience of the parties and witnesses. 28 U.S.C. § 1404(a).
21 The court may also consider factors such as: (1) the location
22 where the relevant agreements were negotiated and executed,
23 (2) the state that is most familiar with the governing law,
24 (3) the plaintiff's choice of forum, (4) the respective parties'
25 contacts with the forum, (5) the contacts relating to the
26 plaintiff's cause of action in the chosen forum, (6) the
27 differences in the costs of litigation in the two forums,
28 (7) the availability of compulsory process to compel attendance

1 of unwilling non-party witnesses, and (8) the ease of access to
2 sources of proof. Jones v. GNC Franchising, Inc., 211 F.3d 495,
3 499 (9th Cir. 2000).

4 2. Analysis

5 Plaintiff does not dispute that this action could have been
6 brought in Nevada. See Opp'n 4. Towbin operates in Nevada, it
7 is where the contract between Defendants was executed, and where
8 any communications from Towbin originated. Towbin's Mot. 5.
9 Accordingly, venue is proper in the District of Nevada. See 28
10 U.S.C. 1391(b)(2). Moreover, as set forth below, upon weighing
11 the relevant factors, the Court finds that the interests of
12 convenience and fairness warrant transfer to the District of
13 Nevada.

14 a. Factors Weighing in Favor of Transfer

15 Several factors support transferring this case to Nevada.
16 First, transfer to Nevada will be more convenient for the
17 witnesses, often considered the most important factor when
18 deciding a motion to transfer. Jovel v. i-Health, Inc., No. CV
19 12-05526 DDP (JCGx), 2012 WL 5470057, at *4 (C.D. Cal. Nov. 8,
20 2012). Defendants contend that most of the witnesses are likely
21 to be Towbin employees. See Towbin's Mot. 10. While Defendants
22 do not specifically identify any critical witnesses, given that
23 Plaintiff's complaint is that he received solicitation from
24 Towbin, it seems likely that many relevant witnesses will be
25 Towbin employees based in Nevada where Towbin operates.
26 Plaintiff on the other hand, does not claim the Eastern District
27 is convenient for any other witness besides himself. See Opp'n
28 4-5. Additionally, because Towbin's business is based in

1 Henderson, Nevada, it is likely the district court in Nevada
2 will have subpoena power to compel testimony from any former
3 employee, while this court will not. See Fed. R. Civ. P.
4 45(c)(1)(A) ("A subpoena may command a person to attend trial,
5 hearing, or deposition . . . within 100 miles of where the
6 person, resides, is employed, or regularly transacts business in
7 person.").

8 Second, litigation costs will likely be reduced in Nevada.
9 Defendants argue that most of the documentary evidence relevant
10 to this case is maintained at Towbin's dealership in Henderson.
11 Towbin's Mot. 11. Plaintiff does not appear to dispute this but
12 instead argues that the physical location of the documents no
13 longer carries much weight given technology has made it easier
14 for documents to be transferred to different locations. Opp'n
15 5. While, "developments in electronic conveyance have reduced
16 the cost of document transfer somewhat, costs of litigation can
17 still be substantially lessened if the venue is in the district
18 in which most of the documentary evidence is stored." Park, 964
19 F. Supp. 2d at 1095. Further, litigation costs are usually
20 reduced when the venue is located near the most witnesses
21 expected to testify. Id. Because most of the documentary
22 evidence and most of the witnesses are in Nevada, the Court
23 finds litigation will be less costly there.

24 Third, Nevada has the most contacts relating to Plaintiff's
25 cause of action. The only contacts related to the cause of
26 action in the Eastern District, are that Plaintiff is a resident
27 of this district and allegedly received the communications here.
28 See generally Compl. Given that this is a putative class

1 action, similar contacts might be found across the country.
2 However, all these communications will have come from Towbin,
3 located in Nevada, or from CDK, on Towbin's behalf. Towbin's
4 Mot. 5-6. Further, Towbin's marketing decisions and execution
5 of the service contract with CDK occurred at its place of
6 business in Nevada. Towbin's Mot. 7-10.

7 b. Factors Weighing Against Transfer

8 The one factor weighing against transfer is the plaintiff's
9 choice of forum. Great weight is generally accorded to the
10 forum of plaintiff's choosing. Lou v. Belzberg, 834 F.2d 730,
11 739 (9th Cir. 1987). However, when an individual represents a
12 class, the named plaintiff's choice of forum is given less
13 weight. Id.

14 Here, Plaintiff has chosen to litigate in his home
15 district, the Eastern District of California, which weighs
16 against transfer. See FAC ¶ 10. Additionally, litigating in
17 Nevada would be less convenient for Plaintiff than litigating in
18 his home state. Opp'n 5. However, because Plaintiff has chosen
19 to represent a class, his choice of forum, and its convenience
20 for him, is given less weight. See LaGuardia v. Designer Brands,
21 Inc., No. 19CV1568 JM(BLM), 2020 WL 2463385, at *8 (S.D. Cal.
22 May 7, 2020) (noting that TCPA class actions are normally
23 attorney driven and require limited participation from the named
24 plaintiff). Potential class plaintiffs may come from all over
25 the country and plaintiff "provides no indication that any class
26 members other than himself would not also have to travel
27 hundreds of miles to litigate" in the Eastern District. Mina v.
28 Red Robin Int'l, Inc., No. CV189472PSGGJSX, 2020 WL 4037163, at

1 *3 (C.D. Cal. Mar. 3, 2020).

2 Thus, ultimately, this factor does not weigh heavily
3 against transfer.

4 c. Neutral Factors

5 Finally, a few factors neither weigh in favor of or against
6 transfer of venue. For instance, the parties both have limited
7 contacts with the other's respective forum choice. Plaintiff's
8 contact with the Eastern District is great, as it is where he
9 resides. See FAC ¶ 10. Plaintiff does not appear to have any
10 contacts with Nevada other than the alleged communication with
11 Defendants. See generally FAC. Defendants, on the other hand,
12 have greater contacts with Nevada and their only alleged
13 contacts with the Eastern District are their communications with
14 Plaintiff. Id. Towbin has significant contacts with Nevada, as
15 it is where it operates its business. See FAC ¶ 11. CDK also
16 has contacts with Nevada as it is where it provided services to
17 its client, Towbin. CDK's Mot. 3. In addition, the TCPA is a
18 federal law, which both districts are equally familiar with.
19 Pierucci v. Homes.com Inc., No. CV-20-08048-PCT-DWL, 2020 WL
20 5439534, at *5 (D. Az. Sept. 10, 2020).

21 d. Conclusion

22 Weighing the relevant factors, the Court finds, on balance,
23 that transfer to the District of Nevada is more convenient to
24 the parties and witnesses in this case. Thus, the Court
25 transfers this case to the District of Nevada under 28 U.S.C.
26 § 1404(a).

27 III. ORDER

28 For the reasons set forth above, the Court DENIES

1 Defendants' Motion to Dismiss and GRANTS Defendants' Motion to
2 for Transfer to the District of Nevada.

3 IT IS SO ORDERED.

4 Dated: November 18, 2020

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6 JOHN A. MENDEZ,
7 UNITED STATES DISTRICT JUDGE
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