

Melanie J. Vartabedian (#10148)
Nathan R. Marigoni (#14885)
BALLARD SPAHR LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001
vartabedianm@ballardspahr.com
marigonin@ballardspahr.com

Attorneys for Defendant, Vivint, Inc.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**JOSEPH BARRETT, CRAIG
CUNNINGHAM and ANDREW
PERRONG, on behalf of themselves and
others similarly situated,**

Plaintiffs,

v.

**VIVINT, INC., JOHN DOE
CORPORATION d.b.a NATIONAL
SOLAR PROGRAM and DSI
DISTRIBUTING, INC. d.b.a DSI
SYSTEMS,**

Defendants.

**REPLY IN SUPPORT OF DEFENDANT
VIVINT, INC'S MOTION TO DISMISS
AMENDED COMPLAINT OR TO
STRIKE PLAINTIFFS' CLASS
ALLEGATIONS**

Case No.: 2:19-cv-00568-DBB-CMR

**District Judge David B. Barlow
Magistrate Judge Cecilia M. Romero**

TABLE OF CONTENTS

INTRODUCTION..... 1

RESPONSE TO STATEMENT OF FACTS..... 1

ARGUMENT..... 3

I. PLAINTIFFS LACK STANDING TO ASSERT TCPA CLAIMS AGAINST VIVINT 3

A. Vivint Did Not Call Mr. Barrett 3

B. Mr. Perrong and Mr. Cunningham Lack Concrete Injuries..... 4

1. Nuisance 5

2. Occupation of Cell Phone..... 8

3. Economic Damages 8

C. Plaintiffs Are Outside the Zone of Interests of the TCPA 9

D. There Is No Private Right of Action for a Violation of 47 C.F.R. § 64.1200(d)..... 10

II. VIVINT’S DEFENSE OF CONSENT IS NON-SPECULATIVE AND PRECLUDES CLASS CERTIFICATION..... 11

CONCLUSION 13

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Am. States Ins. Co. v. Capital Assocs.</i> , 392 F.3d 939 (7th Cir. 2004)	8
<i>Astoria Fed. Sav. & Loan Ass’n v. Solimino</i> , 501 U.S. 104 (1991).....	6
<i>Balthazor v. Cent. Credit Servs., Inc.</i> , No. 10-cv-62435, 2012 WL 6725872 (S.D. Fla. Dec. 27, 2012).....	11
<i>Braver v. NorthStar Alarm Servs., LLC</i> , No. CIV-17-0383-F, 2019 U.S. Dist. LEXIS 118080 (W.D. Okla. July 16, 2019)	11
<i>Clapper v. Amnesty Int’l</i> , 568 U.S. 398 (2013).....	8
<i>Gene & Gene LLC v. BioPay LLC</i> , 541 F.3d 318 (5th Cir. 2008)	11
<i>Hampton v. Barclays Bank Del.</i> , No. 18-4071-DDC-ADM, 2019 U.S. Dist. LEXIS 152932 (D. Kan. Sep. 9, 2019)	5
<i>Holt v. United States</i> , 46 F.3d 1000 (10th Cir. 1995)	1
<i>LaVigne v. First Cmty. Bancshares, Inc.</i> , 215 F. Supp. 3d 1138 (D.N.M. 2016).....	6
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	3, 4, 9
<i>Mahon v. Ticor Title Ins. Co.</i> , 683 F.3d 59 (2d Cir. 2012).....	3
<i>Mey v. Got Warranty, Inc.</i> , 193 F. Supp. 3d 641 (N.D.W.V. 2016).....	8

Pepka v. Kohl’s Dep’t Stores, Inc.,
 No. CV-16-4293-MWF, 2016 U.S. Dist. LEXIS 186402 (C.D. Cal. Dec. 21,
 2016)13

Salcedo v. Hanna,
 936 F.3d 1162 (11th Cir. 2019)5, 7, 8

Spokeo, Inc. v. Robins,
 136 S. Ct. 1540 (2016).....5

Stoops v. Wells Fargo Bank, N.A.,
 197 F. Supp. 3d 782 (W.D. Pa. 2016).....9

Susinno v. Work Out World Inc.,
 862 F.3d 346 (3d Cir. 2017).....5, 6

Van Patten v. Vertical Fitness Group,
 847 F.3d 1037 (9th Cir. 2017)6, 7

Versteeg v. Bennett, Deloney & Noyes,
 P.C., 271 F.R.D. 668 (D. Wyo. 2011).....11

Wilson v. Glenwood Intermountain Props.,
 98 F.3d 590 (10th Cir. 1996)4

Federal Statutes

47 U.S.C. § 2277, 10, 11

Rules

Fed. R. Civ. P. 121

Regulations

47 C.F.R. § 64.120010, 11

Other Authorities

In re Dish Network,
 28 FCC Rcd. 6574 (2013).....10

137 Cong. Rec. 30,821-30,822 (1991).....6

Defendant Vivint, Inc. (“Vivint”) files this reply in support of its Motion to Dismiss Amended Complaint or to Strike Plaintiffs’ Class Allegations (ECF No. 30), and in response to Plaintiffs’ Opposition to Defendant Vivint, Inc. and DSI Distributing, Inc.’s Motions to Dismiss Amended Complaint or to Strike Plaintiffs’ Class Allegations (ECF No. 44).

INTRODUCTION

In their opposition, Plaintiffs object strenuously to being labelled as professional plaintiffs and this suit characterized as part of their ongoing TCPA litigation businesses. But the dozens of phone numbers owned by Plaintiffs and the hundreds of lawsuits they have initiated to extract cash settlements from defendants make plain that Plaintiffs are not merely consumers receiving unwanted calls who are entitled to protection under the TCPA. Rather, they are actively working to invite calls to one of their many phone numbers to manufacture TCPA claims to make money. And the addition of Mr. Barrett to this suit as a plaintiff due to his lack of extensive litigation history like Mr. Perrong and Mr. Cunningham does not alter this analysis because Mr. Barrett never received a call from or on behalf of Vivint—stripping him of any plausible claim of injury or standing to sue.

RESPONSE TO STATEMENT OF FACTS

On a motion to dismiss under Rule 12(b)(1), “a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends.” *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). “When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations.” *Id.* Although Vivint will not respond to each fact relied upon by Plaintiffs in their opposition, Vivint responds to Plaintiffs’ statement of facts as follows:

With respect to Mr. Barrett, the allegations of the Amended Complaint demonstrate that he never received a call from Vivint. Rather, those allegations demonstrate that Mr. Barrett received a call from “National Solar Program” and that, when he “engaged” with the telemarketer, Mr. Barrett was put in touch with a “John Stanasek” using a vivintsolar.com email address. (ECF No. 24, ¶¶ 38-44). While Plaintiffs allege that Vivintsolar.com is a domain registered and owned by Vivint, and that John Stanasek is an employee of Vivint, this is false. Vivintsolar.com is the website for Vivint Solar Developer LLC, dba Vivint Solar, not Vivint, Inc.¹ And John Stanasek is a District Sales Manager at Vivint Solar, not Vivint, Inc.² And, as Vivint has repeatedly noted, Vivint, Inc.³ is a separate entity from Vivint Solar⁴ and does not provide solar services. Mr. Barrett’s claim that he received a call from Vivint that entitles him to sue Vivint in this case is factually baseless and must be dismissed.

With respect to Plaintiffs’ assertion that text messages sent to them by Callfire are attributable to Vivint, that claim is not supported by the allegations of the Amended Complaint. Rather, the Amended Complaint alleges that Mr. Perrong and Mr. Cunningham received text messages from Callfire, which is “a company that promotes its ability to have a user upload a list of numbers and automatically dial them.” (ECF No. 24 at ¶¶ 67-69, 81-87.) However, nowhere in the Amended Complaint is there any allegation that Vivint is a “user” of this service or has

¹ <https://www.vivintsolar.com/about-us>

² <https://www.linkedin.com/in/john-eli-stanasek-874591bb/>

³ <https://secure.utah.gov/bes/details.html?entity=6047238-0142>

⁴ <https://secure.utah.gov/bes/details.html?entity=8367039-0161>

any relationship with Callfire that would subject it to liability for these text messages under the TCPA.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ASSERT TCPA CLAIMS AGAINST VIVINT

To establish standing, the plaintiff must show: 1) an “injury-in-fact” which is concrete and particularized, as well as actual or imminent; 2) that the conduct complained of is “fairly traceable” to the defendant; and 3) that the injury is “likely redressed” by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). All of Plaintiffs’ claims must be dismissed for lack of standing.

A. Vivint Did Not Call Mr. Barrett

While Plaintiffs’ make much of Mr. Barrett’s status as a newcomer to the TCPA litigation business as a defense to Vivint’s standing challenge, Mr. Barrett has no place in this litigation because the allegations of the Amended Complaint demonstrate that he was not called by Vivint. “[W]hether the plaintiff has made out a ‘case or controversy’ between himself and the defendant . . . is the threshold question in every federal case, determining the power of the court to entertain the suit.” *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (alteration and omission in original). Regardless of whether Mr. Barrett was injured by the call he alleges he received from “National Solar Program,” to establish his right to sue Vivint for that claimed injury, he must establish the injury is fairly traceable to Vivint and Vivint’s conduct. *Lujan*, 504 U.S. at 561. He cannot do so because the call Mr. Barrett complains of was not made by Vivint.

As set forth in the Amended Complaint and discussed above, Mr. Barrett alleges that after he “engaged” with the caller from “National Solar Program,” he was contacted by John

Stanasek. (ECF No. 24, ¶¶ 41-42.) Mr. Stanasek is an employee of Vivint Solar, and contacted Mr. Barrett via his vivintsolar.com email address. (*Id.* ¶ 42, *supra* note 2.) And, as discussed above and repeatedly noted in Vivint’s briefing, Vivint and Vivint Solar are distinct and separate businesses and legal entities. (*Supra*, notes 3, 4). Mr. Barrett’s allegations that he was contacted by a “National Solar Program” and was then put in touch with a representative from Vivint Solar belies his claim that the complained-of call was made by or attributable to Vivint.

Because Vivint did not make the complained-of call, assuming it occurred and constituted an injury to Mr. Barrett, that injury is neither fairly traceable to Vivint, nor would that injury be redressable by a decision against Vivint in this litigation. *Lujan*, 504 U.S. at 561. Accordingly, Mr. Barrett lacks standing to bring suit against Vivint or to serve as a class representative.⁵

B. Mr. Perrong and Mr. Cunningham Lack Concrete Injuries

The remaining two defendants, Mr. Perrong and Mr. Cunningham, are professional TCPA litigants who suffer no harm when they receive a call that will form the basis of their lawsuit, and suffered no concrete injury from the single telemarketing call allegedly received by each of them.⁶ But “Article III standing requires a concrete injury even in the context of a

⁵ Vivint recognizes that this argument was not fully developed in its motion to dismiss, however Vivint was at that time still researching whether the alleged call could have been made by Vivint or be fairly attributed to it. Regardless, because Mr. Barrett’s standing is a threshold jurisdictional issue, it may be raised at any time. *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 592 (10th Cir. 1996).

⁶ While the Amended Complaint alleges that Mr. Perrong also received an “automated telemarketing call from DSI” on April 4, he did not answer that call. Because Mr. Perrong did not answer the call, his allegations regarding the indicia of an ATDS dialer, i.e., dead noise, a
(continued...)

statutory violation.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). To “satisfy the injury-in-fact requirement of Article III,” the injury cannot be a “bare procedural violation, divorced from any concrete harm.” *Id.* And this rule applies with full force in the TCPA context. *Salcedo v. Hanna*, 936 F.3d 1162, 1167 (11th Cir. 2019); *Hampton v. Barclays Bank Del.*, No. 18-4071-DDC-ADM, 2019 U.S. Dist. LEXIS 152932, at *27 (D. Kan. Sep. 9, 2019).

Plaintiffs assert they suffered three injuries that supply Article III standing here: “(1) invasion of privacy and a nuisance; (2) occupation of Plaintiffs’ cellular telephone; and (3) economic harm from the use of a phone.”

1. Nuisance

Plaintiffs assert that the single call each allegedly received on behalf of Vivint constitutes an injury sufficient to pursue a nationwide class action because those calls constituted a nuisance or invasion of privacy. Plaintiffs rely on two cases from the Third and Ninth Circuits to establish that a single call constitutes a “nuisance” that establishes standing. However, the authorities cited by Plaintiffs are flawed and should not be followed by this Court.

In *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017), the Third Circuit expressly recognized that a cause of action for invasion of privacy or nuisance based on telephone calls would ordinarily require “persistence and frequency” of calls—that “two or three” calls would not be “highly offensive” to the ordinary reasonable person. *Id.* at 351-52.

Yet the *Susinno* court concluded that a single call to a cell phone could constitute an invasion of privacy in the TCPA context because Congress had “elevated” the harm caused by prerecorded

(...continued)

“pop” sound, and the commercial nature of the call, do not apply to the April 4 call and do not establish it was an automated call that would be actionable under the TCPA.

or automated calls to cell phones by prohibiting them in the TCPA. *Id.* at 352. The Ninth Circuit in *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037 (9th Cir. 2017), reached a similar conclusion, stating that Congress had enacted the TCPA to “elevate” a single text message to a cell phone to a “legally cognizable injury.” *Id.* at 1043.

But as Plaintiffs recognize, the Act was designed to “codif[y] the application of a long-recognized common law tort of invasion of privacy,” not to supplant it. *LaVigne v. First Cmty. Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1147 (D.N.M. 2016). “Congress is understood to legislate against a background of common-law adjudicatory principles.” *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991). “Thus, where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” *Id.*

Moreover, the legislative history for the TCPA demonstrates that Congress was concerned principally with invasion of privacy in the home from intrusive calls to the home phone. As Plaintiffs note, the TCPA’s sponsor was concerned that unwanted calls “wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” (ECF No. 44 at 8, quote 137 Cong. Rec. 30,821-30,822 (1991).) And as the *Van Patten* court recognized, the “session law for the TCPA itself stated: ‘Banning such automated or prerecorded telephone calls to the home . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.’” 847 F.3d at 1043. And while the TCPA does certainly include calls to cell phones within its scope, Congress’s apparent concern in enacting that prohibition was the cost to the

recipient of receiving such calls. 47 U.S.C. § 227(b)(1)(A)(i). Indeed, Congress itself recognized that calls made to cell phones do not present the same concerns as calls to the home, because Congress expressly authorized the FCC to exempt from the TCPA calls made to a cell phone for which the recipient is not charged for the call. *Id.* § 227(b)(2)(C). Accordingly, contrary to the reasoning of both *Sussino* and *Van Patten*, Congress did not intend to—and did not—elevate every call made to a cell phone to a de facto nuisance and thus an injury sufficient to support standing.

Rather, the Eleventh Circuit’s decision in *Salcedo*—which expressly rejected the *Van Patten* court’s “broad overgeneralization of the judgment of Congress” as “unpersuasive”—best analyzes the privacy interests at issue. *Salcedo v. Hanna*, 936 F.3d 1162, 1168, 1170 (11th Cir. 2019). As the *Salcedo* court recognized, calls and texts to a cell phone are different in kind from the “nuisance calls to [consumer’s] homes” that the TCPA sought to prohibit. *Id.* at 1169. “[B]y nature of their portability and their ability to be silenced, cell phone calls may involve less of an intrusion than calls to a home phone.” *Id.* The *Salcedo* court thus observed that a plaintiff would need to show an “objectively serious” intrusion on his privacy to establish standing, such as persistent or frequent calls. *Id.* at 1171. That injury does not exist where “the alleged harm is isolated, momentary, and ephemeral.” *Id.*

Although Plaintiff attempts to distinguish *Salcedo* on the basis that it dealt with a single text message rather than a single call to a cell phone, the reasoning of *Salcedo* applies equally to a call to a cell phone—which may be silenced, removed from the home, and merely “chirp, buzz, or blink” upon receipt of a call. *Id.* at 1172. Thus the allegation of a call to a cell phone,

standing alone, does not constitute an invasion of privacy absent facts demonstrating some injurious intrusion on privacy.

2. Occupation of Cell Phone

Next, Plaintiffs argue their phones were “tied up” by the alleged calls and that this occupation of the line constitutes a concrete injury. However, the cases relied on by Plaintiffs, *Am. States Ins. Co. v. Capital Assocs.*, 392 F.3d 939 (7th Cir. 2004), and *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641 (N.D.W.V. 2016), either involve or trace their analysis to cases involving receipt of unwanted faxes. However, unlike an incoming fax, a call (or text) to a cell phone does not occupy the line in a manner that prevents the recipient from receiving other calls or texts. *See Salcedo*, 936 F.3d at 1168 (“A fax machine's inability to receive another message while processing a junk fax has no analogy with cell phones and text messaging.”); *see, e.g.*, Use Call Waiting, AT&T, <https://www.att.com/esupport/article.html#!/u-verse-voice/KM1066669> (“Call Waiting is included free with your Phone service and allows you to take another call while you’re already on the phone.”). The only “occupation” of Plaintiffs’ phone lines would occur if they elected to remain on the line with the caller rather than hanging up or accepting another incoming call. Plaintiffs cannot manufacture an injury sufficient for Article III by subjecting themselves to costs or burdens. *See Clapper v. Amnesty Int’l*, 568 U.S. 398, 415-16 (2013) (explaining that “respondents cannot manufacture standing merely by inflicting harm on themselves”). Accordingly, this claimed harm is insufficient to establish standing.

3. Economic Damages

Last, Plaintiffs assert they suffered economic harm from receipt of the calls. Mr. Perrong alleges that the call was placed to a cell phone number for which he pays by the call. However,

Mr. Perrong disclosed no evidence of such a billing arrangement that would be sufficient to establish any injury to him on this basis and, in fact, has asserted in his initial disclosures that he “is not in possession of any documents that are required for the pursuit of this lawsuit.” Mr. Cunningham and Mr. Barrett do not even assert they suffered an economic injury as a result of the call, but argue only that they pay for phone service and are thus “charged” for calls as the FCC understands that term. Mr. Cunningham and Mr. Barrett thus assert that “by paying for their monthly cell phone bills” they suffered an injury. But any injury caused by paying those bills is not “fairly traceable” to Vivint and, accordingly, cannot provide a basis for standing. *Lujan*, 504 U.S. at 561.

C. Plaintiffs Are Outside the Zone of Interests of the TCPA

Plaintiffs argue that their serial filing of litigation does not disqualify them from protection under the TCPA, attempting to distinguish their conduct from that of the plaintiff in *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016). But the facts that bring this case within the scope of *Stoops* are not merely the volume of Plaintiffs’ litigation, but the fact that, just like the plaintiff in *Stoops*, they have purchased or acquired between them dozens of phone numbers for the purpose of receiving calls and filing TCPA claims. (ECF No. 29 at n. 2, 4.) Plaintiffs do not even address or attempt to distinguish *Stoops* on this basis, instead relying on cases where plaintiffs had not purposefully obtained dozens of numbers from which they have launched TCPA litigation. As set forth in Vivint’s principal brief, this Court should follow *Stoops* and conclude that Plaintiffs’ operation of a TCPA litigation business places them outside the TCPA’s zone of interests.

D. There Is No Private Right of Action for a Violation of 47 C.F.R. § 64.1200(d)

The parties agree that the TCPA provides a private right of action under 47 U.S.C. § 227(c) but not 47 U.S.C. § 227(d). By extension, no private right of action exists to enforce regulations promulgated under § 227(d). In arguing that a private right of action exists for violations of internal do-not-call lists under 47 C.F.R. § 64.1200(d), Plaintiffs try mightily to slice the regulation by subsection, arguing that while 47 C.F.R. § 64.1200(d)(4) may have been promulgated pursuant to § 227(d), the remaining sections under which they seek relief were not.

Plaintiffs first argue that this question is resolved by the FCC's decision in *In re Dish Network*, 28 FCC Rcd. 6574, ¶ 29 (2013). Plaintiffs' out-of-context quote from that decision misrepresents the import of the FCC's analysis. There, the FCC was analyzing whether actions under the TCPA included common law agency principles of vicarious liability. *Id.* In analyzing this question, the language quoted by Plaintiffs was relied on by the FCC to illustrate that the phrase "by or on behalf of" appears in both section 227(c)(5) and 47 C.F.R. § 64.1200(d), demonstrating their effect is consistent with respect to this vicarious liability issue:

[S]ection 227(c)(5) contemplates, at a minimum, the application of such principles of vicarious seller liability for do-not-call violations. That provision empowers "any person" to sue for damages and injunctive relief for do-not-call violations "by *or on behalf of*" a company. In accordance with this statutory provision, the Commission's company-specific do-not-call rules provide that "[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by *or on behalf of* that person or entity[.]

Id. (emphasis in original). Plaintiffs attempt to twist this language into evidence that 47 C.F.R. § 64.1200(d) was promulgated pursuant to § 227(c)—including by removing the FCC's original emphasis *sub silentio*—but the FCC made no such statement.

The cases relied on by Plaintiffs are no more persuasive, as none of the cases concluding that a private right of action exists for a violation of 47 C.F.R. § 64.1200(d) perform any analysis to reach this conclusion. And 47 C.F.R. § 64.1200(d) by its plain terms establishes the “minimum standards” for procedures that must be instituted prior to commencement of an entity making telemarketing calls to a residential subscriber. *Braver v. NorthStar Alarm Servs., LLC*, No. CIV-17-0383-F, 2019 U.S. Dist. LEXIS 118080 (W.D. Okla. July 16, 2019) thus correctly concluded that 47 C.F.R. § 64.1200(d) sets forth “technical and procedural standards” as required by 47 U.S.C. § 227(d).

II. VIVINT’S DEFENSE OF CONSENT IS NON-SPECULATIVE AND PRECLUDES CLASS CERTIFICATION

Last, Plaintiffs argue that the Court should dismiss as “speculation” Vivint’s argument that the class allegations should be stricken on the basis that individual issues of consent are fatal to class certification. Plaintiffs’ argument boils down to a claim that “there is nothing here to suggest that, contrary to Plaintiffs’ allegations, any of the Plaintiffs here consented to be called.” (ECF No. 44 at 24.) The question is not, however, whether Plaintiffs consented to be called, but whether the Plaintiffs’ claim requires “individual assessment of whether each class member consented.” *Balthazor v. Cent. Credit Servs., Inc.*, No. 10-cv-62435, 2012 WL 6725872, at *4 (S.D. Fla. Dec. 27, 2012); *see also Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) (reversing class certification because “the predominant issue of fact is undoubtedly one of individual consent”); *Versteeg v. Bennett, Deloney & Noyes, P.C.*, 271 F.R.D. 668, 674 (D. Wyo. 2011) (declining to certify a TCPA class because “the TCPA claims will require extensive individual fact inquiries into whether each individual gave ‘express consent’”). And there is no doubt Plaintiffs’ claims do, as Plaintiffs’ proposed nationwide classes include all

persons to whom Vivint or a person acting on its behalf made a telephone call that would be prohibited under the TCPA but for the recipient's consent. (ECF No. 24 at 22.)

Thus, while the presence or absence of Plaintiffs' consent is relevant to their individual claims, the question on class certification is whether the absent class members may have consented, and whether resolution of the class claim would require individualized assessment. While Plaintiffs' suggest this is a speculative inquiry, it is not. Vivint routinely and as a matter of course collects consent to the use of both automated dialers and prerecorded messages from those who request information or express interest in its products and services. As set forth on Vivint's website:

By clicking the button below, you consent for Vivint, and its service provider Aktify, to use automated technology, including texts and prerecorded messages, to contact you at the number and email provided about Vivint offers. This consent is not required to make a purchase. Clicking the button below constitutes your electronic signature.

vivint.SmartHome, <http://vivint.com>. Vivint also requires all third-party marketing affiliates performing telephonic marketing activities on Vivint's behalf to collect prior express written consent to make marketing calls using automated technology or pre-recorded voice. For example, third-party Vivint retailer Clearlink requires users to confirm their agreement to the following conditions before receiving a call from Clearlink:

By clicking "Get My Quote," you consent for Clearlink, a Vivint authorized retailer, to use automated technology, including pre-recorded/artificial voice, email, or text messaging, to contact you for marketing purposes at the phone number and email provided. This includes if the number is currently on any Do Not Call lists. This consent is not required to make a purchase.

Vivint Security & Smart Home Solutions, Clearlink, <http://www.vivintsource.com>.

There is no speculation as to whether potential members of the class consented to receiving such calls from Vivint—it is a certainty. Certification of a class in this matter would require the Court to perform individualized inquiries to determine whether each class member consented and whether consent was subsequently revoked. *Cf. Pepka v. Kohl's Dep't Stores, Inc.*, No. CV-16-4293-MWF (FFMx), 2016 U.S. Dist. LEXIS 186402 (C.D. Cal. Dec. 21, 2016). Because such individualized inquiries would predominate over class issues, class treatment is inappropriate, and the class allegations must be stricken.

CONCLUSION

For the foregoing reasons, the motion to dismiss the Amended Complaint should be granted. Alternatively, the class allegations should be stricken from the Amended Complaint.

DATED this 7th day of January 2020.

/s/ Nathan R. Marigoni

Melanie J. Vartabedian, Esq.

Nathan R. Marigoni, Esq.

BALLARD SPAHR LLP

Attorneys for Defendant, Vivint, Inc.