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

**SHANNON SMITH, individually and on  
behalf of all others similarly situated**

**Plaintiff,**

**v.**

**BLUE SHIELD OF CALIFORNIA  
LIFE & HEALTH INSURANCE  
COMPANY,**

**Defendant.**

**Case No.: SACV 16-00108-CJC(KESx)**

**ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION**

Plaintiff Shannon Smith brings this case against Defendant California Physicians’ Service, d/b/a Blue Shield of California (“Blue Shield”)<sup>1</sup> alleging violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. (Dkt. 1 Ex. A

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<sup>1</sup> Blue Shield claims and Plaintiff does not contest that Plaintiff erroneously named Blue Shield of California Life & Health Insurance Company as defendant. (Dkt. 69 at 1 n.1.) For clarity, the Court uses the correct name above and abbreviates it as “Blue Shield” throughout this Order.

1 (Complaint originally filed in Orange County Superior Court and removed by Blue  
2 Shield to this Court.) Plaintiff’s claim is brought on behalf of herself and all others who  
3 received an automated, pre-recorded telephone call on December 3, 2015, from Blue  
4 Shield regarding renewal of health insurance for 2016. (*Id.* ¶ 6.) Before the Court is  
5 Blue Shield’s motion for summary judgment. (Dkt. 46 [Motion, hereinafter “Mot.”].)  
6 For the following reasons, the motion is GRANTED.

## 7 8 **II. BACKGROUND**

9  
10 Plaintiff completed an application for health coverage for her family through  
11 Covered California for insurance provided by Blue Shield. (Dkt. 46-7 Ex. J at 7–8; Dkt.  
12 68 at 12; Dkt. 46-2 ¶ 1 (Statement of Uncontroverted Facts).) As part of the application,  
13 Plaintiff provided her telephone number as the best number at which to contact her. (Dkt.  
14 46-2 ¶ 2.) The coverage agreement was effective as of April 1, 2014, and remained in  
15 effect until December 31, 2015. (*Id.* ¶ 3.) Coverage was set to renew automatically,  
16 though with modifications, for the 2016 year. (*Id.* ¶ 4.)

17  
18 The Affordable Care Act and its regulations mandate that an individual’s insurance  
19 coverage automatically renews to ensure continuity of coverage. (Dkt. 46-5 ¶ 4  
20 (referencing 42 U.S.C. § 300gg-2 and 45 C.F.R. § 147.106).) However, insurance  
21 providers such as Blue Shield are authorized to modify insurance plans each year in  
22 various ways, including increasing premiums or copayment amounts, modifying  
23 coverage for particular services, and delineating which medical providers were within the  
24 insurance network. (*See id.*) To ensure that individuals are aware of changes to their  
25 insurance, providers such as Blue Shield are required to provide written notice of renewal  
26 “before the date of the first day of the next annual open enrollment period” in which the  
27 individual can opt to select different coverage and/or a different insurance provider. *See*  
28 45 C.F.R. § 147.106(f)(1); *see also id.* § 147.106(f)(2) (delineating notice requirements to

1 individuals in plans that are not being modified); *id.* § 147.200 (describing the “summary  
2 of benefits and coverage” which must be included in notice given to individuals).

3  
4 As authorized by the implementing regulations, the Centers for Medicare and  
5 Medicaid Services has issued guidance on the “form and manner of the notices that are  
6 required to be provided when a health insurance issuer . . . renews a product.” (Dkt. 46-8  
7 Ex. L at 1.) The guidance states that insurers must include information about premiums,  
8 “significant changes to the enrollee’s coverage,” “other health coverage options,” and  
9 “[c]ontact information for the consumer to call with questions.” (*Id.* at 6; *see also id.*  
10 Attachment 7 (listing examples of significant changes as “changes in deductibles, cost  
11 sharing, . . . covered benefits, eligibility and provider network”).) The form letters  
12 provided in the guidance as examples of sufficient notice include phrases such as:

- 13  
14 • **Important: [Name of issuer] is continuing to over your health coverage**  
15 **for next year. Some plan details may have changed. Unless you take**  
16 **action by [Date], you will be automatically enrolled to continue this**  
17 **coverage next year. . . . Read this letter to learn more and to review your**  
18 **options.**
- 19 • **This letter summarizes any changes to your coverage so you can decide**  
20 **if you want to keep your plan or look for a different one.**
- 21 • You can choose a new plan during Open Enrollment from [beginning date  
22 through end date].
- 23 • **So what are my options if . . . I don’t like the plan changes presented**  
24 **above? YOU HAVE THREE WAYS TO LOOK INTO OTHER PLANS**  
25 **AND ENROLL: 1. Visit [Marketplace website] and look at other [Name of**  
26 **Marketplace] plans.**
- 27 • Questions? Call [Name of issuer] at [Issuer phone number], or visit [Issuer  
28 website].

(*Id.* Attachment 1 (emphasis in original).)

1 Blue Shield, in compliance with applicable statutes and regulations, mailed  
2 Plaintiff a packet of information regarding changes to her insurance (*e.g.*, increasing  
3 premiums) in late 2015. (Dkt. 46-2 ¶ 5; Dkt. 46-5 ¶ 4; Dkt. 46 at 10.) Included in the  
4 packet was information of alternative insurance plans offered by Blue Shield. (Dkt. 46-5  
5 ¶ 4.) In response to the numerous packets that were returned as undelivered in previous  
6 years, Blue Shield decided to call each of its existing members using a pre-recorded  
7 message to alert them to the fact that their packets had been mailed. (*Id.* ¶ 7.)  
8

9 The text of the pre-recorded message went through several iterations and was  
10 drafted by Blue Shield’s marketing communications department, which “houses the  
11 professional writers that are responsible for crafting all communications” with existing  
12 and prospective customers. (*Id.* ¶ 9.) The final script read:  
13

14 Hello.

15  
16 This is an important message from Blue Shield of California. It’s time to review  
17 your 2016 health plan options and see what’s new.  
18

19 Earlier this month, we mailed you information about your 2016 plan and benefit  
20 changes. It compares your current health plan to other options from Blue Shield.  
21 You can also find out more online at [blueshieldca.com](http://blueshieldca.com). If you have not received  
22 your information packet in the mail, or if you have any questions, please call the  
23 number on the back of your member ID card.  
24

25 Thank you.

26  
27 Goodbye.  
28

1 (Dkt. 46-2 ¶ 6.)  
2

3 Blue Shield called Plaintiff at the number she provided on the Covered California  
4 application, which was her cellular telephone number, on December 3, 2015. (*Id.*) Three  
5 days later, she completed an application with Blue Shield for a different health insurance  
6 plan for the 2016 year. (*Id.* ¶ 7.)  
7

### 8 **III. LEGAL STANDARD**

9

10 The Court may grant summary judgment on “each claim or defense—or the part of  
11 each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a).  
12 Summary judgment is proper where the pleadings, the discovery and disclosure materials  
13 on file, and any affidavits show that “there is no genuine dispute as to any material fact  
14 and the movant is entitled to judgment as a matter of law.” *Id.*; *see also Celotex Corp. v.*  
15 *Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial  
16 burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*,  
17 477 U.S. at 325. A factual issue is “genuine” when there is sufficient evidence such that  
18 a reasonable trier of fact could resolve the issue in the nonmovant’s favor. *Anderson v.*  
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “material” when its resolution  
20 might affect the outcome of the suit under the governing law, and is determined by  
21 looking to the substantive law. *Id.* “Factual disputes that are irrelevant or unnecessary  
22 will not be counted.” *Id.* at 249.  
23

24 Where the movant will bear the burden of proof on an issue at trial, the movant  
25 “must affirmatively demonstrate that no reasonable trier of fact could find other than for  
26 the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).  
27 In contrast, where the nonmovant will have the burden of proof on an issue at trial, the  
28 moving party may discharge its burden of production by either (1) negating an essential

1 element of the opposing party’s claim or defense, *Adickes v. S.H. Kress & Co.*, 398 U.S.  
2 144, 158–60 (1970), or (2) showing that there is an absence of evidence to support the  
3 nonmoving party’s case, *Celotex Corp.*, 477 U.S. at 325. Once this burden is met, the  
4 party resisting the motion must set forth, by affidavit, or as otherwise provided under  
5 Rule 56, “specific facts showing that there is a genuine issue for trial.” *Anderson*, 477  
6 U.S. at 256. A party opposing summary judgment must support its assertion that a  
7 material fact is genuinely disputed by (i) citing to materials in the record, (ii) showing the  
8 moving party’s materials are inadequate to establish an absence of genuine dispute, or  
9 (iii) showing that the moving party lacks admissible evidence to support its factual  
10 position. Fed. R. Civ. P. 56(c)(1)(A)–(B). The opposing party may also object to the  
11 material cited by the movant on the basis that it “cannot be presented in a form that  
12 would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2). But the opposing party must  
13 show more than the “mere existence of a scintilla of evidence”; rather, “there must be  
14 evidence on which the jury could reasonably find for the [opposing party].” *Anderson*,  
15 477 U.S. at 252.

16  
17 In considering a motion for summary judgment, the court must examine all the  
18 evidence in the light most favorable to the non-moving party, and draw all justifiable  
19 inferences in its favor. *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W.*  
20 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630–31 (9th Cir. 1987).  
21 The court does not make credibility determinations, nor does it weigh conflicting  
22 evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).  
23 But conclusory and speculative testimony in affidavits and moving papers is insufficient  
24 to raise triable issues of fact and defeat summary judgment. *Thornhill Pub. Co., Inc. v.*  
25 *GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be  
26 admissible. Fed. R. Civ. P. 56(c). “If the court does not grant all the relief requested by  
27 the motion, it may enter an order stating any material fact—including an item of damages  
28

1 or other relief—that is not genuinely in dispute and treating the fact as established in the  
2 case.” Fed. R. Civ. P. 56(g).

#### 3 4 **IV. DISCUSSION**

5  
6 The TCPA prohibits initiating “any telephone call to any residential telephone line  
7 using an artificial or prerecorded voice to deliver a message without the prior express  
8 consent of the called party.” 47 U.S.C. § 227(b)(1)(B); *see also id.* § 227(A) (prohibiting  
9 making “any call (other than a call made . . . with prior express consent of the called  
10 party) . . . using any automatic telephone dialing system or an artificial or prerecorded  
11 voice . . . to any telephone number assigned to a . . . cellular telephone service”).

##### 12 13 **A. Standing**

14  
15 As an initial matter, Blue Shield argues that Plaintiff has not suffered a concrete  
16 and particularized injury necessary for Article III standing. (Mot. at 24–25.) To establish  
17 Article III standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly  
18 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed  
19 by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defs. of*  
20 *Wildlife*, 504 U.S. 555, 560 (1992)). With regard to the first element, “[t]o establish  
21 injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally  
22 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not  
23 conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

24  
25 The parties disagree on the scope of the Supreme Court’s recent decision in  
26 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)—particularly as it applies to TCPA cases.  
27 In *Spokeo*, the plaintiff brought a class action lawsuit against the operator of a “people  
28 search engine” for violations of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§

1 1681 *et seq.*, upon discovering that the information the defendant had gathered and  
2 disseminated online about the plaintiff was incorrect. *Spokeo*, 136 S. Ct. at 1544. The  
3 FCRA “imposes a host of requirements concerning the creation and use of consumer  
4 reports,” including the requirement that consumer reporting agencies “follow reasonable  
5 procedures to assure maximum possible accuracy of” consumer reports. *Id.* at 1545  
6 (citing 15 U.S.C. § 1681e(b)). Both actual and statutory damages are available for FCRA  
7 violations. *Id.* (citing 15 U.S.C. § 1681n(a)). The Ninth Circuit had reversed the district  
8 court ruling that the plaintiff lacked standing and held that the plaintiff alleged adequate  
9 injury in fact, based on allegations that the defendant had violated *his* statutory rights, and  
10 that his personal interest in the handling of his credit information was sufficiently  
11 particularized. *Id.* at 1545.

12  
13 The Supreme Court vacated the decision and remanded it to the Ninth Circuit  
14 because it had not considered *both* aspects of the injury in fact analysis: whether the  
15 injury was concrete *and* particularized. (*Id.*) The Supreme Court went on to explain that  
16 in some instances “Congress may ‘elevat[e] to the status of legally cognizable injuries  
17 concrete, *de facto* injuries that were previously inadequate in law.’” *Id.* at 1549 (quoting  
18 *Lujan*, 504 U.S. at 578). However, “Article III standing requires a *concrete* injury even  
19 in the context of a statutory violation. For that reason, [the plaintiff] could not, for  
20 example, allege a bare procedural violation, divorced from any concrete harm, and satisfy  
21 the injury-in-fact requirement of Article III.” *Id.* (emphasis added). On the other hand,  
22 “the violation of a procedural right granted by statute can be sufficient in some  
23 circumstances to constitute injury in fact. In other words, a plaintiff in such a case need  
24 not allege any additional harm beyond the one Congress has identified.” *Id.* Finally, the  
25 Court noted that “[a] violation of one of the FCRA’s procedural requirements may result  
26 in no harm . . . not all inaccuracies cause harm or present any material risk of harm. An  
27 example that comes readily to mind is an incorrect zip code. It is difficult to imagine  
28



1 how the dissemination of an incorrect zip code, without more, could work any concrete  
2 harm.” *Id.* at 1550.

3  
4 Here, Blue Shield argues that Plaintiff lacks standing because she “has not alleged  
5 and cannot prove any concrete harm caused by Blue Shield. . . . She did not pay any  
6 additional money for the call.” (Mot. at 25.) The Court disagrees that Plaintiff’s  
7 allegations are insufficient. In contrast with a FCRA violation, which “*may* result in no  
8 harm,” *Spokeo*, 136 S. Ct. at 1550, a TCPA violation entails inherent harms sufficient to  
9 establish injury in fact. The TCPA codified a remedy for injuries that *already existed* in  
10 order to curb the problem of unwanted telemarketing calls. In determining that the TCPA  
11 encompasses text messages as well as telephone calls, the Ninth Circuit described the  
12 purpose of the TCPA as follows:

13  
14 The TCPA was enacted to “protect the privacy interests of  
15 residential telephone subscribers by placing restrictions on  
16 unsolicited, automated telephone calls to the home and to  
17 facilitate interstate commerce by restricting certain uses of  
18 facsimile machines and automatic dialers.” S. Rep. No. 102-  
19 178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968. The  
20 TCPA was enacted in response to an increasing number of  
21 consumer complaints arising from the increased number of  
22 telemarketing calls. *See id.* at 2. The consumers complained  
23 that such calls are a “nuisance and an invasion of privacy.” *See*  
*id.* The purpose and history of the TCPA indicate that  
24 Congress was trying to prohibit the use of ATDSs to  
25 communicate with others by telephone in a manner that would  
26 be an invasion of privacy.

27 *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). Thus, “[u]nlike  
28 the statute at issue in *Spokeo* . . . the TCPA section at issue does not require the adoption  
of procedures to decrease *congressionally-identified* risks. . . . It directly forbids  
activities that *by their nature* infringe the privacy-related interests that Congress sought to  
protect by enacting the TCPA. . . . In any event, section 227 establishes substantive, not

1 procedural, rights to be free from telemarketing calls consumers have not consented to  
2 receive.” *A.D. v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 4417077, at \*6–7  
3 (N.D. Ill. Aug. 19, 2016) (emphasis added). For this reason, “other district courts have  
4 similarly distinguished statutory violations of the TCPA from statutory violations of the  
5 FCRA in the wake of the Court’s *Spokeo* decision.” *Cabiness v. Educ. Fin. Sols., LLC*,  
6 No. 16-CV-01109-JST, 2016 WL 5791411, at \*5 (N.D. Cal. Sept. 1, 2016) (citing *Mey v.*  
7 *Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at \*3 (N.D. W. Va. June 30,  
8 2016) (noting that the concern in *Spokeo* about a “‘bare procedural violation, divorced  
9 from any concrete harm’ . . . has little application to claims under the TCPA, since those  
10 claims are not based on ‘bare procedural’ rights, but rather on substantive prohibitions of  
11 actions directed toward specific consumers.”)).

12  
13 Unlike FCRA violations, TCPA violations necessarily cause harm to consumers.  
14 For example, *Cabiness* explained that “[e]very unconsented call through the use of an  
15 [Automatic Telephone Dialing System] to a consumer’s cellular phone results in actual  
16 harm: the recipient wastes her time and incurs charges for the call if she answers the  
17 phone, and her cell phone’s battery is depleted even if she does not answer the phone.”  
18 *Cabiness*, 2016 WL 5791411, at \*5. “In addition to these tangible harms, unsolicited  
19 calls also cause intangible harm by annoying the consumer.” *Id.* Although the *Cabiness*  
20 decision was limited because the plaintiff had alleged *additional* harms such as “stress  
21 and anxiety,” *see id.*, the Court finds the *Cabiness* reasoning instructive here.

22  
23 Blue Shield relies on two district court cases decided after *Spokeo* which assert that  
24 a TCPA violation on its own is not sufficient to constitute injury in fact. (Mot. at 24–25  
25 (citing *Romero v. Dep’t Stores Nat’l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL  
26 4184099 (S.D. Cal. Aug. 5, 2016) and *Sartin v. EKF Diagnostics, Inc.*, No. CV 16-1816,  
27 2016 WL 3598297 (E.D. La. July 5, 2016)).) In *Romero*, the plaintiff alleged that the  
28 defendant called her 290 times using an automated telephone dialing system over the

1 course of six months. *Romero*, 2016 WL 4184099, at \*1. *Romero* found that the plaintiff  
2 had not met her burden of establishing standing under *Spokeo* because the fact “[t]hat  
3 Defendants called Plaintiff’s cell phone may satisfy the ‘particular’ component, but it  
4 does not automatically satisfy the requirement that the injury be ‘concrete.’” *Id.* at \*3.  
5 The *Romero* court reasoned that a TCPA violation did not necessarily confer standing  
6 because “it is possible that the recipient’s phone was not turned on or did not ring, that  
7 the recipient did not hear the phone ring, or the recipient for whatever reason was  
8 unaware that the call occurred.” *Id.* The other case on which Blue Shield relies decided  
9 that the plaintiffs lacked standing for similar reasons. *See Sartin v. EKF Diagnostics,*  
10 *Inc.*, No. CV 16-1816, 2016 WL 3598297, at \*3 (E.D. La. July 5, 2016) (“Although Dr.  
11 Sartin has plausibly alleged that defendants violated the TCPA by sending unsolicited fax  
12 advertisements, he fails to plead facts demonstrating how this statutory violation caused  
13 him concrete harm.”).

14  
15 In light of the specific purpose and history of the TCPA, the Court agrees with  
16 those federal courts that have criticized the *Romero* line of cases. *See, e.g., LaVigne v.*  
17 *First Cmty. Bancshares, Inc.*, No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992, at \*6  
18 (D.N.M. Oct. 19, 2016) (“Defendants have also offered *Romero* [to support lack of TCPA  
19 standing], which is hardly convincing. Under its rather draconian analysis, a plaintiff  
20 would find it almost impossible to allege a harm as a result of these robocalls. Worse, the  
21 case ignores the existence of intangible harms that have been recognized in the legislative  
22 history and in the case law. The Court agrees with plaintiff that *Romero* is an outlier in  
23 holding that a violation of the TCPA is a bare procedural violation and that some  
24 additional harm must be shown to establish standing.”); *A.D.*, 2016 WL 4417077, at \*7  
25 (“The Court respectfully disagrees with the reasoning of the judge in *Sartin*. In contrast  
26 to statutes that impose obligations regarding how one manages data, keeps records, or  
27 verifies information, section 227 of the TCPA directly prohibits a person from taking  
28 actions directed at consumers who will be touched by that person’s conduct. It does not

1 matter whether a plaintiff lacks additional tangible harms like wasted time, actual  
2 annoyance, and financial losses. Congress has identified that unsolicited telephonic  
3 contact constitutes an intangible, concrete harm, and A.D. has alleged such concrete  
4 harms that she herself suffered. It would be redundant to require a plaintiff to allege that  
5 her privacy and solitude were breached by a defendant's violation of section 227, because  
6 Congress has provided legislatively that a violation of section 227 is an invasion of the  
7 call recipient's privacy.")

8  
9 In this case, Plaintiff alleges a concrete and particularized injury by laying out the  
10 elements of a TCPA violation. Additionally, Plaintiff alleges that her privacy was  
11 invaded. (*See* Dkt. 68 at 24.) This is precisely the type of harm that the TCPA was  
12 enacted to prevent. *Satterfield*, 569 F.3d at 954; *see, e.g., Holderread v. Ford Motor*  
13 *Credit Co., LLC*, No. 4:16- cv-00222, 2016 WL 6248707, at \*2 (E.D. Tex. Oct. 26, 2016)  
14 ("The harm caused by unwanted phone calls is closely related to an invasion of privacy,  
15 which is a widely recognized common law tort. . . . Congress identified the intangible  
16 harm of invasion of privacy as legally cognizable. Considering this history and  
17 Congress's judgment, the Court finds an invasion of privacy within the context of the  
18 TCPA constitutes a concrete harm that meets the injury-in-fact requirements."); *Griffith*  
19 *v. ContextMedia, Inc.*, No. 16-C-2900, 2016 WL 6092634, at \*1–2 (N.D. Ill. Oct. 19,  
20 2016) ("The complaint also alleges that plaintiff 'lost time reading, tending to and  
21 responding to' the unsolicited communications, and that the texts *invaded her privacy*.  
22 Courts in this district have held, both before and after the Court's decision in *Spokeo*, . . .  
23 that loss of time and privacy are concrete injuries for the purpose of conferring Article III  
24 standing.") (emphasis added); *Hewlett v. Consolidated World Travel, Inc.*, No. 16-713  
25 WBS, 2016 WL 4466536, at \*2 (E.D. Cal. Aug. 23, 2016) ("Courts have consistently  
26 held that allegations of nuisance and *invasion of privacy* in TCPA actions are sufficient to  
27 state a concrete injury under Article III.") (emphasis added); *Krakauer v. Dish Network*  
28 *L.L.C.*, No. 14-cv-333, 2016 WL 4272367, at \*2 (M.D.N.C. Aug. 5, 2016) (TPCA

1 violations “are more than bare procedural violations; here, Satellite Systems Network,  
2 Dish’s alleged agent, actually called the class members’ numbers. These calls form  
3 concrete injuries because unwanted telemarketing calls are a disruptive and annoying  
4 *invasion of privacy*. . . . While class members did not necessarily pick up or hear ringing  
5 every call at issue in this case, each call created, at a minimum, a *risk of an invasion of a*  
6 *class member’s privacy*. *Spokeo* clarified that a ‘risk of real harm’ was enough to show  
7 concrete injury.”) (emphasis added); *Caudill v. Wells Fargo Home Mortgage, Inc.*, No.  
8 16-cv-066, 2016 WL 3820195, at \*2 (E.D. Ky. Jul. 11, 2016) (“These alleged harms,  
9 such as *invasion of privacy*, have traditionally been regarded as providing a basis for a  
10 lawsuit in the United States. . . . Further, when Congress established the TCPA in 1991,  
11 it did so to protect consumers from the ‘nuisance, invasion of privacy, cost, and  
12 inconvenience that autodialed and prerecorded calls generate.’ . . . Based on *Spokeo*, the  
13 Court is satisfied that Caudill has alleged an injury-in-fact that is concrete and  
14 particularized.”) (emphasis added). Accordingly, Plaintiff has standing to bring this  
15 action.

## 16

### 17 **B. Consent**

## 18

19 The TCPA prohibits pre-recorded phone calls made without prior express consent  
20 of the called party. 47 U.S.C. § 227(a),(b)(1)(B). Accordingly, consent is a defense to a  
21 TCPA claim. *Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed. Appx. 598, 600 n.1 (9th Cir.  
22 2011).

23

24 The TCPA delegated to the FCC the authority to “prescribe regulations to  
25 implement [its] requirements.” 47 U.S.C. § 227(b)(2). The FCC has issued rules and  
26 regulations regarding the issue of “prior express consent,” stating that “persons who  
27 knowingly release their phone numbers have in effect given their invitations or  
28 permission to be called at the number which they have given, absent instructions to the

1 contrary.” See In re Rules and Regulations Implementing the Telephone Consumer  
2 Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992).

3  
4 In relationships between consumers and businesses, providing one’s phone number  
5 has generally been deemed to constitute implied consent to communications that are  
6 *closely related* to the purpose for which the number was provided. See, e.g., *Satterfield*,  
7 569 F.3d at 954–55 (9th Cir. 2009) (holding that provision of a phone number to receive  
8 promotional material from Nextones or their affiliates and brands did not consent to  
9 messages from a different company to whom Nextones provided the phone number);  
10 *Roberts v. PayPal, Inc.*, No. C 12–622 PJH, 2013 W L 2384242, at \*4 (N.D. Cal. May  
11 30, 2013) (finding that the plaintiff had consented to receive text messages “closely  
12 related to the circumstances under which [he had] . . . provided his cell phone number”);  
13 *Aderhold v. Car2go N.A., LLC*, No. C13-489RAJ, 2014 WL 794802, at \*8 (W.D. Wash.  
14 Feb. 27, 2014), *aff’d*, No. 14-35208, 2016 WL 4709873 (9th Cir. Sept. 9, 2016)  
15 (“Although the court has no need to consider how broadly to construe the consent of a  
16 consumer who provides his cellular phone number to an entity, this court concurs with  
17 others who have concluded that a consumer at least consents to text messages ‘closely  
18 related to the circumstances under which plaintiff provided his cell phone number.’”)  
19 (quoting *Roberts*); *Olney v. Job.com, Inc.*, No. 1:12-CV-01724-LJO, 2014 WL 1747674,  
20 at \*7 (E.D. Cal. May 1, 2014) (“Defendant is correct that TCPA does not require that a  
21 call be made for the exact purpose for which the number was provided, but it  
22 undoubtedly requires that the call bear some relation to the product or service for which  
23 the number was provided.”) (quotation omitted); *Hudson v. Sharp Healthcare*, No. 13-  
24 CV-1807-MMA NLS, 2014 WL 2892290, at \*6 (S.D. Cal. June 25, 2014) (“The TCPA  
25 does not require that calls be made ‘for the exact purpose for which the number was  
26 provided,’ but rather that the call ‘bear some relation to the product or service for which  
27 the number was provided.’”) (quoting *Hudson*); *Taylor v. Universal Auto Grp. I, Inc.*, No.  
28 3:13-CV-05245-KLS, 2014 WL 6654270, at \*11 (W.D. Wash. Nov. 24, 2014) (“That is,



1 because the 2009 ‘welcome’ message is closely related to the circumstances under which  
2 plaintiff provided his cellular telephone number to old Tacoma Dodge, he gave his prior  
3 express consent to be called on that phone by defendant.”).

4  
5 On October 16, 2013, FCC regulations went into effect that carved out  
6 telemarketing calls to cellular telephones from the general paradigm wherein providing a  
7 phone number constituted implied consent to receive closely related calls. *See* 47 C.F.R.  
8 § 64.1200(a). Instead, the regulations prohibit “any telephone call that includes or  
9 introduces an advertisement or constitutes telemarketing, using an automatic telephone  
10 dialing system or an artificial or prerecorded voice” to cellular telephones unless it is  
11 made “with the prior express *written* consent of the called party.” *Id.* § 64.1200(a)(2)  
12 (emphasis added).

13  
14 The regulations define “advertisement” as “any material advertising the  
15 commercial availability or quality of any property, goods, or services.” *Id.*  
16 § 64.1200(f)(1). “Telemarketing” is defined as “the initiation of a telephone call or  
17 message for the purpose of encouraging the purchase or rental of, or investment in,  
18 property, goods, or services, which is transmitted to any person.” *Id.* § 64.1200(f)(12).

19  
20 As for the term “prior express written consent,” it “means an agreement, in writing,  
21 bearing the signature of the person called that clearly authorizes the seller to deliver or  
22 cause to be delivered to the person called advertisements or telemarketing messages using  
23 an automatic telephone dialing system or an artificial or prerecorded voice, and the  
24 telephone number to which the signatory authorizes such advertisements or telemarketing  
25 messages to be delivered.” *Id.* § 64.1200(f)(8). In addition, that written consent  
26 agreement must “include a clear and conspicuous disclosure informing the person signing  
27 that . . . [they] authorize[] the seller to deliver . . . telemarketing calls using an automatic  
28 telephone dialing system or an artificial or prerecorded voice.” *Id.* § 64.1200(f)(9).

1 Finally, even with express written consent, such calls must “provide an automated,  
2 interactive voice- and/or key press-activated opt-out mechanism for the called person to  
3 make a do-not-call request, including brief explanatory instructions on how to use such  
4 mechanism.” *Id.* § 64.1200(b)(3).

5  
6 In this case, Blue Shield argues, and Plaintiff does not contest, that she provided  
7 express consent by providing her cellular telephone number as the best number to reach  
8 her on her Covered California application. (Mot. at 15; Dkt. 68 at 13.) However,  
9 Plaintiff argues that the call constituted *telemarketing* and accordingly *express written*  
10 consent was required. (Dkt. 68 at 13.) The parties do not dispute that providing her  
11 number as the best way to reach her does not constitute express written consent—there  
12 was no clear authorization of telemarketing, there was no disclosure informing her that  
13 she was providing such consent (let alone a clear and conspicuous disclosure), and the  
14 call’s text did not include or reference an opt-out mechanism. (*See* Mot. at 15–16; Dkt.  
15 68 at 13–14.) Therefore, this case turns on whether the call constituted telemarketing.

16  
17 The Ninth Circuit has stated that courts should evaluate the content of purported  
18 telemarketing “with a measure of common sense.” *Chesbro v. Best Buy Stores, L.P.*, 705  
19 F.3d 913, 918 (9th Cir. 2012). On the one hand, “explicit mention of a good, product, or  
20 service [is not necessary] where the implication is clear from the context” and additional,  
21 informative content does not inoculate telemarketing advertisements. *Id.* On the other,  
22 “messages ‘whose purpose is to facilitate, complete, or confirm a commercial transaction  
23 that the recipient has previously agreed to enter into with the sender are not  
24 advertisements.’” *Aderhold v. car2go N.A. LLC*, No. 14-35208, 2016 WL 4709873, at \*1  
25 (9th Cir. Sept. 9, 2016) (unpublished) (quoting *In re Rules & Regs. Implementing the Tel.*  
26 *Consum. Prot. Act of 1991*, 21 FCC Rcd. 3787, 3812 ¶ 49 (Apr. 6, 2006)).

27  
28 //



1 Blue Shield argues that because the call was purely informational it was not an  
2 advertisement or telemarketing call. (Mot. at 16–19.) Plaintiff disagrees, based on the  
3 fact that the calls were (1) discussed as part of a retention strategy, (2) written by the  
4 marketing team, and (3) initially drafted to link to Blue Shield’s renewal page and  
5 included “We want to keep you covered.” (Dkt. 68 at 16–17.)

6  
7 Simply stated, the text of Blue Shield’s telephone call is informational. It notified  
8 recipients that they should have received information about changes to their insurance  
9 plan, encouraged them to seek out information about their plan by examining the  
10 information packet and visiting Blue Shield’s website, and directed them to call the  
11 member service number (as opposed to the sales department) to resolve any questions or  
12 issues. (Dkt. 46-5 ¶ 10.) This content is virtually identical to the CMS template letters  
13 insurers such as Blue Shield send to customers regarding renewal. Both messages  
14 emphasize the importance of their contents, highlight that customers’ insurance plans and  
15 benefits had changed, inform recipients that there are alternative plans available, provide  
16 the insurer’s contact information, and convey the time-sensitivity of the information and  
17 the opportunity to renew or modify one’s insurance coverage. The only additional  
18 content in the calls versus the mailing *references the mailing*—informing recipients that  
19 (1) Blue Shield mailed them information and (2) what to do if they had not yet received  
20 their mailing—and is similarly informational. *Cf. Chesbro*, 705 F.3d at 918 (“Thus, the  
21 calls encouraged the listener to make future purchases at Best Buy. . . . Any additional  
22 information provided in the calls does not inoculate them.”).

23  
24 The informative, non-telemarketing nature of the call is consistent with those in  
25 other decisions delineating the informative nature of messages. *See, e.g., Daniel v. Five*  
26 *Stars Loyalty, Inc.*, No. 15-CV-03546-WHO, 2015 WL 7454260, at \*3 (N.D. Cal. Nov.  
27 24, 2015) (holding that a text message received within minutes of opting into a rewards  
28 program and stating “Welcome to Five Stars, the rewards program of Flame Broiler.

1 Reply with your email to finish registering and get free pts! Txt STOP to unsubscribe.”  
2 provided information about how to complete registration and did not constitute  
3 advertising or telemarketing); *Aderhold*, No. C13-489RAJ, 2014 WL 794802, at \*9  
4 (holding that text received within seconds of submitting an online registration form to  
5 car2go and stating “Please enter your car2go activation code 145858 into the emailed  
6 link. We look forward to welcoming you to car2go.” was informative, not  
7 telemarketing); *Wick v. Twilio Inc.*, No. C16-00914RSL, 2016 WL 6460316, at \*1, \*2–3.  
8 (W.D. Wash. Nov. 1, 2016) (holding that text message stating “Noah, Your order at  
9 Crevalor is incomplete and about to expire. Complete your order by visiting  
10 <http://hlth.co/xDoXEZ>.” did not constitute telemarketing).

11  
12 The content of the call also contrasts starkly with messages that courts have  
13 deemed to be telemarketing or advertising. Unlike the call in question here, those  
14 messages unequivocally evoke or reference commerce. *See, e.g., Larson v. Harman*  
15 *Mgmt. Corp.*, No. 116CV00219DADSKO, 2016 WL 6298528, at \*1, \*3–4 (E.D. Cal.  
16 Oct. 27, 2016) (“Float into A&W for a 99 cent Reg. Sized Root Beer Float! Limit 1.”);  
17 *Drew v. Lexington Consumer Advocacy, LLC*, No. 16-CV-00200-LB, 2016 WL 1559717,  
18 at \*1, \*6 (N.D. Cal. Apr. 18, 2016) (“Struggling to get ahead but your cash advances  
19 holding you back? We can make them go away . . . call 4753291921 for info.”);  
20 *Chesbro*, 705 F.3d at 918 (calls urging recipient to “redeem” Reward Zone points);  
21 *Consumer Prot. Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL  
22 2132694, at \*1 (D. Ariz. July 16, 2009) (fax listing the share price of JYTO [a stock] and  
23 stating that “JYTO IS ALREADY A WINNER!” and is a “Strong Buy”); *Meyer v. Bebe*  
24 *Stores, Inc.*, No. 14-CV-00267-YGR, 2015 WL 431148, at \*3 (N.D. Cal. Feb. 2, 2015)  
25 (message offering “10% OFF reg-price in-store/online”).

26  
27 Furthermore, deeming the content of the call to be informative rather than  
28 constituting advertising or telemarketing is consistent with the Health Insurance

1 Portability and Accountability Act (“HIPPA”). This case does not arise under that  
2 statutory scheme or its implementing regulations, but given that it regulates  
3 communications between insurers and customers, consistency with HIPPA is relevant to  
4 this Court’s determinations.

5  
6 HIPPA regulations allow insurers to contact their members about matters relating  
7 to renewal or replacement of their insurance coverage. *See* 45 C.F.R. § 164.502(a)(1)(ii)  
8 (authorizing the use of protected health information by insurers for its health care  
9 operations); *id.* § 164.501 (defining health care operations to include “the creation,  
10 renewal, or replacement of a contract of health insurance or health benefits”). However,  
11 HIPPA requires an individual’s written authorization before making marketing  
12 communications. *Id.* § 164.508(a)(3). Marketing is defined as “a communication about a  
13 product or service that encourages recipients of the communication to purchase or use the  
14 product or service” but explicitly excludes “communications about[] the entities  
15 participating in a health care provider network or health plan network [and] replacement  
16 of, or enhancements to, a health plan.” *Id.* § 164.501. The call in this case is, therefore,  
17 not marketing under HIPPA as it is entirely about changes to and replacement of  
18 Plaintiff’s health insurance.

19  
20 Plaintiff’s only argument based on the actual text of the call is that urging  
21 recipients to visit Blue Shield’s website transformed the call into telemarketing. (Dkt. 68  
22 at 17.) Blue Shield’s internal discussions regarding inclusion of the website in the call’s  
23 script demonstrate that the goal was to direct customers to Blue Shield’s member renewal  
24 tool, which allowed consumers to compare their current plan with various Blue Shield  
25 alternatives. (*See* Dkt. 61 Ex. 14.) However, the renewal tool was purely  
26 informational—if customers “wanted to switch plans or purchase a plan [they] would  
27 have to access a different portion of the website.” (Dkt. 69 at 7 n.4.) The mere fact that  
28 parts of Blue Shield’s website contains the capability of allowing consumers to engage in

1 commerce does not transform any message including its homepage into telemarketing or  
2 advertising. *See Aderhold*, No. C13-489RAJ, 2014 WL 794802, at \*9 (“Attempting to  
3 connect the car2go text [Plaintiff] received to the sort of telemarketing call that is at the  
4 heart of the TCPA, he argues that because the text directed him to place an activation  
5 code into an email that ultimately connected to the car2go website which contains  
6 promotions for the car2go service, it was a telemarketing text. . . . It is manifestly  
7 insufficient that Mr. Aderhold could, after choices of his own making, divert himself  
8 from the registration process to car2go marketing.”).

9  
10 Plaintiff argues that various contextual facts make the call telemarketing or  
11 advertising. First, she argues that even if the text is facially informative, Blue Shield’s  
12 overarching incentive to retain customers and receive premium payments creates a clear  
13 implication of encouraging purchase of a good, product, or service. (*See* Dkt. 68 at 17;  
14 *cf. Chesbro*, 705 F.3d 918 (“Neither the statute nor the regulations require an explicit  
15 mention of a good, product, or service where the implication is clear from the context.”).)  
16 However, that purpose is simply too attenuated to give rise to a *clear*, unequivocal  
17 implication of advertising. *See Daniel*, No. 15-CV-03546-WHO, 2015 WL 7454260, at  
18 \*4 (“To the extent that it could be reasonably inferred based on context or otherwise that  
19 the text’s purpose was also to “encourage future purchases at Flame Broiler,” that  
20 purpose is simply too attenuated to make the text telemarketing . . . . Certainly, the text  
21 was designed to allow Daniel to complete the registration process, which could result in  
22 an increase in the chances of Daniel making future purchases at Flame Broiler or other  
23 participants in the Five Stars program. But Daniel cites no authority indicating that this  
24 degree of connection between communication and purchase is sufficient to transform a  
25 text of the sort he received into a telemarketing message.”). Were this Court to hold  
26 otherwise, it would transform practically *all* communication from any entity that is  
27 financially motivated and exchanges goods or services for money into telemarketing or  
28

1 advertising, which would contravene the delineated definitions of telemarketing and  
2 advertising in 47 C.F.R. § 64.1200(f)(1),(12).

3  
4 Plaintiff also attempts to construe the call as telemarketing and advertisement  
5 based on its earlier drafts and its context. (Dkt. 68 at 3–10.) However, the *deletion* of a  
6 phrase expressing Blue Shield’s desire to keep its customers insured does little to change  
7 the informational valence of the call, first and foremost because it was not actually part of  
8 the call and also because it is clearly a friendly salutation that at most barely and  
9 obliquely encourages commercial activity. Similarly, the fact that Blue Shield initially  
10 conceptualized the call as a component of its overall customer retention efforts is  
11 insignificant. (*See, e.g.*, Dkt. 63 Ex. 8 at 107.) The call was devoid of marketing content  
12 and Blue Shield’s discussions around the call centered on *ameliorating* its members’  
13 failure to open the mandated mailing and their subsequent displeasure at insurance  
14 coverage changes. (*See, e.g.*, Dkt. 46-5 Ex. D.) If the Court accepted Plaintiff’s  
15 argument, nearly all innocuous, customer-friendly and informative gestures would be  
16 needlessly transformed into telemarketing and advertising.

17  
18 Evaluating Blue Shield’s call with a measure of common sense, the Court must  
19 conclude that the call is not telemarketing or advertisement within the meaning of 47  
20 C.F.R. § 64.1200(f)(1),(12).<sup>2</sup> It makes no sense to the Court that a single call tracking  
21 Blue Shield’s mandatory communications regarding insurance enrollment and renewal  
22 would expose Blue Shield to millions of dollars of liability under the TCPA.

23  
24  
25  
26  
27  
28 <sup>2</sup> Because the Court finds that the call does not constitute telemarketing or advertisement, the Court need not address Blue Shield’s other arguments for summary judgment.

1 **V. CONCLUSION**

2

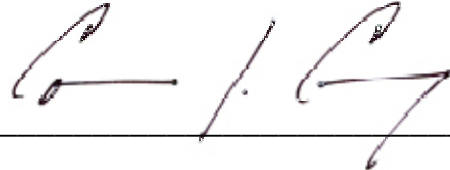
3 For the foregoing reasons, Blue Shield's motion for summary judgment is  
4 GRANTED.

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7 DATED: January 13, 2017

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9 CORMAC J. CARNEY  
10 UNITED STATES DISTRICT JUDGE

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