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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
8 AT SACRAMENTO
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10 MICHELLE COULTER and RICHARD
11 DANIELS, on Behalf of Themselves and
12 all Others Similarly Situated,

13 Plaintiffs,

14 v.

15 ASCENT MORTGAGE RESOURCE
16 GROUP LLC, d/b/a AMERICAN RENT
17 TO OWN,

18 Defendant.
19

No. 2:16-cv-02237-SB

**ORDER DENYING MOTION TO
DISMISS; GRANTING STAY**

20 Before the Court are Defendant's Motion to Dismiss, or in the Alternative,
21 to Stay, ECF No. 16, and Plaintiff's Motion to Compel, ECF No. 18. A telephonic
22 hearing was held on the motions on May 16, 2017. Plaintiffs were represented by
23 Yeremey O. Krivochev.¹ Defendant was represented by Jeffrey Sikkema.

24 This is a proposed class action under the Telephone Consumer Protection
25 Act ("TCPA"), 47 U.S.C. § 227. Plaintiffs allege that Defendant "negligently,
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27 ¹ Attorney Yitzchak Kopel also participated in a limited capacity on behalf of
28 Plaintiffs.

1 knowingly, and willfully, contacted Plaintiffs and class members on their
2 telephone using an artificial or prerecorded voice without their prior written
3 consent.” ECF No. 1. Plaintiffs are seeking statutory damages, injunctive relief,
4 and attorney’s fees.

5 Defendant moves to dismiss the action under Fed. R. Civ. P. 12(b)(1)
6 because Plaintiffs lack standing to bring this action under Article III of the U.S.
7 Constitution and the recent decision of *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136
8 S. Ct. 1540 (2016). In the alternative, Defendant asks the Court to stay the matter
9 because there are three pending appellate cases² that deal with the definition of
10 “automatic telephone dialing system” and the interpretation of the phrase “prior
11 express consent” under 47 U.S.C. § 227(b)(1)(A), which are relevant to Plaintiffs’
12 claims.

13 **Plaintiffs’ Complaint**

14 Plaintiff Michelle Coulter is a resident of Sacramento, California and
15 Plaintiff Richard Daniels is a resident of Desert Hot Springs, California. ¶ 6, 7.
16 Defendant Assent Mortgage Resource Group, LLC, d/b/a/ American Rent to Own,
17 is a Colorado corporation with its principal place of business located in Denver,
18 Colorado. ¶ 8. Defendant advertises itself as a rental home search service and a
19 means for consumers with poor credit to purchase a home. *Id.*

20 Plaintiffs allege that Defendant called Mr. Daniels at least eleven times on
21 his cell phone using an autodialer and/or an artificial or prerecorded voice, even
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23 ² The three cases are: (1) numerous petitions challenging the FCC’s 2015 Omnibus
24 Ruling are pending before the D.C. Circuit, *ACA International v. FCC*, Case No.
25 15-1211; (2) the case of *Marks v. Crunch San Diego, LLC*, Case No. 14-56834
26 (involving the definition of “automated telephonic dialing system”) and (3) the
27 Ninth Circuit is reexamining its ruling in *Robins v. Spokeo*, Case No. 11-56843, in
28 light of the U.S. Supreme Court’s remand.

1 though Mr. Daniels did not give Defendant prior express written consent to make
2 these calls. ¶ 16. Mr. Daniels requested that Defendant stop calling on several
3 occasions, but the calls continued despite his requests. Id.

4 Plaintiffs also allege that Defendant called Ms. Coulter at least five times on
5 her cell phone using an autodialer and/or an artificial or prerecorded voice. ¶ 21.
6 Ms. Coulter requested that Defendant stop calling her and continued to ask it to
7 stop, each and every time it called, but the calls continued despite her request. Id.

8 For its part, Defendant asserts that its calls are not the typical cold calls like
9 those of other TCPA cases. Rather, individuals who access its website provide
10 their contact information for Ascent Mortgage to follow up with them. By
11 providing the contact information, individuals explicitly consent to be contacted
12 by phone by use of an autodialer or predictive dialer. In its motion, Defendant
13 explained that before individuals can view any homes on its website, they are
14 given the following information:

15 By clicking “View Homes” I consent by electronic signature to be
16 contacted about this request and related services at the telephone
17 number provided above (dialed manually, by autodialer, and/or by text
18 message & e-mail). This consent is required as a condition to continue.
ECF No. 16-2.

19 Defendants assert that both named Plaintiffs provided such consent prior to
20 receiving any calls. After a person completes the website protocol and provides
21 their telephone number, the phone numbers are collected and stored in the
22 database in lists. Equipment is used to call the number on the applicable list. When
23 a call is picked up at the other end, the call is sent to an Ascent Mortgage
24 representative. Defendant admits that in some sense, it “uses a telephone system
25 that might be described as an ‘autodialer,’” but points out the phone numbers
26 themselves are not generated by the equipment. ECF No. 16-1 at 4. It maintains
27 procedures are in place if the person wants to be placed on a do-not-call list, but
28 neither of the two Plaintiffs ever revoked their consent or authorization to be

1 called, or asked to be placed on the do-not-call list.

2 **Telephone Consumer Protection Act**

3 The three elements of a TCPA claim are: “(1) the defendant called a cellular
4 telephone; (2) using an automatic telephone dialing system (“ATDS”); (3) without
5 the recipient’s prior express consent.” *Meyer v. Portfolio Recovery Assocs., LLC*,
6 707 F.3d 1036, 1043 (9th Cir. 2012). An ATDS means:

7 “equipment which has the capacity—

8 (A) to store or produce telephone numbers to be called, using a
9 random or sequential number generator; and

9 (B) to dial such numbers.”

10 47 U.S.C. § 227(a)(1).

11 **Standing**

12 In order for the Court to have subject matter jurisdiction to hear this case,
13 Plaintiffs must establish they have Article III standing. *Braunstein v. Arizona*
14 *Dep’t of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012). To satisfy the Article III
15 standing requirement, Plaintiffs must allege (1) they suffered an injury in fact; (2)
16 that is fairly traceable to the challenged conduct of Defendant; and (3) that is
17 likely to be redressed by a favorable judicial decision. *Spokeo*, 136 S. Ct. at 1547.

18 Defendant argues Plaintiffs do not have standing because they have not
19 adequately alleged an injury in fact. The Ninth Circuit recently addressed the
20 standing question with regard to the TCPA. See *Van Patten v. Vertical Fitness*
21 *Group, LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017). There, the Circuit applied
22 the U.S. Supreme Court’s reasoning in *Spokeo* to conclude that an allegation of a
23 violation of the TCPA is sufficient to meet the standing requirement:

24
25 As the Supreme Court explained in *Spokeo*, “both history and the
26 judgment of Congress play important roles” in supporting our
27 conclusion that a violation of the TCPA is a concrete, de facto injury.
28 *Spokeo*, 126 S. Ct. at 1549. Actions to remedy defendants’ invasions
of privacy, intrusion upon seclusion, and nuisance have long been

1 heard by American courts, and the right of privacy is recognized by
2 most states. See Restatement (Second) of Torts § 652(B) (Am. Law
3 Inst. 1977). And in enacting the TCPA, Congress made specific
4 findings that “unrestricted telemarketing can be an intrusive invasion
5 of privacy” and are a “nuisance.” Telephone Consumer Protection Act
6 of 1991, Pub. L. 102–243, § 2, ¶¶ 5, 10, 12, 13, 105 Stat. 2394
7 (1991); see also *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 132
8 S.Ct. 740, 745 (2012). Congress sought to protect consumers from the
9 unwanted intrusion and nuisance of unsolicited telemarketing phone
10 calls and fax advertisements. See Pub. L. 102–243, § 2, ¶ 12. The
11 session law for the TCPA itself stated: “Banning such automated or
12 prerecorded telephone calls to the home, except when the receiving
13 party consents to receiving the call or when such calls are necessary
14 in an emergency situation affecting the health and safety of the
15 consumer, is the only effective means of protecting telephone
16 consumers from this nuisance and privacy invasion.” *Id.* We also
17 have recognized this congressional purpose. *Satterfield v. Simon &*
18 *Schuster*, 569 F.3d 946, 954 (9th Cir. 2009).

14 The TCPA establishes the substantive right to be free from certain
15 types of phone calls and texts absent consumer consent. Congress
16 identified unsolicited contact as a concrete harm, and gave consumers
17 a means to redress this harm. We recognize that Congress has some
18 permissible role in elevating concrete, de facto injuries previously
19 inadequate in law “to the status of legally cognizable injuries.”
20 *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*,
21 504 U.S. 555, 578 (1992)). We defer in part to Congress’s judgment,
22 “because Congress is well positioned to identify intangible harms that
23 meet minimum Article III requirements.” *Id.* We also recognize that
24 “Congress’ role in identifying and elevating intangible harms does
25 not mean that a plaintiff automatically satisfies the injury-in-fact
26 requirement whenever a statute grants a person a statutory right and
27 purports to authorize that person to sue to vindicate that right.” *Id.*

24 Congress aimed to curb telemarketing calls to which consumers did
25 not consent by prohibiting such conduct and creating a statutory
26 scheme giving damages if that prohibition was violated. Unlike in
27 *Spokeo*, where a violation of a procedural requirement minimizing
28 reporting inaccuracy may not cause actual harm or present any
material risk of harm, see *id.* at 1550, the telemarketing text messages

1 at issue here, absent consent, present the precise harm and infringe
2 the same privacy interests Congress sought to protect in enacting the
3 TCPA. Unsolicited telemarketing phone calls or text messages, by
4 their nature, invade the privacy and disturb the solitude of their
5 recipients. A plaintiff alleging a violation under the TCPA “need not
6 allege any additional harm beyond the one Congress has identified.”
7 Id. at 1549 (emphasis in original). Cf. Campbell–Ewald Co. v. Gomez,
8 — U.S. —, 136 S.Ct. 663, 672 (2016) (affirming that “the District
9 Court retained jurisdiction to adjudicate Gomez’s [TCPA]
10 complaint.”).

11 Van Patten, 847 F.3d at 1042-43.

12 Based on this precedent, it is clear Plaintiffs have shown concrete,
13 particularized, legally protected and actual harms and as such, they have standing
14 to bring their claims under the TCPA. Defendant’s Motion to Dismiss for lack of
15 standing is denied.

16 **Defendant’s Motion to Stay**

17 Defendant argues key issues regarding the interpretation of the TCPA are
18 pending before the D.C. Circuit in petitions challenging the FCC’s regulations.³ It
19 also points out that the Ninth Circuit has deferred ruling in Marks v. Crunch San
20 Diego, pending the D.C.’s Circuit’s ruling.⁴ Defendant believes the issues of

21 ³ Numerous petitions challenging the FCC’s 2015 Ruling are pending before the
22 D.C. Circuit. See ACA International v. FCC, Case No. 15-1211.

23 ⁴ In Marks, the district court held the FCC does not have the statutory authority to
24 change the TCPA’s definition of an ATDS. Marks v. Crunch San Diego, 55 F.
25 Supp. 3d 1288, 1292 (S.D. Cal. 2014). It concluded that the use of the term
26 “random or sequential number generator” cannot reasonably refer broadly to any
27 list of numbers dialed in random or sequential order, as that would effectively
28 nullify the entire clause. Id. at 1292. “If the statute meant to only require that an
ATDS include any list or database of numbers, it would simply define an ATDS as
a system with “the capacity to store or produce numbers to be called.” Id. It noted

1 consent and the definition of an ATDS are likely to be dispositive in the present
2 case. It argues judicial economy and efficiency would be served by staying this
3 case until the D.C. Circuit rules on the petitions.

4 **1. Motion Standard**

5 “A trial court may, with propriety, find it is efficient for its own docket and
6 the fairest course for the parties to enter a stay of an action before it, pending
7 resolution of independent proceeding which bear upon the case.” *Leyva v.*
8 *Certified Grocers of Calif., Ltd.*, 593 F.2d 857, 862 (9th Cir. 1979). “This rule
9 applies whether the separate proceedings are judicial, administrative, or arbitral in
10 character, and does not require that the issues in such proceedings are necessarily
11 controlling of the action before the court.” *Id.* “In such cases, the court may order
12 a stay of the action pursuant to its power to control its docket and calendar and to
13 provide for a just determination of the cases pending before it.” *Id.* “A stay should
14 not be granted unless it appears likely the other proceedings will be concluded
15 within a reasonable time.” *Id.* at 864.

16 In determining whether to grant the stay, the court must weigh the
17 competing interest. *Landis. v. N. Am. Co.*, 299 U.S. 248, 255 (1936). These
18 competing interests include the possible damage that may result from granting the
19 stay, the hardship or inequity that a party may suffer in being required to go
20 forward, and the orderly course of justice measured in terms of the simplifying or
21 complicating of issues, proof, and questions of law that could be expected to result
22 from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

24 that the platform used by the defendant did not have the present capacity to store
25 or produce numbers to be called, using a random or sequential number generator,
26 and to dial those numbers. *Id.* It concluded the platform did not meet the definition
27 because the numbers only entered the system through methods that required
28 human curation and intervention. *Id.*

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1 Lengthy or indefinite stays are not permitted. Blue Cross & Blue Shield of
2 Al. v. Unity Outpatient Surgery Cntr., Inc., 490 F.3d 718, 724 (9th Cir. 2007).
3 Such stays effectively force the plaintiff out of court and run the danger of denying
4 justice. Id. The party requesting the stay bears the burden of showing that the
5 circumstances justify the court exercising its discretion to enter a stay. Landis, 299
6 U.S. at 255.

7 **2. Analysis**

8 Here, Defendant has met its burden of showing that a stay would be
9 appropriate in this case. A stay is appropriate for the following reasons: (1) the
10 definition of an ATDS is a threshold issue for liability and will determine the
11 scope of discovery; (2) a stay will conserve judicial resources, clarify the law, and
12 aid the court in making a decision on the merits; (3) Plaintiffs would not be
13 prejudiced by the stay; (4) a stay would reduce the burden of litigation on the
14 parties; (5) the ACA International appeal is not likely to remain pending for long,
15 considering that oral argument was heard in October, 2016; and (6) absent a stay,
16 Defendant would suffer hardship in conducting discovery and preparing for trial.

17 Accordingly, **IT IS HEREBY ORDERED THAT:**

18 1. Defendant's Motion to Dismiss, or in the Alternative, to Stay, ECF No.
19 16, is **GRANTED**, in part and **DENIED**, in part. The above-captioned case is
20 **STAYED** until the D.C. Circuit issues its ruling in ACA International v. FCC.

21 2. Plaintiffs' Motion to Compel, ECF No. 18, is **DENIED**, with leave to
22 renew, after the D.C. Circuit issues its ruling in ACA International v. FCC.

23 3. The parties shall notify the Court when the D.C. Circuit's opinion is
24 issued and file supplemental briefing regarding the impact of the opinion on this
25 case within fifteen days of that notice.

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1 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
2 and forward copies to counsel.

3 **DATED** this 18th day of May, 2017.
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7 Stanley A. Bastian
8 United States District Judge
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