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RHONDA HIEMSTRA,

Plaintiff,

v.

CREDIT ONE BANK,

Defendant.

No. 2:16-cv-02437-JAM-EFB

**ORDER DENYING DEFENDANT'S MOTION
TO STAY**

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The pending D.C. Circuit opinion in ACA International v. Federal Communications Commission has garnered considerable attention in the last year. Many defendants in Telephone Consumer Protection Act cases have moved to stay their cases pending a decision in ACA International. District courts disagree on what to do: Some courts have granted stay requests; others have denied them. For reasons explained below, this Court joins the latter and DENIES Defendant Credit One Bank's motion to stay.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 August 29, 2017.

1 I. BACKGROUND

2 Plaintiff Rhonda Hiemstra sues Defendant Credit One Bank,
3 seeking damages under the Telephone Consumer Protection Act
4 ("TCPA"), 47 U.S.C. § 227 et seq., and California's Rosenthal
5 Fair Debt Collection Practices Act ("Rosenthal Act"), Cal. Civ.
6 Code § 1788 et seq. See Compl., ECF No. 1. Plaintiff alleges
7 Defendant used an automatic telephone dialing system ("ATDS") or
8 artificial or prerecorded voice technology to call Plaintiff
9 several times within the last year to collect a debt. See id.
10 ¶¶ 8, 13, 17. But this debt belonged to a different individual
11 whose telephone number had been reassigned to Plaintiff. See id.
12 ¶¶ 7-9.

13 Plaintiff claims Defendant made these calls without her
14 consent, see id. ¶¶ 20-21, and that Defendant "bombed [her]
15 with multiple calls per day," even after she had "directed
16 [Defendant] to stop calling," id. ¶¶ 12-13. This conduct,
17 Plaintiff alleges, violates the TCPA's prohibition on placing
18 non-emergency phone calls using an ATDS or an artificial or
19 prerecorded voice without having first obtained the called
20 party's prior express consent, see id. ¶¶ 17, 20-21, 25, and
21 constitutes abusive and harassing behavior in connection with
22 debt collection under section 1788 of the Rosenthal Act, see id.
23 ¶¶ 15, 29.

24 More than eight months after Plaintiff filed her complaint,
25 Defendant now moves to stay this case. ECF No. 15. Defendant
26 contends a stay is warranted pending the D.C. Circuit's opinion
27 in ACA International, No. 15-1211, and the Ninth Circuit's
28 opinion in Marks v. Crunch San Diego, LLC, No. 14-56834, which

1 the Ninth Circuit has stayed pending the ACA International
2 decision. Mot. at 1-2.

3 Defendant argues that, given the overlapping issues between
4 ACA International and those here, this Court should stay the
5 proceedings because “[t]he specter of costly discovery and
6 litigating issues that may be moot soon presents an undue burden
7 on Defendant.” Mot. at 7. Plaintiff opposes, urging this Court
8 “not be fooled by Defendant’s attempt to complicate the issues,”
9 for “this is a straight forward [sic] case.” Opp’n, ECF No. 18,
10 at 2.

11 The Court recognizes that the FCC issued a ruling in 2015
12 interpreting various TCPA provisions, In the Matter of Rules &
13 Regulations Implementing the Telephone Consumer Protection Act of
14 1991, 30 F.C.C. Rcd. 7961 (July 10, 2015) (“FCC 2015 Order”), a
15 ruling the D.C. Circuit is now reviewing. As relevant here, the
16 D.C. Circuit is addressing whether the FCC properly defined ATDS
17 as equipment having not only the present capacity to dial
18 sequentially or randomly, but also the potential capacity to do
19 so. Id. at 7972. The D.C. Circuit is also reviewing “whether a
20 caller making a call subject to the TCPA to a number reassigned
21 from the consumer who gave consent for the call to a new consumer
22 is liable for violating the TCPA.” Id. at 7999. Hoping for a
23 favorable decision in ACA International, Defendant asks this
24 Court to stay these proceedings. Plaintiff vehemently opposes
25 this request.

26 II. OPINION

27 A. Judicial Notice

28 Defendant requests this court judicially notice the Second

1 Amended Petition for Review in ACA International, the appellate
2 docket in Marks, and orders granting stay requests in Bowden v.
3 Contract Caller, Inc., No. 16-2v-06171-MMC, 2017 WL 1732017
4 (N.D. Cal. Apr. 5, 2017); Roark v. Credit One Bank, 16-cv-173;
5 and Kristensen v. Credit One Bank, 14-cv-7963. Def.'s Request
6 for Judicial Notice, ECF No. 16. Because it is well established
7 a court may judicially notice judicial proceedings and orders,
8 see Rosales-Martinez v. Palmer, 753 F.3d 890, 894-95 (9th Cir.
9 2014), the Court grants Defendant's judicial notice request.

10 B. Legal Standard

11 "[T]he power to stay proceedings is incidental to the power
12 inherent in every court to control the disposition of the causes
13 on its docket with economy of time and effort for itself, for
14 counsel, and for litigants." Landis v. N. Am. Co., 299 U.S.
15 248, 254 (1936). The court must use sound discretion when
16 deciding whether to grant a stay, considering factors such as
17 "the possible damage which may result from the granting of a
18 stay, the hardship or inequity which a party may suffer in being
19 required to go forward, and the orderly course of justice
20 measured in terms of the simplifying or complicating of issues,
21 proof, and questions of law which could be expected to result
22 from a stay." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir.
23 1962) (citing Landis, 299 U.S. at 254-55). "Only in rare
24 circumstances will a litigant in one cause be compelled to stand
25 aside while a litigant in another settles the rule of law that
26 will define the rights of both." Landis, 299 U.S. at 255. The
27 moving party has the burden to show that a stay is appropriate.
28 See Clinton v. Jones, 520 U.S. 681, 708 (1997).

1 C. Analysis

2 In order to have its request for a stay granted, Defendant
3 here must establish that under the specific claims, issues and
4 facts involved in this action, a stay will result in judicial
5 efficiency, will not prejudice Plaintiff, and that denying
6 Defendant's request will impose hardship and inequity on
7 Defendant. As discussed below, Defendant has not done so.

8 1. Judicial Efficiency

9 Defendant leads with a judicial efficiency argument,
10 contending a favorable ruling in ACA International would narrow
11 the issues here and so it is unnecessary to litigate potentially
12 moot issues. See Mot. at 3-5. Plaintiff disagrees, arguing ACA
13 International will minimally affect this case, making a stay
14 unwarranted. See Opp'n at 2-3.

15 The Court agrees with Plaintiff. Defendant's assertion
16 that ACA International and Marks will moot Plaintiff's claims
17 and preclude the need for discovery is speculative. No matter
18 the results in these appeals, Defendant must still produce
19 discovery to, at the very least, settle factual disputes
20 regarding its prerecorded voice technology. See Glick v.
21 Performant Fin. Corp., No. 16-cv-05461-JST, 2017 WL 786293, at
22 *2 (N.D. Cal. Feb. 27, 2017). Equally important, Plaintiff
23 brings two independent bases for TCPA liability: ATDS or a
24 prerecorded voice, see Compl. ¶ 17, and the pending appeals do
25 not address prerecorded voice technology. See Sliwa v. Bright
26 House Networks, LLC, No. 2:16-cv-235-FTM-29-MRM, 2016 WL
27 3901378, at *4 (ACA International "will not affect Plaintiff's
28 contention that [defendant] called him using a prerecorded or

1 automated voice, which is an independent basis for stating a
2 claim under the TCPA). Moreover, the losing party in ACA
3 International may very well petition the U.S. Supreme Court for
4 review, making it impossible to forecast if or when a decision
5 in ACA International will become final. See Glick, 2017 WL
6 786293 at *2; Sliwa, 2016 WL 3901378 at *4. And, finally, ACA
7 International does not address Rosenthal Act claims, a claim
8 Plaintiff also brings here. In sum, Defendant has not shown a
9 stay would serve judicial efficiency.

10 2. Hardship & Inequity

11 Defendant also fails to "make out a clear case of hardship
12 or inequity" if required to move forward. Landis, 299 U.S. at
13 255. Defendant cites "costly discovery," Mot. at 7, but this
14 alone does not state a compelling need as to why this Court
15 should impose a stay. See Lockyer v. Mirant Corp., 398 F.3d
16 1098, 1112 (9th Cir. 2005) ("[B]eing required to defend a suit,
17 without more, does not constitute a 'clear case of hardship or
18 inequity' within the meaning of Landis.").

19 3. Prejudice

20 Lastly, staying this case would prejudice Plaintiff.
21 Defendant filed its motion more than eight months after Plaintiff
22 filed her complaint. See generally Compl. (filed October 12,
23 2016); Mot (filed June 26, 2017). Discovery has not yet started
24 and, again, Defendant must still produce discovery to settle the
25 factual disputes regarding its prerecorded voice technology and
26 whether Defendant previously obtained consent of the individual
27 it was allegedly trying to reach. See Sliwa, 2016 WL 3901378 at
28 *4. Also, as explained above, Plaintiff's prerecorded-voice

1 basis for her TCPA claim and her Rosenthal Act claim will remain,
2 no matter the result in ACA International.

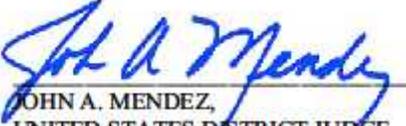
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4 III. ORDER

5 Defendant has not shown this case is one of those "rare
6 circumstances" where a court may compel a party in one case "to
7 stand aside while a litigant in another settles the rule of law
8 that will define the rights of both," Landis, 299 U.S. at 255,
9 and so has not met its burden. Indeed, each case this Court
10 judicially noticed, at Defendant's request, was factually
11 distinguishable: Bowen discussed burdensome class action
12 discovery; Rowark and Kristensen concluded a stay would only
13 minimally prejudice plaintiff. This case, however, is not a
14 class action, and this Court has found that imposing a stay would
15 prejudice Plaintiff. The Court therefore DENIES Defendant's
16 motion to stay.

17 Finally, the Court sanctions Defendant for violating this
18 Court's Filing Requirements Order. ECF No. 3-2. Reply briefs
19 shall not exceed five pages. See id. (those who violate this
20 order must pay monetary sanctions: \$50 per page). Defendant
21 filed a ten-page reply brief and counsel for Defendant is ordered
22 to pay \$250 to the Clerk of the Court within five days of this
23 Order.

24 IT IS SO ORDERED.

25 Dated: September 14, 2017

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28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE