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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEITH BOWDEN,
Plaintiff,
v.
CONTRACT CALLERS, INC.,
Defendant.

Case No. [16-cv-06171-MMC](#)

**ORDER GRANTING DEFENDANT’S
MOTION TO STAY**

Re: Dkt. No. 27

Before the Court is defendant Contract Callers, Inc.'s (“Contract Callers”) “Motion to Stay,” filed February 3, 2017. Plaintiff Keith Bowden (“Bowden”) has filed opposition, to which Contract Callers has replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.¹

BACKGROUND

In his complaint, Bowden alleges that, in June 2016, Contract Callers “called [him] at least 8 times on his cellular telephone using an autodialer and/or an artificial or prerecorded voice in an attempt to collect a consumer debt that [he] did not owe” and that such calls “continued despite several requests by [Bowden] to stop calling him.” (See Compl. ¶ 1.) Bowden further alleges that he “did not give [Contract Callers] prior express consent to make these calls” and had previously “had no contact or relationship with”

¹ By order filed March 3, 2017, the Court took the motion under submission.

1 Contract Callers. (See id.)

2 Based thereon, Bowden asserts claims, on behalf of himself and a number of
3 subclasses, under the Telephone Consumer Protection Act (“TCPA”), Fair Debt
4 Collection Practices Act (“FDCPA”), and California’s Rosenthal Fair Debt Collection
5 Practices Act (“Rosenthal Act”).

6 By the instant motion, Contract Callers seeks a stay of the above-titled action
7 pending the outcome of ACA Int’l v. Fed. Commc’n Comm’n, No. 15-1211 (D.C. Cir.
8 2015) (hereinafter ACA International), in which the D.C. Circuit has been asked to review
9 various aspects of an order issued by the Federal Communications Commission
10 (“F.C.C.”) as to the TCPA, see In the Matter of Rules & Regulations Implementing the
11 Telephone Consumer Protection Act of 1991, 30 F.C.C. Recd. 7961 (July 10, 2015). As
12 relevant to the instant motion, the D.C. Circuit has been asked to decide whether the
13 F.C.C.’s holding that the statutory definition of an “automatic telephone dialing system”
14 (“ATDS”)² “is not limited to its current configuration” but, instead, also “includes its
15 potential functionalities,” see 30 F.C.C. Recd. at 7974, constitutes an abuse of discretion
16 or violates callers’ constitutional rights. (See Amended Petition for Review, Def.’s
17 Request for Judicial Notice (“RJN”), Ex. 6, at 3).³

18 Contract Callers also points out that the Ninth Circuit has stayed its review of
19 Marks v. Crunch San Diego, 55 F.Supp.3d 1288 (S.D. Cal. 2014), a case concerning the
20 definition of an ATDS, pending the D.C. Circuit’s decision in ACA International (see Def.’s
21 RJN, Ex. 1, at 7), and asks the Court to extend any stay it may grant to “the possible
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23 ² The TCPA defines an ATDS as “equipment which has the capacity . . . to store or
24 produce telephone numbers to be called, using a random or sequential number generator
25 . . . and . . . to dial such numbers,” see 47 U.S.C. § 227(a)(1), and sets forth the limited
circumstances under which an ATDS may be used, see 47 U.S.C. § 227(b).

26 ³ Contract Callers’ unopposed request for judicial notice of various orders issued
27 by trial and appellate courts in several cases, as well as the docket for an additional case,
28 is hereby GRANTED. See Rosales–Martinez v. Palmer, 753 F.3d 890, 894 (9th Cir.
2014) (“It is well established that [a court] may take judicial notice of judicial proceedings
in other courts.”).

1 decision of the Ninth Circuit in Marks” (see Mot. at 3:27).

2 LEGAL STANDARD

3 “[T]he power to stay proceedings is incidental to the power inherent in every court
4 to control the disposition of the causes on its docket with economy of time and effort for
5 itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). A
6 court may “find it is efficient for its own docket and the fairest course for the parties to
7 enter a stay of an action before it, pending resolution of independent proceedings which
8 bear upon the case,” even if the “issues in such proceedings” are not “necessarily
9 controlling of the action before the court.” See Leyva v. Certified Grocers of Cal., Ltd.,
10 593 F.2d 857, 863–64 (9th Cir. 1979).

11 “The proponent of a stay bears the burden of establishing its need.” Clinton v.
12 Jones, 520 U.S. 681, 708 (1997). In deciding whether to stay proceedings pending
13 resolution of an appeal in another action, a district court must weigh “the competing
14 interests which will be affected by the granting or refusal to grant a stay,” including “the
15 possible damage which may result from the granting of a stay, the hardship or inequity
16 which a party may suffer in being required to go forward, and the orderly course of justice
17 measured in terms of the simplifying or complicating of issues, proof, and questions of
18 law which could be expected to result from a stay.” See Lockyer v. Mirant Corp., 398
19 F.3d 1098, 1110 (9th Cir. 2005) (internal quotation and citation omitted).

20 DISCUSSION

21 Contract Callers argues a stay is appropriate here because the D.C. Circuit’s
22 decision in ACA International will narrow the issues and conserve judicial resources in
23 the instant action, reduce Contract Callers’ discovery burdens, and pose no harm to
24 Bowden. Bowden disagrees with each of Contract Callers’ arguments and, in addition,
25 contends a stay is inappropriate given Bowden’s FDCPA and Rosenthal Act claims.
26 Although the Court recognizes that district courts in the Ninth Circuit have disagreed as to
27 the propriety of a stay pending the D.C. Circuit’s decision in ACA International, see, e.g.,
28 Clayton v. Synchrony Bank, -- F.Supp.3d --, 2016 WL 7106018, at *3-4 (E.D. Cal., Nov. 7,

1 2016) (collecting cases), the Court finds, for the reasons set forth below, a stay is, in this
2 instance, appropriate.

3 One of the competing interests the Court must consider is whether a stay would
4 promote “the orderly course of justice measured in terms of the simplifying . . . of issues,
5 proof, and questions of law.” See Lockyer, 398 F.3d at 1110. In that regard, Contract
6 Callers asserts, the equipment it used to call Bowden has already been found by two
7 district courts to not be an ATDS because it lacks the present capacity to generate or dial
8 random or sequential numbers (see Reply at 1:21-27 (citing Smith v. Stellar Recovery,
9 No. 15-cv-11717 (E.D. Mich. Feb. 7, 2017); Pozo v. Stellar Recovery, No. 8:15-cv-00929-
10 AEP (M.D. Fla. Sept. 2, 2016))), and that, consequently, Bowden’s “only possible
11 argument” as to its TCPA claim is “that the concept of capacity or ‘potential capacity’ is
12 broadly construed” to include both present and potential capacity (see Reply at 1:24-25),
13 which issue the D.C. Circuit will decide in ACA International.

14 In response Bowden argues that the D.C. Circuit’s decision would not be binding
15 on this Court, an issue the Court does not resolve herein, as, irrespective of any
16 precedential effect, ACA International will at least provide substantial guidance on a key
17 issue in the case,⁴ and a stay in the interim would thus serve to conserve judicial
18 resources. See, e.g., Fontes v. Time Warner Cable, Inc., No. CV 14-2060-CAS (CSW),
19 2015 WL 9272790, at *5 (C.D. Cal. Dec. 17, 2015) (finding stay appropriate where
20 decision may otherwise “render moot substantial efforts by the parties as well as many of
21 the Court’s rulings”); see also Gustavson v. Mars, Inc., No. 13-CV-04537-LHK, 2014 WL
22 6986421, at *3 (N.D. Cal. Dec. 10, 2014) (finding stay appropriate where decision may
23 change “the applicable law or the landscape of facts that need to be developed” and “the
24 need to re-brief and potentially re-open discovery would involve a significant expenditure
25 of time and resources”) (internal quotation and citation omitted).

26 _____
27 ⁴ Moreover, as noted above, the Ninth Circuit has found the D.C. Circuit’s ruling in
28 ACA International to be of sufficient significance to warrant a stay in a case presently
pending before the Ninth Circuit.

1 The Court next considers the “hardship or inequity which a party may suffer in
2 being required to go forward” with the case. See Lockyer, 398 F.3d at 1110. Here,
3 Contract Callers argues, it would be harmed by burdensome class discovery. Although,
4 as Bowden correctly points out, discovery on the functionality of the system Contract
5 Callers used to call Bowden will be required regardless of the outcome of ACA
6 International, the Court finds denying a stay would “force[]” the parties “to spend time and
7 money conducting discovery on a critical issue of liability without knowing what law will
8 ultimately apply at summary judgment or at trial—a fool’s errand, to say the least.” See
9 Washington v. Six Continents Hotels, Inc., No. 16-cv-03719-ODW (JEMx), 2017 WL
10 111913, at *2 (C.D. Cal., Jan. 9, 2017); see also Gustavson, 2014 WL 6986421, at *3
11 (finding defendant “would clearly suffer significant and potentially unnecessary hardship if
12 compelled to proceed” where outcome of decision might require defendant to “re-depose
13 key witnesses, conduct further discovery, and re-brief class certification”).⁵

14 With respect to “the possible damage which may result from the granting of a
15 stay,” see Lockyer, 398 F.3d at 1110, Bowden argues that the stay requested here is
16 indefinite in nature, thereby increasing the risk of evidence becoming stale or witnesses’
17 memories fading. In support thereof, Bowden cites to cases in which other courts have
18 denied motions to stay pending ACA International, due, in part, to the length of time it
19 may take the D.C. Circuit to reach its decision. While recognizing that “[a] stay should
20 not be granted unless it appears likely the other proceedings will be concluded within a
21 reasonable time in relation to the urgency of the claims presented to the court,” see
22 Leyva, 593 F.2d at 864, the Court agrees with Contract Callers that “ACA International is
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24 ⁵ To the extent Bowden contends Contract Callers “must make out a clear case of
25 hardship or inequity in being required to go forward” where there is “even a fair
26 possibility” the stay will prejudice the opposing party, see Landis, 299 U.S. at 255, the
27 Court finds such a “clear case” of hardship has been made, as denial of a stay would
28 require both parties to conduct discovery and prepare for summary judgment without
clarity as to the underlying law. In light of such finding, Bowden’s request that, even if a
stay is granted, the Court permit written discovery to go forward, or, in the alternative,
require the parties to respond to all pending written discovery, is denied.

1 now in a different posture” than it was in most of the earlier cases to which Bowden cites,
2 as, at this point, appellate briefing is complete and the D.C. Circuit heard oral argument
3 on October 19, 2016. (See Reply at 6:13-18 (citing Clayton, 2016 WL 7106018, at *4).)
4 Thus, the Court finds a stay is unlikely to last more than a few months and, consequently,
5 the damage from granting such relief is, if any, minimal. See Washington, 2017 WL
6 111913, at *2 (holding, as of January 9, 2017, ACA International stay is “unlikely to
7 exceed four to six months”).⁶

8 Lastly, as to Bowden’s argument that “Contract Callers fails to offer any legal basis
9 to stay the FDCPA and Rosenthal Act claims, which have nothing to do with the
10 proceedings in ACA [International]” (see Opp. at 9:2-4), the Court notes that all of
11 Bowden’s claims revolve around the same set of facts, and that even Bowden concedes
12 that “discovery concerning the [FDCPA and Rosenthal Act claims] overlaps with [the]
13 TCPA claim.” (See id. at 6:19-20.) Accordingly, in the interests of judicial efficiency, the
14 Court finds a stay of the entire action is appropriate. See, e.g., Clayton, 2016 WL
15 7106018 at *1, 4 (granting stay of action with TCPA and Rosenthal Act claims pending
16 ACA International).

17 CONCLUSION

18 For the reasons stated above, Contract Callers’ motion to stay is hereby
19 GRANTED and the instant action is hereby STAYED pending the D.C. Circuit’s opinion in
20 ACA International. No later than four weeks from the date the D.C. Circuit issues said
21 opinion, the parties shall submit a joint report apprising the Court of the status of any
22 appeal of ACA International, the status of the Ninth Circuit’s review of Marks, and the
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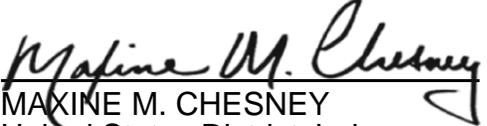
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25 ⁶ To the extent Bowden argues ACA International is “almost certain to [be]
26 appeal[ed] to the Supreme Court” (see Opp. at 8:13-17 (citing Lathrop v. Uber Techs.,
27 Inc., No. 14-cv-05678-JST, 2016 WL 97511, at *4 (N.D. Cal. Jan. 8, 2016))) or that a stay
28 pending the Ninth Circuit’s resolution of Marks would be indefinite, any potential harm
resulting from either such occurrence can be addressed at a later stage of the
proceedings. In particular, the Court will limit its order to the D.C. Circuit’s decision in
ACA International, after which the Court will be in a position to “reevaluate whether
continuation of a stay is warranted,” see Washington, 2017 WL 111913, at *2 n. 2.

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parties' positions as to whether a continuation of the stay is warranted.

IT IS SO ORDERED.

Dated: April 5, 2017


MAXINE M. CHESNEY
United States District Judge