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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ABANTE ROOTER AND PLUMBING
INC,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

Case No. [17-cv-03328-EMC](#)

**ORDER DENYING DEFENDANT’S
MOTION TO STAY OR DISMISS**

Docket No. 33

Plaintiff Abante Rooter and Plumbing Inc. alleges Defendant Nationwide Mutual Insurance Company violated the Telephone Consumer Protection Act (“TCPA”) by using an “automatic telephone dialing system” (ATDS) to call Plaintiff and other putative class members without their consent and to solicit their purchase of Defendant’s services.

Defendant moves to stay the case pending the D.C. Circuit’s resolution of an issue as to what types of devices qualify as an ATDS under the statute or, alternatively, to dismiss Plaintiffs’ claims as inadequately pled. For the reasons below, Defendant’s motion is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Abante is a roofing and plumbing business. First Amended Complaint (“FAC”), Docket No. 18 ¶ 4. Nationwide is an insurance company. *Id.* ¶ 5. Abante alleges that Nationwide called its cellphone numbers to promote Nationwide’s services between August 2016 and March 2017. *Id.* ¶ 8. Abante alleges it heard an “audible clicking noise” when it answered the calls and before a Nationwide representative began speaking. *Id.* ¶ 9. According to Abante, such an audible clicking noise is “indicative of the switching device used as part of a predictive dialer or other automatic dialing system.” *Id.* Abante alleges that it did not give prior consent to receive the calls, and the

1 calls therefore violated the TCPA. *See* 47 U.S.C. § 227(b)(1)(A); *id.* ¶¶ 12, 14. Abante requested
2 Nationwide place its cellular telephone numbers on a Do-Not-Call list, but Nationwide continued
3 to make solicitation calls after that request. *Id.* ¶ 15.

4 At the last case management conference, the Court directed the parties to conduct limited
5 discovery on whether an auto dialer or manual click was used. *See* Docket No. 36. Nationwide’s
6 supplemental brief includes a declaration from its vendor, Exclusive Calls, stating that a Fenero
7 phone system was used to call Plaintiff. Docket No. 39. According to the declaration, “an
8 Exclusive Calls representative had to physically click a button on his/her computer screen to
9 launch each call, which required human intervention. The representative who launched the call is
10 the same person on the phone when the called party answers the call.” Amin Decl. ¶ 3.
11 “Exclusive Calls did not place any calls to the phone numbers... using artificial or prerecorded
12 voice.” *Id.* ¶ 5.

13 Plaintiff reports that, other than Defendant’s declaration, no other discovery on the
14 question has taken place and more is needed to understand the degree of human intervention that
15 occurred as well as the configuration of the particular phone system used to call Plaintiff.

16 **II. LEGAL CONTEXT**

17 The TCPA prohibits use of an automatic telephone dialing system (ATDS) to place calls to
18 wireless subscribers without their prior express consent. An ATDS is “equipment which has the
19 capacity—(A) to store or produce telephone numbers to be called, using a random or sequential
20 number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The Federal
21 Communications Commission (“FCC”) has determined that the basic functions of an ATDS are
22 the capacity to “dial numbers without human intervention” and to “dial thousands of numbers in a
23 short period of time.” *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of*
24 *1991*, 18 F.C.C. Rcd. 14014, 14092 (2003), ¶¶ 132-33. An ATDS “need not actually store,
25 produce, or call randomly or sequentially generated telephone numbers, it need only have the
26 capacity to do it.” *Satterfield v. Simon & Schuster*, 569 F.2d 946, 951 (9th Cir. 2009).

27 On July 10, 2015, the FCC rejected a request to limit its interpretation of “capacity” under
28 the TCPA to equipment which has the “present ability” to dial telephone numbers randomly or

1 sequentially. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of*
2 *1991*, 30 F.C.C. Rcd. 7961, 7974 (2015) (hereinafter, “2015 FCC Order”). Rather, it determined
3 that equipment has such “capacity” if it has the future potential to do so even if it is not
4 “presently” used in that manner. *Id.* This interpretation is at the heart of a consolidated appeal
5 before the D.C. Circuit in *ACA International et al., v. Federal Communications Commission and*
6 *USA*, No. 15-1211 (D.C. Cir. 2016) (“*ACA Int’l*”). In part, the D.C. Circuit is considering the
7 validity of the FCC’s interpretation of the term “capacity” with respect to future potential. *ACA*
8 *International et al., v. Federal Communications Commission and USA*, Joint Brief for Petitioners,
9 No. 15-1211 (D.C. Cir. 2016). The D.C. Circuit heard oral argument on October 19, 2016 but has
10 yet to issue a decision.¹

11 The 2015 FCC Order also re-affirms its long-standing position in prior orders that a
12 “predictive dialer” constitutes an ATDS. *Id.* at 7972. Additionally, the FCC affirmed that what
13 constitutes human intervention requires a “case-by-case determination,” 2015 FCC Order at 7975,
14 rejecting a request that the Commission “adopt a ‘human intervention’ test by clarifying that a
15 dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.”
16 *Id.* at 7976. These two aspects of the 2015 FCC Order are not at issue in *ACA Int’l*, and thus are
17 not affected by the pending appeal.

18 **III. DISCUSSION**

19 **A. Defendant’s Motion for a Stay**

20 Nationwide argues that the case should be stayed because the outcome of *ACA Int’l* will
21 affect the scope of the dispute. The Court’s “power to stay proceedings is incidental to the power
22 inherent in every court to control the disposition of the causes on its docket with economy of time
23 and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248,
24 254 (1936). Under *Landis*, the Court must weigh: (1) “the possible damage which may result

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26 ¹ The D.C. Circuit’s decision will be binding on this Court because the appellate courts have
27 exclusive jurisdiction to determine the validity of all FCC final orders and the Judicial Panel on
28 Multidistrict Litigation has consolidated the various appeals in the D.C. Circuit. *See* 28 U.S.C.
§2342(1); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1987); *Peck v. Cingular*
Wireless, LLC, 535 F.3d 1053, 1057 (9th Cir. 2008); *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-
CV-01109-JST, 2017 WL 167678, n. 1 (N.D. Cal. Jan. 17, 2017).

1 from the granting of a stay,” (2) “the hardship or inequity which a party may suffer in being
2 required to go forward,” and (3) “the orderly course of justice measured in terms of the
3 simplifying or complicating of issues, proof, and questions of law which could be expected to
4 result from a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962). Indeed, “[o]nly in rare
5 circumstances will a litigant in one cause be compelled to stand aside while a litigant in another
6 settles the rule of law that will define the rights of both.” *Id.*

7 The *Landis* factors weigh against a stay here. Even if the D.C. Circuit reverses the 2015
8 FCC Order, the claims in dispute will not be narrowed significantly as Plaintiff does not rely
9 exclusively on a “future potential” theory of liability but also a “present ability” theory.
10 Regardless of the outcome of *ACA Int’l*, a factual record will need to be developed on issues such
11 as whether Abante gave advanced consent, the degree of human intervention involved in calling
12 Abante, the configuration of the phone system used and the extent of its “present abilities,” and
13 was there telltale click and what did it mean. There is no indication that ascertaining these facts
14 will be costly or entail significant resources. Nationwide’s own declaration indicates that it has
15 already identified who called Abante and how that call was made, demonstrating that discovery on
16 those issues will not be complex or burdensome.² Nationwide has not demonstrated undue
17 prejudice in the absence of a stay.

18 The orderly course of justice will be enhanced because development of the record on key
19 facts may expedite and facilitate the application of law, including that pronounced by the Circuit

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21 ² Defendant argues that its declaration demonstrates that there was “human intervention,”
22 precluding liability. If the Court were to ultimately determine that the degree of human
23 intervention precluded liability, then Plaintiffs’ claims would turn on *ACA Int’l*. But Defendant
24 has fallen far short of demonstrating that that is the case on this motion. First, this is a motion to
25 dismiss not a motion for summary judgment, so the declaration is not properly before the Court.
26 Second, the declaration does not explain what it means to “launch” a call and provides insufficient
27 detail to determine whether the human intervention alleged is sufficient to conclude the phone
28 system is not an ATDS, a highly fact-specific inquiry. *See, e.g.*, 30 FCC Rcd. at 7975 (“How the
human intervention element applies to a particular piece of equipment is specific to each
individual piece of equipment, based on how the equipment functions and depends on human
intervention, and is therefore a case-by-case determination.”); *Brickman v. Facebook, Inc.*, 230
F.Supp.3d 1036, 1042 (N.D. Cal. 2017) (the court must determine “to what extent human
intervention is the impetus for the transmission” because “a person will always be a but-for cause
of any action’s machine”). Moreover, Plaintiff has not had an opportunity to test the declaration
through discovery or deposition. The parties and the Court will be better served by a more
developed factual record before reaching this question.

1 Court in *ACA Int'l*.

2 In contrast, Abante and other class members could be prejudiced by a stay because witness
3 memories may fade, turnover of employees at Nationwide may result in diminished access to
4 material witnesses, and it may become more difficult to locate and notify putative class members
5 as time lapses. This is exacerbated by the unknown duration of a stay as the D.C. Circuit's
6 decision has long been pending and is likely to be followed by appeals to the Supreme Court.³

7 In sum, a stay is not warranted. *ACA Int'l* will not significantly narrow the disputed
8 issues,⁴ will not simplify the proceedings,⁵ and focused discovery will prepare a factual record so
9 that the legal issues can be resolved after *ACA Int'l* is decided.

10 Accordingly, Defendant's request for a stay is **DENIED**.

11 As stated at the hearing, discovery at this time will be limited to non-burdensome
12 document discovery on individual issues such as the account notes for Plaintiff, including call
13 logs; the manual for the dialer used to call Plaintiff; the method by which the dialing system
14 determines what phone numbers to dial; a more robust declaration from the third-party who placed
15 the calls to Plaintiff concerning the configuration of the system and the role of human
16 intervention; and up to two depositions.

17 B. Motion to Dismiss

18 Nationwide moves in the alternative to dismiss Abante's claims arguing that Plaintiff has

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20 ³ See, e.g., *Pedro-Salcedo v. Haagen-Dazs Shoppe Co., Inc.*, No. 5:17-CV-03504-EJD, 2017 WL
21 4536422, at *3 (N.D. Cal. Oct. 11, 2017); *Glick v. Performant Fin. Corp.*, No. 16-CV-5461-
22 JST, 2017 WL 786293, at *2 (N.D. Cal. Feb. 27, 2017) ("it is far from guaranteed that a final
23 result in *ACA International* is imminently forthcoming"); *Cabiness v. Educ. Fin. Solutions, LLC*,
24 No. 16-CV-1109-JST, 2017 WL 167678, at *3 (N.D. Cal. Jan. 17, 2017) (finding that appeal in
25 *ACA International* is likely, and "[s]uch an extended stay would prejudice the Plaintiff because the
26 passage of time will make it more difficult to reach class members and will increase the likelihood
27 that relevant evidence will dissipate").

28 ⁴ See *Glick*, 2017 WL 786293, at *2; see also *Cabiness*, 2017 WL 167678, at *3; *Lathrop*, 2016
WL 97511, at *4; *Edwards v. Oportun, Inc.*, 193 F.Supp.3d 1096, 1102 (N.D. Cal. 2016).

⁵ See *Edwards*, 193 F.Supp.3d at 1102 (finding that judicial economy is not served because
factual disputes remain); see also *DeClue v. United Consumer Fin. Servs. Co.*, No. 16CV2833 JM
(JMA), 2017 WL 4541668, at *2 (S.D. Cal. Oct. 11, 2017) (same); *Mendez*, 239 F. Supp. 3d at
1234 (finding that the D.C. Circuit's decision would not substantially simplify the issues presented
because defendant must still produce discovery to settle factual disputes regarding its autodialing
technology).

1 not adequately pled the use of an ATDS. Abante claims it received at least two calls (including
2 after requesting to be placed on a do not call list), that it had no prior relationship with
3 Nationwide, that it heard a clicking noise and pause at the beginning of the calls, and that the
4 representative attempted to sell Nationwide’s products to it. See FAC ¶¶ 8-15. These allegations
5 are sufficient to support a plausible inference that an ATDS was used to call Plaintiff. See, e.g.,
6 *Lofton v. Verizon Wireless (VAW) LLC*, No. 13-CV-05665-YGR, 2015 WL 1254681, at *5 (N.D.
7 Cal. Mar. 18, 2015) (holding that descriptions of the “‘telltale’ pause after plaintiff picked up each
8 call” support inference a predictive dialing system was used); *Holt v. Facebook, Inc.*, 240 F. Supp.
9 3d 1021, 1027-30 (N.D. Cal. 2017) (holding that “where the content of the messages is impersonal
10 advertisement, the content supports an inference that a defendant used an ATDS,” and that
11 allegations of more than one call also bolster inference).⁶ Accordingly, Nationwide’s motion to
12 dismiss is **DENIED**.

13 This order disposes of Docket No. 33.

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15 **IT IS SO ORDERED.**

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17 Dated: January 26, 2018

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19 _____
20 EDWARD M. CHEN
21 United States District Judge

22 _____
23 ⁶ See also *Lemieux v. Lender Processing Ctr.*, No. 16-CV-1850-BAS(DHB), 2017 WL 1166430,
24 at *5 (S.D. Cal. Mar. 29, 2017) (“the allegation that Plaintiff heard a ‘pause and/or clicking noise
25 before a representative of Defendants came on the line’ is a sufficient description in laymen’s
26 terms to establish Plaintiff’s belief that the call was delivered via an ATDS”); *Thomas v. Dun &
27 Bradstreet Credibility Corp.*, 100 F.Supp.3d 937 (C.D. Cal. 2015) (allegations that defendant used
28 an ATDS and that he heard a “pause” after answering the telephone was sufficient); *Loveless v. AI
Solar Power, Inc.*, No. EDCV141779FMODTBX, 2015 WL 4498787, at *1 (C.D. Cal. July 23,
2015) (allegations that defendant contacted telephone number more than once for solicitation
purposes and that plaintiff was greeted by “dead air” before defendant’s representative spoke
sufficient); *Kazemi v. Payless Shoesource, Inc.*, No. 09-cv-5142-MHP, 2010 WL 963225, at *2
(N.D. Cal. Mar. 16, 2010) (allegations sufficient where content of the messages was advertisement
scripted “in an impersonal manner”); *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165, 1171 (N.D.
Cal. 2010) (same).