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

JAMES GUSMAN, individually and
on behalf of all others similarly
situated,

Plaintiff,

vs.

COMCAST CORPORATION,

Defendant.

CASE NO. 13CV1049-GPC(DHB)

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

[Dkt. Nos. 34, 46, 57.]

Before the Court is Defendant's motion to stay the case. (Dkt. No. 34.) Plaintiff filed an opposition and Defendant replied. (Dkt. Nos. 45, 48.) The parties also filed Notices of Supplemental Authority concerning recent district court cases addressing issues relevant in this motion. (Dkt. No. 49, 50, 54.) Based on the reasoning below, the Court GRANTS Defendant's motion to stay the case.

Background

On May 2, 2013, Plaintiff James Gusman filed a putative class action complaint against Defendant Comcast Corporation for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 277 *et seq.* (Dkt. No. 1.) He alleges that in February 2013, Defendant contacted Plaintiff with an automatic telephone dialing system ("ATDS") using an "artificial or prerecorded voice" in order to discuss Defendant's subscription services with Plaintiff as many as ten times in a day. (Id.,

1 Compl. ¶ 13.) After answering each call, an artificial or prerecorded voice instructed
2 Plaintiff to hold while he was connected to an available representative. (Id. ¶ 14.)
3 These call began when Plaintiff obtained the cellular telephone number around
4 February 1, 2013. (Id. ¶ 16.) Plaintiff did not provide his cellular telephone number
5 to Defendant and did not provide prior express consent to receive calls or messages.
6 (Id. ¶¶ 17, 24.) Plaintiff received about three calls from Defendant where Defendant
7 used an “artificial or prerecorded voice” in conjunction with an ATDS. (Id. ¶ 20.)
8 Plaintiff alleges these telephone communications various provisions under the TCPA.
9 One specific provision relevant to the instant motion is that it is unlawful for any
10 person “to make any call (other than a call made for emergency purposes or made with
11 the *prior express consent* of the *called party*) using any automatic telephone dialing
12 system or an artificial or prerecorded voice” to, among other things, cellular
13 telephones. 47 U.S.C. § 227(b)(1)(A) (emphasis added).

14 Defendant does not dispute that calls were made to Plaintiff; however, it argues
15 that Comcast had the consent of the prior owner of Plaintiff’s cellular telephone
16 number. At the time Comcast called Plaintiff, between March 30 and June 2, 2013,
17 Comcast’s records show the number belonged to the account of a subscriber with a past
18 due balance. The subscriber’s telephone number was recycled and reassigned to
19 Plaintiff. Plaintiff obtained his telephone number on February 1, 2013. Plaintiff
20 testified that he stopped receiving calls from Comcast in the Fall of 2013. (Dkt. No.
21 48-1, Hawk Decl. ¶ 2.)

22 Defendant filed a motion to stay the proceedings under the primary jurisdiction
23 doctrine because the Federal Communications Commission, the administrative agency
24 charged by Congress with regulatory authority over the TCPA, is currently considering
25 the specific issues raised in the complaint. Plaintiff opposes.

26 On January 16, 2014, United Healthcare Services, Inc. (“United Healthcare”)
27 filed a petition for expedited declaratory ruling with the FCC. (Dkt. No. 34-4, D’s
28 RJN, Ex. A.) Petitioner seeks to “clarify the applicability of the . . . [TCPA] and the

1 Commission’s TCPA rules to informational, non-telemarketing autodialed and
2 prerecorded calls to wireless numbers for which valid prior express consent has been
3 obtained but which, unbeknownst to the calling party, have subsequently been
4 reassigned from one wireless subscriber to another.” (Id. at 7.) On January 31, 2014,
5 ACA International (“ACA”) filed a petition for rulemaking with the FCC. (Id., Ex. B.)
6 In that case, ACA sought several rulings including “clarify that prior express consent
7 attaches to the person incurring a debt, and not the specific telephone number provided
8 by the debtor at the time a debt was incurred” (Id. at 21-22.)

9 On February 6, 2014, the FCC issued a Public Notice seeking Comment on
10 Petition for Expedited Declaratory Ruling from United Healthcare filed on January 16,
11 2014. (Id., D’s RJN, Ex. C.) The reply Comment Date was on March 24, 2014. (Id.)

12 On February 21, 2014, the FCC issued a Public Notice directing interested
13 persons to file statements opposing or supporting the Petition for Rulemaking by ACA
14 within thirty days. (Id., D’s RJN, Ex. D.)

15 On March 25, 2014, an FCC Commissioner Michael O’Reilly, on the Official
16 FCC Blog, noted the 30% increase of TCPA lawsuits over the past year and a backlog
17 of petitions pending at the FCC. (Dkt. No. 48-2, D’s RJN, Ex. E.) Commissioner
18 O’Reilly noted the importance of ruling on these issues “as soon as possible.” (Id.)
19 He further wrote, “[t]hrough this process, the FCC has the opportunity to answer
20 important questions and provide much needed guidance on a variety of TCPA issues,
21 including . . . whether there is liability for calls made to reassigned phone numbers . .
22 . . .” (Id.)

23 Discussion

24 A. Primary Jurisdiction Doctrine

25 The primary jurisdiction doctrine “allows courts to stay proceedings or to
26 dismiss a complaint without prejudice pending the resolution of an issue within the
27 special competence of an administrative agency.” Clark v. Time Warner Cable, 523
28 F.3d 1110, 1114 (9th Cir. 2008). The doctrine is a “prudential” one where the court

1 determines that a claim implicates technical and policy questions that should be first
2 addressed in by the relevant agency with regulatory authority over the relevant industry
3 rather than by the courts. Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.,
4 307 F.3d 775, 780 (9th Cir. 2002).

5 Primary jurisdiction does not apply every time a court is presented with an issue
6 conceivably within the agency’s expertise but only used if a claim “requires resolution
7 of an issue of first impression, or of a particularly complicated issue that Congress has
8 committed to a regulatory agency,’ . . . and if ‘protection of the integrity of a regulatory
9 scheme dictates preliminary resort to the agency which administers the scheme.’”
10 Clark, 523 F.3d at 1114 (citations omitted). If a district court applies the doctrine of
11 primary jurisdiction, the issue is “referred” to the relevant agency and the court either
12 stays the proceedings or dismisses the case without prejudice so the parties may seek
13 an administrative ruling. Id. at 1115; see also Syntek, 307 F.3d at 782; Astiana v. Hain
14 Celestial Grp., Inc., 905 F. Supp. 2d 1013, 1015 (N.D. Cal. 2012) (if doctrine applies,
15 court can either stay proceedings or dismiss the case without prejudice).

16 Although there is no fixed formula, the Ninth Circuit has looked to four factors
17 when applying the doctrine: “(1)[a] need to resolve an issue that (2) has been placed
18 by Congress within the jurisdiction of an administrative body having regulatory
19 authority (3) pursuant to a statute that subjects an industry or activity to a
20 comprehensive regulatory authority that (4) requires expertise or uniformity in
21 administration.” Syntek, 307 F.3d at 781.

22 Congress granted the FCC the authority to promulgate regulations to implement
23 the TCPA. See 47 U.S.C. § 227(b)(2). The FCC has regulatory authority that subjects
24 the “industry to a comprehensive regulatory scheme that requires expertise or
25 uniformity in administration.” Matlock v. United Healthcare, No. 2:13cv2206-MCE-
26 EFB, 2014 WL 1155541, at *2 (E.D. Cal. Mar. 20, 2014). It does not appear that
27 Plaintiff disputes the second, third or fourth factors.

28 Plaintiff opposes the stay arguing that the issue is not an issue of first impression

1 and the FCC has already reviewed and decided the issues presented in the petitions by
2 United Healthcare and ACA. First, it contends that the TCPA’s do-not-call provisions
3 apply to specific telephone numbers rather than an individual’s name associated with
4 a telephone number. Second, the FCC has shown signs of narrowing the scope of
5 “prior express consent”, not broadening it as Defendant seeks to do. See In the Matter
6 of Rules and Regulations Implementing the Telephone Consumer Protection Act of
7 1992, 27 F.C.C.R. 1830, 1831 at 2 (2012) (revised TCPA” rule to require prior express
8 written consent for all autodialed or prerecorded telemarketing calls to wireless
9 numbers.”) Plaintiff alleges that the Ninth Circuit has already held that express consent
10 is consent that is “clearly and unmistakably stated.” Satterfield v. Simon & Schuster,
11 Inc., 569 F.3d 946, 955 (9th Cir. 2009).

12 Defendant contends that the FCC has not addressed the narrow issues in this
13 case. The Court agrees with Defendant. In this case, Comcast placed collection calls
14 to subscribers who consented to receive calls from Comcast to discuss their past due
15 balances. When Comcast made the calls, it did not know that its subscriber no longer
16 used the telephone number and that the cellular telephone number had been reassigned
17 to Plaintiff.

18 Courts are divided as to whether a “called party” is the “actual recipient” or the
19 “intended recipient.” Compare Cellco Partnership v. Wilcrest Health Care Mgmt. Inc.,
20 No. 09-3534(MLC), 2012 WL 1638056, at *7 (D.N.J. May 8, 2012) (“called party” is
21 the “intended recipient”) with Olney v. Progressive Cas. Inc. Co., –F. Supp. 2d –, 2014
22 WL 294498, at *3 (S.D. Cal. Jan. 24, 2014) (“called party” is not limited to “intended
23 recipient” and citing cases in support). The FCC has not defined “called party” for
24 purposes of giving consent and courts have not uniformly decided the issue.

25 The FCC has also not ruled on “prior express consent” in the context of recycled
26 or reassigned cellular telephone numbers. The issue of liability under the TCPA for
27 calls made to reassigned telephone numbers where the caller had the consent of the
28 prior owner of telephone number is an issue of first impression and within the expertise

1 of the FCC.

2 There are currently two pending proceedings before the FCC ready to be ruled
3 on. These proceedings address whether there is liability under the TCPA for calls
4 placed to a telephone number where consent had been previously given but the
5 telephone number has been reassigned to someone who has not given consent. The
6 public comment period has passed on both petitions. As to the rulemaking petition, the
7 FCC must now either dispose of the petition, issue a notice of inquiry or a notice of
8 proposed rulemaking. (Dkt. No. 45-2, Kazerounian Decl., Ex. A.) Moreover, in March
9 2014, an FCC Commissioner noted that this issue is one that needs to be resolved by
10 the FCC in a timely manner. (See Dkt. No. 48-2, D's RJN, Ex. E.)

11 Recently, district courts have stayed cases concerning this particular issue of
12 whether liability attaches for calls placed to reassigned telephone numbers based on
13 these petitions before the FCC. Fontes v. Time Warner Cable Inc., No. 2:14cv2060-
14 CAS(CWx), Dkt. No. 23 (C.D. Cal. May 19, 2014) (declining to address whether action
15 should be stayed under the primary jurisdiction doctrine but staying action on its own
16 motion for 120 days pursuant to its inherent power to control its docket); Barrera v.
17 Comcast Holdings Corp., Case No. 14cv00343-THE, 2014 WL 1942829 (N.D. Cal.
18 May 12, 2014); Matlock v. United Healthcare, No. 2:13cv2206-MCE-EFB, 2014 WL
19 1155541, at *1 (E.D. Cal. Mar. 20, 2014); Henrichs v. Wells Fargo Bank, NA, No.
20 3:13cv5434-WHA, Dkt. No. 56 at 2-3 (N.D. Cal. Apr. 15, 2014).

21 In a notice of supplemental authority, Plaintiff cites to Meyer v. Receivables
22 Performance Mgmt., LLC, No. C12-2013RAJ, 2014 WL 1744284, at *1-2 (W.D.
23 Wash. Apr. 30, 2014), where a district court denied a motion to stay despite a pending
24 rulemaking petition and four declaratory relief petitions. However, that case is
25 distinguishable. First, Meyer did not address liability for calls placed to reassigned or
26 recycled cellular telephone numbers where the consent was granted by the previous
27 telephone call owner but concerned which devices or technologies are autodialers
28 within the meaning of the TCPA. Moreover, the court expressed concern that any

1 rulings from the FCC is discretionary and stated that the court “will not stay this case
2 while it awaits rulings that may never come.” Id. at *2. However, in the instant case,
3 the public comment periods have passed and unlike Meyer, there is an indication by an
4 FCC Commissioner that this is an issue of importance where guidance is needed and
5 that the FCC should work on resolving this issue without delay. (See Dkt. No. 48-2,
6 D’s RJN, Ex. E.)

7 Plaintiff also contends that he will be prejudiced due to passage of time as any
8 FCC rulings regarding the TCPA are applied prospectively, not retroactively.
9 Defendant disagrees.

10 Administrative rules will not have retroactive effect unless Congress authorized
11 the administrative agency and the language of the regulations require it. Bowen v.
12 Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). However, a clarification of a
13 regulation does not raise issues about retroactivity. Clay v. Johnson, 264 F.3d 744, 749
14 (7th Cir. 2001) (stating that a clarifying rule “can be applied to the case at hand just as
15 a judicial determination construing a statute can be applied to the case at hand,” and
16 does not raise issues of retroactivity).

17 Here, both petitions seek to “clarify” the regulations. In United Healthcare,
18 Petitioner seeks to “*clarify* the applicability of the . . . [TCPA] and the Commission’s
19 TCPA rules to informational, non-telemarketing autodialed and prerecorded calls to
20 wireless numbers for which valid prior express consent has been obtained but which,
21 unbeknownst to the calling party, have subsequently been reassigned from one wireless
22 subscriber to another.” (Dkt. No. 34-4, D’s RJN, Ex. A at 7) (emphasis added.) ACA
23 also sought to “*clarify* that prior express consent attaches to the person incurring a debt,
24 and not the specific telephone number provided by the debtor at the time a debt was
25 incurred” (Id. at 21-22) (emphasis added). Therefore, any clarifications made by
26 the FCC may be applied retroactively. Moreover, Plaintiff will not be prejudiced since
27 he stopped receiving calls in the Fall of 2013 and the case is in the early stages of
28 litigation. Accordingly, Plaintiff’s argument is without merit.

1 Based on the Syntek factors, the Court concludes that a stay is warranted under
2 the primary jurisdiction doctrine.

3 **B. Requests for Judicial Notice**

4 Defendant filed requests for judicial notice as to documents posted on the official
5 websites of the FCC. (Dkt. No. 34-4, D's RJN; Dkt. No. 48-2.) The Court may take
6 judicial notice of information made "publicly available by government entities" and
7 whose authenticity no party disputes, such as declaratory ruling petitions filed with the
8 FCC, and subsequent filings by the FCC and other parties on the same docket.
9 Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010). Here,
10 Defendant seeks the Court to take judicial notice of materials posted on the FCC
11 website. Plaintiff has also not opposed the requests for judicial notice. Accordingly,
12 the Court GRANTS Defendant's requests for judicial notice.

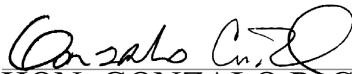
13 **Conclusion**

14 Based on the above, the Court GRANTS Defendant's motion for a stay. The
15 parties shall submit a joint status report regarding the status of the FCC petitions every
16 120 days until the stay in this case is lifted. The hearing set for May 23, 2014 shall be
17 vacated.

18 The Court also DENIES without prejudice Plaintiff's pending motion to certify
19 class, (Dkt. No. 57), and motion to file documents under seal, (Dkt. No. 46), currently
20 set for hearing on July 25, 2014 subject to renewal once the stay is lifted.

21 IT IS SO ORDERED.

22
23 DATED: May 21, 2014

24 
25 HON. GONZALO P. CURIEL
26 United States District Judge
27
28