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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Michelle Meza and Steve Meza,
12 Plaintiffs,
13 v.
14 Sirius XM Radio, Inc.,
15 Defendant,
16 United States of America,
17 Intervenor.
18

Case No.: 17-cv-2252-AJB-JMA

ORDER:
(1) DENYING DEFENDANT’S
MOTION TO DISMISS, (Doc. No. 16);
AND
(2) STAYING THE CASE

19 Defendant Sirius XM Radio, Inc’s motion to dismiss raises constitutional issues
20 currently pending before the Ninth Circuit. Sirius argues that a provision of the Telephone
21 Consumer Protection Act violates the First Amendment because it is a content-based
22 restriction on speech which is not narrowly tailored under a strict scrutiny analysis.
23 Recently, a number of defendants have appealed district court orders on identical grounds,
24 asserting that a government-debt exemption written into a provision of the statute turns a
25 content-neutral provision into a content-based one. Because the Ninth Circuit has granted
26 briefing concerning the same constitutional issues Sirius raises, the Court chooses to **STAY**
27 this case pending the Ninth Circuit’s decision regarding the constitutionality of
28 47 U.S.C. § 227(b)(1)(A)(iii). Thus, the Court **DENIES** Sirius’ motion to dismiss on First

1 Amendment grounds as premature, given that the issue is before the Ninth Circuit. (Doc.
2 No. 16.) The Court also **DENIES** Sirius’ argument that the complaint should be dismissed
3 for failure to allege a key element under the TCPA, finding the complaint adequately pleads
4 Sirius used an ATDS.

5 **I. BACKGROUND**

6 Plaintiffs allege Sirius contacted their cellular phones for illegal marketing purposes,
7 violating the TCPA. (Doc. No. 1 ¶ 1.) Under the Telephone Consumer Protection Act,
8 (“TCPA”), businesses are prevented from calling a cell phone using an “automatic
9 telephone dialing system, (“ATDS”). 47 U.S.C. § 227 (b)(1)(a). The Act, however, allows
10 the use of an ATDS if the caller has been given “the prior express consent of the called
11 party,” or if the call is made “solely to collect a debt owed to or guaranteed by the United
12 States.” (Doc. No. 16-1 at 7.)

13 **II. REQUEST FOR JUDICIAL NOTICE**

14 Sirius requests the Court take judicial notice of a settlement agreement and a fee
15 memorandum in *Hooker v. Sirius XM Radio Inc.*, No. 13-cv-3 (E.D. Va. 2013).
16 (Doc. No. 16-2.) In that case, Sirius was the defendant and the Meza’s current attorneys
17 were also plaintiff’s attorneys-of-record.

18 Pursuant to Federal Rule of Evidence 201(b), “[t]he court may judicially notice a
19 fact that is not subject to reasonable dispute because it: (1) is generally known within the
20 trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from
21 sources whose accuracy cannot reasonably be questioned.” However, “[a]s a general rule,
22 [the court] ‘may not consider any material beyond the pleadings in ruling on a Rule
23 12(b)(6) motion.’” *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011)
24 (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). The Court may “take
25 judicial notice of ‘matters of public record,’ but not of facts that may be ‘subject to
26 reasonable dispute.’” *Corinthian Colleges*, 655 F.3d at 999.

27 Here, the Court takes judicial notice of both the settlement agreement and the fee
28 memorandum as the former is not subject to dispute and the latter is a matter of public

1 record. (Doc. No. 16-2.)

2 III. MOTION TO DISMISS

3 Sirius gives two reasons why the complaint should be dismissed: (1) the Meza’s fail
4 to plead Sirius used an ATDS; and (2) the TCPA violates both the First Amendment and
5 the Equal Protection Clause. Sirius also requests the class allegations should be stricken,
6 arguing plaintiffs are inadequate class representatives.¹

7 A. Legal Standard

8 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the legal
9 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A
10 pleading must contain “a short and plain statement of the claim showing that the pleader is
11 entitled to relief” Fed. R. Civ. P. 8(a)(2). Plaintiffs must also plead, however, “enough
12 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550
13 U.S. 544, 570 (2007). The plausibility standard thus demands more than a formulaic
14 recitation of the elements of a cause of action or naked assertions devoid of further factual
15 enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint “must
16 contain sufficient allegations of underlying facts to give fair notice and to enable the
17 opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
18 2011).

19 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
20 truth of all factual allegations and must construe them in the light most favorable to the
21 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The
22 court need not take legal conclusions as true “merely because they are cast in the form of
23 factual allegations.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting
24 *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Similarly, “conclusory
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26
27 ¹ In the interest of judicial efficiency, the Court declines to rule on Sirius’ request to strike
28 the class allegations. (Doc. No. 16-1 at 16–19.) Sirius can renew this request when the
case’s stay is lifted, should they wish to do so.

1 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
2 dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

3 **B. The ATDS Element is Adequately Pled**

4 Sirius argues the Meza’s failed to plead an essential element of the TCPA, namely,
5 that Sirius used an ATDS. (Doc. No. 16-1 at 11.) To state a claim for a violation of the
6 TCPA, a plaintiff must allege that “(1) the defendant called a cellular telephone number;
7 (2) using an automatic telephone dialing system; (3) without the recipient’s prior express
8 consent.” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012);
9 47 U.S.C. § 227(b)(1). An ATDS is “equipment which has the capacity – (A) to store or
10 produce telephone numbers to be called, using a random or sequential number generator;
11 and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). Complicating matters is a recent
12 decision significantly narrowing what “capacity” means under the statute. *ACA*
13 *International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The FCC had previously determined
14 that the “capacity” of calling equipment “includes its potential functionalities” or “future
15 possibility,” not just its “present ability.” *Id.* at 695. However, *ACA International* held that
16 “the FCC’s interpretation of a device that has the ‘capacity’ to operate as an ATDS was
17 impermissibly expansive.” *Gonzalez v. Ocwen Loan Servicing, LLC*, No: 5:18-cv-340-Oc-
18 30PRL, 2018 WL 4217065, at *3 (M.D. Fla. Sep. 5, 2018) (referencing *ACA International*,
19 885 F.3d at 695–99). This is because such an interpretation could encompass any cell phone
20 that could download an application or extension with the capacity to store numbers dialed
21 using a random generator and dial them—thus turning any cellular phone into an
22 autodialer. *Id.* at 699–70.

23 Sirius asserts that the conclusory allegations the Meza’s pled are insufficient to
24 support a claim for relief. (Doc. No. 16-1 at 11.) The Meza’s assert they have included
25 “several factual allegations” which create “at a minimum a reasonable inference that []
26 Sirius used an ATDS here.” (Doc. No. 19 at 14.) The complaint states “[u]pon information
27 and belief, the calls were placed via an automatic telephone dialing system.”
28 (Doc. No. 1 ¶ 13 (internal quotations omitted).) The complaint also alleges that “[u]pon

1 information and belief, this telephone dialing equipment used by Sirius has the capacity to
2 store or produce telephone numbers to be called, using a random or sequential number
3 generator.” (*Id.* ¶ 20.) Also, upon “information and belief,” the Meza’s allege that “this
4 telephone dialing equipment also has the capacity to dial telephone numbers stored in a
5 database or as a list without human intervention.” (*Id.* ¶ 21.) Sirius cites several cases which
6 held such conclusory allegations are insufficient to support a claim. (Doc. No. 16-1 at 11–
7 12; *See Dugiud v. Facebook, Inc.*, No. 15-cv-00985-JST, 2016 WL 1169365, at *4
8 (N.D. Cal. Mar. 24, 2016 (“This conclusory allegation that Facebook used an ATDS is not,
9 without more, sufficient to support a claim for relief under the TCPA.”).)

10 However, the Meza’s provided a few additional facts beyond these conclusory
11 allegations. Supporting the claim Sirius used an ATDS, the Meza’s also pled that “[a]t the
12 beginning of some of the calls there was a long pause before a live agent of Sirius would
13 come on the line.” (*Id.* ¶ 19.) Mr. Meza also stated he heard a prerecorded voice and waited
14 twenty minutes before connecting to a live person. (*Id.* ¶ 14.) While courts have held that
15 isolated assertions based upon information and belief that defendant is using an ATDS need
16 not be taken as true, here, the Meza’s provided additional information inferring the use of
17 an ATDS. *See Lofton v. Verizon Wireless (VAW) LLC*, No. 13-cv-05665-YGR, 2015 WL
18 1254681, at *5 (N.D. Cal. Mar. 18, 2015) (finding an allegation of a “telltale” pause after
19 plaintiff picked up the telephone is sufficient at the pleadings stage to allege use of an
20 ATDS); *Thomas v. Dun & Bradstreet Credibility Corp.*, 100 F. Supp. 3d 937 (C.D. Cal.
21 2015) (finding that plaintiffs’ allegations that defendant used an ATDS and that he heard
22 a “pause” after answering the telephone was sufficient at the pleading stage).

23 Thus, the Court finds the Meza’s plausibly stated a claim that Sirius used an ATDS
24 when contacting plaintiffs. The issues raised the parties’ supplemental filings on what
25 constitutes an ATDS post-ACA *International* is better suited for a summary judgment
26 motion, as the Court is bound to accept well-pleaded allegations as true at this stage.
27 (*See* Doc. No. 48.) As such, the Court declines to analyze the parties’ arguments regarding
28 the classification of Sirius’ dialing equipment. As such the Defendant’s 12(b)(6) motion is

1 **Denied.**

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3 **C. Sirius’ Constitutional Arguments Require a Stay**

4 Sirius also challenges the constitutionality of the TCPA, arguing it violates the First
5 Amendment and the Equal Protection Clause. (Doc. No. 16-1 at 13.) The United States
6 intervened to oppose Sirius’ assertions of unconstitutionality and filed a brief in support of
7 the TCPA. (Doc. No. 36.) The Meza’s assert these “unconstitutionality arguments have
8 been rejected before.” (Doc. No. 19 at 23.)

9 Sirius argues that 47 U.S.C. § 227(b)(1)(A)(iii) is unconstitutional because it is a
10 content-based restriction on freedom of speech and is not narrowly tailored. (Doc. No. 16-
11 1 at 13.) This section prohibits an unconsented call from an ATDS to a “cellular telephone
12 service . . . unless such call is made solely to collect a debt owed to or guaranteed by the
13 United States.” 47 U.S.C. § 227(b)(1)(A)(iii). The government-debt exception clause was
14 added in November 2015. (Doc. No. 36 at 10.) Sirius asserts the law is “content-based”
15 because it draws a distinction based on the message conveyed, namely, that “[a] caller may
16 use an ATDS or prerecorded voice to collect a government debt, but not (for example) to
17 urge church attendance, solicit a charitable contribution, or (as here) communicate with a
18 customer.” (*Id.* at 14.) Sirius states “this law singles out calls about government debts for
19 special favor. The preferential treatment here amounts not just to content discrimination,
20 but to outright viewpoint discrimination. . . .” (*Id.*) Because the Meza’s allege their cellular
21 phone was the called phone, which is prohibited only under § 227(b)(1)(A)(iii), Sirius
22 argues the entire provision is unconstitutional and must be struck, leaving all ATDS-based
23 allegations asserted by the Meza’s unfounded.

24 In 2015, the Supreme Court held that a town ordinance prohibiting the display of
25 outdoor signs without a permit, but which also exempted 23 categories of signs (including
26 political and ideological signs), was a content-based restriction under the First Amendment.
27 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The Court reasoned the ordinance
28 was content-based because the restrictions “depend entirely on the communicative content

1 of the sign.” *Id.* at 2228. The Court struck down the ordinance finding it did not pass strict
2 scrutiny because it was not narrowly tailored and was “hopelessly underinclusive.” *Id.* at
3 2231. Post-*Reed*, a number of defendants have asserted, as Sirius does, that the TCPA is
4 similarly unconstitutional as a content-based restriction under the First Amendment. The
5 United States acknowledged that at least “[s]ix courts have determined the TCPA is content
6 based, after *Reed* and as amended in 2015. . . .” (Doc. No. 36 at 12 n.1.) However, each of
7 those courts “upheld the statute under strict scrutiny.” (*Id.*) Of those six cases, however,
8 four have been appealed: three to the Ninth Circuit and one to the Fourth Circuit. (*Id.*)

9 In *Brickman v. Facebook, Inc.*, Facebook makes a nearly identical argument as
10 Sirius, arguing that “the TCPA is content-based because it’s riddled with exceptions that
11 draw[] distinctions based on the message a speaker conveys.” *Brickman v. Facebook, Inc.*,
12 230 F. Supp. 3d 1036, 1044 (N.D. Cal. 2017), *appeal filed*, No. 17-80080 (9th Cir. May 9,
13 2017) (internal quotations omitted). The district court, agreeing with Facebook, held that
14 § 227(b)(1)(A)(iii) is “content-based and therefore subject to strict scrutiny.” *Id.* The Court
15 reasoned that the section is content-based because it “would require a court to examine the
16 content of the message that is conveyed in order to determine if a violation of the TCPA
17 has occurred.” *Id.* The Court went on to find the TCPA withstood strict scrutiny and denied
18 Facebook’s dismissal motion. *Id.* at 1045–49.

19 Facebook requested permission to appeal to the Ninth Circuit, arguing the First
20 Amendment question is one of great importance because “if this Court [the Ninth Circuit]
21 were to agree with Facebook . . . there would be nothing left to do but dismiss this case
22 entirely.” (Petition for Permission to Appeal at 9, *Brickman*, No. 17-80080 (9th Cir. May
23 9, 2017).) The petition was stayed pending the outcome of *ACA International*. (Order at 2,
24 *Brickman*, No. 17-80080, ECF No. 12.) Facebook renewed its request for permission to
25 appeal post-*ACA International*, as that case did “not address the constitutionality of the
26 TCPA’s content-based speech exceptions.” (Notification of Decision in *ACA International*
27 *v. FCC* at 2, *Brickman*, No. 17-80080.)

28 Alternatively, Facebook requested another stay pending the outcome of a similar

1 case already on appeal: *Marks v. Crunch of San Diego*. (*Id.* at 3.) The Ninth Circuit opted
2 to again stay the case—as well as another case Facebook requested permission to appeal,
3 *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021 (N.D. Cal. 2017), *appeal filed*, No. 17-80086
4 (9th Cir. May 12, 2017)—pending the outcome of *Marks v. Crunch of San Diego, LLC*.
5 (Order at 2, *Brickman*, No. 17-80080, ECF No. 21.) The Ninth Circuit issued its opinion in
6 *Marks* on September 20, 2018. *Marks*, No. 14-56834, 2018 WL 4495553 (9th Cir. 2018).
7 The *Marks* opinion did not touch on the constitutionality issues raised by Sirius and
8 Facebook. As the *Facebook* cases stand, counsel is required to notify the Circuit of the
9 *Marks* decision—which it has yet to do—and it remains unclear whether the Ninth Circuit
10 will grant Facebook’s requests to appeal.

11 However, in yet another appeal debating the TCPA’s constitutionality, the Circuit
12 did grant permission to appeal. *Gallion v. Charter Commc’ns, Inc.*, 287 F. Supp. 3d 920
13 (C.D. Cal. 2018), *appeal docketed*, No. 18-80031, No. 18-55667 (9th Cir. Mar. 8, 2018).
14 In its opening brief, appellant-Defendant Charter Communications made the same
15 constitutional arguments as Facebook and Sirius: that § 227(b)(1)(A)(iii) is a content-based
16 and speaker-based speech restriction which fails strict scrutiny. (Opening Brief at 14,
17 *Gallion*, No. 18-55667.) *Gallion*’s opening brief mentions three of Facebook’s cases in a
18 “statement of related cases,” asserting “[t]hese three cases are ‘related’ to this matter
19 because they ‘raise the same or closely related issues.’” (*Id.* at 63 (citing Ninth Circuit Rule
20 28-2.6(c)).) On September 6, 2018, the Chamber of Commerce of the United States of
21 America submitted an amicus brief supporting the TCPA’s constitutionality. (Brief of
22 Amicus Curiae Chamber of Commerce, *Gallion*, No. 18-55667 (Sep. 6, 2018).)
23 Additionally, on September 7, 2018, the American Association of Political Consultants
24 filed an amicus brief supporting Charter Communications, arguing § 227(b)(1)(A)(iii) is
25 unconstitutional. (Brief of Amicus Curiae American Association of Political Consultants
26 at 10, *Gallion*, No. 18-55667 (Sep. 7, 2018).)

27 Thus, in summarizing pending litigation before the Ninth Circuit, this Court finds
28 the constitutional issues Sirius raises are substantively identical to those raised in both the


1 *Facebook* cases and *Gallion*. While Sirius moved for a stay pending *ACA International*,
2 which is now moot, the Court finds a stay pending the outcome of *Gallion* or either
3 *Facebook* case is appropriate at this time (although a resolution in *Gallion* is likely to occur
4 first, as the case is further along). If the Ninth Circuit agrees with defendants that
5 47 U.S.C. § 227(b)(1)(A)(iii) is unconstitutional, then the Meza's ATDS allegations would
6 have to be dismissed as they allege both of their cellular telephones were called in violation
7 of this provision. (Doc. No. 1 ¶¶ 12, 13.) Based on the forgoing, Defendant's motion on
8 constitutional grounds is Denied as premature.

9 IV. CONCLUSION

10 Because the constitutionality of 47 U.S.C. § 227(b)(1)(A)(iii) is pending before the
11 Ninth Circuit, the Court **DENIES** Sirius' motion to dismiss and **STAYS** the case pending
12 a ruling in *Gallion v. Charter Commc'ns, Inc.*, No. 18-55667 (9th Cir. Mar. 8, 2018).
13 Defendants are **ORDERED** to file a status report on that case's progress every **6 months**
14 with this court and either party must notify this Court within **14 days** after a decision is
15 ordered.

16 **IT IS SO ORDERED.**

17 Dated: September 25, 2018

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19 Hon. Anthony J. Battaglia
20 United States District Judge
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