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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF WASHINGTON  
4

5  
6 SUSAN EMBREE,  
7 Plaintiff,  
8 v.  
9 OCWEN LOAN SERVICING, LLC,  
10 Defendant.  
11

NO. 2:17-CV-00156-JLQ

MEMORANDUM OPINION AND  
ORDER RE: MOTION TO DISMISS

12  
13 **I. Introduction**

14 BEFORE THE COURT is Defendant Ocwen Loan Servicing, LLC’s (“Defendant” or  
15 “Ocwen”) Motion to Dismiss or in the Alternative to Stay the Case (ECF No. 23). Plaintiff  
16 filed a Response (ECF No. 27) and Defendant filed a Reply (ECF No. 28). The Motion was  
17 submitted without oral argument. This Order memorializes the court’s ruling on the Motion.  
18

19 **II. Factual Background**

20 All well-pleaded facts are accepted as true as follows for the purposes of the Motion  
21 to Dismiss.

22 Between November 22, 2011, through December 16, 2015, Plaintiff Susan Embree  
23 received calls on her cellular phone from Defendant. (ECF No. 19 at ¶28). When she would  
24 answer the calls, there would often be silence, sometimes with a click or beep-tone before  
25 an Ocwen representative would pick up and start speaking. (ECF No. 19 at ¶30). Plaintiff  
26 contends she received calls at times from Defendant where the caller was a recorded voice  
27 or message and not a live representative. (ECF No. 19 at ¶31). In total, Plaintiff received at  
28 least 1,505 calls from Defendant on her cell phone. (ECF No. 19 at ¶32).

1 Plaintiff alleges she never gave Defendant her cell phone number on any loan  
2 application. (ECF No. 19 at ¶34). She also alleges she revoked any type of prior consent by  
3 stating she no longer wished to be contacted by phone. (ECF No. 19 at ¶35). Plaintiff claims  
4 after she stated she no longer wanted to be called, Defendant continued to contact Plaintiff.  
5 (ECF No. 19 at ¶37).

6 Plaintiff alleges she has suffered frustration and distress because of the calls. (ECF No.  
7 19 at ¶42). She also alleges the calls “disrupted Plaintiff’s daily activities and the peaceful  
8 enjoyment of Plaintiff’s personal and professional life, including the ability to use Plaintiff’s  
9 phone.” (ECF No. 19 at ¶44).

### 10 III. Discussion

11 To survive a motion to dismiss, the pleading must allege sufficient facts, which,  
12 accepted as true, “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*  
13 *Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when “the plaintiff  
14 pleads factual content that allows the court to draw the reasonable inference that the  
15 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
16 In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), “the court accepts the facts  
17 alleged in the complaint as true.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup>  
18 Cir. 1990). However, a claim may be dismissed “based on the lack of a cognizable legal  
19 theory.” (*Id.*).

20 The Telephone Consumer Protection Act (“TCPA”) makes it “unlawful for any  
21 person within the United States ... to make any call (other than a call made for emergency  
22 purposes or made with the prior express consent of the called party) using any  
23 automatic telephone dialing system or an artificial or prerecorded voice... to any  
24 telephone number assigned to ... cellular telephone service... unless such call is made  
25 solely to collect a debt owed to or guaranteed by the United States.” 47 U.S.C.  
26 § 227(b)(1)(A)(iii); *see also*, *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d  
27 1037, 1041-42 (9<sup>th</sup> Cir. 2017). An “automated telephone dialing system” is defined  
28 as “equipment which has the capacity– to store or produce telephone numbers to be

1 called, using a random or sequential number generator, and to dial such numbers.” 47 U.S.C.  
2 § 227(a)(1).

3 The Federal Communications Commission (“FCC”) is charged with implementing the  
4 TCPA. *See* 47 U.S.C. § 227(b)(2); *Van Patten*, 847 F.3d at 1041. The Court of Appeals has  
5 exclusive jurisdiction to set aside “all final orders of the Federal Communications  
6 Commission made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342(1). Certain  
7 FCC orders are subject to exclusive review in the Court of Appeals for the District of  
8 Columbia. *See* 47 U.S.C. § 402(b).

9 In 2015, the FCC issued a ruling providing interpretation of several provisions of  
10 the TCPA. *In the Matter of Rules & Regulations Implementing the Telephone*  
11 *Consumer Protection Act of 1991*, 30 F.S.C.R. 7961 (July 10, 2015) (“2015 FCC  
12 Order”). The 2015 FCC Order has been challenged in a lawsuit currently pending before the  
13 Court of Appeals for the District of Columbia. *See ACA International v. FCC*, No. 15-1211  
14 (D.C. Cir.). The issues presented in that appeal relate to: (1) whether the new definition  
15 of “automatic telephone dialing system” violates due process; (2) whether the 2015  
16 FCC Order’s treatment of “prior express consent”, including the provision for a right of  
17 revocation, violates due process; and (3) whether the 2015 FCC Order violates  
18 due process by disregarding Congress’ findings in the TCPA. *See ACA International*,  
19 Petitioner ACA International’s Statement of Issues, Dkt. #21 (August 12, 2015).  
20 Oral argument in the *ACA International* case was heard on October 19, 2016. (*Id.* at  
21 Dkt. #131) (October 19, 2016). No opinion by the D.C. Circuit has been issued to  
22 date.

23 The parties assert the decision in *ACA International* will be binding on this court.  
24 However, the parties do not discuss 47 U.S.C. § 402(b) or identify which subsection the *ACA*  
25 *International* case falls into. *See Campos v. F.C.C.*, 650 F.2d 890, 892-93 (7<sup>th</sup> Cir. 1981)  
26 (stating “it is well settled that Section 402(b) is to be narrowly construed and confined to the  
27 enumerated categories”). The court makes no finding as to the effect, if any, the *ACA*  
28 *International* case will have on this matter.

1 **A. Motion to Stay**

2 “[T]he power to stay proceedings is incidental to the power inherent in every court to  
3 control the disposition of the causes on its docket with economy of time and effort for itself,  
4 for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The  
5 party seeking a stay “must make out a clear case of hardship or inequity in being required  
6 to go forward, if there is even a fair possibility that the stay ... will work damage to some one  
7 [sic] else.” (*Id.* at 255).

8 When a party seeks a stay pending resolution of another matter, the Ninth Circuit  
9 requires the district court to weigh “the competing interests which will be affected by the  
10 granting or refusal to grant a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9<sup>th</sup> Cir.  
11 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9<sup>th</sup> Cir. 1962)). Those competing  
12 interests include: (1) “the possible damage which may result from the granting of a stay”; (2)  
13 “the hardship or inequity which a party may suffer in being required to go forward”; and (3)  
14 “the orderly course of justice measured in terms of the simplifying or complicating of issues,  
15 proof, and questions of law which could be expected to result from a stay.” (*Id.*). The burden  
16 of proof is on the party seeking the stay. *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Both  
17 parties cite a number of district court cases either granting or denying a stay pending *ACA*  
18 *International*.

19 Defendant argues a stay is appropriate because the *ACA International* decision “could  
20 be dispositive” of Plaintiff’s TCPA claims or narrow her claims. (ECF No. 23 at 15).  
21 Defendant also argues a stay prevents “the potential for inconsistent rulings on the scope of  
22 the TCPA.” (ECF No. 23 at 16). Defendant claims a stay would not prejudice the parties  
23 because discovery has not begun. (ECF No. 23 at 17). Additionally, Defendant argues absent  
24 a stay, there is the potential the parties will have to litigate this matter twice if *ACA*  
25 *International* sets forth a new standard. (ECF No. 23 at 22-24).

26 Plaintiff opposes a stay, asserting Defendant’s arguments are “based on speculation  
27 as to what may happen in *ACA International*.” (ECF No. 27 at 10-11). Also, if the 2015 FCC  
28 Order is struck down, Plaintiff argues “there is no reason to believe that the decision would

1 apply retroactively to affect the outcome of this case.” (ECF No. 27 at 14). Plaintiff argues  
2 a stay will cause her hardship because a stay will be “indefinite and potentially lengthy” with  
3 an appeal to the Supreme Court “almost certain.” (ECF No. 27 at 11). Specifically, Plaintiff  
4 notes “[s]ome documents and evidence, including call logs and dialer information may be  
5 under the control of third parties” and such documents may be destroyed during a stay. (ECF  
6 No. 27 at 11-12). Additionally, Plaintiff asserts the claimed burden of producing discovery  
7 does not justify a stay. (ECF No. 27 at 15).

8         The fact *ACA International* was argued over a year ago does not infer a decision is  
9 forthcoming. Instead, the delay shows there is no guarantee when an opinion will be issued.  
10 An indefinite stay in this matter would run contrary to the interests of justice. Additionally,  
11 Defendant fails to demonstrate it will suffer undue prejudice absent a stay. In essence,  
12 Defendant asks the court to read the tea-leaves and conclude the decision in *ACA*  
13 *International* will be in its favor. The court will not engage in such speculation. Regardless  
14 of the outcome of *ACA International*, the parties will need to develop a factual record to  
15 show if, or how, that decision applies to the instant matter. Proceeding with discovery  
16 forthwith will enable prompt resolution of any issues raised by *ACA International* whenever  
17 an opinion is issued therein. Additionally, given the age of the claims in this case and  
18 evidence related thereto, Plaintiff faces a reasonable possibility of prejudice if this matter is  
19 stayed indefinitely. Defendant has not met its burden of establishing a stay is warranted.

20         For all of the foregoing reasons, the court declines to indefinitely stay this matter  
21 pending final resolution of the *ACA International* case. In light of this ruling, the court next  
22 considers the merits of Defendant’s Motion to Dismiss.

### 23 **B. Standing**

24         Article III of the Constitution limits federal judicial power to “Cases” and  
25 “Controversies.” U.S. Const. Art. III, § 2. Standing to sue “limits the category of litigants  
26 empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.” *Spokeo,*  
27 *Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To satisfy Article III standing, “[t]he plaintiff  
28 must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct

1 of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” (*Id.*).  
2 “Injury in fact” occurs when the plaintiff establishes they suffered “‘an invasion of a legally  
3 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not  
4 conjectural or hypothetical.’” (*Id.*) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
5 560 (1992)).

6 “Article III standing requires a concrete injury even in the context of a statutory  
7 violation.” (*Id.* at 1549). “Congress’ role in identifying and elevating intangible harms does  
8 not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a  
9 statute grants a person a statutory right and purports to authorize that person to sue to  
10 vindicate that right.” (*Id.*).

11 The Ninth Circuit has addressed the issue of Article III standing in the context of the  
12 TCPA. *See Van Patten*, 847 F.3d at 1042-43. The Ninth Circuit noted “in enacting the  
13 TCPA, Congress made specific findings that ‘unrestricted telemarketing can be an intrusive  
14 invasion of privacy’ and are a ‘nuisance.’” (*Id.* at 1043) (quoting Telephone Consumer  
15 Protection Act of 1991, Pub. L. 102-243, § 2, ¶¶5, 10, 12, 13, 105 Stat. 2394 (1991)).  
16 Additionally, the Ninth Circuit quoted the TCPA session law which stated “[b]anning such  
17 automated or prerecorded telephone calls to the home, except when the receiving party  
18 consents to receiving the call... is the only effective means of protecting telephone consumers  
19 from this nuisance and privacy invasion.” (*Id.*) (quoting Pub. L. 102-243, § 2, ¶12).

20 The Ninth Circuit concluded “[t]he TCPA establishes the substantive right to be free  
21 from certain types of phone calls and texts absent consumer consent. Congress identified  
22 unsolicited contact as a concrete harm, and gave consumers a means to redress this harm.”  
23 (*Id.*). In *Van Patten*, the Ninth Circuit ultimately held “[a] plaintiff alleging a violation under  
24 the TCPA ‘need not allege any *additional* harm beyond the one Congress has identified.’”  
25 (*Id.* at 1043) (emphasis in original) (quoting *Spokeo*, 136 S. Ct. at 1549)).

26 Defendant’s Motion relies on *Spokeo*, but does not address *Van Patten*. *See* (ECF No.  
27 23 at 10-14). After Plaintiff raised *Van Patten* in her Response, Defendant, in a footnote in  
28 its Reply, argued *Van Patten* is “easily distinguishable” because the holding was “very

1 clearly limited” to “unsolicited” contact. (ECF No. 28 at 2 n.1). Defendant asserts *Van Patten*  
2 addressed “unsolicited contact between parties without a continued relationship.” (ECF No.  
3 28 at 2 n.1). Defendant’s characterization of *Van Patten* misses the mark.

4 Like *Van Patten*, Plaintiff has claims she revoked consent which makes the alleged  
5 contact by Defendant unsolicited. Congress specifically sought to ban “automated or  
6 prerecorded telephone calls” which is the same kind of harm alleged herein. The injurious  
7 acts alleged by Plaintiff are indistinguishable from those found to be sufficient in *Van*  
8 *Patten*. The court finds no basis to depart from *Van Patten*. Accordingly, Plaintiff has  
9 standing and the Motion to Dismiss the TCPA claim is Denied.

### 10 **C. Negligence**

11 “In order to prove actionable negligence, a plaintiff must establish the existence  
12 of a duty, a breach thereof, a resulting injury, and proximate causation between the  
13 breach and the resulting injury.” *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468,  
14 474 (1998). Defendant asserts “the TCPA does not provide a duty of care sufficient for  
15 a negligence cause of action.” (ECF No. 23 at 9). Plaintiff states she is not looking to  
16 the TCPA as the source of a duty of care and argues the duty to act reasonably  
17 when collecting a debt arises out of the common law. (ECF No. 27 at 7-8). In making this  
18 argument, Plaintiff cites several cases from other jurisdictions, but does not cite any case  
19 addressing Washington law.

20 Courts in New York, Kansas, California, Georgia, and Mississippi have found a duty  
21 to act with reasonable care in the context of loan or debt collection. *See Aguirre v. Wells*  
22 *Fargo Bank, N.A.*, No. CV 15-1816-GHK (MRWx), 2015 WL 4065245 at \*\*8-9 (C.D. Cal.  
23 July 2, 2015); *Howard v. CitiMortgage, Inc.*, No. 1:13cv543-KS-MTP, 2014 WL 6802550  
24 at \*\*9-10 (S.D. Miss. Dec. 2, 2014); *Tourgeman v. Collins Financial Services, Inc.*, No. 08-  
25 CV-1392 JLS (NLS), 2010 WL 4817990 at \*\*5-6 (S.D. Cal. Nov. 22, 2010); *Johnson v.*  
26 *Citimortgage, Inc.*, 351 F. Supp. 2d 1368, 1378-80 (N.D. Ga. 2004); *Colorado Capital v.*  
27 *Owens*, 227 F.R.D. 181, 187-90 (E.D. N.Y. 2005); *Lowe v. Surpas Res. Corp.*, 253 F. Supp.  
28 2d 1209, 1237 (D. Kan. 2003). While none of those cases speak to Washington law, they

1 demonstrate there may be a cause of action for negligence in the collection of debts. The  
2 court is not convinced at this stage the negligence claim lacks plausibility. However, this  
3 issue may be raised again on a developed factual record and a thorough discussion of  
4 Washington law.

5 The statute of limitations in Washington for tort claims is three years from the date of  
6 injury. *See* RCW 4.16.080(2). The Complaint in this matter was filed on May 4, 2017, and  
7 the Amended Complaint alleges Defendant called her over 1,505 times between November  
8 22, 2011, and December 16, 2015. *See* (ECF No. 19 at ¶¶28, 32). Defendant argues Plaintiff  
9 “pleads no facts to demonstrate that any violation actually occurred within the relevant  
10 statutory period.” (ECF No. 23 at 8). This argument carries no weight. Plaintiff alleges the  
11 relevant calls occurred within a period which includes dates within the last three years. The  
12 fact some of the alleged injurious calls may have occurred outside the statutory period does  
13 not demonstrate an insufficient pleading or otherwise require the claims to be dismissed.  
14 Through discovery, Defendant can establish how many calls took place within the statutory  
15 period.

16 Insofar as some of the calls took place outside the three year statutory period, Plaintiff  
17 argues the statute of limitations were tolled pursuant to *American Pipe & Construction Co.*  
18 *v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Supreme Court held “where class action  
19 status has been denied solely because of failure to demonstrate that the class is so numerous  
20 that joinder of all members is impracticable, the commencement of the original class suit  
21 tolls the running of the statute [of limitations] for all purported members of the class who  
22 make timely motions to intervene after the court has found the suit inappropriate for class  
23 action status.” (*Id.* at 552-53) (internal quotation marks omitted). The Supreme Court also  
24 held “the commencement of a class action suspends the applicable statute of limitations as  
25 to all asserted members of the class who would have been parties had the suit been permitted  
26 to continue as a class action.” (*Id.* at 554). Additionally, tolling under *American Pipe* applies  
27 where plaintiffs do not attempt to intervene but rather seek to file an entirely new action. *See*  
28 *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983).





1 No. 23) is **DENIED** as set forth herein.

2 2. Within 21 days after the entry of this Order, the parties shall submit a report  
3 with their proposed dates for trial and pretrial deadlines. The court will thereafter issue a  
4 Scheduling Order.

5 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish  
6 copies to counsel.

7 Dated November 22, 2017.

8 s/ Justin L. Ouackenbush  
9 JUSTIN L. QUACKENBUSH  
10 SENIOR UNITED STATES DISTRICT JUDGE