IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Joanne Knapper, on behalf of herself and others similarly situated, Plaintiff, vs. Cox Communications, Inc., Defendant.	No. CV-17-00913-PHX-SPL **ORDER**

Before the Court is Defendant's Motion to Stay, Motion to Stay Discovery Pending Ruling, and Motion to Strike. (Doc. 13.) For the following reasons, the motion will be denied.

Plaintiff Joanne Knapper, on behalf of herself and others similarly situated, alleges that, in July 2015, Defendant began placing calls to her cell phone. (Doc. 1 ¶ 8.) Defendant's calls were intended for a recipient other than Plaintiff. (Doc. 1 ¶ 10.) Defendant left at least five voice messages on Plaintiff's cell phone voice mail service. (Doc. 1 ¶ 14.) Plaintiff is not a Cox customer and she does not have a business relationship with Defendant. (Doc. 1 ¶¶ 21-22.) On March 28, 2017, Plaintiff filed a Complaint against Defendant Cox Communications, Inc. for violating the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. (Doc. 1.)

Congress enacted the TCPA to address telemarketing calls and practices which Congress found to be an invasion of consumer privacy. The TCPA prohibits the use of automatic telephone dialing systems and artificial or prerecorded voices to cell phones

unless the call is "made for emergency purposes or made with the prior express consent of the called party[.]" 47 U.S.C. § 227(b)(1)(A)(iii). Congress tasked the FCC with making the necessary rules and regulations to carry out the provisions of the TCPA. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1117 (11th Cir. 2014). District courts lack jurisdiction to review FCC rulings. *Id.* at 1119-20.

At issue here is the definition of "called party." Defendant intended to call a recipient other than Plaintiff. Unbeknownst to Defendant, the cell number had been reassigned to Plaintiff. In 2015, the FCC addressed the issue. The FCC found that the term "called party" as described in the TCPA was "ambiguous." *In the matter of rules and regulations implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8001 (2015) ("2015 Order"). The FCC determined that "the TCPA requires the consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone).… [H]owever, … callers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber." *Id.* at 7999-8000. The FCC deemed the additional call constructive knowledge, *id.* at 8000, and determined that the caller's intent was irrelevant, *id.* at 8002-03. ACA International, along with other parties, appealed the findings of the FCC to the D.C. Circuit Court of Appeals. *ACA Int'l v. FCC*, Case No. 15-1211. The cases were fully briefed and oral argument was held on October 19, 2016.

The ruling by the D.C. Circuit may be binding on this Court. *See MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1267 (9th Cir. 2000) (when FCC regulations are challenged in multiple circuits, and consolidated and assigned to a single court, that circuit becomes the sole forum for addressing the validity of the regulation).[1] Even if not binding, the ruling will be persuasive as the Ninth Circuit

[1] Here, the D.C. Circuit consolidated a number of cases, but they were not from different Courts of Appeals.

Court of Appeals has not addressed the meaning of "called party" as used in the TCPA. *See Thomas v. Dun & Bradstreet Credibility Corp.*, 100 F.Supp.3d 937, 943 (C.D. Cal. 2015). Indeed, the Ninth Circuit deferred ruling on a fully-briefed appeal pending the decision in *ACA Int'l. See Marks v. Crunch San Diego, LLC,* Case No. 14-56834 (9th Cir. Dec. 14, 2016).

Defendant seeks a stay of this action pending the ruling in *ACA Int'l* because the ruling could affect its liability in this litigation. (Doc. 13.) District courts have "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (citation omitted). In determining whether a stay is warranted, courts consider competing interests, including (1) possible damage resulting from a stay; (2) hardship of a party in being required to move forward; and (3) the orderly course of justice measured in terms of simplifying or complicating the issues, proof, and questions of law expected as a result of the stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

The 2015 Order is a lengthy document covering a wide range of TCPA topics. *ACA Int'l* is a large, complex case with many parties and issues. It has been over eight months since oral argument was held. A ruling may be imminent, or it may not. The D.C. Circuit has not indicated when it will rule. Furthermore, it is unlikely the D.C. Circuit will issue a ruling that would relieve Defendant of all liability. Such a ruling would be inconsistent with the purpose of the TCPA.

The Court finds that the pending ruling may affect the scope of this action, but is unlikely to be dispositive of the entire action. Therefore, an indefinite stay is not appropriate. Fact discovery will need to occur regardless of the *ACA Int'l* ruling. Having considered the *Lockyer* factors, the Court finds that a stay is unnecessary at this procedural posture. *See Lockyer*, 398 F.3d at 1112 ("being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity'").

Next, Defendant seeks the Court to strike Plaintiff's request for treble damages pursuant to 47 U.S.C. § 227(b)(3). (Doc. 13 at 12-14.) A court may strike "any redundant,

immaterial, impertinent, or scandalous matter" from a pleading. Fed. R. Civ. P. 12(f). The TCPA permits treble damages when the call was placed "willfully or knowingly." 47 U.S.C. § 227(b)(3). It will be Plaintiff's burden to prove willfulness at summary judgment and trial, but this case is in its early stages. Defendant has failed to show that the allegation is "redundant, immaterial, impertinent, or scandalous." Defendant's request will be denied. Accordingly,

IT IS ORDERED:

1. That Defendant's motion to stay (Doc. 13) the action in its entirety is **denied**;
2. That Defendant's motion to stay discovery (Doc. 13) pending the ruling on the motion to stay is **denied as moot**;
3. That Defendant's motion to strike (Doc. 13) Plaintiff's allegation for treble damages is **denied**; and
4. That the parties file a Joint Rule 26(f) Case Management Report and a Joint Proposed Rule 16 Case Management Order no later than **July 24, 2017**.

Dated this 10th day of July, 2017.

Honorable Steven P. Logan
United States District Judge