

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MICHAEL ROSE,

Plaintiff,

v.

WELLS FARGO ADVISORS, LLC,

Defendant.

CIVIL ACTION NO.

1:16-CV-562-CAP

**ORDER**

This matter is before the court on the defendant's motion to stay [Doc. No. 10]<sup>1</sup> and the plaintiff's motion for leave to file a supplemental brief to inform the court of new relevant case law [Doc. No. 18]. As an initial matter, the motion for leave to file a supplemental brief regarding new case law [Doc. No. 18] is GRANTED.

In the amended complaint [Doc. No. 12], the plaintiff contends that the defendant repeatedly violated the Telephone Consumer Protection Act ("TCPA") by sending him more than 600 texts messages without his consent.

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<sup>1</sup> The motion to stay was filed in alternative along with a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). The plaintiff filed an amended complaint within the time allowed by Federal Rule of Civil Procedure 15(a)(1)(B); therefore, the court has dismissed the motion to dismiss as moot [Doc. No. 21].

The text messages continued even after efforts by the plaintiff's wife to have the defendant stop sending the unwanted messages.

The defendant moved to stay this action pending a decision by the United States Supreme Court in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (granting petition for writ of certiorari) and a decision by the Court of Appeals for the D.C. Circuit in *ACA Int'l, et al. v. Fed. Commcn's Comm.*, No. 15-1211 (D.C. Cir. July 13, 2015). Since the filing of the motion to stay, the Supreme Court issued its opinion in *Spokeo*.<sup>2</sup> Therefore, the only issue for this court to consider is whether to stay this action pending a decision in *ACA*.

A district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Federal courts routinely exercise their power to stay a proceeding where a pending decision in another court would "have a substantial or controlling effect on the claims and issues in the stayed case." *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).

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<sup>2</sup> The plaintiff provided the court with the recent decision by the Supreme Court as an attachment to his motion for leave to file a supplemental brief to inform the court of new relevant case law [Doc. No. 18]. *Spokeo Inc. v. Robins*, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016).

In *ACA*, the D.C. Circuit will address, among other things, what type of equipment constitutes an “ATDS.” Under the TCPA, an “ATDS” is equipment “which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). On appeal is the Federal Communications Commission’s (“FCC”) finding that a piece of equipment has sufficient capacity to qualify as an ATDS if it has the present or “potential” capacity to store or produce numbers to be called using a random generator, but not if it only has the “theoretical” capacity. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 7961 (2015) (“July 2015 Ruling”). The July 2015 Ruling does not clarify the difference between “potential” and “theoretical” capacity. The D.C. Circuit will determine whether the FCC’s treatment of the term “capacity” in defining ATDS is “arbitrary, capricious, [or] an abuse of discretion,” and thus results in an approach that does not comport with the caller’s constitutional rights of due process and freedom of speech, and that disregards the applicable statute.

Whether the defendant here used an ATDS in sending text messages to the plaintiff is a threshold issue for liability under the TCPA and for the scope of discovery. Furthermore, the final briefing in the *ACA* appeal was

completed on February 24, 2016. *See Errington v. Time Warner Cable Inc.*, No. 215CV02196RSWLDTB, 2016 WL 2930696, at \*4 (C.D. Cal. May 18, 2016). Accordingly, the appeal before the D.C. Circuit is not likely to remain pending for an extended period of time, and the possible prejudice to the plaintiff is minimal. On the other hand, if the case is not stayed, the defendant may suffer hardship in conducting discovery and trial preparation in light of the uncertain difference between “potential” capacity and “theoretical” capacity under the definition of an ATDS. Finally, granting a stay may simplify the issues in this case and conserve judicial resources because any order by this court issued in reliance on the July 2015 Ruling will be called into question if the D.C. Circuit overturns the July 2015 Ruling.

Based on the foregoing, the defendant’s motion to stay this action pending a decision by the Court of Appeals for the D.C. Circuit [Doc. No. 10] is GRANTED. Either party may request the court to lift the stay once the ACA appeal has been decided. Preferably, the parties will jointly move to lift the stay in order to avoid wasting time with response and reply briefings.

**SO ORDERED** this 14th day of June, 2016.

/s/ Charles A. Pannell, Jr.  
CHARLES A. PANNELL, JR.  
United States District Judge