

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WINIFRED CABINESS,  
Plaintiff,  
v.  
EDUCATIONAL FINANCIAL  
SOLUTIONS, LLC  
Defendant.

Case No. 16-cv-01109-JST

**ORDER DENYING MOTION TO  
DISMISS AND MOTION TO STAY**

Re: ECF No. 24

Before the Court is Defendant Educational Financial Solutions, LLC’s, doing business as Campus Debt Solutions (“CDS”), Motion to Dismiss Plaintiff Winifred Cabiness’ complaint. The Court will deny the motion.

**I. BACKGROUND**

Plaintiff Winifred Cabiness alleges that Defendant CDS violated § 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act (“TCPA”) by making repeated calls to her cellular telephone using an Automatic Telephone Dialing System (“ATDS”) without her consent. See ECF No. 1 ¶¶ 7-8, 23; see also 47 U.S.C.A. § 227(b)(1)(A)(iii). In May 2015, Ms. Cabiness called a phone number on her student loan account statement in an attempt to reach the Department of Education. Id. ¶¶ 9-10. Ms. Cabiness, unaware that the phone number had since been acquired by CDS, reached a CDS representative. Id. The CDS representative did not clearly identify his employer, but Ms. Cabiness eventually became suspicious that she had not reached the Department of Education and hung up. Id. ¶¶ 11-12. When Ms. Cabiness called the same phone number again the next day, she was connected to a message system that identified the number as belonging to CDS. Id. ¶ 13.

In the months that followed, Ms. Cabiness was “bombarded” with phone calls from CDS, despite her request that CDS stop contacting her. Id. ¶ 7. In May 2015, CDS Representative

1 Daniel Benitez called Ms. Cabiness repeatedly in an attempt to persuade her to enter into a loan  
 2 repayment plan. Id. ¶ 14. On May 17, 2015, Ms. Cabiness emailed Daniel Benitez and requested  
 3 that CDS “cease all contact immediately.” Id. ¶ 15. Despite Ms. Cabiness’ request, she continued  
 4 to receive repeated phone calls from CDS. In June 2015, Ms. Cabiness received two calls from  
 5 (510) 270-2836, a number that she did not recognize and that was later found to connect to CDS.  
 6 Id. ¶ 16. Between November 2015 and February 2016, Ms. Cabiness continued to receive phone  
 7 calls, often several times in the same day, from the (510) 270-2836 number. Id. ¶¶ 17-18. Ms.  
 8 Cabiness did not answer the calls. Id. She alleges that these repeated, unconsented phone calls to  
 9 her cellular telephone “caused her a large amount of stress and anxiety,” “particularly during the  
 10 holidays.” Id. ¶¶ 17, 7 (“Ms. Cabiness now will not answer calls from numbers that she does not  
 11 recognize, fearing that they will be from CDS.”).

12 Ms. Cabiness further alleges that these calls were placed with an ATDS. Id. ¶ 21. Ms.  
 13 Cabiness claims that when she answered a call on February 11, 2016 from the (510) 270-2836  
 14 number she heard several seconds of silence, indicating the use of a predictive dialing system.<sup>1</sup> Id.  
 15 ¶ 20-21. Moreover, she claims that CDS explicitly stated on its website that it uses an ATDS to  
 16 place phone calls and text messages. Id. ¶ 19.

17 Ms. Cabiness filed a complaint with this Court on March 5, 2016, seeking damages and  
 18 injunctive relief for CDS’s violation of the TCPA. Id. at 5. On June 6, 2016, CDS moved to  
 19 dismiss the case due to lack of subject matter jurisdiction and/or failure to state a claim. ECF No.  
 20 24. In the alternative, CDS moved to stay the case pending the Ninth Circuit’s decision on remand  
 21 in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), as revised (May 24, 2016).

## 22 **II. LEGAL STANDARDS**

### 23 **A. Motions to Dismiss Under Rule 12(b)(1)**

24 A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the Court.  
 25 See Fed R. Civ. P. 12(b)(1). If a plaintiff lacks Article III standing to bring a suit, the federal court

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 27 <sup>1</sup> A predictive dialing system allows a single human operator to make calls to multiple consumers  
 28 at the same time. Id. ¶ 21. Although the consumer that answers the phone first will be connected  
 to the human operator, all subsequent consumers that answer the phone will initially hear only  
 silence. Id.

1 lacks subject matter jurisdiction and the suit must be dismissed under Rule 12(b)(1). Cetacean  
2 Cnty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004). “A Rule 12(b)(1) jurisdictional attack may  
3 be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a  
4 complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual  
5 attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise  
6 invoke federal jurisdiction.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.2004)  
7 (citation omitted). In resolving a facial attack, the court assumes that the allegations are true and  
8 draws all reasonable inferences in the plaintiff’s favor. Wolfe v. Strankman, 392 F.3d 358, 362  
9 (9th Cir.2004) (citations omitted). A court addressing a facial attack must confine its inquiry to  
10 the allegations in the complaint. See Savage v. Glendale Union High Sch., Dist. No. 205,  
11 Maricopa Cty., 343 F.3d 1036, 1051 (9th Cir. 2003).

12 **B. Motions to Dismiss Under Rule (12)(b)(6)**

13 A complaint must contain “a short and plain statement of the claim showing that the  
14 pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and  
15 the ground upon which it rests.” Fed. R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S.  
16 544, 555 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual  
17 matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal,  
18 556 U.S. 662, 678 (2009) (internal quotation marks omitted). “A claim has facial plausibility  
19 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that  
20 the defendant is liable for the misconduct alleged.” Id. “Dismissal under Rule 12(b)(6) is  
21 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support  
22 a cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th  
23 Cir. 2008). The Court must “accept all factual allegations in the complaint as true and construe  
24 the pleadings in the light most favorable to the nonmoving party.” Knievel v. ESPN, 393 F.3d  
25 1068, 1072 (9th Cir. 2005).

26 **C. Motions to Stay**

27 “[T]he power to stay proceedings is incidental to the power inherent in every court to  
28 control the disposition of the causes on its docket with economy of time and effort for itself, for

counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). Whether to stay proceedings is entrusted to the discretion of the district court. See id. at 254–55 (“How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”). In deciding whether to stay proceedings pending resolution of an appeal in another action, a district court must weigh various competing interests, including the possible damage which may result from granting a stay, the hardship a party may suffer if the case is allowed to go forward, and “the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005). The burden is on the movant to show that a stay is appropriate. See Clinton v. Jones, 520 U.S. 681, 708 (1997).

### III. ANALYSIS

Defendant CDS makes three arguments in its motion: (1) the complaint should be dismissed under Rule 12(b)(1) because Ms. Cabiness has not pled a concrete injury in fact and, therefore, she lacks standing and this court lacks subject matter jurisdiction over the action; (2) the complaint should be dismissed under Rule 12(b)(6) because Ms. Cabiness has failed to state a claim under the TCPA; and (3) if Ms. Cabiness’ complaint is not dismissed, this case should be stayed pending the Ninth Circuit’s forthcoming decision following remand in Spokeo. ECF No. 24 at 7. The Court addresses each of these arguments in turn.

#### A. Standing

To have the requisite constitutional standing to bring a suit in federal court, a plaintiff must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-561 (1992)). “The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.” Spokeo, 136 S. Ct. at 1547. And “at the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element.” Id. (internal quotation marks omitted). However, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we

1 ‘presum[e] that general allegations embrace those specific facts that are necessary to support the  
2 claim.’” Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (quoting Lujan v. National Wildlife  
3 Federation, 497 U.S. 871, 889 (1990)). The present motion hinges primarily on the first element:  
4 the “injury in fact” requirement.

5 **1. The Spokeo Decision**

6 The Supreme Court recently reaffirmed a few well-established principles with respect to  
7 the “injury in fact” requirement. First, “[t]o establish injury in fact, a plaintiff must show that he  
8 or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and  
9 ‘actual or imminent, not conjectural or hypothetical.’” Spokeo, 136 S. Ct at 1548 (quoting Lujan,  
10 504 U.S. at 560) (internal quotation marks omitted)). Second, the Court reiterated that the injury  
11 must be both “particularized” (i.e. it must “affect the plaintiff in a personal and individualized  
12 way”) and “concrete” (i.e. it must be “real” and “actually exist”). Id. Lastly, the Court  
13 acknowledged that “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete,  
14 *de facto* injuries that were previously inadequate in law.’” Id. at 1549 (quoting Lujan, 504 U.S. at  
15 578) (emphasis in original). It “has the power to define injuries and articulate chains of causation  
16 that will give rise to a case or controversy where none existed before.” Id. (quoting Lujan, 504  
17 U.S. at 580) (J. Kennedy, concurring in part and concurring in judgment)).

18 The Court also reaffirmed that “intangible injuries can nevertheless be concrete.” Id. To  
19 determine whether an intangible injury is concrete, the Court instructed that there are two  
20 important considerations: historical practice and Congressional judgment. Id. First, the Court  
21 noted that “it is instructive to consider whether an alleged intangible harm has a close relationship  
22 to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or  
23 American courts.” Id. Second, the Court explained that “[Congress’] judgment is also instructive  
24 and important” because “Congress is well positioned to identify intangible harms that meet  
25 minimum Article III requirements.” Id.

26 However, the Court in Spokeo clarified that the mere violation of a statutory right created  
27 by Congress is not always sufficient on its own to constitute an “injury in fact.” Id. at 1549  
28 (explaining that the plaintiff could not “allege a bare procedural violation, divorced from any

1 concrete harm, and satisfy the injury-in-fact requirement of Article III”). *Id.* In other words,  
2 “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff  
3 *automatically* satisfies the injury-in-fact requirement whenever a statute grants a person a statutory  
4 right and purports to authorize that person to sue to vindicate that right.” *Id.* (emphasis added).

5 In some cases, the statutory violation at issue “may result in no harm” such that the  
6 plaintiff must allege additional harm to satisfy the injury in fact requirement. *Id.* at 1550. For  
7 example, the plaintiff in *Spokeo* alleged that the defendant search engine had published inaccurate  
8 information about him in violation of the Fair Credit Reporting Act (“FCRA”). *Id.* at 1546.  
9 Although the information was inaccurate such that it constituted a technical violation of the  
10 plaintiff’s statutory rights,<sup>2</sup> the Supreme Court noted that a statutory violation of the FCRA “may  
11 result in no harm” because “not all inaccuracies cause harm or present any material risk of harm.”  
12 *Id.* at 1550. For example, the Court pointed out, “[i]t is difficult to imagine how the dissemination  
13 of an incorrect zip code, without more, could work any concrete harm.” *Id.* Because the Ninth  
14 Circuit had not separately analyzed whether this statutory violation of the FCRA actually harmed  
15 the plaintiff—i.e. whether the plaintiff had suffered a “concrete” injury—the Court remanded to  
16 the Ninth Circuit to address concreteness. *Id.* (“[The Ninth Circuit did not address . . . whether the  
17 particular procedural violations alleged in this case entail a degree of risk sufficient to meet the  
18 concreteness requirement. We take no position as to whether the Ninth Circuit’s ultimate  
19 conclusion . . . was correct.”).

20 However, the Court suggested that in other cases the statutory violation at issue could  
21 present an inherent “risk of real harm” such that the statutory violation will be sufficient on its  
22 own to constitute an injury in fact. *Id.* at 1549. In doing so, the Court analogized to the common  
23 law, which has permitted tort suits to proceed as long as there is a “risk of real harm,” even if that  
24 harm is “difficult to prove or measure.” *Id.* Similarly, the Court explained, “the violation of a  
25 procedural right granted by statute can be sufficient in some circumstances to constitute injury in  
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27 <sup>2</sup> The search engine reported that the *Spokeo* plaintiff is married, has children, is in his fifties, has  
28 a job, is relatively affluent, and holds a graduate degree. *Id.* at 1546. In fact, all of this  
information is incorrect. *Id.*

1 fact,” and “a plaintiff in such a case need not allege any *additional* harm beyond the one Congress  
2 has identified.” *Id.* (emphasis in original).<sup>3</sup>

3 In sum, “standing requires a concrete injury even in the context of a statutory violation.”  
4 *Id.* at 1549. In some cases, the statutory violation at issue will not necessarily result in actual harm  
5 and, therefore, the plaintiff must allege additional harm above and beyond the statutory violation  
6 itself to establish standing. *Id.* at 1550. In other cases, however, the statutory violation will be  
7 inherently coupled with a “risk of real harm” such that the mere allegation of a statutory violation  
8 *is* sufficient on its own to establish a concrete injury in fact. *Id.* at 1549. In either event, the Court  
9 must decide “whether the particular procedural violations alleged . . . entail a degree of risk  
10 sufficient to meet the concreteness requirement.” *Id.* at 1550.

## 11 2. Application of Standing Principles to This Case

12 Based on Spokeo, CDS argues that Ms. Cabiness “fails to allege she suffered any concrete  
13 harm or injury and, as a result, fails to allege the injury-in-fact required for standing under Article  
14 III.” ECF No. 24 at 9.<sup>4</sup>

15 This Court first addresses which of Ms. Cabiness’ allegations may be taken into  
16 consideration in its standing analysis. In addition to alleging a statutory violation of the TCPA,  
17 Ms. Cabiness’ complaint alleges the following harms: (1) the repeated calls “caused her a large  
18 amount of stress and anxiety,” (2) she was “concerned and upset by the constant calls,” and (3) she  
19 “will not answer calls from numbers that she does not recognize, fearing that they will be from  
20 CDS.” ECF No. 1 ¶¶ 17, 15, 7. Ms. Cabiness also argues in her Opposition brief that she has suffered

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21  
22 <sup>3</sup> The Court provided just two examples of statutory violations that were sufficient on their own to  
23 constitute an injury in fact; both cases held that the plaintiffs’ inability to obtain information that  
24 Congress sought to make public constituted an injury in fact because it impaired their ability to  
25 participate meaningfully in the democratic process. *Id.* at 1549-50 (citing Public Citizen v.  
Department of Justice, 491 U.S. 440, 449 (1989) and Fed. Election Comm’n v. Akins, 524 U.S.  
11, 21 (1998)).

26 <sup>4</sup> Because CDS does not argue that Ms. Cabiness has not satisfied the other requirements for  
27 constitutional standing, this Court does not address the other requirements at length. In any event,  
28 Ms. Cabiness’ alleged injury is “particularized” because she alleges that she received unsolicited  
phone calls from the Defendant on her personal cellular telephone. She also alleges that she  
suffered an invasion of a legally protected interest—namely, her interest in not receiving  
unconsented to phone calls from an ATDS under the TCPA. This injury is traceable to CDS’s  
challenged conduct and likely to be redressed by a favorable judicial decision.

1 the following harms: (1) invasion of privacy and nuisance; 2) intrusion upon and occupation of the  
2 capacity of her cellular phone; 3) wasting of her time; and (4) monetary injury caused by the  
3 depletion of limited minutes, charges for calls, and depletion of the cell phone's battery. ECF No.  
4 29 at 6. In deciding this motion, the Court may not look beyond the allegations in Ms. Cabiness'  
5 complaint. Savage, 343 F.3d at 1051 ("Rule 12(b)(1) attacks on jurisdiction can be either facial,  
6 confining the inquiry to allegations in the complaint, or factual, permitting the court to look  
7 beyond the complaint."). Therefore, the Court considers only the complaint's allegations when  
8 determining whether Plaintiff has sufficiently alleged an injury in fact for standing purposes.

9 Limiting its inquiry to those allegations, the Court finds that Plaintiff sufficiently alleges a  
10 concrete injury in fact for standing purposes. First, the Court's reasoning in Spokeo suggests that,  
11 unlike a statutory violation of the FCRA which "may result in no harm," a statutory violation of §  
12 227(b)(1)(A)(iii) of the TCPA inherently presents a "risk of real harm," even if that harm is  
13 "difficult to prove or measure," such that the statutory violation is sufficient on its own to  
14 constitute an injury in fact. Spokeo, 136 S. Ct. at 1549-1550. Although the Court in Spokeo did  
15 not elaborate on the circumstances in which the violation of a statutory right would be sufficient to  
16 establish a concrete injury in fact, the complaint alleges such circumstances here. Every  
17 unconsented call through the use of an ATDS to a consumer's cellular phone results in actual  
18 harm: the recipient wastes her time and incurs charges for the call if she answers the phone, and  
19 her cell phone's battery is depleted even if she does not answer the phone. See Mey v. Got  
20 Warranty, Inc., No. 5:15-CV-101, 2016 WL 3645195, at \*3 (N.D.W. Va. June 30, 2016) ("[A]ll  
21 ATDS calls deplete a cell phone's battery, and the cost of electricity to recharge the phone is also  
22 a tangible harm."). In addition to these tangible harms, unsolicited calls also cause intangible  
23 harm by annoying the consumer. See Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 638  
24 (7th Cir. 2012) ("[A]n automated call to a cell phone adds expense to annoyance."). For this  
25 reason, other district courts have similarly distinguished statutory violations of the TCPA from  
26 statutory violations of the FCRA in the wake of the Court's Spokeo decision. See, e.g., Mey, 2016  
27 WL 3645195 at \*2 (noting that the Court's concern in Spokeo about a "bare procedural violation,  
28 divorced from any concrete harm' . . . has little application to claims under the TCPA, since those

1 claims are not based on ‘bare procedural’ rights, but rather on substantive prohibitions of actions  
 2 directed toward specific consumers”) (quoting Spokeo, 136 S. Ct. at 1549)); Booth v. Appstack,  
 3 Inc., No. C13-1533JLR, 2016 WL 3030256, at \*5 (W.D. Wash. May 25, 2016) (distinguishing the  
 4 “merely procedural” injury in Spokeo from the alleged TCPA violations in that case because the  
 5 “TCPA . . . violations alleged here, if proven, required Plaintiffs to waste time answering or  
 6 otherwise addressing widespread robocalls” and “such an injury is sufficiently concrete to confer  
 7 standing”).<sup>5</sup> In sum, because a statutory violation of § 227(b)(1)(A)(iii) of the TCPA necessarily  
 8 causes harm to the recipient of the automated call, Ms. Cabiness “need not allege any *additional*  
 9 harm beyond the one Congress has identified.” Spokeo, 136 S. Ct. at 1549 (emphasis in original).

10 Second, even if a statutory violation of the TCPA is *not* sufficient on its own to establish a  
 11 concrete injury, the remaining allegations in Ms. Cabiness’ complaint establish a concrete injury  
 12 in fact. The additional harms alleged by Ms. Cabiness in her complaint—i.e. suffering “a large  
 13 amount of stress and anxiety” and being “concerned and upset by the constant calls,” which she  
 14 received “often several times in the same day”—are intangible. ECF No. 1 ¶¶ 17, 15. Therefore,  
 15 the Court must look to both historical practice and Congressional judgment to determine whether  
 16 she has alleged a concrete injury in fact. Spokeo, 136 S. Ct. at 1549 (“[I]ntangible injuries can  
 17 nevertheless be concrete. In determining whether an intangible harm constitutes injury in fact,  
 18 both history and the judgment of Congress play important roles.”) (internal citations omitted).  
 19 Here, both considerations suggest that the intangible injuries alleged in Ms. Cabiness’ complaint  
 20 constitute a concrete injury in fact. After all, Congress enacted the TCPA because it recognized  
 21 that constant, unsolicited phone calls necessarily intrude on consumers’ privacy interests and are a  
 22 nuisance. See Telephone Consumer Protection Act of 1991, Pub. L. 102–243, 105 Stat. 2394  
 23 (December 20, 1991) (“Evidence compiled by the Congress indicates that residential telephone  
 24 subscribers consider automated or prerecorded telephone calls, regardless of the content or the  
 25 initiator of the message, to be a nuisance and an invasion of privacy. . . . [b]anning such automated  
 26

27 <sup>5</sup> But see Sartin v. EKF Diagnostics, Inc., No. CV 16-1816, 2016 WL 3598297, at \*3 (E.D. La.  
 28 July 5, 2016) (dismissing the plaintiff’s TCPA claims with leave to amend because he “fail[ed] to  
 plead facts demonstrating how this statutory violation caused him concrete harm”).

1 or prerecorded telephone calls to the home, except when the receiving party consents to receiving  
 2 the call or when such calls are necessary in an emergency situation affecting the health and safety  
 3 of the consumer, is the only effective means of protecting telephone consumers from this nuisance  
 4 and privacy invasion.”); Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 744 (2012) (explaining  
 5 that Congress enacted the TCPA because it determined that “[u]nrestricted telemarketing . . . can  
 6 be an intrusive invasion of privacy” and that “federal legislation was needed because  
 7 telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance  
 8 calls”) (internal quotation marks and citations omitted). The Ninth Circuit explained the harm that  
 9 Congress sought to prevent by passing the TCPA as follows:

10 The TCPA was enacted to protect the privacy interests of residential telephone subscribers  
 11 by placing restrictions on unsolicited, automated telephone calls to the home and to  
 12 facilitate interstate commerce by restricting certain uses of facsimile machines and  
 13 automatic dialers. The TCPA was enacted in response to an increasing number of  
 14 consumer complaints arising from the increased number of telemarketing calls. The  
 15 consumers complained that such calls are a nuisance and an invasion of privacy. The  
 16 purpose and history of the TCPA indicate that Congress was trying to prohibit the use of  
 17 ATDSs to communicate with others by telephone in a manner that would be an invasion of  
 18 privacy.

19 Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (internal citations and  
 20 quotation marks omitted). Although Ms. Cabiness’ complaint does not include the exact terms  
 21 “invasion of privacy” and “nuisance,” she alleges that she suffered stress and anxiety resulting  
 22 from constant phone calls placed using an ATDS – the same harm that Congress clearly “sought to  
 23 curb” and “elevat[ed] to the status of [a] legally cognizable injur[y]” when it passed the TCPA.  
 24 Spokeo, 136 S. Ct. at 1549-1550. Moreover, the statutory violation of the TCPA and the ensuing  
 25 injury to Ms. Cabiness have “a close relationship to a harm that has traditionally been regarded as  
 26 providing a basis for a lawsuit in English or American courts” – namely, invasion of privacy. Id.  
 27 See also Restatement (Second) of Torts § 652B (1977); see also, e.g., Mey, 2016 WL 3645195 at  
 28 \*3 (holding that unwanted calls in violation of § 227(b)(1)(A)(iii) of the TCPA caused concrete  
 harm under Spokeo because “[i]nvasion of privacy is . . . an intangible harm recognized by the  
 common law”).

In sum, a statutory violation of Section 227(b)(1)(A)(iii) of the TCPA necessarily harms

1 the recipient of the unwanted calls such that the statutory violation is sufficient on its own to  
 2 constitute an injury in fact. Spokeo, 136 S. Ct. at 1549-1550. Accordingly, Ms. Cabiness’  
 3 complaint “need not allege any *additional* harm beyond the one Congress has identified.” Id.  
 4 Moreover, even if the statutory violation is not sufficient on its own to establish a concrete injury  
 5 in fact, both Congressional judgment and historical practice suggest that Ms. Cabiness has  
 6 suffered a concrete injury in fact for standing purposes.

7 **B. TCPA Claim**

8 In order to state a claim under Section 227(b)(1)(A)(iii) of the TCPA, Ms. Cabiness must  
 9 allege facts sufficient to support a plausible claim that: (1) CDS called Ms. Cabiness at her cellular  
 10 telephone number, (2) using an ATDS, (3) without Ms. Cabiness’ consent. See 47 U.S.C. §  
 11 227(b)(1)(A)(iii); see also Meyer v. Portfolio Recovery Associates, LLC, 707 F.3d 1036, 1043  
 12 (9th Cir. 2012). CDS argues that the Court should dismiss Ms. Cabiness’ complaint because she  
 13 failed to adequately allege both the use of an ATDS and lack of consent. See ECF No. 24 at 9-11.

14 First, CDS argues that Ms. Cabiness failed to plead sufficient facts to demonstrate that  
 15 CDS utilized an ATDS. Id. at 10. Rather, CDS argues, Ms. Cabiness’ allegations amount to  
 16 “nothing more than a threadbare, formulaic recitation of the elements of a TCPA cause of action.”  
 17 Id. at 12. To the contrary, Ms. Cabiness’ complaint alleges two critical pieces of factual support  
 18 that support a plausible claim that CDS used an ATDS: (1) CDS’s website states that it uses an  
 19 ATDS to place both phone calls and text messages; and (2) when Ms. Cabiness answered a call on  
 20 February 11, 2016 from the number associated with CDS, she heard several seconds of silence or  
 21 “dead air.” ECF No. 1 ¶¶ 19-21. In particular, “general allegations [of use of an ATDS] are  
 22 sufficiently bolstered by specific descriptions of the ‘telltale’ pause after plaintiff picked up each  
 23 call until the agent began speaking, which suggests the use of a predictive dialing system, and thus  
 24 renders plausible the conclusory allegation that an ATDS was used.” Lofton v. Verizon Wireless  
 25 (VAW) LLC, No. 13-CV-05665-YGR, 2015 WL 1254681, at \*5 (N.D. Cal. Mar. 18, 2015).

26 Accepting both of these factual allegations as true, as the Court must when ruling on a Rule  
 27 12(b)(6) motion to dismiss, the Court finds that Ms. Cabiness has pled sufficient facts to support  
 28 her allegation that CDS called her using an ATDS.

1 Second, CDS argues that Ms. Cabiness did not sufficiently allege that the calls were made  
2 without her consent because “she initiated communications with CDS, and called CDS back the  
3 next day before she purportedly received any calls from CDS.” ECF No. 24 at 10. However, Ms.  
4 Cabiness also alleged in her complaint that she initially called CDS by mistake in an attempt to  
5 call the Department of Education, suggesting that she did not consent to calls from CDS. ECF No.  
6 1 ¶¶ 9-12. In addition, Ms. Cabiness alleged that she subsequently emailed the CDS  
7 representative with explicit instructions to “cease all contact immediately,” but the calls continued.  
8 ECF No. 1 ¶ 15. When construed in the light most favorable to her, Ms. Cabiness’ allegations  
9 state a plausible claim that she did not consent to CDS’s phone calls.

10 In sum, the allegations in Ms. Cabiness’ complaint include sufficient factual support for  
11 her claim under the TCPA. Accordingly, CDS’s motion to dismiss the complaint under Rule  
12 12(b)(6) for failure to state a claim is denied.

### 13 C. Motion for Stay

14 As an alternative to dismissal, CDS requests that this Court stay this action pending the  
15 Ninth Circuit’s decision in Spokeo on remand. ECF No. 24 at 13. CDS argues that a stay will  
16 preserve judicial and party resources because the Ninth Circuit’s decision will help guide this  
17 Court’s analysis of the standing issues. Id.

18 The Court finds that a stay is not appropriate for two reasons. First, the Ninth Circuit’s  
19 decision on remand in Spokeo will be of little guidance to this Court. The Supreme Court in  
20 Spokeo did not change well-established standing principles; it remanded because the Ninth Circuit  
21 failed to analyze one of those principles altogether (concreteness). In addition, the Court’s  
22 analysis in Spokeo focused narrowly on “the context of [that] particular case.” Spokeo, 136 S. Ct.  
23 at 1550. Given the Court’s instruction to consider the nature of the statutory violation at issue –  
24 namely, the Congressional judgment underlying the statute and whether a violation of the  
25 particular statutory right “may result in no harm” – the Ninth Circuit’s analysis on remand will  
26 hinge on a statutory violation of the FCRA. Id. at 1549. Accordingly, a stay will not simplify the  
27 standing issue in this case, which involves a statutory violation of the TCPA. See Lockyer, 398  
28 F.3d at 1110. Second, a stay could result in unreasonable delay. Leyva v. Certified Grocers of

1 California, Ltd., 593 F.2d 857, 864 (9th Cir. 1979) (“A stay should not be granted unless it appears  
2 likely the other proceedings will be concluded within a reasonable time in relation to the urgency  
3 of the claims presented to the court.”).

4 **CONCLUSION**

5 In conclusion, Ms. Cabiness has sufficiently alleged that she suffered actual harm—i.e. a  
6 concrete injury in fact—resulting from CDS’s alleged statutory violation of the TCPA. As a  
7 result, she has standing to bring this suit and this Court has subject matter jurisdiction over the  
8 action. In addition, Ms. Cabiness’ complaint alleges sufficient facts to state a plausible claim  
9 under the TCPA. Accordingly, CDS’s motion to dismiss is denied. The Court also denies CDS’s  
10 motion to stay the action.

11 IT IS SO ORDERED.

12 Dated: September 1, 2016

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15 JON S. TIGAR  
16 United States District Judge  
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United States District Court  
Northern District of California