

1 TRINETTE G. KENT (State Bar No. 222020)
2 10645 North Tatum Blvd., Suite 200-192
3 Phoenix, AZ 85028
4 Telephone: (480) 247-9644
5 Facsimile: (480) 717-4781
6 E-mail: tkent@leberglaw.com

6 Of Counsel to
7 Lemberg Law, LLC
8 A Connecticut Law Firm
9 43 Danbury Road
10 Wilton, CT 06897
11 Telephone: (203) 653-2250
12 Facsimile: (203) 653-3424

11 Attorneys for Plaintiff,
12 Jeremy Klein

13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION

17
18 Jeremy Klein, *on behalf of himself and all*
19 *others similarly situated,*

20 Plaintiff,

21 vs.

22
23 Hyundai Capital America d/b/a Hyundai
24 Motor Finance,

25 Defendant.

Case No.: 8:16-cv-01469-JLS-JCG

**PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S AMENDED
COMPLAINT FOR LACK OF
STANDING OR, IN THE
ALTERNATIVE, TO STAY
PROCEEDINGS**

Date: December 9, 2016

Time: 2:30 P.M.

Courtroom: 10A—10th Floor

Judge: Hon. Josephine L. Staton

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23
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25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT..... 4

 I. STANDARD OF LAW 4

 A. Motion to Dismiss..... 4

 B. Motion to Stay 5

 II. PLAINTIFF HAS CONSTITUTIONAL STANDING UNDER *SPOKEO* 6

 A. Plaintiff Has Standing Pursuant to Overwhelming Post-*Spokeo* Authority ... 6

 B. Plaintiff Alleges Numerous Actual Injuries, Conferring Standing 9

 C. Plaintiff’s Injuries Connect to Defendant’s Robocalls 11

 D. Plaintiff’s Alleged Injuries Suffice 13

 III. A STAY IS NOT WARRANTED BY THE DEBT COLLECTION AND
TELEMARKETING INDUSTRIES’ D.C. CIRCUIT APPEAL 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A.D. v. Credit One Bank, N.A., 2016 WL 4417077 (N.D. Ill. Aug. 19, 2016) 8

Abramson v. CWS Apartment Homes, LLC, 2016 WL 6236370 (W.D. Pa. Oct. 24, 2016)..... 8

Aranda v. Caribbean Cruise Line, Inc., 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016)..... 8

Bernhardt v. County of Los Angeles, 279 F.3d 862 (9th Cir. 2002) 5

Booth v. Appstack, Inc., 2016 WL 3030256 (W.D. Wash. May 25, 2016)..... 9

Caudill v. Wells Fargo Home Mortg., Ing., 2016 WL 3820195 (E.D. Ky. July 11, 2016)..... 8

Chandler v. State Farm Mut. Auto Ins. Co., 598 F.3d 1115 (9th Cir. 2010) 5

Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636 (1997) 5, 17

Davis v. Diversified Consultants, Inc., 36 F. Supp. 3d 217 (D. Mass. 2014) 15

Etzel v. Hooters of America, LLC, No. 1:15-cv-01055-LMM (N.D. Ga. Nov. 15, 2016)..... 7, 10

Ewing v. SQM US, Inc., --- F. Supp. 3d ----, 2016 WL 5846494 (S.D. Cal. Sept. 29, 2016) 11, 12

Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246 (3d Cir. 2001)..... 16

Gager v. Dell Fin. Servs., LLC, 727 F.3d 265 (3d Cir. 2013)..... 17

Griffith v. ContextMedia, Inc., 2016 WL 6092634 (N.D. Ill. Oct. 19, 2016) 9

Hewlett v. Consol. World Travel, Inc., 2016 WL 4466536 (E.D. Cal. Aug. 23, 2016)..... 8

Holderread v. Ford Motor Credit Co., LLC, 2016 WL 6248707 (E.D. Tex. Oct. 26, 2016)..... 9

1	<i>I.C.C. v. Brotherhood of Locomotive Eng’rs</i> , 482 U.S. 270, 107 S. Ct. 2360	
2	(1987)	16
3	<i>Jamison v. Esurance Ins. Servs., Inc.</i> , 2016 WL 320646 (N.D. Tex. Jan. 27,	
4	2016).....	10
5	<i>JEM Broadcasting Co., Inc. v. F.C.C.</i> , 22 F.3d 320 (D.C. Cir. 1994).....	16
6	<i>Krakauer v. Dish Network L.L.C.</i> , 168 F. Supp. 3d 843 (M.D.N.C. 2016)	6, 8
7	<i>Landis v. North American Co.</i> , 299 U.S. 248, 57 S. Ct. 163 (1936).....	5, 6, 17
8	<i>Larson v. Harman Mgmt. Corp.</i> , 2016 WL 6298528 (E.D. Cal. Oct. 27,	
9	2016).....	18
10	<i>LaVigne v. First Community Bancshares, Inc.</i> , --- F. Supp. 3d ----, 2016	
11	WL 6305992 (D.N.M. Oct. 19, 2016).....	passim
12	<i>Leite v. Crane Co.</i> , 749 F.3d 1117 (9th Cir. 2014)	5
13	<i>Lennartson v. Papa Murphy’s Holdings, Inc.</i> , 2016 WL 51747 (W.D. Wash.	
14	Jan. 5, 2016)	18
15	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S. Ct. 2130 (1992).....	7
16	<i>Mey v. Got Warranty, Inc.</i> , 2016 WL 3645195 (N.D.W. Va. June 30, 2016)	6, 8, 10
17	<i>Meyer v. Portfolio Recovery Assocs., LLC</i> , 707 F.3d 1036 (9th Cir. 2012)	15
18	<i>Mims v. Arrow Fin. Servs., LLC</i> , 132 S. Ct. 740 (2012).....	10, 13
19	<i>Moore v. Dish Network L.L.C.</i> , 57 F. Supp. 3d 639 (N.D.W.V. 2014).....	15
20	<i>Morse v. Allied Interstate, LLC</i> , 65 F. Supp. 3d 407 (M.D. Pa. 2014)	15
21	<i>Osorio v. State Farm Bank, F.S.B.</i> , 746 F.3d 1242 (11th Cir. 2014).....	17
22	<i>Palm Beach Golf Ctr.–Boca, Inc. v. John G. Sarris, D.D.S., P.A.</i> , 781 F.3d	
23	1245 (11th Cir. 2015).....	10
24	<i>Rogers v. Capital One Bank (USA), N.A.</i> , 2016 WL 3162592 (N.D. Ga.	
25	June 7, 2016)	9
26	<i>Romero v. v. Dep’t Stores Nat’l Bank</i> , 2016 WL 4184099 (S.D. Cal. Aug. 5,	
27	2016).....	11, 12
28		

1	<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004).....	5
2	<i>Sherman v. Yahoo! Inc.</i> , 997 F. Supp. 2d 1129 (S.D. Cal. 2014)	14
3	<i>Soppet v. Enhanced Recovery Co., LLC</i> , 679 F.3d 637 (7th Cir. 2012)	3, 15
4		
5	<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	passim
6	<i>St. Clair v. City of Chico</i> , 880 F.2d 199 (9th Cir. 1989)	5
7	<i>Sterk v. Path, Inc.</i> , 46 F. Supp. 3d 813 (N.D. Ill. 2014).....	14
8	<i>Thomas v. FTS USA, LLC</i> , 2016 WL 3653878 (E.D. Va. June 30, 2016).....	6
9		
10	<i>Ung v. Universal Acceptance Corp.</i> , --- F. Supp. 3d ----, 2016 WL 4132244 (D. Minn. Aug. 3, 2016).....	8, 11
11	<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000)	5
12		
13	Statutes	
14	28 U.S.C. § 2344	16
15	47 U.S.C. § 227	10
16	47 U.S.C. § 227(b)(1)(A).....	1
17		
18	Rules	
19	Fed. R. Civ. P. 12(b)(1)	4
20	Other	
21	Restatement (First) of Torts (1938).....	7
22	<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 18 FCC Rcd. 14014 (July 3, 2003).....	14
23		
24	<i>Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72 (July 10, 2015)	15, 17
25		
26		
27	Legislative History	
28	137 Cong. Rec. 30,821-30,822 (1991)	10, 13

1	Pub. L. 102-243, § 2, 105 Stat 2394 (1991)	10, 13
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1 Plaintiff Jeremy Klein (“Plaintiff”), through counsel, hereby opposes Defendant
2 Hyundai Capital America d/b/a Hyundai Motor Finance’s (“Hyundai” or
3 “Defendant”) Motion to Dismiss Plaintiff’s Amended Complaint for Lack of Standing
4 or, in the Alternative, to Stay Proceedings (Doc. No. 22).

5 **INTRODUCTION**

6 Plaintiff brings this action under the Telephone Consumer Protection Act
7 (“TCPA”), 47 U.S.C. § 227(b)(1)(A), alleging that Defendant placed automated calls
8 to his cellular telephone without prior express consent.

9 First, Defendant argues Plaintiff does not have standing under the Supreme
10 Court’s decision, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (concerning the Fair
11 Credit Reporting Act). Defendant is wrong. The TCPA creates substantive—not
12 procedural—rights and “a violation of the TCPA constitutes a ‘concrete’ harm for an
13 Article III injury-in-fact requirement.” *LaVigne v. First Community Bancshares, Inc.*,
14 --- F. Supp. 3d ----, 2016 WL 6305992, at *6 (D.N.M. Oct. 19, 2016) (stating that
15 “[m]ost courts that have addressed this issue [since *Spokeo*] have sided with
16 Plaintiff.”). The alleged violation of the TCPA provides Article III standing.

17 Even if it did not, Plaintiff alleges actual real world harms resulting directly
18 from Defendant’s unauthorized calls; including headaches, loss of focus and
19 productivity at work, disruption and inconvenience to everyday activities, invasion of
20 privacy including waking Plaintiff from sleep, “frustration and emotional drain” from
21 Defendant ignoring his requests that the calls cease, wasted time, and added electricity
22 costs. Defendant’s arguments that Plaintiff must plead the particular injury as to each
23 particular call, or that Plaintiff must tie particular injuries specifically to the
24 ‘automated’ nature of Defendant’s calls, are meritless.

25
26 Second, Defendant asks the Court to stay Plaintiff’s case pending a decision by
27 the D.C. Circuit in *ACA International v. FCC*, No. 15-1211 (D.C. Cir.) (“*ACA*”), the
28 case deciding the efficacy of the Federal Communications Commission’s 2015 TCPA

1 order (“2015 FCC Order”), which Defendant says will clarify or be dispositive of the
2 “ATDS” issue here. *ACA* will not in any way change the ATDS issue here, and no
3 stay is warranted. Plaintiff alleges Defendant’s use of a “predictive dialer,” which
4 was deemed an ATDS in 2003 and is not on review now. In other words, regardless
5 of the decision in *ACA*, Defendant’s predictive dialer will be an ATDS, thus this case
6 should proceed without delay.

7
8 Hyundai also argues a stay is warranted to await the D.C. Circuit’s decision on
9 the FCC’s single-call “‘reassigned number’ safe harbor.”¹ It is entirely unclear that
10 the ‘safe harbor’ applies here. Even if it does, it would affect at most Defendant’s
11 liability as to a single call. Moreover, any decision of the D.C. Circuit can only take
12 away the safe harbor and thus *hurt* the Defendant. Regardless, the ‘safe harbor’
13 cannot be dispositive of Plaintiff’s claim, will not affect discovery in any way, and
14 thus cannot support a stay.

15 Hyundai also vaguely cites issues of “consent” it says are to be decided in *ACA*.
16 The 2015 FCC Order broke no new ground as to consent; therefore no ‘consent’
17 issues are to be decided in *ACA*. Regardless, again, there is no argument that Hyundai
18 had Plaintiff’s consent under *any* set of rules, where Plaintiff alleges (1) he does no
19 business with Hyundai, (2) that he never gave Hyundai his phone number, and (3) that
20 Hyundai was expressly calling for another person whom Plaintiff does not know (*see*
21 FACAC ¶¶ 9, 14 (“Christine”)) and (4) he informed Hyundai it had the wrong number
22 and requested Hyundai cease calling (FACAC ¶ 14).

23 **BACKGROUND**

24 Plaintiff is a consumer residing in Lake Stevens, Washington. (Doc. No. 17,
25 First Amended Class Action Complaint (“FACAC”) ¶ 5). Defendant is a California
26 corporation located in Irvine, California. (FACAC ¶ 6). Defendant “provides a full

27
28 ¹ This argument was not made in Defendant’s first Motion to Stay, which Plaintiff
opposed, Defendant withdrew, and then refiled.

1 range of auto finance and leasing solutions to Hyundai customers, both individuals
2 and businesses.” (FACAC ¶ 2). Plaintiff does not own a Hyundai vehicle, has not
3 inquired about purchasing a Hyundai vehicle, and is not interested in doing so.
4 (FACAC ¶¶ 3, 13). He has not provided Defendant his cell phone number or prior
5 express consent, written or otherwise, for Defendant to call him there. (FACAC ¶¶ 4,
6 13).

7
8 Nonetheless, for the last several years, Plaintiff has received automated calls
9 from Defendant on his cellular telephone at number 425-xxx-5457. (FACAC ¶¶ 4, 9).
10 Hyundai called from telephone number 800-523-7020. (FACAC ¶ 10). When
11 Plaintiff answered Defendant’s calls, he heard an extended period of silence before the
12 calls would be routed to a live agent, indicative of Defendant’s use of a “predictive
13 dialer.”² (FACAC ¶ 12). On at least one occasion, Plaintiff answered Defendant’s
14 call, waited through a dead-air pause, spoke to Defendant’s representative who asked
15 for a person named “Christine” who is unknown to Plaintiff, and informed Defendant
16 that it was calling the wrong number and to cease calling. (FACAC ¶ 14). Defendant
17 continued placing automated calls to Plaintiff’s cell phone. (FACAC ¶ 15).

18 Plaintiff was annoyed, frustrated, distracted, distressed and inconvenienced by
19 Defendant’s automated calls. Plaintiff received calls during work, causing him to lose
20

21 ² See *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638–39 (7th Cir. 2012)
22 (“The machine, called a predictive dialer, works autonomously until a human voice
23 comes on the line. If that happens, an employee in Bill Collector's call center will join
24 the call. But Customer no longer subscribes to Cell Number, which has been
25 reassigned to Bystander. A human being who called Cell Number would realize that
26 Customer was no longer the subscriber. But predictive dialers lack human intelligence
27 and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped
28 by their true master. Meanwhile Bystander is out of pocket the cost of the airtime
minutes and has had to listen to a lot of useless voicemail. (We use Bill Collector as
the caller, but this simplified description could as easily use an advertiser that relies
for consent on earlier transactions with Customer, or a box that Consumer checked on
a vendor's web site.)”).

1 focus and productivity. At least one of Hyundai's calls came while Plaintiff was on a
2 personal call on his cell phone, causing great disruption and inconvenience. (FACAC
3 ¶ 16). Plaintiff suffered from headaches as a result of Hyundai's unwanted automated
4 calls. (FACAC ¶ 17). Hyundai's calls invaded Plaintiff's privacy by interrupting
5 Plaintiff's activities while he was in his home, including waking Plaintiff from sleep
6 on at least one occasion. (FACAC ¶ 18). Plaintiff's inability to get the calls to stop,
7 even through explicit request to Hyundai, caused Plaintiff further frustration and
8 emotional drain. (FACAC ¶ 19). Plaintiff's time was wasted answering Hyundai's
9 calls Plaintiff neither asked for nor wanted. (FACAC ¶ 20). Finally, the calls caused
10 Plaintiff tangible, financial harm. Defendant's calls caused Plaintiff's cell phone
11 battery to deplete, resulting in Plaintiff recharging the battery more often and
12 incurring additional electricity charges. Plaintiff charged his cell phone at home,
13 where he pays for electricity. (FACAC ¶ 21).

14 Plaintiff seeks to represent two classes of consumers for Defendant's TCPA
15 violations:

16 TCPA Class: (1) All persons in the United States (2) to whose cellular
17 telephone number (3) Hyundai placed a non-emergency telephone call (4)
18 using an autodialer or a prerecorded voice (5) within four years of the
19 complaint.

20 Revoke Class: (1) All persons in the United States (2) to whose cellular
21 telephone number (3) Hyundai placed a non-emergency telephone call (4)
22 using an autodialer or a prerecorded voice (5) within four years of the
complaint (6) after said person requested Hyundai cease calling.

23 (FACAC ¶ 24).

24 **ARGUMENT**

25 **I. STANDARD OF LAW**

26 **A. Motion to Dismiss**

27 Federal Rule of Civil Procedure 12(b)(1) allows a party to assert the defense of
28 lack of subject-matter jurisdiction by motion. Fed. R. Civ. P. 12(b)(1). "Because

1 standing . . . pertain[s] to federal courts’ subject matter jurisdiction, [it] is properly
2 raised in a Rule 12(b)(1) motion to dismiss.” *Chandler v. State Farm Mut. Auto Ins.*
3 *Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citing *St. Clair v. City of Chico*, 880 F.2d
4 199, 201 (9th Cir. 1989); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A
5 subject-matter jurisdiction challenge may take the form of either a facial or factual
6 attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A party
7 asserting a facial challenge moves for dismissal on the grounds that the averments of
8 the complaint “are insufficient on their face to invoke federal jurisdiction.” *Id.* A
9 factual attack challenges the veracity of the allegations themselves. *Id.*

10 Here, Hyundai asserts a facial challenge to subject-matter jurisdiction.
11 Accordingly, the Court “must adopt as true all material allegations in the complaint,
12 and must construe the complaint in the nonmovant’s favor. The Court may not
13 speculate as to the plausibility of the plaintiff’s allegations.” *Chandler*, F.3d at 1121
14 (citing *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002)); *see*
15 *also Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (noting that standard
16 applied to facial jurisdictional challenges mirrors 12(b)(6) standard).

17
18 B. Motion to Stay

19 The Court has the inherent power to stay proceedings to control the disposition
20 of its docket. *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163 (1936).
21 “How this can best be done calls for the exercise of judgment, which must weigh
22 competing interests and maintain an even balance.” *Id.* at 254-55. “[T]he suppliant for
23 a stay must make out a clear case of hardship or inequity in being required to go
24 forward, if there is even a fair possibility that the stay for which he prays will work
25 damage to some one else.” *Id.* at 255; *see also Clinton v. Jones*, 520 U.S. 681, 706,
26 117 S. Ct. 1636 (1997) (“The proponent of a stay bears the burden of establishing its
27 need.”). “Only in rare circumstances will a litigant in one cause be compelled to stand
28

1 aside while a litigant in another settles the rule of law that will define the rights of
2 both.” *Landis*, 299 U.S. at 255.

3 **II. PLAINTIFF HAS CONSTITUTIONAL STANDING UNDER SPOKEO**

4 **A. Plaintiff Has Standing Pursuant to Overwhelming Post-*Spokeo* Authority**

5
6 In *Spokeo*, the Supreme Court addressed the injury-in-fact requirement for
7 Article III standing. Article III, section 2 of the United States Constitution limits the
8 judicial power of federal courts to cases and controversies. 136 S. Ct. at 1547. To
9 qualify as a case or controversy, a plaintiff in federal court must have (1) suffered an
10 injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,
11 and (3) that is likely to be redressed by a favorable judicial decision. *Id.* “To establish
12 injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally
13 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not
14 conjectural or hypothetical.’” *Id.* at 1548.

15 *Spokeo* did not create new law or a new standing requirement. *Lavigne*, 2016
16 WL 6305992, at *3 (“*Spokeo* did not break any new legal ground for case-and-
17 controversy requirements.”); *Mey v. Got Warranty, Inc.*, 2016 WL 3645195, at *2
18 (N.D.W. Va. June 30, 2016) (“*Spokeo* appears to have broken no new ground.”);
19 *Thomas v. FTS USA, LLC*, 2016 WL 3653878, at *4 (E.D. Va. June 30, 2016)
20 (“*Spokeo* did not change the basic requirements of standing.”); *Krakauer v. Dish*
21 *Network L.L.C.*, 168 F. Supp. 3d 843 (M.D.N.C. 2016) (*Spokeo* “did not
22 fundamentally change the doctrine of standing or jurisdiction.”). The Supreme Court
23 in *Spokeo* did, however, set forth the blueprint for determining concreteness and
24 whether an ‘injury’ beyond the violation of law is required.

25 Thus, a concrete injury for standing purposes may be tangible or
26 intangible. *Spokeo*, 136 S. Ct. at 1549 (“‘Concrete’ is not, however, necessarily
27 synonymous with ‘tangible.’”). Where the injury is intangible, *Spokeo* summarizes
28 two approaches to meeting the concreteness and, thus, the standing requirement. First,

1 courts should consider “whether an alleged intangible harm has a close relationship to
2 a harm that has traditionally been regarded as providing a basis for a lawsuit in
3 English or American courts. *Id.* As the court noted, “the law has long permitted
4 recovery by certain tort victims even if their harms may be difficult to prove or
5 measure. *See, e.g.,* Restatement (First) of Torts §§ 569 (libel), 570 (slander per se)
6 (1938).” *Id.* at 1549. Thus, an intangible harm that bares a close relationship to a
7 traditionally recognized harm, satisfies the concreteness and injury in fact
8 requirements.

9
10 Second, Congress may “elevat[e] to the status of legally cognizable injuries
11 concrete, *de facto* injuries that were previously inadequate in law . . .
12 .” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130
13 (1992)). Congress “has the power to define injuries and articulate chains of causation
14 that will give rise to a case or controversy where none existed before.” *Id.*

15 Separately, an allegation of a violation of a mere “procedural requirement” of a
16 federal statute—not relevant here—does not meet the concreteness requirement. *Id.* at
17 2550 (*Spokeo* uses the example of dissemination of an “incorrect zip code” that does
18 not, on its face, cause any harm). In such circumstances the proponent must allege
19 some additional harm, beyond the procedural violation itself, to satisfy standing. *Id.*
20 However, even violations of mere procedural rights can be sufficient in certain
21 circumstances where there is a risk of real harm. *Id.* at 1549-50.

22 Post-*Spokeo*, the overwhelming weight of authority establishes that receipt of
23 unwanted calls establishes concrete injuries and, therefore, Article III standing. *See,*
24 *e.g., Etzel v. Hooters of America, LLC*, No. 1:15-cv-01055-LMM, Doc. No. 39 p. 9
25 (N.D. Ga. Nov. 15, 2016) (“[I]n light of the plain language of the TCPA and
26 Congress’s role in elevating injuries to legally cognizable status, sending a single text
27 message in violation of the TCPA constitutes an injury-in-fact to the recipient so as to
28

1 provide Article III standing.”)³; *Abramson v. CWS Apartment Homes, LLC*, 2016 WL
2 6236370, at *2 (W.D. Pa. Oct. 24, 2016) (“Abramson . . . alleges CWS violated the
3 Act by sending him a telemarketing text message—without his prior express
4 consent—using an automatic telephone dialing system. These facts sufficiently
5 demonstrate Abramson suffered an injury harming him in a ‘personal and individual
6 way.’”); *LaVigne*, 2016 WL 6305992, at *6 (“[A] violation of the TCPA constitutes a
7 ‘concrete’ harm for an Article III injury-in-fact requirement. Most courts that have
8 addressed this issue have sided with Plaintiff.”); *Aranda v. Caribbean Cruise Line,*
9 *Inc.*, 2016 WL 4439935, at *5 (N.D. Ill. Aug. 23, 2016) (“[T]he TCPA . . . directly
10 forbids activities that by their nature infringe the privacy-related interests that
11 Congress sought to protect by enacting the TCPA. There is no gap—there are not
12 some kinds of violations . . . that do not result in the harm Congress intended to curb .
13 . . .”); *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536, at *2 (E.D. Cal. Aug.
14 23, 2016) (noting that courts “have consistently held that allegations of nuisance and
15 invasion of privacy in TCPA actions are sufficient to state a concrete injury under
16 Article III” where defendant used ATDS to call plaintiff without her consent in an
17 attempt to sell her a free cruise) (citing cases); *A.D. v. Credit One Bank, N.A.*, 2016
18 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016); *Ung v. Universal Acceptance Corp.*, ---
19 F. Supp. 3d ----, 2016 WL 4132244, at *2 (D. Minn. Aug. 3, 2016) (“Cases . . . have
20 repeatedly recognized that the receipt of unwanted phone calls constitutes a concrete
21 injury sufficient to create standing under the TCPA”) (citing cases); *Krakauer*, 168 F.
22 Supp. 3d at 845 (“Post-*Spokeo* cases have consistently concluded that calls that violate
23 the TCPA establish concrete injuries.”); *Caudill v. Wells Fargo Home Mortg., Ing.*,
24 2016 WL 3820195, at *6 (E.D. Ky. July 11, 2016) (“[The] alleged harms, such as
25 invasion of privacy, have traditionally been regarded as providing a basis for a lawsuit
26 in the United States.”); *Mey*, 2016 WL 3645195, at *3 (“[U]nwanted phone calls cause
27

28 _____
³ For the Court’s convenience, a copy of *Etzel* is attached hereto as Exhibit A.

1 concrete harm.”); *Griffith v. ContextMedia, Inc.*, 2016 WL 6092634 (N.D. Ill. Oct. 19,
2 2016) (“I . . . join the courts in this district and elsewhere to have concluded that
3 plaintiffs alleging the receipt of specific, unsolicited telephone communications,
4 whether by voice or text message, have Article III standing to pursue TCPA claims
5 based on lost time and invasion of privacy.”); *Rogers v. Capital One Bank (USA),*
6 *N.A.*, 2016 WL 3162592 (N.D. Ga. June 7, 2016) (“Plaintiffs . . . have suffered
7 particularized injuries because their cell phone lines were unavailable for legitimate
8 use during the unwanted calls.”); *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5
9 (W.D. Wash. May 25, 2016) (“[T]he TCPA . . . violations alleged here, if proven,
10 required Plaintiffs to waste time answering or otherwise addressing widespread
11 robocalls. . . . Congress . . . agreed, such an injury is sufficiently concrete to confer
12 standing.”); *see also Holderread v. Ford Motor Credit Co., LLC*, 2016 WL 6248707,
13 at *3 (E.D. Tex. Oct. 26, 2016) (finding TCPA plaintiff alleged “intangible form of
14 concrete harm” where plaintiff received unauthorized calls).

15
16 As the Court in *LaVigne* held, “a violation of the TCPA constitutes a ‘concrete’
17 harm for an Article III injury-in-fact requirement.” 2016 WL 6305992, at *6. This is
18 so because “the TCPA codifies the application of a long-recognized common law tort
19 of invasion of privacy (and the Court would add the tort of nuisance as well).”*Id.* at
20 *7. This satisfies the requirements of *Spokeo* that a concrete harm arises from a
21 violation of an intangible harm that has “traditionally provided a basis for lawsuits in
22 American courts.” *Id.* at *4.

23 Here, Plaintiff alleges receiving unwanted and unauthorized automated calls
24 specifically prohibited by the TCPA. Alleging a violation of the TCPA alone alleges
25 violation of a ‘substantive’ right, sufficient to confer standing.

26 B. Plaintiff Alleges Numerous Actual Injuries, Conferring Standing

27 On top of alleging repeated violation of his substantive TCPA rights, a concrete
28 injury in and of itself, Plaintiff alleges tangible injuries from Defendant’s

1 unauthorized automated calls. The calls caused Plaintiff headaches, loss of focus and
2 productivity at work, disruption and inconvenience to everyday activities, invasion of
3 privacy including waking Plaintiff from sleep, “frustration and emotional drain” from
4 Defendant ignoring his requests that the calls cease, wasted time, and added electricity
5 costs. (FACAC ¶¶ 16-21). These are cognizable injuries, some identical to the
6 injuries related to common law intrusion upon seclusion, which Congress purposely
7 elevated with the TCPA. *Spokeo*, 136 S. Ct. at 1549 (ruling Congress’s judgment
8 important in determining whether an intangible harm constitutes injury in fact, as is
9 “relationship to a harm that has traditionally been regarded as providing a basis for a
10 lawsuit in English or American courts.”); see Pub. L. 102-243, § 2, 105 Stat 2394
11 (1991) (found as note to 47 U.S.C. § 227) (repeatedly listing invasion of privacy as
12 primary concern in enacting TCPA); 137 Cong. Rec. 30,821-30,822 (1991)
13 (Statement of Sen. Hollings) (“Computerized calls are the scourge of modern
14 civilization. They wake us up in the morning; they interrupt our dinner at night; they
15 force the sick and elderly out of bed; they hound us until we want to rip the telephone
16 right out of the wall.”); see, e.g., *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745
17 (2012) (identifying protection from invasion of privacy as primary goal of TCPA);
18 *Etzel*, No. 1:15-cv-01055-LMM, Doc. No. 39 p. 7 (listing “several injuries” courts
19 have articulated are caused by “unwanted phone calls in the TCPA context”); *Mey*,
20 2016 WL 3645195, at *3-4; *Jamison v. Esurance Ins. Servs., Inc.*, 2016 WL 320646,
21 at *3 (N.D. Tex. Jan. 27, 2016) (finding standing at pleading stage based on plaintiff’s
22 allegation that unwanted calls “invaded her privacy”).
23

24 Even as to a single unauthorized call, Plaintiff’s allegations are more than
25 sufficient to confer standing. See, e.g., *Palm Beach Golf Ctr.–Boca, Inc. v. John G.*
26 *Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250–1251 (11th Cir. 2015) (occupation of fax
27 machine for one minute is sufficient, even though there was no evidence that anyone
28 ever printed or saw the faxes); *Etzel*, No. 1:15-cv-01055-LMM, Doc. No. 39 p. 9;

1 *LaVigne*, 2016 WL 6305992, at *6 (stating as to single phone calls: “Regardless of
2 how small the harm is, it is actual and it is real.”). This Court should join the
3 overwhelming majority of courts and hold that Plaintiff’s allegations confer standing.

4 C. Plaintiff’s Injuries Connect to Defendant’s Robocalls

5 Defendant argues Plaintiff has no standing because Plaintiff does not “connect”
6 his injuries to Defendant’s use of an ATDS. (Doc. No. 22-1 p. 12 (“Plaintiff does not
7 plead how his alleged injuries are connected with Hyundai’s alleged use of an ATDS
8 to call him, rather than a manually-dialed telephone.”)).

9 This argument fails: “the manner in which the call was placed has no bearing on
10 the existence of the injury; the use of an autodialer might increase the possibility of a
11 plaintiff receiving hundreds or thousands of phone calls, thus perhaps increasing the
12 extent of the invasion of [] privacy, but it is the fact of the call (or calls) that creates
13 the injury sufficient to confer standing.” *Ung*, 2016 WL 4132244 at *2; *LaVigne*,
14 2016 WL 6305992, at *7 (“[T]he manner in which the call was placed has no bearing
15 on the existence of the injury.”); Defendant’s argument “conflates the *means* through
16 which it (allegedly) violated the TCPA with the *harm* resulting from that alleged
17 violation.” *Id.* (emphasis in original). Even were the Court to find, ultimately, that
18 there was not even one autodialed call made in violation of the TCPA, such is a merits
19 determination that does not affect whether there is constitutional harm in the first
20 instance.⁴

21
22 Defendant cites solely to *Romero v. v. Dep’t Stores Nat’l Bank*, 2016 WL
23 4184099, *2 (S.D. Cal. Aug. 5, 2016) (Bencivengo, J.) and its progeny, *Ewing v. SQM*
24 *US, Inc.*, --- F. Supp. 3d ----, 2016 WL 5846494 (S.D. Cal. Sept. 29, 2016)
25 (Bencivengo, J.), in support of its argument. Those two decisions by the same court

26
27 ⁴ See *Ung*, 2016 WL 4132244, at *3 n.3 (“In other words, even if Universal showed its
28 calls were in fact manually dialed and that such calls were beyond the TCPA’s ambit,
that would in no way preclude the Court from determining *Ung* has standing to sue.”).

1 are against the majority of TCPA jurisprudence, are distinguishable, and should not
2 guide the Court here. As the court in *LaVigne* found:

3 The Court agrees with Plaintiff that *Romero* is an outlier in holding
4 that a violation of the TCPA is a bare *procedural* violation and that
5 some additional harm must be shown to establish standing.

6 2016 WL 6305992, at *6.

7 Additionally, *Romero* and *Ewing* are distinguishable on the alleged facts and
8 because of the stage of proceedings. *Romero* was a summary judgment decision made
9 after discovery, during which it was determined that, out of almost 300 automated
10 debt collection calls placed by the defendant, the plaintiff had answered only two, and
11 as to those two calls, put forth no evidence of actual injury. *Romero*, 2016 WL
12 4184099, at *5. *Ewing* similarly involved a single allegedly illegal call and no alleged
13 injury beyond the TCPA violation itself. *Ewing*, 2016 WL 5846494, at *2. Here, at
14 the pleading stage, Plaintiff alleges actually receiving Defendant’s automated calls,
15 and that particular calls caused him particular injuries which rebuts Defendant’s
16 contention that Plaintiff does not allege actual harm from calls. (See FACAC ¶ 16
17 (“At least one . . . call[] came while Plaintiff was on a personal call on his cell phone,
18 causing great disruption and inconvenience.”), ¶ 18 (“Hyundai’s calls invaded
19 Plaintiff’s privacy . . . waking Plaintiff from sleep on at least one occasion.”), ¶ 19
20 (Plaintiff’s inability to get the calls to stop, even through explicit request . . . caused
21 Plaintiff further frustration and emotional drain.”)).⁵

22 Under a straightforward application of the Supreme Court’s *Spokeo* guidance,
23 see ‘Argument’ Section II(A) *supra*, and the majority of pertinent case law, a violation
24 of the TCPA confers Article III standing and Defendant’s motion should be denied.
25 Even under the minority view which would require a litigant to allege some tangible

26 ⁵ Defendant incredibly argues it cannot tell from Plaintiff’s pleading whether Plaintiff
27 alleges “he received one call or multiple calls.” (Doc. No. 22-1 p. 15). Plaintiff’s
28 pleading consistently refers to multiple “calls,” received both before and after the call
upon which he told Defendant to cease calling. (FACAC ¶¶ 4, 9, 12-21, 23).

1 injury to open up the Federal Courts when their substantive rights are violated,
2 Plaintiff easily clears that hurdle and Defendant’s motion should be denied.

3 D. Plaintiff’s Alleged Injuries Suffice

4 Defendant next argues, again backed only by *Romero*, that Plaintiff has alleged
5 only “‘Invasion-of-Privacy’ and ‘Trespass-to-Chattels’ injuries” which it argues are
6 “‘torts, not injuries in and of themselves.” (Doc. No. 22-1 pp. 17-19). It is unclear
7 what relevance the characterizations of an injury has; injury is injury. Further, the
8 argument misconstrues Plaintiff’s pleading and the Supreme Court’s *Spokeo* decision.

9 First, Plaintiff alleges actual negative impact from Defendant’s unauthorized
10 automated calls. (See FACAC ¶¶ 16-21). The label of near-invasion of privacy or
11 trespass to chattels is irrelevant. This is complaint of actual harm suffered as a result
12 of Defendant alleged unlawful conduct.

13 Second, the Supreme Court has already rejected Defendant’s contention that
14 harms associated with invasion of privacy and trespass to chattels are inadequate.
15 They are completely adequate as harms with “a close relationship to a harm that has
16 traditionally been regarded as providing a basis for a lawsuit in English or American
17 courts” indicates “an intangible harm [that] constitutes injury in fact.” *Spokeo*, 136 S.
18 Ct. at 1549. Plaintiff alleges Defendant did impose on his personal privacy and cell
19 phone ownership with its unauthorized robocalls, causing harms closely related to
20 those traditionally recognized. (See FACAC ¶¶ 16-21). See Pub. L. 102-243, § 2, 105
21 Stat 2394 (1991) (found as note to 47 U.S.C. § 227) (repeatedly listing invasion of
22 privacy as primary concern in enacting TCPA); 137 Cong. Rec. 30,821-30,822 (1991)
23 (Statement of Sen. Hollings) (“Computerized calls are the scourge of modern
24 civilization. They wake us up in the morning; they interrupt our dinner at night; they
25 force the sick and elderly out of bed; they hound us until we want to rip the telephone
26 right out of the wall.”); see, e.g., *Mims*, 132 S. Ct. at 745 (identifying protection from
27 invasion of privacy as primary goal of TCPA). Thus the relationship between
28

1 Plaintiff's pleading and the torts of invasion of privacy and trespass to chattels helps
2 establish Plaintiff's standing. It does not hinder it as argued by Defendant. Plaintiff
3 has standing and Defendant's Motion must be denied.

4 **III. A STAY IS NOT WARRANTED BY THE DEBT COLLECTION AND**
5 **TELEMARKETING INDUSTRIES' D.C. CIRCUIT APPEAL**

6 Defendant argues a stay is warranted to await a decision by the D.C. Circuit in
7 *ACA* because it could dispose of or simplify the ATDS issue here. Staying a lawsuit is
8 the exception, not the ordinary course of litigation, and here Defendant does not meet
9 its burden to show any efficiency benefits a stay might provide.

10 First, no stay is warranted because the ATDS analysis here will not be affected
11 regardless of the decision in *ACA*. Plaintiff alleges that Defendant used a predictive
12 dialer (FACAC ¶ 12), a type of ATDS, which will not be impacted by the *ACA*
13 decision. In 2003, the FCC exercised its express authority granted by Congress to rule
14 that “predictive dialers”—defined as “hardware, when paired with certain software,
15 [which] has the capacity to store or produce numbers and dial those numbers at
16 random, in sequential order, or from a database of numbers”—qualified as ATDS
17 under the TCPA. *Rules and Regulations Implementing the Telephone Consumer*
18 *Protection Act of 1991*, 18 FCC Rcd. 14014, at ¶¶ 131-33 (July 3, 2003) (the “2003
19 FCC Order”) (emphasis added). Under that ruling, “an ATDS may include equipment
20 that automatically dials numbers from a stored list without human intervention, even
21 when the equipment lacks the capacity to store or produce telephone numbers to be
22 called, using a random or sequential number generator.” *Sterk v. Path, Inc.*, 46 F.
23 Supp. 3d 813, 818 (N.D. Ill. 2014) (emphasis added); *see also Sherman v. Yahoo!*
24 *Inc.*, 997 F. Supp. 2d 1129, 1135 (S.D. Cal. 2014). The FCC confirmed and re-
25 confirmed its rulings regarding predictive dialers and ATDS in 2008 and 2015. *See*
26 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,
27 Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72, at ¶¶ 13-15 (July
28

1 10, 2015) (the “2015 FCC Order”). In the last thirteen years, courts have routinely
2 applied the 2003 FCC Order to hold users of predictive dialers liable for errant,
3 unauthorized calls like those at issue here. *See, e.g., Soppet v. Enhanced Recovery*
4 *Co., LLC*, 679 F.3d 637, 638-39 (7th Cir. 2012) (“[A] predictive dialer works
5 autonomously until a human voice comes on the line. If that happens, an employee in
6 Bill Collector’s call center will join the call. . . . But predictive dialers lack human
7 intelligence and, like the buckets enchanted by the Sorcerer’s Apprentice, continue
8 until stopped by their true master.”); *Meyer v. Portfolio Recovery Assocs., LLC*, 707
9 F.3d 1036, 1043 (9th Cir. 2012) (finding predictive dialer was used to violate TCPA);
10 *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 410 (M.D. Pa. 2014); *Moore v.*
11 *Dish Network L.L.C.*, 57 F. Supp. 3d 639, 654-55 (N.D.W.V. 2014); *Davis v.*
12 *Diversified Consultants, Inc.*, 36 F. Supp. 3d 217, 224-25 (D. Mass. 2014) (listing
13 cases). In 2015, in response to the telemarketing and debt collection industries’ many
14 petitions, the FCC further clarified, correctly, that “the TCPA’s use of ‘capacity’ does
15 not exempt equipment that lacks the ‘present ability’ to dial randomly or sequentially.
16 . . . [A]utodialers need only have the ‘capacity’ to dial random and sequential
17 numbers, rather than the ‘present ability’ to do so.” 2015 FCC Order, at ¶ 15; *see also*
18 *Meyer*, 707 F.3d at 1043 (rejecting “present capacity” argument). The industry groups
19 have now appealed that specific 2015 clarification to the D.C. Circuit, seeking a
20 decision that the FCC erred.
21

22 Here, Plaintiff plausibly pleads that Defendant used a predictive dialer on its
23 calls to his cell phone. Specifically, Plaintiff pleads that when he answered the phone,
24 “he heard an extended period of silence before the calls would be routed to a live
25 agent.” (FACAC ¶ 12). This is exactly how predictive dialers work. *See Soppet*, 679
26 F.3d at 638-39; *Meyer*, 707 F.3d at 1043. Plaintiff now seeks discovery to prove
27 Defendant is liable under the TCPA and 2003 FCC Order.
28

1 *ACA* will not change whether Defendant is liable for its use of a predictive
2 dialer, thus there is no justification for a stay. First, Plaintiff pleads that Defendant
3 *actually used* automated capacities on its calls, not just that Defendant’s system was
4 capable in some theoretical sense of automated calling. Thus, even if the D.C. Circuit
5 rules that the FCC went too far with its 2015 Order, and that ATDS must have the
6 present ability to auto-dial, Plaintiff’s claims meet that standard. Indeed, Plaintiff not
7 only alleges that Defendant’s dialer had the present ability to autodial—he alleges the
8 capacity was *used on the calls to him*.

9 Second, that predictive dialers are prohibited by the TCPA was established in
10 2003 and is not on review in *ACA* now. *Nussbaum*, 2015 WL 5707147, at *3 (denying
11 motion to stay pending D.C. Circuit decision on FCC’s 2015 Order because FCC’s
12 definition of ATDS “not on appeal in *ACA International*”); *see* 28 U.S.C. § 2344
13 (requiring final agency orders to be challenged “within 60 days after its entry”);
14 *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246,
15 259-60 (3d Cir. 2001) (citing *I.C.C. v. Brotherhood of Locomotive Eng’rs*, 482 U.S.
16 270, 277, 107 S. Ct. 2360 (1987)) (“Once that 60-day period has passed, an agency is
17 no longer subject to judicial review.”); *JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d
18 320, 324 (D.C. Cir. 1994) (dismissing as untimely petition to FCC); *see also* Brief for
19 Respondent at 37, *ACA* (FCC arguing that the D.C. Circuit “lacks jurisdiction to
20 consider the Commission’s treatment of devices that call a stored list of numbers
21 [ATDS], because that issue was resolved in past orders that were not timely appealed
22 and were not reconsidered in the *Omnibus Ruling* under review in this case”). Thus,
23 Plaintiff’s claim that Defendant used a predictive dialer will not be upended by *ACA*.
24 Put another way, wiping the slate clean of the 2015 FCC Order will not do away with
25 the 2003 and 2008 Orders which state that predictive dialers qualify as ATDS under
26 the TCPA. Defendant makes no argument how *ACA* could affect liability from use of
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1 equipment with present ability to autodial. That is the claim brought by Plaintiff, thus
2 Plaintiff's claims should proceed without delay.

3 Defendant also argues this Court should await *ACA* for that court's review of
4 the single-call "'reassigned number' safe harbor" created in the 2015 FCC Order.
5 (Doc. No. 22-1 pp. 22-23). This issue does not affect Plaintiff's claim sufficient to
6 warrant a stay. Courts and the FCC have uniformly opined that one consumer may
7 not provide 'prior express consent' for another. *See Osorio v. State Farm Bank,*
8 *F.S.B.*, 746 F.3d 1242, 1252-53 (11th Cir. 2014) (rejecting theory that consent of
9 "intended recipient" equated to consent of actual "called party" under TCPA and
10 common law (citing *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270-71 (3d Cir.
11 2013))); 2015 FCC Order, at ¶ 72 ("We clarify that the TCPA requires the consent not
12 of the intended recipient of a call, but of the current subscriber [T]he TCPA
13 requires consent from the actual party who receives a call."). However, in the 2015
14 FCC Order, the FCC created a single-call "safe harbor" for "callers who make calls
15 without knowledge of reassignment and with a reasonable basis to believe that they
16 have valid consent to make the call." 2015 FCC Order, at ¶ 72. Here, Plaintiff alleges
17 Defendant was calling for someone named "Christine"; thus, Defendant's theory goes,
18 it is theoretically possible Defendant had 'Christine's' consent to autodial, excusing
19 its very first call to Plaintiff.
20

21 The single-call safe harbor does not warrant a stay. First, it is entirely unclear
22 that Defendant had 'Christine' or any other consumer's consent to call Plaintiff's cell
23 phone number. Defendant has a heavy burden of establishing a need for a stay.
24 *Landis*, 299 U.S. at 254; *Clinton*, 520 U.S. at 706. Defendant's theorizing that it may
25 have had 'Christine's' consent, without more, does not satisfy that burden. Second,
26 *ACA*'s review of the safe harbor can only result in it being upheld (resulting in no
27 change) or struck down, hurting Defendant's case, albeit by a single call. Defendant's
28 plea to wait for a ruling that can only hurt its case does not establish the prejudice

1 required to stay this action. Third, the single-call safe harbor is in no way dispositive
2 of Plaintiff’s claim. Plaintiff alleges receiving multiple calls from Defendant, even
3 after specifically telling Hyundai that “it was calling the wrong number, and
4 request[ing] that Hyundai cease calling.” (FACAC ¶ 14). Thus, regardless of any
5 effect the safe harbor (and *ACA*’s decision thereon) may have on liability, it will not
6 affect the discovery required, thus there is no justification for staying the case.

7
8 To the extent Defendant asserts that the rules surrounding Plaintiff’s consent
9 might change as a result of *ACA*—and it is entirely unclear that Defendant does (*see*
10 Doc. No. 22-1 p. 22 (stating only that “the outcome of this case will depend in large
11 part on . . . the TCPA’s treatment of . . . consumers’ prior express consent to receive
12 calls to their cellular telephone”))—that argument lacks merit. Indeed, the rules in
13 place at the time Hyundai called Plaintiff were clear—autodialers need prior express
14 consent to place ordinary automated calls to consumers, and specific prior express
15 *written* consent to place *telemarketing* calls to consumers. *See, e.g., Larson v. Harman*
16 *Mgmt. Corp.*, 2016 WL 6298528, at *3 (E.D. Cal. Oct. 27, 2016); *Lennartson v. Papa*
17 *Murphy’s Holdings, Inc.*, 2016 WL 51747, at *1 (W.D. Wash. Jan. 5, 2016) (citing
18 FCC’s 2012 Order that telemarketing calls require specific prior express *written*
19 consent). Here, Plaintiff is not Defendant’s customer, did not provide Defendant his
20 telephone number, and certainly did not provide Defendant consent—written or
21 otherwise—to autodial his cell phone. (FACAC ¶ 13). Accordingly, the only question
22 is to what degree Hyundai violated the ‘consent’ requirement, the same discovery will
23 be required regardless, and no stay is warranted. It is Defendant’s burden to establish
24 a clear need for a stay, and its vague suppositions as to what the *ACA* decision might
25 entail regarding ‘consent’ do not meet that burden.

26 In sum, staying a lawsuit is an extraordinary remedy and Defendant has the
27 burden to show its absolute need. The sole issue identified by Defendant as requiring
28 a stay is whether its equipment can be an ATDS if it does not have the current

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capacity to autodial. But that is not a dispositive issue here, where Plaintiff alleges receiving calls *actually made* with autodialing capacities. There are thus no grounds to stop this lawsuit in its tracks, and the motion should be denied.

CONCLUSION

For the foregoing, Plaintiff respectfully requests the Court deny Defendant’s Motion to Dismiss Plaintiff’s Amended Complaint for Lack of Standing or, in the Alternative, to Stay Proceedings.

DATED: November 18, 2016

TRINETTE G. KENT

By: /s/ Trinette G. Kent
Trinette G. Kent, Esq.
Lemberg Law, LLC
Attorney for Plaintiff, Jeremy Klein

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, a true copy of the above document was served upon the attorney of record for each other party using the Court's CM/ECF system.

/s/ Trinette G. Kent
Trinette G. Kent

General Information

Court	United States District Court for the Central District of California; United States District Court for the Central District of California
Federal Nature of Suit	Other Statutory Actions[890]
Docket Number	8:16-cv-01469