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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AJ REYES, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Defendant.

Case No. 15-cv-00628-BAS-AGS

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT’S *EX PARTE*
APPLICATION FOR A
TEMPORARY STAY OF
DISTRICT COURT
PROCEEDINGS**

[ECF No. 120]

Presently before the Court is Defendant ECMC’s *ex parte* application to stay the proceedings in this Court pending the resolution of the Federal Rule of Civil Procedure 23(f) petition Defendant filed with the Ninth Circuit Court of Appeals on October 3, 2017. (ECF No. 120.) Plaintiff AJ Reyes filed an opposition to Defendant’s *ex parte* application. (ECF No. 121.) For the reasons set forth below, the Court grants in part and denies in part ECMC’s *ex parte* application for a temporary stay of all proceedings.

I. BACKGROUND

Plaintiff AJ Reyes brought this suit over two and half years ago against Defendant Educational Credit Management Corporation (“ECMC”) on behalf of a putative class alleging violations of California’s Invasion of Privacy Act (“CIPA”),

1 Cal. Penal Code § 630 *et seq.* (ECF No. 1, Compl. ¶¶82–92.) Specifically, the
2 Complaint alleges that ECMC violated §632.7(a) of the CIPA in the course of dealing
3 with the Plaintiff and other putative class members by recording their cellular phone
4 calls without their consent.

5 On September 19, 2017, this Court granted Plaintiff’s Motion for Class
6 Certification pursuant to Rule 23 and appointed Plaintiff Reyes as class
7 representative. (ECF No. 113.) Subject to certain exclusions, the class the Court
8 certified is:

9 All individuals who, between August 2, 2014, to March 31, 2015,
10 inclusive (the “Class Period”), participated in an inbound
11 telephone conversation with a live representative of ECMC that
12 was: (1) placed to an ECMC phone line that used the non-
13 mandatory message setting for its admonition that the call is being
14 recorded; (2) made from a telephone number that includes a
15 California area code; (3) transmitted via cellular telephone; and (4)
16 recorded without the caller’s consent. (*Id.* at 7.)

17 In certifying this class, the Court observed that the fourth part of the class
18 definition was compelled by the class allegations in the Complaint. (*Id.* at 6.)
19 Although Plaintiff Reyes moved to certify a class which removed the lack of consent
20 feature (ECF No. 76-1 at 1), the Court noted that it could not broaden the class beyond
21 the class alleged in the Complaint (ECF No. 113 at 6).

22 On October 3, 2017, ECMC filed a Petition for Leave to Appeal the Class
23 Certification Order (the “Petition”) with the Ninth Circuit. (ECF No. 120 Ex. A.)
24 ECMC’s Petition presents three issues: (1) whether Plaintiff Reyes can represent the
25 certified class when “the evidence cited by the District Court demonstrates that [he]
26 is not a class member”; (2) if Plaintiff Reyes can represent the class, can Rule 23’s
27 requirements be met “when the evidence cited to certify the class was deemed
28 unreliable by the District Court”; and (3) did the District Court certify an

1 “impermissible failsafe class” by adding the language “recorded without the caller’s
2 consent” to the class definition. (*Id.* at 1.)

3 ECMC filed the instant *ex parte* application to stay proceedings in this Court
4 pending the resolution of its Petition. The Ninth Circuit has not accepted the Petition
5 as of the date of this Order. Plaintiff Reyes has also filed an answer in opposition to
6 ECMC’s Petition. (*See Reyes v. Ed. Credit Mgmt. Corp.*, No. 17-80199, ECF No. 11
7 (9th Cir. Oct. 13, 2017).)

8 **II. DISCUSSION**

9 **A. *Ex Parte* Application**

10 As an initial matter, the Court observes that ECMC has brought its request for
11 a stay through an *ex parte* application to the Court, outside of the Court’s regular
12 noticed motion procedures. ECMC provides no justification for seeking a stay on an
13 *ex parte* basis. ECMC’s *ex parte* application also failed to comply with the Local
14 Rules and this chamber’s Standing Order requiring ECMC to submit an affidavit or
15 declaration with its *ex parte* application documenting its meet and confer efforts. *See*
16 Civ. L.R. 83.3(g); Standing Order at 7. ECMC’s failure to comply with these rules
17 would be a sufficient basis to deny its application for *ex parte* relief. However,
18 Plaintiff has responded to ECMC’s opposition. (ECF No. 121.) Being presented
19 with full briefing on whether a stay should be imposed, the Court will address its
20 merits.

21 **B. Legal Standard for Stay**

22 Federal Rule of 23(f) provides a mechanism for interlocutory appeal of a
23 court’s order granting or denying class certification. Such appeals do “not stay
24 proceedings in the district court unless the district court or the court of appeals so
25 orders.” Fed. R. Civ. P. 23(f). “A stay is not a matter of right, even if irreparable
26 injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418 (2009). The decision
27 of whether to grant a stay is an “exercise of judicial discretion” and “the propriety of
28 its issue is dependent upon the circumstances of the particular case.” *Id.* A court

1 balances four factors in determining how to exercise its discretion: (1) whether the
2 movant is likely to succeed on the merits; (2) whether the movant is likely to suffer
3 irreparable harm in the absence of a stay; (3) whether the issuance of the stay would
4 not substantially harm the non-moving party; and (4) whether a stay will serve the
5 public interest. *Rainbow Bus. Solutions v. Merch. Servs., Inc.*, No. C 10-1993 CW,
6 2014 WL 1783945, at *1 (N.D. Cal. May 5, 2014). The first two factors of the
7 standard “are the most critical.” *Id.*

8 The factors are examined on a “flexible continuum” or “sliding scale
9 approach.” *Aguayo v. U.S. Bank*, No. 08-cv-2139 W (BLM), 2015 WL 13344756, at
10 *1 (S.D. Cal. June 26, 2015). Specifically, a party seeking a stay must either (1)
11 make a strong showing it is likely to succeed on the merits and show it will be
12 irreparably harmed absent a stay, or (2) demonstrate that its appeal presents a serious
13 question on the merits and the balance of hardships tilts sharply in its favor.” A stay
14 may be appropriate if the party moving for a stay demonstrates that serious legal
15 questions are raised and the balance of hardships tips sharply in its favor. *Morse v.*
16 *Servicemaster Global Holdings, Inc.*, Nos. C 10–00628, C 08–03894, C 09–04044,
17 C 09–05152, C 09–05153, 2013 WL 123610, at *2 (N.D. Cal. Jan. 8, 2013).

18 **C. Propriety of a Temporary Stay of All Proceedings in this Case**

19 **1. Likelihood of Success on the Merits**

20 ECMC contends that each of the issues identified in its Petition constitutes a
21 serious legal question. It has not argued it has a likelihood of success on the merits.
22 Plaintiff strongly disputes that ECMC has raised any serious legal question and
23 emphasizes that the Ninth Circuit only grants Rule 23(f) petitions in rare
24 circumstances.

25 The Court does not find that the first and second issues identified in ECMC’s
26 Petition present serious legal questions. “For a legal question to be serious, it must
27 be a question going to the merits so serious, substantial, difficult and doubtful, as to
28 the make the issues ripe for litigation and deserving of more deliberate investigation.”

1 *Guifu Li v. A Perfect Franchise, Inc.*, No. 5:10-cv-01189-LHK, 2011 WL 2293221
2 at *3 (N.D. Cal. June 8, 2011). Rather than presenting such serious legal questions,
3 ECMC seeks to re-litigate objections this Court overruled in the class certification
4 order and also misconstrues that order.

5 More specifically, as to the Petition’s first issue about whether Plaintiff is an
6 adequate class representative, ECMC seeks to litigate a merits issue as to its defenses
7 to potential liability. In its Petition, ECMC claims that the hold time data shows that
8 Plaintiff is not a part of the certified class because “he was on hold for much longer
9 than necessary to hear ECMC’s Recording Disclosure.” (ECF No. 120 at 3.) As the
10 Court determined, ECMC’s hold time data defense is not specific to Plaintiff, but
11 rather applies to all class members. (ECF No. 113 at 24.) Therefore, it does not
12 support a conclusion that Plaintiff Reyes is not an adequate class representative.

13 Regarding the Petition’s second issue about whether there was “insufficient
14 evidence” to certify the class, the Petition is premised on an incorrect interpretation
15 of the Court’s class certification order. The order did not call into question the
16 *reliability* of ECMC’s hold time data, but rather ECMC’s *questionable*
17 *representations* to the Court and Plaintiff about the significance of that data. (*Id.* at
18 13.) The Court determined that the hold time data can “provide an objective record”
19 that is plausibly susceptible to classwide proof and consequently overruled ECMC’s
20 assertion that no class could ever be certified because of the possibility of
21 “unmanageable individualized inquiries.” (*Id.* at 12–14.)

22 The Petition’s third issue is whether the certified class is an “impermissible
23 failsafe class.” ECMC has identified a Ninth Circuit decision in which the Court
24 appears to have granted a Rule 23(f) Petition to determine whether the certified class
25 was an impermissible failsafe class, although the court ultimately found the class was
26 not failsafe. *See Kamar v. RadioShack*, 375 Fed. App’x 734, 736 (9th Cir. 2010).
27 ECMC argues that the current class definition creates a situation in which either (1)
28 all the Plaintiff and the class members need to do to prevail is demonstrate that their

1 inbound calls were recorded without their consent or (2) if they fail to demonstrate
2 that they were recorded without consent, the class does not exist. (ECF No. 120 at 5.)
3 The Court accepts that the Petition’s third issue may raise a serious legal question
4 about the certified class in light of §632.7(a)’s consent element.

5 Even so, the Court observes that there exists at the District Court level various
6 mechanisms for addressing the failsafe issue that would obviate the need to appeal
7 the class certification order. The most immediate example is that a class certification
8 order is subject to revision by the district court *at any time* before final judgment.
9 Fed. R. Civ. P. 23(c)(1)(C). A request from either party to amend the order on this
10 basis would be well received. In recognition of the Court’s power to narrow, rather
11 than expand a class, *Costelo v. Chertoff*, 258 F.R.D. 600, 604–05 (C.D. Cal. 2009),
12 the Court is open to a request from Plaintiff for leave to file an amended complaint
13 amending its class allegations to remove the “without the caller’s consent” feature,
14 which would obviate the need for an appeal on the failsafe issue.

15 2. Irreparable Harm to the Parties and Class Members

16 ECMC argues that it will suffer irreparable harm without a temporary stay of
17 the proceedings because it will incur significant expenses in preparing to try this case
18 as a class action and in providing class notice and any curative notice that might be
19 necessary. (ECF No. 120 at 5-6.)

20 The costs of pretrial litigation may amount to an irreparable harm when
21 granting the stay would avoid substantial, unrecoverable, and wasteful discovery
22 costs; when the costs would impose serious burdens that an appeal would avoid; or
23 when pretrial litigation would moot an appeal. *See Pena v. Taylor Farms Pac., Inc.*,
24 No. 2:13-cv-01282-KJM-AC, 2015 WL 5103157, at *4 (E.D. Cal. Aug. 31, 2015)
25 (citing cases). But costs may not amount to an irreparable harm, particularly where
26 the costs would be inevitable regardless of the appeal’s outcome, or where the costs
27 can be avoided by a tailored stay. *Id.* Here, costs associated with any proceedings,
28 discovery, or orders that do not rely upon the challenged class certification would not

1 be affected by any decision ECMC’s Petition. *Gilman v. Davis*, No. CIV. S-05-830
2 LLK/GGH, 2009 WL 3365858, at *4 (E.D. Cal. Oct. 15, 2009). At most, a stay
3 delays, rather than avoids altogether, those costs. *Id.*

4 The Court does not find that ECMC has shown an irreparable harm that would
5 warrant a stay of all district court proceedings at this time. The costs associated with
6 trying this case as a class action, including class discovery, will not be rendered
7 unnecessary by the Ninth Circuit’s resolution of ECMC’s Petition. *See, e.g., Amaro*
8 *v. Gerawan Farming, Inc.*, No. 1:14-cv-00147-DAD-SAB, 2016 U.S. Dist. LEXIS
9 157409, at *9 (E.D. Cal. Nov. 14, 2016) (no irreparable injury where it was “unclear
10 how discovery . . . will be rendered unnecessary” by Ninth Circuit’s potential reversal
11 of class certification order). Here, the Court fails to see how this case will not proceed
12 as a class action whether on the current certified class or a modified one. Plaintiff
13 has filed a motion for leave to amend to add a new putative class representative and
14 modify the certification order, which will need to be adjudicated. (ECF No. 125.)
15 Even if the Ninth Circuit decertifies the class as impermissibly failsafe, there are also
16 mechanisms available to certify a class that is not failsafe. That potential class likely
17 will be larger than the currently certified class of individuals who did not consent to
18 be recorded by ECMC. If the Ninth Circuit modifies or upholds the certified class,
19 the costs associated with trying this case as a class action also will not have been in
20 vain.

21 On the other hand, the Court believes that a stay of all proceedings could
22 potentially harm the Plaintiff and the class by delaying the proceedings and the
23 benefits of the requested injunctive relief. With respect to delay, the Ninth Circuit
24 has not accepted the Petition, and there is no indication that it will be accepted soon.
25 Even if the Petition is accepted, it likely will take several months for briefing to be
26 completed and for a decision to be issued. Such delays can constitute a harm to the
27 Plaintiff. *See, e.g., Thorpe v. District of Columbia*, 306 F.R.D. 6, 11 (D.D.C. 2014)
28 (delay of “more than a couple of months” resulting from Rule 23(f) appeal constituted

1 harm to plaintiffs’ ability to take discovery if stay were granted). Staying all
2 proceedings will also harm the Plaintiff and the class by “depriv[ing] some class
3 members of the opportunity to benefit from any [injunctive] relief that is obtained.”
4 *Id.* Contrary to ECMC’s argument that this action is aimed at collecting damages for
5 past harm, Plaintiff has alleged an injunctive class specifically aimed at ensuring that
6 ECMC does not continue to engage in its allegedly unlawful conduct. (ECF No.
7 113.) Further delay in this case is harmful to them.

8 However, the Court finds that there is potential irreparable harm to the class if
9 notice is prematurely disseminated. It is important to recognize that this is a harm *to*
10 *class members* because of the potential confusion it can cause.¹ *See, e.g., Brown v.*
11 *Wal-Mart Stores, Inc.*, No. 5:09-cv-03339-EJD, 2012 WL 5818300, at *4 (N.D. Cal.
12 Nov. 15, 2012) (irreparable harm to class where parties “risk generating confusion
13 among class members” by disseminating notice that could require curative notice).
14 Where the potential irreparable harm concerns a specific aspect of the proceedings,
15 courts have developed tailored stay procedures to address that harm rather than
16 permitting a full stay. *See, e.g., Thorpe*, 306 F.R.D. at 11 (staying expert discovery
17 but not fact discovery), *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D.
18 88, 94 (D.D.C. 2012) (staying class notice but not expert discovery). Here, the Court
19 will adopt a tailored procedure temporarily staying proceedings concerning class
20 notice, including the requirement that the parties jointly submit a proposed class
21 notice and notice dissemination plan. The Court, however, will permit all other
22 proceedings to continue, including class discovery.

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25 ¹ Although ECMC argues that the costs it would incur from providing a class
26 notice now would constitute an irreparable harm, it identifies no authorities holding
27 or otherwise suggesting that costs associated with providing class notice constitute
28 such a harm warranting a stay. Premature notice can constitute a harm to the moving
party where, for example, it could damage the reputation of the defendant. *See, e.g.,*
Willcox v. Lloyds, TSB Bank, PLC, Civ. No. 13-00508 ACK-RLP, 2016 U.S. Dist.
LEXIS 28959, at *18–19 (D. Haw. Mar. 7, 2016).

1 **3. Whether a Stay Will Serve the Public Interest**

2 Lastly, the public interest cautions against granting a temporary stay of all
3 proceedings in this action. ECMC argues that the public interest warrants a stay
4 because any notice disseminated will cause confusion. Although the Court accepts
5 this argument, *see, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D.
6 at 94 (public interest warrants not proceeding with class notice while a Rule 23(f)
7 petition is pending), it points toward a tailored stay of class notice approval and
8 dissemination, not of all proceedings. More importantly, the public interest does not
9 warrant a stay of all proceedings given the length of time this case has been pending
10 and the underlying allegations. This case is over two and a half years old. California
11 residents have an interest in the efficient prosecution of California’s privacy laws and
12 seeking to hold those who violate those laws accountable. The public interest will
13 not be served by a stay of all proceedings at this time.

14 **III. CONCLUSION**

15 For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN**
16 **PART** ECMC’s request for a temporary stay of the proceedings.

17 It is **HEREBY ORDERED THAT:**

- 18 1. All proceedings relating to class notice, including the obligation of the
19 parties to jointly submit a proposed class notice and notice
20 dissemination plan, are **TEMPORARILY STAYED**. If the Ninth
21 Circuit accepts ECMC’s Petition, the stay on class notice will extend
22 until the Ninth Circuit issues a decision on ECMC’s appeal. If the Ninth
23 Circuit does not accept ECMC’s Petition, ECMC must immediately
24 notify the Court of its denial, and the parties must jointly submit a
25 proposed class notice and notice dissemination plan based on the
26 certified class (ECF No. 113) within 30 days of the denial of the Petition.
- 27 2. The Court **VACATES the October 17, 2017 deadline** for the parties to
28 file a proposed class notice and notice dissemination plan.

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- 3. All other proceedings, including class discovery proceedings, are **NOT STAYED** at this time.
- 4. If the Ninth Circuit accepts ECMC’s Petition, ECMC is **HEREBY PERMITTED** to submit a properly noticed motion for a stay as to all other proceedings.

IT IS SO ORDERED.

DATED: October 17, 2017


Hon. Cynthia Bashant
United States District Judge