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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Beheshta MAHBOOB, on behalf of  
herself and all others similarly  
situated,  
  
Plaintiffs,  
  
v.  
  
EDUCATIONAL CREDIT  
MANAGEMENT CORP.,  
  
Defendant.

Case No.: 15-cv-0628-TWR-AGS  
**ORDER GRANTING DEFENDANT’S  
MOTION TO STAY (ECF 166)**

Defendant moves for a stay until the California Supreme Court decides *Smith v. LoanMe, Inc.*, Case No. S260391. Because a stay would simplify the issues with minimal prejudice to plaintiff, the Court grants defendant’s request.

**BACKGROUND**

Defendant Educational Credit Management Corporation allegedly recorded its phone conversations with plaintiff without consent. (ECF 1, at 2-3). Plaintiff sued ECMC for unlawful privacy-invasion under California Penal Code section 632.7, which is the sole remaining claim in this putative class action. (ECF 153, at 11.)

In 2019, the California Court of Appeal ruled that section 632.7 only applies to third-party eavesdroppers and “does not prohibit the participants in a phone call from intentionally recording it.” *Smith v. LoanMe, Inc.*, 43 Cal. App. 5th 844, 848 (2019), *rev.*

1 *granted*, No. S260391, 2020 WL 1608928, at \*1 (Cal. Apr. 1, 2020). This holding conflicts  
2 with another Court of Appeal decision, which concluded that section 632.7 prohibits  
3 recording communications without consent “no matter the particular role or degree of  
4 participation that a party has in the communication.” *See Gruber v. Yelp Inc.*, 55 Cal. App.  
5 5th 591, 608 (2020). Unsurprisingly, the California Supreme Court granted review of *Smith*  
6 to settle the issue. *See Smith*, 2020 WL 1608928, at \*1. If the California Supreme Court  
7 affirms *Smith*, section 632.7 would not apply to call-participant ECMC, dooming plaintiff’s  
8 only cause of action. So, ECMC seeks to stay this case until *Smith* is resolved. (ECF 166,  
9 at 6-7.)

## 10 DISCUSSION

11 “A district court has discretionary power to stay proceedings.” *Lockyer v. Mirant*  
12 *Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). And a case may be stayed “pending resolution  
13 of independent proceedings which bear upon the case.” *Leyva v. Certified Grocers of Cal.,*  
14 *Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). For any stay request, the Court must weigh: (1) “the  
15 possible damage which may result from the granting of a stay”; (2) “the hardship or  
16 inequity which a party may suffer in being required to go forward”; and (3) “the orderly  
17 course of justice measured in terms of the simplifying or complicating of issues, proof, and  
18 questions of law which could be expected to result from a stay.” *Lockyer*, 398 F.3d at 1110.

### 19 A. Prejudice to Plaintiff from Granting Stay

20 Plaintiff fears that a stay would lead to lost evidence and delay needed injunctive  
21 relief. Regarding evidence loss, plaintiff worries about the “memory of witnesses fading,”  
22 defendant’s “company turnover,” and “potential destruction” of information. (ECF 170,  
23 at 17.) The generic “risk of lost evidence is inherent in every stay.” *Burnell v. Swift Transp.*  
24 *Co.*, No. EDCV1000809VAPOPX, 2011 WL 13352810, at \*5 (C.D. Cal. Jan. 20, 2011).  
25 But that risk is slight here. First, a stay in this case would not be “tantamount to an  
26 ‘indefinite’ stay, because the California Supreme Court has internal procedures to ensure  
27 timely management of its docket.” *Id.* at \*3 (quotation marks omitted). More importantly,  
28 plaintiff already conducted five years of extensive formal discovery, which vastly reduces

1 the danger of lost evidence. *See id.* at \*5 (finding the risk from a stay to be “mitigated  
2 considerably” because plaintiffs “already have received some informal discovery.”).

3 Plaintiff’s other argument—that the class and the “public at large” badly need  
4 injunctive relief (ECF 170, at 20)—is also unpersuasive. Generally, a prayer for injunctive  
5 relief weighs heavily against a stay if the plaintiff is suffering ongoing harm or “if there is  
6 even a fair possibility that the stay . . . will work damage to some[]one else.” *See Lockyer*,  
7 398 F.3d at 1112 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). But if the harm  
8 is only in the past, an injunctive-relief claim does not prevent a stay. For example, in  
9 *Reynolds v. Geico Corp.*, No. 2:16-CV-01940-SU, 2017 WL 815238 (D. Or. Mar. 1, 2017),  
10 the Court granted a stay despite an injunction request in a Telephone Consumer Protection  
11 Act case, because there was little proof of ongoing harm. *Id.* at \*4. Plaintiff had not received  
12 an offending text from defendant for over six months, and the Court noted that “nothing  
13 suggests that plaintiff is in jeopardy of receiving additional text messages.” *Id.*

14 As in *Reynolds*, there is no ongoing harm here. ECMC claims that “the inadvertent  
15 setting at issue in this case was corrected . . . [over five years ago] on April 1, 2015,” and  
16 there is “no evidence” that the problem has recurred. (ECF 173, at 9.) On the other hand,  
17 plaintiff argues that injunctive relief is still necessary because ECMC’s fix of their phone-  
18 system glitch “could be easily abandoned or altered in the future.” (*See* ECF 170, at 18-  
19 20.) But this argument conflates the availability of a final remedy with ongoing harm. Just  
20 because injunctive relief is available does not mean the harm persists. The only ongoing  
21 harm that plaintiff identifies is that the class will not be “made whole as rapidly as  
22 possible.” (*Id.* at 20.) That is not enough. “Delay in monetary relief alone is not a sufficient  
23 basis to deny a stay.” *Grendene USA, Inc. v. Brady*, No. 3:14-CV-2955-GPC-KSC,  
24 2015 WL 4606261, at \*4 (S.D. Cal. July 30, 2015). So, the first factor favors granting the  
25 stay.

## 26 **B. Prejudice to Defendant from Denying Stay**

27 “[D]efend[ing] a suit, without more, does not constitute a clear case of hardship or  
28 inequity.” *Lockyer*, 398 F.3d at 1112 (quotation marks omitted). But when a case-

1 dispositive issue is pending before a supreme court, “[p]reparing for trial without a clear  
2 answer” causes potentially “unnecessary work” and “amount[s] to a hardship.” *Goro v.*  
3 *Flowers Foods, Inc.*, No. 17-CV-2580 JLS (JLB), 2020 WL 804841, at \*3 (S.D. Cal. Feb.  
4 18, 2020). The hardship is even more severe when the case is a “putative class action,”  
5 forcing defendant to “incur expenses above and beyond the costs of two-party litigation,  
6 such as the cost of class discovery and costs incurred to oppose class certification.” *Del*  
7 *Rio v. Creditanswers, LLC*, No. 10CV346-WQH BLM, 2010 WL 3418430, at \*4 (S.D.  
8 Cal. Aug. 26, 2010).

9 The pending *Smith* decision could end this case. After all, federal courts “are bound  
10 to follow the decisions of the state’s highest court” when interpreting state law. *See Salazar*  
11 *v. McDonald’s Corp.*, 944 F.3d 1024, 1029 (9th Cir. 2019). Meanwhile, plaintiff recently  
12 moved to certify the class. (ECF 201.) The expense of opposing a potentially moot class-  
13 certification motion constitutes a hardship that favors a stay.

#### 14 **C. Orderly Course of Justice**

15 Finally, a stay would conserve judicial resources. Even if the California Supreme  
16 Court ultimately overturns *Smith*, it would resolve a central legal issue—whether section  
17 632.7 applies to participants—that has split the California appellate courts. So, no matter  
18 the outcome, it will simplify the “issues, proof, and questions of law.” *See Lockyer*, 398  
19 F.3d at 1110.

20 Yet plaintiff argues that a stay is unnecessary because this Court can “interpret state  
21 law itself,” predicting how the California Supreme Court would rule. (ECF 170, at 8.) And  
22 plaintiff opines that it is “extremely likely that the California Supreme Court will apply  
23 [section 632.7] to further telephone privacy.” (*Id.* at 14.) This Court nonetheless joins the  
24 other federal courts that have rejected such a speculative exercise. *See, e.g., Erceg v.*  
25 *LendingClub Corp.*, No. 20-CV-01153-HSG, 2020 WL 4340173, at \*4 (N.D. Cal. July 28,  
26 2020) (“It would be a waste of judicial resources to try to guess . . . how the California  
27 Supreme Court will decide [*Smith*],” which “easily could be determinative of Plaintiff’s  
28 claims . . . .”); *Brinkley v. Monterey Fin. Servs., LLC*, No. 16-CV-1103-WQH-WVG, 2020

1 WL 1929023, at \*5-6 (S.D. Cal. Apr. 21, 2020) (staying the case to avoid “expend[ing]  
 2 unnecessary time and resources” litigating issues when the *Smith* decision will have “a  
 3 decisive effect on the viability” of plaintiff’s claim); *Saunders v. Sunrun, Inc.*, No. 19-CV-  
 4 04548-HSG, 2020 WL 4601636, at \*6 (N.D. Cal. Aug. 11, 2020) (staying the case and  
 5 holding that it “would be a waste of judicial resources to assume how the California  
 6 Supreme Court will decide the issues” in *Smith*); *Franklin v. Ocwen Loan Servicing, LLC*,  
 7 No. 18-CV-03333-SI, 2020 WL 3316058, at \*2 (N.D. Cal. June 18, 2020) (staying the case  
 8 and noting that “the Supreme Court’s decision will determine whether plaintiff’s claim is  
 9 viable at all, let alone on a class basis”); *CS Wang & Assoc. v. Wells Fargo Bank, N.A.*,  
 10 No. 16 C 11223, 2020 WL 5297045, at \*5 (N.D. Ill. Sept. 4, 2020) (staying the case, in  
 11 part, because a “decision by the California Supreme Court affirming *Smith* would . . . likely  
 12 be dispositive of Plaintiff’s § 632.7 claims”).


13 A decision affirming *Smith* would significantly narrow, or even eliminate, plaintiff’s  
 14 sole cause of action. Even if this possibility were remote, the outcome’s inherent  
 15 uncertainty warrants staying the proceedings to promote judicial economy.

16 **CONCLUSION**

17 Because all three factors favor it, the Court **GRANTS** defendant’s motion to stay  
 18 these proceedings until the California Supreme Court resolves *Smith v. LoanMe, Inc.*,  
 19 No. S260391. The Court further orders:

- 20 1. Status Reports: ECMC must file periodic status reports on the state court  
 21 proceedings. ECMC must file such a report on March 1, 2021, and every three  
 22 months thereafter (that is, June 1, 2021; September 1, 2021; etc.).
- 23 2. Notice of *Smith* Resolution: The parties must jointly file a notice within seven  
 24 calendar days of the California Supreme Court’s resolution of *Smith*. In that  
 25 notice, the parties must include a recommended schedule for all remaining dates.  
 After this seven-day period, the stay will be lifted, and proceedings will resume.

26 Dated: December 21, 2020

27   
 28 Hon. Andrew G. Schopler  
 United States Magistrate Judge