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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JUAN ROMERO; FRANK TISCARENO;
12 and KENNETH ELLIOTT, on behalf of
13 themselves and all others similarly
situated,

14 Plaintiffs,

15 v.

16 SECURUS TECHNOLOGIES, INC.,

17 Defendant.
18

Case No.: 16cv1283 JM (MDD)

**ORDER GRANTING DEFENDANT'S
MOTION FOR STAY PENDING
APPEAL**

19 Defendant Securus Technologies, Inc. ("Securus") moves the court for a stay
20 pending the Ninth Circuit's resolution of its Federal Rule of Civil Procedure 23(f) appeal.
21 (Doc. No. 160.) Plaintiffs oppose. (Doc. No. 163.) For the reasons discussed below, the
22 court grants Securus' motion to stay.

23 **BACKGROUND**

24 The background facts are well known to the court and parties and are not repeated
25 here. On November 21, 2018, the court certified a statewide class for Plaintiffs' California
26 Invasion of Privacy Act ("CIPA") claims. (Doc. No. 141.) On December 5, 2018, Securus
27 filed a Rule 23(f) petition for appeal of the court's class certification order. In the petition,
28 Securus argued that review was warranted because the class certification order presents

1 “unsettled and fundamental issue[s] of law” and “manifest error.” In its petition for appeal,
2 Securus sought review of three “fundamental questions” on the court’s class certification
3 order: (1) whether the issue of intent presents a “common question” for all class members,
4 (2) whether class litigation is superior to other forms of litigation, and (3) whether the court
5 had the authority to grant Plaintiffs’ motion for class certification after it denied Plaintiffs’
6 first motion for class certification. Petition for Rule 23(f) Appeal, Doc. No. 1-2, No. 18-
7 80181. Securus also argued that this court “committed a manifest and substantial error
8 regarding its jurisdiction” because Plaintiffs failed to present evidence of improperly
9 recorded calls after 2014. Id. On December 5, 2018, Plaintiffs also filed a petition for
10 review of the court’s denial of their request to certify a class for Plaintiffs’ remaining
11 claims. On February 26, 2019, the Ninth Circuit denied Plaintiffs’ petition for an appeal.
12 (Doc. No. 155.) On February 27, 2019, the Ninth Circuit granted Securus’ petition for an
13 appeal. (Doc. No. 156.)

14 **LEGAL STANDARDS**

15 An appeal from a class certification order does not stay proceedings in the district
16 court unless the district judge or the court of appeals so orders. Fed. R. Civ. P. 23(f).
17 Pursuant to Federal Rule of Appellate Procedure 8, this court retains jurisdiction to order a
18 stay pending appeal of its order. The court has broad discretion to stay proceedings. Landis
19 v. N. American Co., 299 U.S. 248, 254 (1936). “The party requesting a stay bears the
20 burden of showing that the circumstances justify an exercise of that discretion.” Nken v.
21 Holder, 556 U.S. 418, 433-34 (2009). Accord Landis, 299 U.S. at 255.

22 The Ninth Circuit has not articulated a specific standard for evaluating a proposed
23 stay pending decision of a Rule 23(f) appeal. Most district courts in this circuit apply the
24 standard enumerated in Nken v. Holder, 556 U.S. 418 (2009) and Hilton v. Braunskill, 481
25 U.S. 770, 776 (1987).¹ The court applies this standard as there is substantial overlap
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27 ¹ A minority of district courts in this circuit hold that the Nken and Hilton test applies “only
28 when a party seeks the stay of execution of a judgment or order that modifies the status

1 between the tests, the outcome is the same under either standard, and the parties only
2 reference the Nken and Hilton test. This four-factor test mirrors the factors considered for
3 a request for injunctive relief. Nken, 556 U.S. at 433-34. The court considers: “(1) whether
4 the stay applicant has made a strong showing that he is likely to succeed on the merits;
5 (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of
6 the stay will substantially injure the other parties interested in the proceeding; and
7 (4) where the public interest lies.” Id. at 434 (quoting Hilton, 481 U.S. at 776). The first
8 two factors are the most critical. Nken, 556 U.S. at 434. In weighing the four factors,
9 courts use a flexible “sliding scale” approach, “so that a stronger showing of one element
10 may offset a weaker showing of another.” Leiva-Perez v. Holder, 640 F.3d 962, 964-66
11 (9th Cir. 2011).

12 DISCUSSION

13 A. Likelihood of Success on the Merits

14 “It is not enough that the chance of success on the merits be better than negligible . . .
15 more than a mere possibility of relief is required.” Id. (quotations and citation omitted).
16 Nken, 556 U.S. at 434. The Ninth Circuit has explained that the first factor does not require
17 a party seeking a stay to demonstrate that it is more likely than not to prevail on its appeal.

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20 quo pending the resolution of the correctness of that order or judgment by the appellate
21 court.” Finder v. Leprino Foods Co., No. 113CV02059AWIBAM, 2017 WL 1355104, at
22 *2 (E.D. Cal. Jan. 20, 2017) (citing Consumer Cellular Inc. v. ConsumerAffairs.com, 2016
23 WL 7238919, *3-4 (D. Or. Sept. 26, 2016); American Hotel & Lodging Assn. v. City of
24 Los Angeles, 2015 WL 10791930, *3 (C.D. Cal. Nov. 5, 2015)). Many of these courts
25 apply the Landis v. North American Co., 299 U.S. 248 (1936) factors instead. See id. In
26 Landis, the Supreme Court enumerated the factors a court should consider when deciding
27 whether to stay an action pending the outcome of an independent proceeding. Landis,
28 299 U.S. 248. These factors include: “[1] the possible damage which may result from the
granting of a stay, [2] the hardship or inequity which a party may suffer in being required
to go forward, and [3] 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) (citing CMAX, Inc.
v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)).

1 Leiva-Perez, 640 F.3d at 968. Instead, as long as the equities tip sharply in support of a
2 stay, it is enough that there is “a substantial case for relief on the merits.” Id. This burden
3 can be met by demonstrating a “reasonable probability” or “fair prospect” of success, “a
4 substantial case on the merits,” or that “serious legal questions are raised.” Id. (internal
5 quotations and citations omitted).

6 Securus argues that it has met this standard because in granting its Rule 23(f) petition
7 for appeal, the Ninth Circuit implicitly found that this case presented “an unsettled and
8 fundamental issue of law” or “manifest error.” (Doc. No. 160-1 at 6) (quoting Chamberlan
9 v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005).)² Plaintiffs argue that Securus must
10 also demonstrate that it is likely to succeed on the substantive merits of its appeal but fails
11 to do so. (Doc No. 163) (citing Gray v. Golden Gate Nat. Recreational Area, No. C 08-
12 00722 EDL, 2011 WL 6934433, at *1 (N.D. Cal. Dec. 29, 2011) (“Looking to the
13 likelihood of success on the merits, the Court must consider both the likelihood that the
14 Ninth Circuit will grant Defendants’ Rule 23(f) petition, and the likelihood that the Ninth
15 Circuit will agree with Defendants on the substantive merits.”).)

16 The Ninth Circuit’s acceptance of Securus’ Rule 23(f) petition for appeal
17 demonstrates that serious legal questions are at issue. Although the Ninth Circuit’s order
18 does not indicate the basis for its decision, it cites to Chamberlan. (Doc. No. 156.) In
19 Chamberlan, the Ninth Circuit held that Rule 23(f) review of a class certification order is
20 “most appropriate when: (1) there is a death-knell situation for either the plaintiff or
21 defendant that is independent of the merits of the underlying claims, coupled with a class
22 certification decision by the district court that is questionable; (2) the certification decision
23 presents an unsettled and fundamental issue of law relating to class actions, important both
24 to the specific litigation and generally, that is likely to evade end-of-the-case review; or
25 (3) the district court’s class certification decision is manifestly erroneous.” Chamberlan,
26 402 F.3d at 959. The court emphasized that “Rule 23(f) review should be a rare
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28 ² All page citations in this order refer to those generated by the court’s CM/ECF system.

1 occurrence,” *id.* at 955, and such petitions “should be granted sparingly.” *Id.* at 959. Each
2 of the bases for granting a petition for appeal identified in Chamberlan suggest that serious
3 legal questions are raised. *See Reyes v. Educ. Credit Mgmt. Corp.*, No. 15cv628 BAS
4 (AGS), 2018 WL 1316129, at *1 (S.D. Cal. Mar. 13, 2018) (“The grant of the [Rule 23(f)]
5 petition satisfies the first factor for a stay and also alters the calculus of the harms that
6 Defendant faces if proceedings in this Court proceed.”).

7 Furthermore, the court’s order presented an issue of first impression—the intent
8 requirement of Cal. Penal Code § 636(a). Securus petitioned the Ninth Circuit for review,
9 among other issues, on whether this intent requirement presents a common question to all
10 class members or will require individualized inquiry. Petition for Rule 23(f) Appeal, Doc.
11 No. 1-2, No. 18-80181. The court’s ruling on the intent requirement of § 636(a) is
12 intertwined with that question.³ District courts in this circuit often find that serious legal
13 questions are presented when novel issues or matters of first impression are raised. *See,*
14 *e.g., Morse v. Servicemaster Glob. Holdings, Inc.*, No. C 08-03894, 2013 WL 123610, at
15 *3 (N.D. Cal. Jan. 8, 2013) (“Often a ‘substantial case’ is one that raises genuine matters
16 of first impression within the Ninth Circuit.”); *Pena v. Taylor Farms Pac., Inc.*, No. 2:13-
17 cv-01282-KJM-AC, 2015 U.S. Dist. LEXIS 115718, at *7 (E.D. Cal. Aug. 27, 2015) (“And
18 if the Ninth Circuit has identified an unsettled and fundamental issue of law, the defendants
19 have met their burden to show their appeal raises ‘serious legal questions.’”). This factor
20 weighs in Securus’ favor as its petition presents serious legal questions.

21 **B. Irreparable Injury to Movant**

22 A sufficient showing of irreparable harm is “a necessary but not sufficient condition
23 for the exercise of judicial discretion to issue a stay.” *Leiva-Perez*, 640 F.3d at 965.
24 “[S]imply showing some possibility of irreparable injury . . . fails to satisfy the second

25 ³ At oral argument, Securus affirmed that a systemwide computer glitch caused the calls at
26 issue to be recorded, as it has previously represented. Securus, somewhat
27 counterintuitively, now suggests on appeal that the question of intent will need to be
28 determined by individual proof, even though the court determined this threshold issue of
mens rea on a classwide basis in Securus’ favor.

1 factor.” Nken, 556 U.S. at 434-35 (quotations and citation omitted). Rather, the movant
2 must show that irreparable harm is likely or probable. Leiva-Perez, 640 F.3d at 968.

3 This factor supports a stay. First, the prospect of substantial, unrecoverable time and
4 resources spent on class discovery weighs in Securus’ favor. District courts have found
5 irreparable harm probable where an appeal may result in decertification of the class,
6 thereby resulting in a substantial waste of time and resources. See, e.g., Pena, 2015 WL
7 5103157, at *4 (pretrial costs may be irreparable harm “when granting a motion to stay
8 would avoid substantial, unrecoverable, and wasteful discovery costs,” or “when the costs
9 would impose ‘serious burdens’ that an appeal would avoid”); Senne v. Kansas City Royals
10 Baseball Corp., No. 14-CV-00608-JCS, 2017 WL 5973487, at *3 (N.D. Cal. May 5, 2017)
11 (“Should the Ninth Circuit reverse this Court’s . . . Order on certification of . . . the Rule
12 23(b) California Class, Defendants will suffer substantial harm if this action is not stayed
13 pending appeal as they will have devoted very substantial time and resources on the
14 litigation, particularly with respect to the completion of discovery, dispositive motions and
15 trial preparation on class claims.”); Brown v. Wal-Mart Stores, Inc., No. 5:09-CV-03339-
16 EJD, 2012 WL 5818300, at *4 (N.D. Cal. Nov. 15, 2012). On the other hand, courts have
17 found routine discovery and litigation costs that are unavoidable regardless of the outcome
18 of the appeal do not amount to irreparable harm. See e.g., Amaro v. Gerawan Farming,
19 Inc., No. 114CV00147DADSAB, 2016 WL 10679467, at *3 (E.D. Cal. Nov. 14, 2016)
20 (finding no irreparable harm when defendants failed to identify significant types of
21 discovery relevant to plaintiffs’ appealed claims but not their remaining claims); Bradberry
22 v. T-Mobile USA, Inc., No. C 06-6567 CW, 2007 U.S. Dist. LEXIS 58801, at *11-12 (N.D.
23 Cal. Aug. 2, 2007) (stating that a stay would be appropriate if discovery were burdensome
24 but “[t]he cost of some pretrial litigation does not constitute an irreparable harm to
25 Defendant”); Monaco v. Bear Stearns Companies, Inc., No. CV0905438SJOJCX, 2012
26 WL 12506860, at *4 (C.D. Cal. Dec. 5, 2012).

27 Here, Plaintiffs seek class discovery on a wide range of issues, including class
28 contact information, all 64 facilities Securus operates in, and identification of potential
class members, among other issues. (Doc. No. 160-2, Exh. A at 8-11; Doc. No. 160-3,

1 Exh. B at 6-20.) Plaintiffs argue that the burden of routine discovery does not amount to
2 irreparable harm, Plaintiffs' individual claims must be litigated regardless of the outcome
3 of the appeal, and individual and class discovery may overlap extensively. But the parties
4 dispute whether Plaintiffs are entitled to discovery on the merits of their individual claims.
5 Moreover, the discovery Plaintiffs currently seek is primarily focused on class issues. (See
6 Doc. No. 160-2, Exh. A at 8-11; Doc. No. 160-3, Exh. B at 6-20.) Such discovery would
7 likely involve substantial, unrecoverable costs if the Ninth Circuit reverses the court's class
8 certification order. See Pena, 2015 WL 5103157, at *4.⁴

9 Second, class notice may unnecessarily damage Securus' reputation, as Securus
10 argues. (Doc. No. 160-1 at 9.) Any such damage would be completely unnecessary,
11 Securus contends, if the class is decertified. Plaintiffs contend that this argument is
12 premature because the parties have not yet requested approval of a class notice. But they
13 do not dispute that the class will need to be notified in a timely manner. "Aside from the
14 heightened emotion and awareness of the lawsuit that notice would bring, such notice could
15 also cause potential class members to hire attorneys to assist them in making a decision
16 whether or not to opt out of the class; whereas the Ninth Circuit ultimately might rule they
17 should not be included in the class." Willcox v. Lloyds TSB Bank, PLC, No. 13-00508
18 ACK-RLP, 2016 U.S. Dist. LEXIS 28959, at *19 (D. Haw. Mar. 7, 2016). Accord Reyes
19 v. Educ. Credit Mgmt. Corp., No. 15cv628 BAS (AGS), 2017 WL 4640418, at *4 n.1 (S.D.
20 Cal. Oct. 17, 2017).

21 Without citing any authority, Plaintiffs argue that Securus should have moved for a
22 stay earlier. This argument is unpersuasive as the likelihood of success and potential harm
23 to Securus increased after the Ninth Circuit granted Securus' Rule 23(f) petition.

24 **C. Substantial Injury to Other Parties**

25 Plaintiffs argue that they will be irreparably injured if a stay is granted but fail to
26 identify any irreparable harm. First, Plaintiffs argue that a stay will result in undue delay

27 ⁴ Securus argues that the parties will have to incur the cost of experts on class issues but
28 does not identify any specific issues requiring expert testimony. (Doc. No. 160-1 at 8.)

1 of discovery. Plaintiffs argue that they have not received any discovery since the first phase
2 of discovery ended in September 2017. As time passes, Plaintiffs argue, witnesses'
3 memories fade and employees leave Securus. Plaintiffs will suffer little, if any, harm on
4 this point. Witnesses' memories may fade with time, but Plaintiffs do not identify any key
5 witnesses whose testimony they are concerned about or any other specific evidence that
6 may be less valuable at a later time.

7 Second, Plaintiffs argue that Securus may not supplement its discovery responses.
8 Plaintiffs argue that Securus provided late supplemental responses in the past and recently
9 failed to update its responses when a potential class member reached out. The court sees
10 no connection between Securus' willingness to provide timely supplemental responses and
11 the granting of a stay.

12 Lastly, Plaintiffs argue that evidence will likely be destroyed if a stay is granted.
13 Plaintiffs argue that Securus previously destroyed call recordings and may still be
14 destroying evidence under its file deletion protocols. As Securus points out, Judge Dembin
15 previously rejected the argument that Securus' purge of call recordings presents a danger
16 of spoliation. In denying Plaintiffs' motion for a preservation order, Judge Dembin found
17 that the purge occurred years before this case was filed and that he had "no concern, based
18 upon this record, for the continuing existence and maintenance of the integrity of the
19 evidence in question." (Doc. No. 42 at 2-3.) The court agrees with Judge Dembin on this
20 matter as Plaintiffs present no other evidence of spoliation.

21 Plaintiffs also argue that third parties may destroy evidence. Plaintiffs represent that
22 some law enforcement agencies have said they will not implement litigation holds or search
23 for responsive documents. In July 2017, Plaintiffs served subpoenas on the San Diego
24 District Attorney's Office (the "SDDA"), the Riverside County Sheriff's Office (the
25 "Riverside Sheriff"), and the United States Attorney's Office for the Central District of
26 California (the "USACAC"). (Doc. No. 163-1, Teel Decl. ¶ 4.) The SDDA confirmed that
27 it was conducting a diligent and thorough search for responsive recordings. (*Id.* ¶¶ 10, 11;
28 Doc. No. 163-9, Exh. G.) Plaintiffs do not indicate whether the Riverside Sheriff is

1 complying with the subpoena. The only agency to assert that it will not comply is
2 USACAC. On August 10, 2017, USACAC stated that it could not comply with Plaintiffs’
3 subpoena because Plaintiffs’ counsel failed to comply with the applicable *Touhy*
4 regulations, which govern discovery from the Department of Justice, and because the
5 federal government is not a “person” within the meaning of Federal Rule of Civil Procedure
6 45 and thus cannot be served with a subpoena under that rule. (Doc. No. 163-3, Exh. A at
7 2-3.) On the current record, Plaintiffs’ counsel made no attempt to comply with the Federal
8 Rules of Civil Procedure or *Touhy* regulations. (See Doc. No. 163-4, Exh. B.) Instead,
9 Plaintiffs’ counsel sought to meet and confer and proposed that USACAC only search its
10 open, instead of archived, files. (*Id.*) USACAC declined to place a litigation hold or search
11 for documents. (Doc. No. 163-5, Exh. C at 2.) This exchange occurred over a year and a
12 half ago. On the record before the court, Plaintiffs have taken no other action since that
13 time. Plaintiffs fail to identify any facts suggesting that evidence may be destroyed despite
14 their diligent efforts.

15 Lastly, a stay may benefit class members as it would protect against the possibility
16 of unnecessary disclosure of personal information and avoid any confusion caused by
17 issuing a class notice that may later need to be revised or withdrawn. See *Brown*, 2012
18 WL 5818300, at *4 (class members “face a likelihood of harm should a stay not issue”
19 because sending class notice risks confusing class members and implicates privacy
20 interests).

21 In sum, weighing the parties’ prospective harm if a stay is granted, the balance tips
22 sharply in Securus’ favor.

23 **D. Public Interest**

24 The public interest weighs in favor of granting a stay. Although the public has an
25 interest in vindicating invasions of privacy, as Plaintiffs argue, the public also has an
26 interest in efficient use of judicial resources. See *id.* at *5. Rule 23(f) petitions are “granted
27 sparingly.” *Chamberlan*, 402 F.3d at 959. Staying this case pending appeal would “ensure
28 the proper resolution of the important issues raised in this case by preventing potentially


1 wasteful work on the part of the court and the parties while the Ninth Circuit considers the
2 serious legal question raised by Defendant's Rule 23(f) petition." Brown, 2012 WL
3 5818300, at *5 (quotation and citation omitted).

4 **CONCLUSION**

5 Securus' motion for a stay is granted as its Rule 23(f) petition presents serious legal
6 questions and the balance of harm tips sharply in its favor. This motion is granted without
7 prejudice to the filing of an application to lift the stay partially or in its entirety if future
8 circumstances warrant.

9 IT IS SO ORDERED.

10 DATED: April 17, 2019


JEFFREY T. MILLER
United States District Judge