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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LUCAS AMBEZEWICZ, et al,  
Plaintiffs,  
v.  
GDFRIEND, INC.,  
Defendant.

Case No.: 3:17-cv-02234-L-JMA  
**ORDER DENYING DEFENDANT’S  
MOTION [Doc. 7] TO STAY**

Pending before the Court is Defendant GDFriend, Inc.’s (“Defendant”) motion to stay. Pursuant to Civil Local Rule 7.1(d)(1), the Court decides the matter on the papers submitted and without oral argument. For the foregoing reasons, the Court **DENIES** Defendant’s motion

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1 **I. BACKGROUND**

2 The plaintiffs in this action are three individuals<sup>1</sup> who claim to have received  
3 multiple telemarketing calls to their cell phones from Defendant. Plaintiffs allege that  
4 Defendant placed these calls using an automated telephone dialing system and without  
5 prior express consent. Accordingly, on November 11, 2017, Plaintiffs filed a putative  
6 class action complaint alleging violations of the Telephone Consumer Protection Act  
7 (“TCPA”), 47 U.S.C. § 227. (Complaint [Doc. 1].)

8 To trigger the TCPA, it suffices to show that (1) Defendant used an automated  
9 telephone dialing system (2) to call a cell phone for purposes of communicating an  
10 advertisement (3) without the express written permission of the call recipient. 47 U.S.C. §  
11 227 (b)(1)(A)(iii); 47 C.F.R. § 64.1200 (a)(2). The TCPA defines an “automated  
12 telephone dialing system” as equipment which has the *capacity* to (A) to store or produce  
13 telephone numbers to be called, using a random or sequential number generator; and (B)  
14 to dial such numbers.” 47 U.S.C. § 227(a)(1)(emphasis added). In a 2015 order, the  
15 Federal Communications Commission (“FCC”)<sup>2</sup> explained that “the capacity of an  
16 autodialer is not limited to its current configuration but also includes its potential  
17 functionalities.” 30 FCC Rcd. 7961, 7974 (July 10, 2015) (“FCC Order”).

18 The FCC Order is currently under review by the District of Columbia Circuit Court  
19 of Appeals in *ACA International v. Fed. Comm’n Comm’n*, Case No. 15-1211 (D.C.  
20 Cir.) (“ACA”). The D.C. Circuit heard oral argument in December of 2016, but a  
21 decision has yet to issue. Defendant seeks a stay of the present proceedings pending the  
22 forthcoming ACA decision, which Defendants argue could establish a new controlling  
23 definition for what constitutes an “automated telephone dialing system” for purposes of  
24 the TCPA. (Def.’s Mot. [Doc. 7].) Plaintiffs oppose a stay. (Opp’n [Doc. 8].)

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27 <sup>1</sup> Lucas Ambrezewicz, Edward Timmons, and Mark Haigler (collectively “Plaintiffs”).

28 <sup>2</sup> The FCC has the authority to prescribe regulations to implement the requirements of the TCPA. 47 U.S.C. § 227 (b)(2).

1 **II. LEGAL STANDARD**

2 The power to stay proceedings stems from the Court’s inherent power to control its  
3 docket in a manner aimed at the efficient disposition of cases. *Landis v. N. Am. Co.*, 299  
4 U.S. 248, 254 (1936). Under this inherent power, the Court may issue a stay pending the  
5 outcome of an independent case whose resolution could establish applicable law. *Leyva*  
6 *v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979). That said,  
7 “[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside  
8 while a litigant in another settles the rule of law that will define the rights of both.”  
9 *Landis*, 299 U.S. at 255.

10 To determine whether such a stay is appropriate, a court must consider  
11 the possible damage which may result from the granting of a stay, the  
12 hardship or inequity which a party may suffer in being required to go  
13 forward, and the orderly course of justice measured in terms of the  
14 simplifying or complicating of issues, proof, and questions of law which  
could be expected to result from a stay.

15 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The moving party carries the  
16 burden of demonstrating that a stay is appropriate. *Nken v. Holder*, 556 U.S. 418, 433–34  
17 (2009).

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19 **III. DISCUSSION**

20 Defendant complains that it might incur unnecessary litigation expenses if the  
21 Court does not issue a stay. More specifically, Defendant argues that “[i]t makes no  
22 sense to move forward with costly discovery while a decision pending an appeal is  
23 expected to clarify the proper definition of an ATDS—an essential element of Plaintiff’s  
24 entire lawsuit.” (Def’s Mot. 9:14–16.)

25 While it is true that the forthcoming *ACA* decision *may* clarify the ATDS  
26 definition, it does not follow that allowing discovery in the interim would amount to  
27 waste. Indeed, whatever ATDS definition emerges from the *ACA* decision, resolution of  
28 this dispute will still require consideration of whether the specific equipment Defendant

1 used to place the calls at issue triggers that definition. Such an analysis will require  
2 consideration of a factual record, developed through discovery, showing what type  
3 equipment Defendant used to place the calls.

4 Furthermore, granting a stay carries significant risk of prejudice to Plaintiff. It is  
5 unclear when the D.C. Circuit will issue a decision in *ACA*. During the indeterminate  
6 period of time between now and the decision in *ACA*, witnesses' memories could fade  
7 and evidence could go stale. *Blue Cross and Blue Shield of Alabama v. Unity Outpatient*  
8 *Surgery Center, Inc.*, 490 F.3d 718, 723-24 (9th Cir. 2007) (holding that indeterminate  
9 stays of potentially lengthy duration carry substantial risk of prejudice to a plaintiff and  
10 are therefore disfavored.) The concern over loss of access to relevant evidence is  
11 especially pronounced in TCPA cases because "much of the relevant evidence Plaintiff  
12 will be interested in, such as call logs and dialer information, will be in the hands of third  
13 parties and subject to unknown data retention policies." *Montegna v. Ocwen Loan*  
14 *Servicing, LLC.*, Case no. 17-cv-00939-AJB-BLM (S.D. Cal. 2017). For the foregoing  
15 reasons, the Court finds that this case does not present the "rare circumstances"  
16 warranting a stay pending the resolution of a separate proceeding.

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18 **IV. CONCLUSION & ORDER**

19 For the foregoing reasons, Defendant's motion to stay is **DENIED**.

20 **IT IS SO ORDERED.**

21 Dated: March 12, 2018

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23 Hon. M. James Lorenz  
24 United States District Judge  
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