

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
8

9 ERIC FRANTZ,

10 Plaintiff,

11 v.

12 FORCE FACTOR, LLC,

13 Defendant.
14

Case No. 20-cv-1012-MMA (KSC)

**ORDER GRANTING DEFENDANT'S
MOTION TO STAY**

[Doc. No. 16]

15
16 Force Factor, LLC (“Defendant”) moves to stay the action pending resolution of
17 *Facebook, Inc. v. Duguid*, Sup. Ct. Dkt. No. 19-511. *See* Doc. No. 16.¹ Eric Frantz
18 (“Plaintiff”) filed an opposition to Defendant’s motion, and Defendant replied. *See* Doc.
19 Nos. 18, 19. The Court found the matter suitable for determination on the papers and
20 without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local
21 Rule 7.1.d.1. *See* Doc. No. 24. For the reasons set forth below, the Court **GRANTS**
22 Defendant’s motion to stay.

23 **I. BACKGROUND**

24 This case arises from a series of promotional text messages Plaintiff received from
25 Defendant. According to Plaintiff’s First Amended Complaint (“FAC”), in October
26
27

28 ¹ All citations refer to the pagination assigned by the CM/ECF system.

1 2019, Plaintiff began receiving promotional text messages from Defendant after texting
2 the word “SCORE” to receive a complimentary bottle of one of Defendant’s products.
3 See Doc. No. 12 (“FAC”) ¶ 29. Plaintiff alleges Defendant sent these text messages
4 using an automatic telephone dialing system (“ATDS”) in violation of the Telephone
5 Consumer Protection Act (“TCPA”), 48 U.S.C. § 227(b)(1). See *id.* ¶¶ 35, 39. Plaintiff
6 contends the promotional text messages were sent using an ATDS, “which had the
7 capacity to produce or store numbers randomly or sequentially, and to place text message
8 calls to Plaintiff’s cellular telephone by dialing such numbers.” *Id.* ¶ 35. Furthermore,
9 Plaintiff alleges these text messages were sent without the prior express consent of
10 Plaintiff and that the text messages were not sent for emergency purposes. See *id.* ¶¶ 37,
11 38. Plaintiff alleges negligent and willful violations of the TCPA pursuant to 48 U.S.C.
12 § 227. See FAC ¶¶ 51–63. Defendant now moves to stay this action pending resolution
13 of *Facebook, Inc. v. Duguid*, Sup. Ct. Dkt. No. 19-511, currently before the United States
14 Supreme Court. See Doc. No. 16.

15 **II. LEGAL STANDARD**

16 “A district court has discretionary power to stay proceedings in its own court”
17 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v. N. Am.*
18 *Co.*, 299 U.S. 248, 254 (1936)). “The power to stay a case is ‘incidental to the power
19 inherent in every court to control the disposition of the causes on its docket with
20 economy of time and effort for itself, for counsel, and for litigants.’” *Halliwell v. A-T*
21 *Sols.*, No. 13-cv-2014-H (KSC), 2014 WL 4472724, at *7 (S.D. Cal. Sept. 10, 2014)
22 (quoting *Landis*, 299 U.S. at 254). A district court may stay a case “pending resolution of
23 independent proceedings which bear upon the case,” even if those proceedings are not
24 “necessarily controlling of the action before the court.” *Leyva v. Certified Grocers of*
25 *Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979) (citations omitted). However, “[o]nly in
26 rare circumstances will a litigant in one cause be compelled to stand aside while a litigant
27 in another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at
28 255.

1 In determining whether to grant a stay, courts in the Ninth Circuit weigh the
2 “competing interests which will be affected by the granting or refusal to grant a stay,”
3 including

4
5 [1] the possible damage which may result from the granting of a stay, [2] the
6 hardship or inequity which a party may suffer in being required to go
7 forward, and [3] the orderly course of justice measured in terms of the
8 simplifying or complicating of issues, proof, and questions of law which
could be expected to result from a stay.

9 *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.
10 1962)). “‘If there is even a fair possibility that the stay will work damage to someone
11 else,’ the stay may be inappropriate absent a showing by the moving party of ‘hardship or
12 inequity.’” *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059,
13 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 255). The burden is on the movant to
14 show that a stay is appropriate. *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing
15 *Landis*, 299 U.S. at 255).

16 **III. DISCUSSION**

17 **A. The Definition of an ATDS**

18 Under the TCPA, it is “unlawful for any person within the United States . . . (A) to
19 make any call . . . using any [ATDS] . . . (iii) to any telephone number assigned to a . . .
20 cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an ATDS
21 as “equipment which has the capacity (A) to store or produce telephone numbers to be
22 called, using a random or sequential number generator; and (B) to dial such numbers.”
23 47 U.S.C. § 227(a)(1). The interpretation of 47 U.S.C. § 227(a)(1)(A) is the subject of a
24 split among the circuit courts of appeal. “Specifically, the circuits are divided on the
25 question of whether the clause ‘random or sequential number generator’ in Section
26 227(a)(1)(A) modifies both ‘to store’ and ‘to produce.’” *Borden v. eFinancial, LLC*, No.
27 C19-1430JLR, 2020 U.S. Dist. LEXIS 192912, at *3 (W.D. Wash. Oct. 16, 2020). “The
28 Third, Seventh, and Eleventh [Circuits] have read the TCPA to apply only to devices with

1 the capacity to ‘generate random or sequential telephone numbers and dial those
2 numbers.’” *Komaiko v. Baker Techs., Inc.*, No. 19-cv-03795-DMR, 2020 WL 5104041,
3 at *2 (N.D. Cal. Aug. 11, 2020) (brackets omitted) (quoting *Dominguez on Behalf of*
4 *Himself v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018)); *see also Gadelhak v. AT&T*
5 *Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co.,*
6 *LLC*, 948 F.3d 1301, 1306–10 (11th Cir. 2020). In contrast, the Ninth Circuit defined an
7 ATDS as “equipment which has the capacity—(1) to store numbers to be called *or* (2) to
8 produce numbers to be called, using a random or sequential number generator—and to
9 dial such numbers automatically.” *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1150 (9th
10 Cir. 2019) (emphasis added) (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041,
11 1053 (9th Cir. 2018)). On July 9, 2020, the Supreme Court granted certiorari review of
12 the Ninth Circuit’s decision in *Duguid* to resolve this circuit split. *See Facebook, Inc. v.*
13 *Duguid*, Sup. Ct. Dkt. No. 19-511. The Supreme Court’s docket provides the following
14 question presented: “[w]hether the definition of ATDS in the TCPA encompasses any
15 device that can ‘store’ and ‘automatically dial’ telephone numbers, even if the device
16 does not ‘us[e] a random or sequential number generator.’” *Id.*

17 **B. Stay Pending *Facebook***

18 Defendant argues that a stay pending the Supreme Court’s decision in *Facebook* is
19 warranted for the following reasons: (1) the Supreme Court’s Decision in *Facebook* “will
20 simplify the issues, narrow discovery, and potentially dispose of—or at least define—a
21 necessary element of Plaintiff’s claim”; (2) Defendant will suffer substantial harm if the
22 case is not stayed pending the decision in *Facebook*; and (3) a stay would neither harm
23 nor prejudice Plaintiff. Doc. No. 16 at 13–14; *see also* Doc. No. 19 at 4, 9, 10. Plaintiff
24 counters that a stay is not warranted for the following reasons: (1) Plaintiff will be
25 prejudiced by a stay; (2) denial of a stay will not result in hardship to Defendant; and (3)
26 Defendant failed to establish that the Supreme Court’s decision in *Facebook* will simplify
27 the issues of this case. *See* Doc. No. 18 at 10–11, 15, 18–19.

28 **1. Damage Resulting from Granting a Stay**

1 The first factor the Court considers is “the possible damage which may result from
2 the granting of a stay.” *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc.*, 300 F.2d at
3 268). Plaintiff argues that he will be prejudiced by a “lengthy stay.” Doc. No. 18 at 10.
4 Plaintiff’s primary concern is the risk of evidence being lost or destroyed. *See id.* at 12.
5 Plaintiff also contends that a stay would force the putative class to wait “at least an
6 additional year” before receiving any sort of relief from Defendant’s marketing messages.
7 *Id.* at 15.

8 The Court finds these concerns are relatively minimal and do not justify the denial
9 of Defendant’s motion to stay. First, both parties have an obligation to preserve
10 evidence, and Defendant is aware of this obligation. *See Canady v. Bridgecrest*
11 *Acceptance Corp.*, No. CV-19-04738-PHX-DWL, 2020 WL 5249263, at *4 (D. Ariz.
12 Sept. 3, 2020) (noting that the obligation to preserve evidence reduces the risk of
13 evidence being destroyed, lost, corrupted, or forgotten); *Borden*, 2020 U.S. Dist. LEXIS
14 192912, at *7 (noting that the risk of evidence loss “appears minimal in light of the
15 parties’ obligations to preserve evidence”); *see also* Doc. No. 19 at 7 (“[Defendant] is
16 preserving potentially relevant documents within its possession, custody, or control.”).
17 Second, the requested stay is not impermissibly “indefinite in nature.” *Dependable*
18 *Highway Exp., Inc.*, 498 F.3d at 1066. Rather, Defendant requests a stay of these
19 proceedings pending the Supreme Court’s decision in *Facebook*. Several courts have
20 recognized that a 2021 decision in *Facebook* is likely. *See Borden*, 2020 U.S. Dist.
21 LEXIS 192912, at *8; *Creasy v. Charter Commc’ns, Inc.*, No. CV 20-1199, 2020 WL
22 5761117, at *7 (E.D. La. Sept. 28, 2020); *Canady*, 2020 WL 5249263, at *3. Therefore,
23 a stay would only minimally delay discovery. The obligation to preserve evidence,
24 “coupled with the fact that the stay is not for an indefinite amount of time, further
25 underscores that there is little risk of harm in instituting a stay.” *Canady*, 2020 WL
26 5249263, at *4.

27 Plaintiff also argues a stay is improper because the putative class is “likely” still
28 receiving marketing text messages from Defendant; therefore, the “individuals in the

1 putative class will be forced [to wait] at least an additional year on top of the usual
2 litigation for any sort of potential relief should a stay be granted.” Doc. No. 18 at 15.
3 Plaintiff’s argument is speculative. Plaintiff offers no support for the conclusion that
4 Defendant is continuing to send marketing text messages in violation of the TCPA.
5 Furthermore, nothing from the FAC suggests Plaintiff is in jeopardy of receiving
6 additional text messages. *See Reynolds v. Geico Corp.*, No. 2:16-CV-01940-SU, 2017
7 WL 815238, at *4 (D. Or. Mar. 1, 2017) (noting that the potential prejudice to the
8 plaintiff was minimal where there was no indication that the plaintiff was at risk of
9 receiving additional text messages).

10 Accordingly, the court finds the first factor weighs in favor of a stay.

11 **2. Hardship or Inequity Defendant May Suffer Absent a Stay**

12 The second factor the Court considers is “the hardship or inequity which a party
13 may suffer in being required to go forward.” *Lockyer*, 398 F.3d at 1110 (quoting *CMAX*,
14 *Inc.*, 300 F.2d at 268). Defendant argues that, “if a stay is not granted, [Defendant] will
15 be forced to expend unnecessary time and resources to defend relief that may be all but
16 foreclosed by the Supreme Court’s ruling in [*Facebook*].” Doc. No. 16 at 28.
17 Specifically, Defendant contends that, in the absence of a stay, “the parties may be forced
18 to complete the following benchmarks without the benefit of knowing the ATDS
19 definition—a cornerstone issue in this litigation: fact discovery, class discovery, expert
20 discovery, class certification, and summary judgment.” *Id.* Plaintiff responds that
21 Defendant has not established any hardship sufficient to warrant a stay because ATDS-
22 related discovery will be needed regardless of the Supreme Court’s decision in *Facebook*.
23 *See* Doc. No. 18 at 16.

24 ATDS related discovery will likely be necessary regardless of the outcome in
25 *Facebook*. However, the Supreme Court’s decision in *Facebook* may narrow the scope
26 of discovery because it will limit discovery to a single definition of an ATDS. *See*
27 *Canady*, 2020 WL 5249263, at *4 (“The Supreme Court’s resolution of *Facebook* has the
28 potential to significantly narrow the issues involved in this case, including the scope of

1 discovery as to [the plaintiff’s] ATDS allegations and the scope of [the plaintiff’s] class-
2 certification request.”); *Saunders v. Sunrun, Inc.*, No. 19-cv-04548-HSG, 2020 WL
3 6342937, at *2 (N.D. Cal. Oct. 29, 2020) (“[A] decision in [*Facebook*] will likely
4 simplify the matter and inform the parameters of discovery.”). Furthermore, “[i]n the
5 absence of a stay, the parties will have to expend time and money conducting discovery
6 on an issue central to Defendant’s liability while lacking a clear idea of the law that will
7 ultimately apply at summary judgment or at trial.” *Ambrezewicz v. LeadPoint, Inc.*, No.
8 EDCV 16-2331 JGB (KKx), 2017 WL 8185862, at *4 (C.D. Cal. May 8, 2017); *see also*
9 *Aleisa v. Square, Inc.*, No. 20-cv-00806-EMC, 2020 WL 5993226, at *8 (N.D. Cal. Oct.
10 9, 2020) (“[T]he parties and the Court would have to engage in costly and time-
11 consuming class action discovery and ongoing litigation, which could be wasted.”).
12 Additionally, “[i]t is well-recognized that discovery in class actions is expensive and
13 asymmetric, with defendants bearing most of the burdens.” *Babare v. Sigue Corp.*, No.
14 C20-0894-JCC, 2020 U.S. Dist. LEXIS 180262, at *6 (W.D. Wash. Sep. 30, 2020).

15 Accordingly, the court finds that the second factor weighs in favor of a stay.

16 **3. The Orderly Course of Justice**

17 The third factor the Court considers is “the orderly course of justice measured in
18 terms of the simplifying or complicating of issues, proof, and questions of law which
19 could be expected to result from a stay.” *Lockyer*, 398 F.3d at 1110 (quoting *CMAX,*
20 *Inc.*, 300 F.2d at 268). Defendant argues that “any decision rendered by the Supreme
21 Court will necessarily simplify numerous practical aspects of this case, including
22 discovery, class certification, and motions practice, and will prevent duplicative
23 proceedings.” Doc. No. 16 at 24. Plaintiff responds that “Defendant’s failure to explain
24 how a decision in *Facebook* would narrow the scope of discovery . . . is reason enough to
25 deny its motion.” Doc. No. 18 at 19.

26 As discussed in the preceding section, a stay pending the outcome of *Facebook*
27 will promote the orderly course of justice by clarifying the issues involved in this case.
28 *See supra* Section III.B.2. The Supreme Court’s decision in *Facebook* will provide

1 clarity to the definition of an ATDS, a central issue in both of Plaintiff’s claims—
2 negligent and willful violations of the TCPA. *See Sealey v. Chase Bank (U.S.A.), N.A.*,
3 No. 19-CV-07710-JST, 2020 WL 5814108, at *2 (N.D. Cal. Sept. 29, 2020) (“[T]he
4 orderly course of justice dictates that [*Facebook*] should be decided first, as that case
5 addresses the central question at issue here.”); *Borden*, 2020 U.S. Dist. LEXIS 192912, at
6 *6 (“[A] stay will promote the orderly course of justice because the Supreme Court’s
7 decision will inform the central question at issue here: whether [the defendant] used an
8 ATDS to send its text messages to [the plaintiff].”).

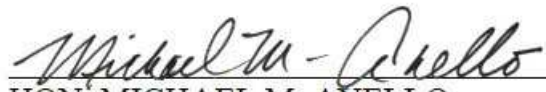
9 Accordingly, the Court finds that the third factor weighs in favor of granting a stay.
10 Therefore, after weighing the competing interests, the Court concludes that a stay is
11 warranted pending the Supreme Court’s resolution of *Facebook*.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court **GRANTS** Defendant’s motion to stay and
14 **STAYS** this action pending the Supreme Court’s resolution of *Facebook, Inc. v. Duguid*,
15 Sup. Ct. Dkt. No. 19-511. The Court **ORDERS** that the parties submit a joint status
16 report within **5 days** of the Supreme Court issuing its decision.

17 **IT IS SO ORDERED.**

18
19 Dated: November 13, 2020

20 
21 HON. MICHAEL M. ANELLO
22 United States District Judge
23
24
25
26
27
28