

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHARLES SINGER,)
)
Plaintiff,)
vs.)
)
LAS VEGAS ATHLETIC CLUBS,)
)
Defendants.)
_____)

Case No.: 2:17-cv-01115-GMN-VCF

ORDER

Pending before the Court are the Motions for Summary Judgment, (ECF Nos. 23, 24), filed by Plaintiff Charles Singer (“Plaintiff”) and Defendant Las Vegas Athletic Clubs (“LVAC”). Plaintiff and LVAC filed Responses, (ECF Nos. 28, 29), as well as Replies, (ECF Nos. 32, 33), in support of their respective Motions.

Also pending before the Court are the fully briefed Motions to Amend Complaint and to Stay the Case, (ECF Nos. 22, 37), filed by Plaintiff and LVAC, respectively.¹

For the reasons discussed below, Plaintiff’s Motion for Summary Judgment is **GRANTED in part** and **DENIED in part**; LVAC’s Motion for Summary Judgment is **DENIED**; Plaintiff’s Motion to Amend is **DENIED**; and LVAC’s Motion to Stay is **DENIED**.

I. BACKGROUND

This case arises from LVAC’s alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”) by way of its efforts to collect Plaintiff’s unpaid gym membership dues. In 2015, Plaintiff signed a gym membership agreement (the “Membership Agreement”) with LVAC under which Plaintiff agreed to pay \$23.00 per month in exchange for

¹ LVAC’s unopposed Motion for Leave to File Supplemental Authority, (ECF No. 34), is **GRANTED**.

1 access to LVAC's fitness facilities. (*See* Membership Agreement, Ex. 1-B to LVAC's MSJ,
2 ECF No. 24-1). By signing the Membership Agreement, Plaintiff authorized LVAC to contact
3 him on the cell phone number he provided, and to do so "by any method, including use of a
4 predictive dialer." (*Id.*). The Membership Agreement also states: "This Contract may be
5 modified only by an instrument in writing." (*Id.*).

6 On October 8, 2016, after Plaintiff defaulted on his monthly dues, LVAC initiated debt
7 collection associated with Plaintiff's account. (LVAC Decl. ¶ 12, Ex. 1 to LVAC's MSJ, ECF
8 No. 24-1). To effectuate its debt collection, LVAC agents are licensed to use computerized
9 telephone software designed by Nuxiba Technologies, Inc. ("Nuxiba"). (Nuxiba Decl. ¶ 2, Ex.
10 2 to LVAC's MSJ, ECF No. 24-2). The Nuxiba system operates by dialing phone numbers
11 from a list "loaded into the system by an LVAC system administrator," and connecting
12 available LVAC agents to live calls. (*Id.* ¶ 4); (LVAC's 30(b)(6) Dep. 23:7-16, Ex. 2 to Pl.'s
13 Reply, ECF No. 32-2).

14 LVAC began placing calls to Plaintiff's cell phone on December 29, 2016, using the
15 Nuxiba system. (Pl.'s Decl. ¶¶ 2, 3, Ex. 2 to Pl.'s MSJ, ECF No. 23-2). Plaintiff spoke with an
16 LVAC representative on three occasions, during which Plaintiff stated he did not have money
17 to pay off his debt and no longer wanted to receive LVAC's calls. (Collection Notes, Ex. 4 to
18 Pl.'s MSJ, ECF No. 23-4). LVAC continued to place calls to Plaintiff until at least April of
19 2017. (Pl.'s Decl. ¶¶ 5, 7, 10, ECF No. 23-2).

20 Plaintiff filed this action on April 21, 2017, bringing two claims against LVAC for
21 violation of the TCPA and intrusion upon seclusion. (*See* Compl. ¶¶ 24-29, ECF No. 1). In
22 April 2018, Plaintiff and LVAC filed their respective Motions for Summary Judgment, (ECF
23 Nos. 23, 24).

1 **II. LEGAL STANDARD**

2 The Federal Rules of Civil Procedure provide for summary adjudication when the
3 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
4 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
5 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
6 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
7 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
8 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
9 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
10 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
11 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
12 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
13 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

14 In determining summary judgment, a court applies a burden-shifting analysis. “When
15 the party moving for summary judgment would bear the burden of proof at trial, it must come
16 forward with evidence which would entitle it to a directed verdict if the evidence went
17 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
18 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
19 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
20 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
21 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
22 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
23 party failed to make a showing sufficient to establish an element essential to that party’s case
24 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
25 24. If the moving party fails to meet its initial burden, summary judgment must be denied and

1 the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*,
2 398 U.S. 144, 159–60 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing
4 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
5 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
6 the opposing party need not establish a material issue of fact conclusively in its favor. It is
7 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
8 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
9 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
10 summary judgment by relying solely on conclusory allegations that are unsupported by factual
11 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
12 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
13 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

14 At summary judgment, a court’s function is not to weigh the evidence and determine the
15 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
16 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
17 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
18 not significantly probative, summary judgment may be granted. *See id.* at 249–50

19 **III. DISCUSSION**

20 **A. Telephone Consumer Protection Act**

21 Plaintiff and LVAC each seek summary judgment on Plaintiff’s TCPA claim. (Pl.’s MSJ
22 3:6–9, ECF No. 23); (LVAC’s MSJ 1:18–21, ECF No. 24). Plaintiff contends that LVAC
23 knowingly or willfully persisted in calling him without his consent using an automatic
24 telephone dialing system (“ATDS”). (Pl.’s MSJ 6:9–14:17). LVAC argues that Plaintiff cannot
25 demonstrate that an ATDS was used, and regardless, Plaintiff consented to being called under

1 the parties' Membership Agreement. (LVAC's MSJ 6:4–13:4). LVAC also moves the Court to
2 stay this action, asserting that new controlling authority on the definition of an ATDS is
3 impending. (*See* Mot. to Stay, ECF No. 37). Before turning to the merits of Plaintiff's claim,
4 the Court first considers the impact of recent developments in TCPA jurisprudence, followed
5 by LVAC's request for a stay.

6 **1. Authority Defining an ATDS**

7 Under the TCPA, it is unlawful "to make any call . . . using any automatic telephone
8 dialing system" to any "cellular telephone service," without the called party's prior consent. *See*
9 47 U.S.C. § 227(b)(1)(A)(iii). To implement the TCPA, Congress vested the Federal
10 Communications Commission ("FCC") with the authority to issue rules and regulations. *See id.*
11 § 227(b)(2).

12 The TCPA defines an ATDS as "equipment which has the capacity (a) to store or
13 produce telephone numbers to be called, using a random or sequential number generator; and
14 (b) to dial such numbers." *See id.* § 227(a)(1). In 2015, the FCC issued a declaratory order (the
15 "2015 FCC Order") suggesting an ATDS may include systems that dial from "a fixed set of
16 numbers," despite lacking the capability to dial randomly or sequentially. *In the Matter of Rules*
17 *& Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2015 FCC Order)*, 30 FCC
18 Rcd. 7961, 7972–78 (2015).

19 Following the 2015 FCC Order, several regulated entities challenged the FCC's
20 definition of an ATDS in the D.C. and Seventh Circuits, culminating in a consolidated petition
21 in the D.C. Circuit. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043–47 (9th Cir.
22 2018). In March 2018, the D.C. Circuit Court of Appeals set aside the FCC's interpretation of
23 an ATDS, finding it to be "an unreasonably, and impermissibly, expansive one." *ACA Int'l v.*
24
25

1 *Fed. Commc 'ns Comm 'n*, 885 F.3d 687, 700 (D.C. Cir. 2018).² The Court reasoned that the
2 FCC's definition is ambiguous as to whether it embraces software that dials from a fixed set of
3 numbers, even if the system cannot randomly or sequentially generate numbers. *Id.* at 702–03;
4 *see 2015 FCC Order*, 30 FCC Rcd. at 7973. Rejecting the FCC's construction, the D.C. Circuit
5 explained:

6 So which is it: does a device qualify as an ATDS only if it can
7 generate random or sequential numbers to be dialed, or can it so
8 qualify even if it lacks that capacity? The 2015 ruling, while
9 speaking to the question in several ways, gives no clear answer (and
10 in fact seems to give both answers). It might be permissible for the
11 [FCC] to adopt either interpretation. But the [FCC] cannot,
12 consistent with reasoned decisionmaking, espouse both competing
13 interpretations in the same order.

14 *ACA Int'l*, 885 F.3d at 702–03.

15 In the wake of *ACA Int'l*, the Ninth Circuit issued a decision holding that the 2015 FCC
16 Order, as well as “any prior FCC rules that were reinstated by the 2015 order,” no longer serve
17 as binding authority as to the meaning of an ATDS. *Marks*, 904 F.3d at 1049. Consequently,
18 “only the statutory definition of ATDS as set forth by Congress in 1991 remains.” *Id.*

19 Interpreting the statute “anew,” the Ninth Circuit held that an ATDS encompasses systems that
20 make automatic calls from lists of recipients. *Id.* at 149–50, 1051–53. Thus, under *Marks*, an
21 ATDS “means equipment which has the capacity—(1) to store numbers to be called *or* (2) to
22 produce numbers to be called, using a random or sequential number generator—and to dial
23 such numbers automatically (even if the system must be turned on or triggered by a person).”
24 *Id.* at 1052 (emphasis added).

25 ² The *ACA Int'l* decision is binding upon this Court because appellate courts have exclusive jurisdiction to
determine the validity of all FCC final orders and the Judicial Panel on Multidistrict Litigation consolidated the
appellate cases in the D.C. Circuit. *See* 28 U.S.C. § 2342(1); *see also Peck v. Cingular Wireless, LLC*, 535 F.3d
1053, 1057 (9th Cir. 2008).

1 In response to *ACA Int'l* and *Marks*, the FCC issued requests for public comment as to
2 the interpretation of an ATDS. *See Consumer & Governmental Affairs Bureau Seeks Comment*
3 *on Interpretation of the Tel. Consumer Prot. Act in Light of the D.C. Circuit's ACA Int'l*
4 *Decision*, 33 FCC Rcd. 4864 (2018); *Consumer & Governmental Affairs Bureau Seeks Further*
5 *Comment on Interpretation of the Tel. Consumer Prot. Act in Light of the Ninth Circuit's Marks*
6 *v. Crunch San Diego, LLC Decision*, No. 02-278, 2018 WL 4801356, at *1 (OHMSV Oct. 3,
7 2018). Against this backdrop, LVAC moves the Court to stay this action. (*See Mot. to Stay*,
8 ECF No. 37).

9 **2. LVAC's Motion to Stay**

10 LVAC requests a stay pending the FCC's anticipated rule making following its requests
11 for public comment. (*Id.* 1:24–2:2). LVAC points out that under the Hobbs Act, the FCC's
12 definition of an ATDS would control the Court's analysis to the extent it conflicted with *Marks*.
13 (*Id.* 2:2–4). LVAC invokes the primary jurisdiction doctrine as well as the Court's inherent
14 authority in support of its Motion to Stay. (*Id.* 6:17–13:13).

15 **a. Primary Jurisdiction**

16 Primary jurisdiction is “a prudential doctrine under which courts may, under appropriate
17 circumstances, determine that the initial decisionmaking responsibility should be performed by
18 the relevant agency rather than the courts.” *Syntek Semiconductor Co. v. Microchip Tech. Inc.*,
19 307 F.3d 775, 780 (9th Cir. 2002). In evaluating primary jurisdiction, Ninth Circuit courts
20 consider “(1) the need to resolve an issue that (2) has been placed by Congress within the
21 jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that
22 subjects an industry or activity to a comprehensive regulatory authority that (4) requires
23 expertise or uniformity in administration.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753,
24 760 (9th Cir. 2015) (quoting *Syntek*, 307 F.3d at 781).

1 The primary jurisdiction doctrine does not apply here. “The doctrine is reserved for a
2 ‘limited set of circumstances’ that ‘requires resolution of an issue of first impression, or of a
3 particularly complicated issue that Congress has committed to a regulatory agency.’” *Astiana*,
4 783 F.3d at 760 (citation omitted). Given the *Marks* Court’s construction of the TCPA, the
5 statutory definition of an ATDS is neither an issue of first impression, nor one that judges are
6 incompetent to decide. Applying this rationale, Ninth Circuit courts have consistently rejected
7 requests to stay actions pending further FCC rulemaking. *See, e.g., Nicholson, v. REI Energy,*
8 *LLC*, No. 3:18-cv-00203-HZ, 2019 WL 993624, at *5 (D. Or. Feb. 28, 2019) (holding that in
9 light of *Marks*, “this case presents neither an issue of first impression nor a question better
10 suited to the expertise of the [FCC].”); *Knapper v. Cox Commc’ns, Inc.*, No. 17-cv-00913-
11 PHX-SPL, 2019 WL 250430, at *2 (D. Ariz. Jan. 17, 2019); (“*Marks* represents binding law in
12 this Circuit. Consequently, there is no matter of first impression or of such complexity
13 inhibiting this Court from proceeding.”); *Larson v. Harman Mgmt. Corp.*, No. 1:16-cv-00219-
14 DAD-SKO, 2018 WL 6459964, at *4 (E.D. Cal. Dec. 10, 2018) (“The Ninth Circuit’s
15 willingness to decide the meaning of an ATDS in *Marks* also indicates that defining that term
16 as used in the applicable statute is within the conventional experience of judges.”); *Pieterston v.*
17 *Wells Fargo Bank, N.A.*, No. 17-cv-02306-EDL, 2018 WL 3241069, at *3 (N.D. Cal. July 2,
18 2018) (“[T]he primary jurisdiction doctrine does not comfortably fit the circumstances of this
19 case because the issues before the FCC are not ones of first impression and controlling or
20 persuasive law already exists.”).

21 Considerations of judicial efficiency also counsel against a stay. “The ‘deciding factor’
22 in determining whether the primary jurisdiction doctrine should apply is ‘efficiency.’” *Reid v.*
23 *Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015) (quoting *Rhoades v. Avon Prods., Inc.*,
24 504 F.3d 1151, 1165 (9th Cir. 2007)). Aside for LVAC’s speculation, there is no indication
25 that a new FCC order is imminent or any assurance such an order will conclusively resolve the

1 ATDS issue. As another court explained, “this cycle of staying a case while an FCC order is
2 pending only to have the FCC order challenged in court has played out before, demonstrating
3 the real possibility of indefinite delay.” *See Pieterston*, 2018 WL 3241069, at *5; *see also*
4 *Larson*, 2018 WL 6459964, at *4 (“[A]ny action from the FCC will be subject to further
5 challenge, which is exactly what happened with the 2015 Declaratory Ruling.”); *Goldschmidt v.*
6 *Rack Room Shoes*, No. 18-21220, 2019 WL 166629, at *1 (S.D. Fla. Jan. 4, 2019) (“[D]espite
7 Defendant’s assertion that the ruling is expected by late 2018 or early 2019, there is no real
8 indication that the FCC will in fact issue a ruling by a certain date.”).

9 In sum, the Court is unconvinced that judges are incompetent to construe the TCPA to
10 define the contours of an ATDS. Moreover, even if LVAC’s speculation is correct and the
11 FCC order is looming, the Court is skeptical that such an order would bring finality to the issue
12 of what constitutes an ATDS. Accordingly, the Court declines to stay this matter under the
13 primary jurisdiction doctrine.

14 ***b. Inherent Authority to Stay***

15 “A district court has discretionary power to stay proceedings in its own court under
16 [*Landis*].” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v.*
17 *North American Co.*, 299 U.S. 248, 254 (1936)). When deciding whether to issue a stay, the
18 court must weigh competing interests including: (1) the possible damage which may result from
19 the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to
20 go forward; and (3) the orderly course of justice measured in terms of the simplifying or
21 complicating of issues, proof, and questions of law which could be expected to result from a
22 stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The proponent of a stay bears the
23 burden of establishing its need. *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299
24 U.S. at 255).

1 As an initial matter, *Landis* stays “should not be granted unless it appears likely the
2 other proceedings will be concluded within a reasonable time.” *Leyva v. Certified Grocers of*
3 *California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979); *Dependable Highway Exp., Inc. v.*
4 *Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (“Generally, stays should not be
5 indefinite in nature.”). As discussed above, the Court is not convinced that an FCC order is
6 imminent or that such an order will settle the dispute over the definition of an ATDS. Just as
7 the 2015 FCC Order gave rise to the *ACA Int’l* consolidated appeal, a new FCC order may very
8 well bring about more legal challenges, further delaying resolution. Thus, a stay here would
9 not serve the orderly course of justice.

10 As to the balance of hardships, LVAC claims that without a stay, “LVAC would be
11 required to spend significant time and resources defending this lawsuit, even though the FCC’s
12 ruling . . . could dispose of a significant portion of Plaintiff’s claims.” (Mot. to Stay 12:11–23).
13 However, in this Circuit, “being required to defend a suit, without more, does not constitute a
14 clear case of hardship or inequity” for purposes of a stay. *Hawai’i v. Trump*, 233 F. Supp. 3d
15 850, 854 (D. Haw. 2017) (quoting *Lockyer*, 398 F.3d at 1112). Additionally, LVAC’s
16 argument presupposes that the FCC’s order will be favorable to its position. Because a future
17 FCC order may support either party’s case, the Court finds the balance of the hardships is
18 neutralized.

19 Finally, with respect to potential damage arising from the stay, LVAC argues that the
20 “only conceivable harm that Plaintiff could experience from a stay is temporary delay in
21 pursuing his requested relief.” (Mot. to Stay 11:21–22). Plaintiff responds that because LVAC
22 “cannot tell us with any degree of certainty whether the FCC will issue any new rulings or
23 guidance,” a stay would be indefinite and prejudice Plaintiff’s “right to have his claim
24 resolved.” (Resp. to Mot. to Stay at 3, ECF No. 38).

25

1 LVAC cites authority for the proposition that a “[d]elay in obtaining money damages . . .
2 does not constitute sufficient prejudice for purposes of the stay analysis.” (Mot. to Stay 11:21–
3 12:5). Those cases, however, include express findings that the respective stays would be of
4 limited duration—a finding this Court does not make. *Cf. Doerken v. USAA Sav. Bank*, No. 16-
5 cv-08824-RSWL-MRW, 2017 WL 1534186, at *3 (C.D. Cal. Apr. 26, 2017) (“[T]he appeal is
6 not likely to remain pending for an extended period of time, and the possible prejudice to
7 Plaintiff is minimal.”); *Reynolds v. Geico Corp.*, No. 2:16-cv-01940-SU, 2017 WL 815238, at
8 *4 (D. Or. Mar. 1, 2017) (“Further, ‘[t]his case is in the early stages of litigation and in all
9 likelihood, the stay will not be lengthy,’ especially as the D.C. Circuit has already heard oral
10 argument in *ACA International*.”). Here, in contrast, LVAC has not satisfied the Court that a
11 stay in this matter would be of limited duration.

12 Accordingly, the Court declines to issue a *Landis* stay. LVAC has not carried its burden
13 of demonstrating hardship or that a stay would serve the orderly course of justice. To the
14 extent LVAC has established that a stay would result in de minimis harm to Plaintiff, this
15 consideration is outweighed by the other *Landis* factors.

16 **B. Motions for Summary Judgment**

17 Plaintiff seeks summary judgment on the TCPA claim, asserting the evidence
18 demonstrates LVAC placed calls using an ATDS, and that LVAC willfully continued calling
19 Plaintiff after he revoked his consent. (Pl.’s MSJ 6:9–14:17). LVAC counters that Plaintiff can
20 neither show that the Nuxiba system is an ATDS nor that Plaintiff validly revoked his consent
21 under the Membership Agreement. (LVAC’s MSJ 6:4–13:4).

22 **1. TCPA**

23 As discussed above, the TCPA makes it unlawful to make any call “using any automatic
24 telephone dialing system” to any “cellular telephone service,” in the absence of the called
25 party’s prior consent. *See* 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA dispute in this case centers

1 upon whether the Nuxiba system, on which LVAC placed calls to Plaintiff, meets the definition
2 of an ATDS, and whether Plaintiff consented to receiving LVAC's calls.

3 ***a. Whether the Nuxiba System is an ATDS***

4 In light of the Ninth Circuit's holding in *Marks*,³ there is no genuine dispute that the
5 Nuxiba system is an ATDS. An ATDS "means equipment which has the capacity—(1) to store
6 numbers to be called or (2) to produce numbers to be called, using a random or sequential
7 number generator—and to dial such numbers automatically (even if the system must be turned
8 on or triggered by a person)." *Marks*, 904 F.3d at 1052.

9 The evidence in the record demonstrates the Nuxiba system has the present capacity to
10 store numbers to be called, and to dial such numbers. Nuxiba's President declares that the
11 system dials "phone numbers loaded into the system by an LVAC system administrator."
12 (Nuxiba Decl. ¶¶ 3–4, Ex. 2 to LVAC's MSJ, ECF No. 24-2). LVAC's 30(b)(6) designee also
13 testified that the system dial calls from a pre-loaded database of numbers, connecting live calls
14 to available agents. (*See* LVAC 30(b)(6) Dep. 18:9–24, 23:1–16, Ex. 2 to Pl.'s Reply, ECF No.
15 32-2); (*see also* LVAC's MSJ 4:10–14) (explaining that LVAC added Plaintiff's phone number
16 to a spreadsheet, which was subsequently uploaded "to a phone system, which would place a
17 call to a phone number included on the spreadsheet.").

18 LVAC contends that the Court must consider whether the Nuxiba system has the
19 capacity to randomly or sequentially generate numbers. (LVAC's MSJ 7:6–10). The
20 authorities LVAC cites, however, precede the Ninth Circuit's holding in *Marks*.⁴ Because the
21 *Marks* Court held that an ATDS includes systems that "store numbers to be called," the fact

22
23 ³ *Marks* was decided after the parties briefed their summary-judgment Motions.

24 ⁴ LVAC relies upon the now-vacated district court order in *Marks* as well as this Court's decision in *Marshall*.
25 (*See* LVAC's MSJ 6:17–8:15, ECF No. 24) (citing *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288 (S.D. Cal. 2014), *vacated and remanded*, 904 F.3d 1041 (9th Cir. 2018); *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852 (D. Nev. Mar. 30, 2018)).

1 that the Nuxiba software cannot generate numbers on its own no longer ends the ATDS
2 inquiry.⁵ *See Marks*, 904 F.3d at 152. As there is no genuine dispute that the Nuxiba system
3 dials from a stored list of phone numbers, the system is an ATDS as a matter of law.

4 ***b. Authority to Revoke Prior Express Consent***

5 Given that the TCPA only prohibits calls without “the prior consent of the called party,”
6 47 U.S.C. § 227(b)(1)(A), the Court turns to whether Plaintiff consented to LVAC’s calls.
7 Plaintiff does not dispute LVAC’s argument that under the Membership Agreement, Plaintiff
8 initially consented to receiving LVAC’s calls to his cell phone. (Pl.’s Resp. 5:5–6, ECF No.
9 29). Instead, the parties’ disagreement concerns whether the Membership Agreement
10 precluded Plaintiff from revoking his consent and, if not, whether there is an issue of fact
11 regarding Plaintiff’s revocation. (*Id.* 8:1–9:9); (LVAC’s MSJ 9:8–12:9).

12 In *Van Patten v. Vertical Fitness Grp., LLC*, the Ninth Circuit Court of Appeals
13 followed the lead of sister circuits in holding that “the TCPA permits consumers to revoke their
14 prior express consent to be contacted by telephone autodialing systems.” 847 F.3d 1037, 1048
15 (9th Cir. 2017); *see also Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013);
16 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014). Ninth Circuit courts,
17 applying *Van Patten*, have held that prior express consent, even if obtained through a contract
18 between the parties, does not preclude a party from revoking consent. *See, e.g., Self-Forbes v.*
19 *Advanced Call Ctr. Techs., LLC*, No. 17-15804, 2018 WL 5414613, at *2 (9th Cir. Oct. 29,
20 2018) (reversing grant of summary judgment in the defendant’s favor on consent revocation
21 notwithstanding the plaintiff’s prior consent to be called under the terms of her credit card
22 application); *Herrera v. First Nat’l Bank of Omaha, N.A.*, No. 2:17-cv-01136-RSWL-SKA,

23
24
25 ⁵ LVAC also points the Court to *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018), which the *Marks*
Court expressly declined to follow. *See Marks*, 904 F.3d at 1052 n.8 (“Because the Third Circuit merely avoided
the interpretive questions raised by the statutory definition of ATDS, its published opinion is unpersuasive.”)

1 2017 WL 6001718, at *3 (C.D. Cal. Dec. 4, 2017); *Jara v. GC Servs. Ltd. P’ship*, No. 2:17-cv-
2 04598-ODW-RAO, 2018 WL 2276635, at *3 (C.D. Cal. May 17, 2018).

3 LVAC urges the Court to follow *Reyes v. Lincoln Auto. Fin. Servs.*, where the Second
4 Circuit held “the TCPA does not permit a party who agrees to be contacted as part of a
5 bargained-for exchange to unilaterally revoke that consent” 861 F.3d 51, 56–57 (2d Cir.
6 2017). In that case, because the plaintiff’s consent was part of an “express provision of a
7 contract to lease an automobile”—rather than a “gratuitous” manifestation of assent—the
8 plaintiff could not unilaterally revoke it. *Id.* at 57. LVAC argues the *Reyes* Court has the right
9 approach because it is based upon “generally-accepted contractual common law,” and
10 “consistent with the D.C. Circuit’s [*ACA Int’l*] decision and the FCC’s interpretations of
11 consent revocation.” (LVAC’s MSJ 11:1–11).

12 Preliminarily, the Court is bound by the Ninth Circuit’s ruling in *Van Patten*. To the
13 extent *Reyes* may serve as persuasive authority, the Court finds it cannot be reconciled with
14 *Van Patten*, *ACA Int’l*, or the 2015 FCC Order. First, the 2015 FCC Order states that “callers
15 may not abridge a consumer’s right to revoke consent using any reasonable method.” 30 FCC
16 Rcd. at 7996 (“[C]onsumers must be able to respond to an unwanted call— using either a
17 reasonable oral method or a reasonable method in writing—to prevent future calls.”). The D.C.
18 Circuit subsequently endorsed the “[FCC’s] approach to revocation of consent, under which a
19 party may revoke her consent through any reasonable means clearly expressing a desire to
20 receive no further messages from the caller.” *ACA Int’l*, 885 F.3d at 692.

21 As to whether the *Reyes* Court properly applied common-law understandings of consent
22 revocation, this contention is immaterial. The 2015 FCC Order explicitly sets forth a statutory,
23 rather than common law, right of revocation. *See 2015 FCC Order*, 30 FCC Rcd. at 7995 (“We
24 do not rely on common law to interpret the TCPA to include a right of revocation. We simply
25

1 note our conclusion is consistent with the common law right of revocation and do not attempt
2 to substitute common law for statutory law.”).

3 Last, LVAC asserts that *Reyes* is in harmony with *ACA Int’l* because the D.C. Circuit
4 noted that the FCC has yet to address “revocation rules mutually adopted by contracting
5 parties,” or “parties’ ability to agree upon revocation procedures.” *ACA Int’l*, 885 F.3d at 710.
6 This argument, even if credited, has no bearing on this case as the Membership Agreement is
7 without any revocation mechanism. (See Membership Agreement, Ex. 1-B to LVAC’s MSJ,
8 ECF No. 24-1); see also *Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578, 600 (M.D. Tenn.
9 2018) (“The parties here did not contractually agree to a revocation mechanism. In the absence
10 of such an agreement, *ACA International* supports the FCC’s objection to the very type of
11 unilateral imposition of irrevocable consent that was sanctioned in *Reyes* and is advocated by
12 [the defendant] here.”); *Rodriguez v. Premier Bankcard, LLC*, No. 3:16-cv-2541, 2018 WL
13 4184742, at *11 (N.D. Ohio Aug. 31, 2018) (“[T]he FCC’s clarification does not help Premier
14 in this case, because here, there is also no ‘particular revocation procedure’ set by ‘mutual
15 agreement’ between the parties.”).

16 In sum, the Court declines LVAC’s invitation to follow the Second Circuit’s holding in
17 *Reyes*. The Court now considers whether there is a factual dispute regarding Plaintiff’s alleged
18 revocation of consent.

19 ***c. Whether Plaintiff Revoked His Prior Express Consent***

20 Consumers may revoke their consent, orally or in writing, to be contacted under the
21 TCPA, but “[r]evocation of consent must be clearly made and [the consumer] must express a
22 desire not to be called” *Van Patten*, 847 F.3d at 1047–48; see also *ACA Int’l*, 885 F.3d at
23 692. “[A] factual dispute regarding alleged revocation of consent cannot be properly resolved
24 on summary judgment.” *Herrera*, 2017 WL 6001718, at *4; see also *Osorio*, 746 F.3d at 1256.
25

1 Plaintiff has adduced evidence that on three occasions—between December 2016 and
2 April 2017—he requested that LVAC cease calling him. (Singer Decl. ¶ 5, Ex. 2 to Pl.’s MSJ,
3 ECF No. 23-2); (*see also* Recordings of Calls, Exs. 1, 4–5 to Pl.’s MSJ, ECF Nos. 23-3, 23-6,
4 23-7). Plaintiff also points to LVAC’s debt-collection notes, which show that LVAC
5 documented Plaintiff’s requests but nonetheless continued to call Plaintiff. (*See* Collection
6 Notes, Ex. 4 to Pl.’s MSJ, ECF No. 23-4). LVAC contends that Plaintiff’s alleged oral
7 revocations were too ambiguous to be afforded legal weight. (LVAC’s Resp. 21:20–22:16).

8 Upon review of the parties’ competing evidence and arguments, the Court finds a
9 genuine issue of material fact as to whether Plaintiff revoked his consent on the initial
10 December 29, 2016 call. The Court also finds no genuine dispute that Plaintiff expressly
11 revoked his consent on February 15, 2017, rendering subsequent calls violative of the TCPA.

12 **i. December 29, 2016 Call**

13 On the December 29, 2016 call, LVAC’s agent introduced himself and asked Plaintiff if
14 he was prepared to make a payment. (Recording of December 29, 2016 Call, Ex. 1 to Pl.’s
15 MSJ, ECF No. 23-3). Plaintiff responded, “not right now but I want you guys to stop calling
16 me. I don’t have the money right now.” (*Id.*). The agent replied, “I do apologize for the
17 inconvenience. . . . I will try to push that date out for you to give you some time to come up
18 with the payment,” to which Plaintiff stated, “thanks.” (*Id.*). LVAC’s collection notes show
19 that the agent wrote “CNT PAY AT THIS TIME . . . REQ STOP CLLNG.” (*See* Collection
20 Notes at 2, Ex. 2 to Pl.’s MSJ, ECF No. 23-4).

21 On the one hand, a reasonable jury could find that Plaintiff’s words, “I want you guys to
22 stop calling me,” against the backdrop of LVAC’s collection notes, indicate that Plaintiff
23 revoked his consent and that LVAC understood the message. On the other hand, a jury could
24 reasonably determine, based on the remainder of the call, that Plaintiff and LVAC merely
25

1 agreed to temporarily suspend, or “push out,” the calls to allow Plaintiff to come up with his
2 payment.

3 **ii. February 15, 2017 Call**

4 On the February 15, 2017 call, LVAC’s agent again identified himself and asked
5 Plaintiff if was able to make a payment. (Recording of February 15, 2017 Call, Ex. 4 to Pl.’s
6 MSJ, ECF No. 23-6). Plaintiff responded “I’ve asked you guys to stop calling me. I don’t have
7 the money.” (*Id.*). LVAC’s agent summarized the call as follows: “SD DONT HAVE THE
8 MONEY. . . STOP CALLING.” (*See* Collection Notes at 2, Ex. 2 to Pl.’s MSJ).

9 No reasonable jury could construe Plaintiff’s request as anything other than a clear
10 request that LVAC stop calling him. Unlike the December 29, 2016 call, Plaintiff and the
11 LVAC agent do not engage in any dialogue that could be interpreted as an agreement to merely
12 extend or “push out” the date of the next scheduled call. Additionally, LVAC’s collection
13 notes summarizing the call lend support to the notion that Plaintiff unambiguously conveyed
14 his revocation.

15 Therefore, the Court finds no genuine dispute that Plaintiff revoked his consent as of
16 February 15, 2017. Thus, LVAC’s calls using an ATDS after that period violated the TCPA.
17 However, because there is a factual issue as to the clarity of Plaintiff’s purported December 29,
18 2016 revocation, that question will be left to a jury.

19 **2. Intrusion Upon Seclusion**

20 The tort of intrusion upon seclusion is “grounded in a plaintiff’s objective expectation of
21 privacy.” *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 734 (Nev. 2017).

22 “To recover for the tort of intrusion, a plaintiff must prove the following elements: 1) an
23 intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that
24 would be highly offensive to a reasonable person.” *People for Ethical Treatment of Animals*
25

1 (*PETA*) v. *Bobby Berosini, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995), *overruled on other grounds*
2 *by City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127 (Nev. 1997).

3 “While what is ‘highly offensive to a reasonable person’ suggests a standard upon which
4 a jury would properly be instructed, there is a preliminary determination of ‘offensiveness’
5 which must be made by the court” *Id.* 1281–82 (citation omitted). Whether “conduct will
6 be regarded as a ‘highly offensive’ intrusion is largely a matter of social conventions and
7 expectations.” *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1449 (D. Nev. 1994)
8 (citation omitted). Courts look to “the degree of intrusion, the context, conduct and
9 circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the
10 setting into which he intrudes, and the expectations of those whose privacy is invaded.” *Id.*

11 Here, neither party has satisfactorily argued the elements of intrusion upon seclusion to
12 shift the summary-judgment burden to the other party. Instead, both parties rehash their TCPA-
13 related arguments, contending that the Court’s findings on the TCPA claim dictate a result as to
14 the intrusion claim.

15 According to Plaintiff, because the Ninth Circuit has recognized that “a TCPA claim is
16 intrinsically an invasion of privacy claim,” Plaintiff’s success on his TCPA claim entitles him
17 to the same on intrusion upon seclusion. (Pl.’s MSJ 14:20–15:11) (citing *L.A. Lakers, Inc. v.*
18 *Fed. Ins. Co.*, 869 F.3d 795, 804 (9th Cir. 2017)). This argument is without merit. Unlike an
19 intrusion upon seclusion claim, the TCPA does not require a showing that the calls would be
20 “highly offensive to a reasonable person.” *Compare* 47 U.S.C. § 227(b)(1)(A), *with PETA*, 895
21 P.2d at 1279.

22 LVAC asserts that Plaintiff cannot establish he had a reasonable expectation of privacy
23 because Plaintiff “expressly authorized LVAC to call him.” (LVAC’s MSJ 12:25–27). The fact
24 of Plaintiff’s initial consent, however, does not foreclose liability for the tort of intrusion.
25 Indeed, a reasonable jury could conclude that despite Plaintiff’s prior consent, the manner of

1 LVAC's ensuing debt collection, particularly the volume and frequency of the calls, would be
2 highly offensive to a reasonable person.

3 All told, Plaintiff has not demonstrated a prima facie case of intrusion, and LVAC has
4 not negated any essential element of Plaintiff's claim. Accordingly, both parties' Motions must
5 be denied as to the intrusion claim.

6 **C. Motion for Leave to Amend**

7 Plaintiff moves to amend his Complaint to update the alleged number of "times [LVAC]
8 called Plaintiff's cell phone" after he allegedly revoked consent on December 29, 2016. (Mot.
9 for Leave 1:21–25, ECF No. 22). Plaintiff asserts that his Motion meets the standard under
10 Federal Rule of Civil Procedure 15(a), as there is an absence of bad faith and prejudice to
11 LVAC, and amendment would not be futile or unduly delay proceedings. (*Id.* 3:13–8:21).

12 LVAC opposes Plaintiff's Motion stating Plaintiff fails to address the good cause
13 standard under Rule 16(b). (Resp. to Mot. for Leave 4:8–11, ECF No. 26). According to
14 LVAC, Plaintiff cannot demonstrate good cause because: (1) Plaintiff likely knew of the
15 number of calls LVAC placed to Plaintiff; (2) Plaintiff waited until the end of discovery to
16 reveal the additional calls; and (3) Plaintiff's counsel represented to LVAC's counsel that he
17 would not seek amendment to allege the additional calls. (*Id.* 4:12–24).

18 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to "freely give
19 leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Once a court has filed a
20 pretrial scheduling order, however, Rule (16)(b) governs rather than Rule 15(a). *Johnson v.*
21 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). Rule 16(b) requires a showing
22 of "good cause" in order to modify a scheduling order. *Id.* 608–09; Fed. R. Civ. P. 16(b). Only
23 if the movant establishes good cause under Rule 16 does the court consider the propriety of
24 amendment under Rule 15. *Johnson*, 975 F.2d at 609.

1 Plaintiff has not articulated good cause for the untimely amendment. “Rule 16(b)’s
2 ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.”
3 *Id.* Under the scheduling order, the parties’ deadline to amend the pleadings was November 21,
4 2017; the discovery cut-off date was March 16, 2018; and dispositive motions were due on
5 April 27, 2018. (*See* Scheduling Order 2:15–24, ECF No. 11). Plaintiff filed his Motion for
6 Leave on April 16, 2018, (ECF No. 22).

7 Plaintiff erroneously applies the more lenient standard of Rule 15, “which focuses on the
8 bad faith,” of the moving party and “the prejudice to the opposing party.” *Johnson*, 975 F.2d at
9 609. Even if the Court were to find an absence of bad faith and no prejudice to LVAC, these
10 findings are immaterial without a preliminary showing of diligence on Plaintiff’s part, or else
11 an explanation for the untimely request. *Id.*

12 Plaintiff claims he did not know of LVAC’s additional phone calls at the time he
13 brought this action. (Mot. for Leave 5:1–4). Plaintiff states that screenshots of his cell phone,
14 purportedly showing the correct number of phone calls at issue, were given to LVAC “early in
15 the litigation,” and that LVAC “had them for months before they took Plaintiff’s deposition.”
16 (*Id.* 6:8–9). This argument is unhelpful for two reasons. First, this reasoning goes toward
17 prejudice to LVAC rather than Plaintiff’s diligence in seeking amendment. Second, and more
18 significantly, this concession signifies that Plaintiff knew of the additional calls well in advance
19 of his untimely Motion.

20 Without identification of when Plaintiff obtained this information in discovery or
21 description of Plaintiff’s good-faith attempt to timely amend, the Court cannot discern—one
22 way or the other—whether Plaintiff’s efforts were diligent. As such, Plaintiff has not carried
23 his burden of showing good cause under Rule 16. Plaintiff’s Motion for Leave to Amend is
24 therefore denied. *See Johnson*, 975 F.2d at 609 (“If the party was not diligent, the inquiry
25 should end.”).

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment, (ECF No.
3 23), is **GRANTED in part** and **DENIED in part**. Plaintiff's Motion as to the TCPA claim is
4 **GRANTED** to the extent it applies to LVAC's calls after February 15, 2017. The Motion is
5 **DENIED** as to LVAC's calls prior to February 15, 2017.

6 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment on his
7 intrusion upon seclusion claim is **DENIED**.

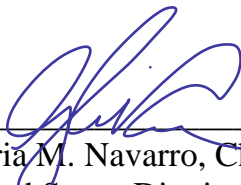
8 **IT IS FURTHER ORDERED** that LVAC's Motion for Summary Judgment, (ECF No.
9 24), is **DENIED**.

10 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Amend, (ECF No. 22), and
11 LVAC's Motion to Stay, (ECF No. 37), are **DENIED**.

12 **IT IS FURTHER ORDERED** that LVAC's Motion for Leave to File Supplemental
13 Authority, (ECF No. 34), is **GRANTED**.

14 **IT IS FURTHER ORDERED** that the parties shall file a Joint Pretrial Order within
15 thirty (30) days of this Order's issuance.

16 **DATED** this 25 day of March, 2019.

17
18
19 
20 _____
21 Gloria M. Navarro, Chief Judge
22 United States District Judge
23
24
25