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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Lisa Pierucci,

No. CV-20-08048-PCT-DWL

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Plaintiff,

ORDER

11

v.

12

Homes.com Incorporated,

13

Defendant.

14

15 Pending before the Court are four motions filed by Defendant Homes.com,
16 Incorporated (“Homes.com”). (Docs. 13, 14, 15, 28). The first is a motion to transfer
17 venue to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), the second a
18 motion to dismiss under Rule 12(b)(6), the third a motion to strike a proposed class
19 definition, and the last a motion to stay further proceedings in this case. (*Id.*) For the
20 following reasons, the motion to transfer will be granted and the other motions will be
21 denied without prejudice, to be refiled in the Eastern District of Virginia.

22

BACKGROUND

23

I. Factual Background

24

The facts as alleged in Plaintiff Lisa Pierucci’s complaint are as follows.
25 Homes.com is a “real estate website that among other things generates leads for listing for
26 real estate agents.” (Doc. 1 ¶ 5.) It markets these leads through the use of “unsolicited,
27 autodialed text messages.” (*Id.* ¶ 6.)

28

On February 27, 2020 Pierucci, a resident of Lake Havasu City, Arizona, received

1 one such text message. (*Id.* ¶¶ 7-8.) The message purported to be from “Dion with
2 Homes.com” and stated that Homes.com was “looking for an agent to pick up openings we
3 have in your county and surrounding areas to work every pre-screened buyer/seller lead
4 coming through.” (*Id.* ¶ 7.) The text further offered “30% OFF on ANY zip codes, to help
5 agents get a head start on preparing for the upcoming season” and asked “[w]hat zip
6 codes/areas” Pierucci liked to target. (*Id.*)

7 According to Pierucci, that text message “was a nuisance that aggravated [her],
8 wasted her time, invaded her privacy, diminished the value of the cellular services she paid
9 for, caused her to temporarily lose the use and enjoyment of her phone, and caused wear
10 and tear to her phone’s data, memory, software, hardware, and battery components.” (*Id.*
11 ¶ 9.)

12 II. Procedural History

13 On March 4, 2020, Pierucci initiated this action. (Doc. 1.) In addition to recounting
14 the facts described above, Pierucci alleged that Homes.com had “utilized an automatic
15 telephone dialing system [‘ATDS’]; hardware or software with the capacity to store or
16 produce cellular telephone number[s] to be called, using a random or sequential number
17 generator, or to dial telephone numbers from preloaded lists.” (*Id.* ¶ 10.) This, she alleged,
18 was in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).
19 (*Id.* ¶ 3.) She further alleged, upon information and belief, that “substantively identical
20 unsolicited text messages” had been sent “en masse to the cellular telephone numbers of
21 thousands of customers.” (*Id.* ¶ 11.) Thus, Pierucci brought a single claim under the TCPA
22 based on the use of ATDSs and sought to represent a class composed of:

23 All persons who, on or after four years prior to the filing of the initial
24 complaint in this action through the date of class certification (1) were sent a
25 text message to their cellular telephone number by or on behalf of
26 Homes.com, (2) using a dialing system substantially similar . . . as used to
text message Plaintiff, (3) for a substantially similar reason as Homes.com
texted Plaintiff.

27 (*Id.* ¶¶ 13, 21-24.)

28 Pierucci originally brought this action against, and served a summons on, Dominion

1 Enterprises, Incorporated (“Dominion”), which Pierucci believed did business as
2 Homes.com. (*Id.* at 2; Docs. 5, 7.) Dominion, in turn, informed Pierucci that it didn’t do
3 business as Homes.com and that the entity Pierucci really wanted to sue was Homes.com,
4 Inc. (Doc. 10 ¶ 3.) Pierucci, Dominion, and Homes.com then filed a joint motion to
5 substitute Homes.com as the defendant in this case and to dismiss Dominion. (*Id.*) That
6 motion was granted. (Doc. 11).

7 On June 8, 2020, Homes.com filed four motions, all of which Pierucci opposes. The
8 first is a motion to “transfer venue on the grounds of *forum non conveniens*” pursuant to
9 28 U.S.C. § 1404(a). (Doc. 13.) In it, Homes.com argues that transferring this case to the
10 Eastern District of Virginia will best “serve the convenience of the parties, witnesses, and
11 the interests of justice” because Virginia is “the center of gravity in this case” and “the bulk
12 of the conduct challenged took place” there. (*Id.* at 1-2.)

13 The second motion is a Rule 12(b)(6) motion to dismiss. (Doc. 14.) In it,
14 Homes.com argues (1) the complaint’s allegations are insufficient to state a claim; (2) the
15 TCPA is unconstitutional because it favors some forms of speech over others in violation
16 of the First Amendment; and (3) because Pierucci seeks to represent a nationwide class,
17 the different definitions of ATDSs utilized by different Circuits renders the TCPA
18 unconstitutionally vague. (*Id.*)

19 The third motion is a motion to strike Pierucci’s class definition. (Doc. 15.) In it,
20 Homes.com argues that Pierucci’s class definition is “facially deficient” because it uses
21 “imprecise, vague, and subjective criteria.” (*Id.* at 1.) Homes.com further argues that
22 Pierucci “should not be permitted to pursue a class action on behalf of non-Arizona class
23 members, whose claims have no connection whatsoever to Arizona.” (*Id.* at 1-2.)

24 The final motion was a motion to stay proceedings. (Doc. 16.) That motion sought
25 a stay pending the Supreme Court’s then-unreleased decision in *Barr v. Am. Ass’n of*
26 *Political Consultants*, 140 S. Ct. 2335 (2020), which would determine the constitutionality
27 of the TCPA. (Doc. 16.) But after *Barr* was decided, Homes.com withdrew its original
28 motion to stay (Doc. 26) and then filed a new motion to stay, which seeks a stay pending

1 the Supreme Court’s decision in *Facebook, Inc. v. Duguid*, No. 19-511, because that case
2 will determine the definition of ATDSs. (Doc. 28.)

3 On June 8, 2020, in addition to its flurry of motions, Homes.com filed a notice
4 pursuant to Rule 5.1(a) that it is challenging the constitutionality of a federal statute. (Doc.
5 17.) On July 29, 2020, the United States acknowledged the notice and requested additional
6 time to determine whether it wanted to intervene. (Doc. 30.) The Court granted that
7 request, giving the United States until October 6, 2020 to make a decision. (Doc. 32.)

8 ANALYSIS

9 The Court is faced with four fully briefed motions. Because the motion to transfer
10 could obviate the need to address the other motions, and because the other motions don’t
11 challenge the existence of personal or subject matter jurisdiction, the Court, in its
12 discretion, will begin with the transfer request. *Cf. Sinochem Int’l Co. Ltd. v. Malaysia*
13 *Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007) (“We hold that a district court has discretion
14 to respond at once to a defendant’s *forum non conveniens* plea, and need not take up first
15 any other threshold objection.”); *Smith v. Gen. Info. Solutions, Inc.*, 2018 WL 4019463, *2
16 (S.D. Ohio 2018) (“Contrary to Defendant’s argument, the Court finds it appropriate and
17 in the interest of judicial economy to consider first Plaintiff’s Motion to Transfer Venue.”).

18 I. Motion To Transfer

19 As a threshold matter, although Homes.com has styled its motion as a request
20 “pursuant to 28 U.S.C. § 1404(a) to transfer venue on the grounds of *forum non*
21 *conveniens*” (*id.* at 1), this is something of a misnomer. Transfer under § 1404(a) and
22 *forum non conveniens* are distinct concepts. The latter applies only when the alternative
23 forum is not a “sister federal court”—most commonly, when the alternative forum is
24 another country’s judicial system. *Sinochem*, 549 U.S. at 430 (“The common-law doctrine
25 of *forum non conveniens* has continuing application [in federal courts] only in cases where
26 the alternative forum is abroad For the federal court system, Congress has . . . provided
27 for transfer, rather than dismissal, when a sister federal court is the more convenient place
28 for trial of the action.”) (quotation and internal citation omitted). *See also Am. Dredging*

1 *Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (“[T]he federal doctrine of *forum non*
2 *conveniens* has continuing application only in cases where the alternative forum is
3 abroad.”); *Galvin v. McCarthy*, 545 F. Supp. 2d 1176, 1182 (D. Colo. 2008) (denying
4 motion to dismiss for *forum non conveniens* because “the Supreme Court has . . . made
5 clear that the doctrine survives only as it relates to dismissal to a *foreign* forum” and
6 “Texas, contrary to the wishes of some of its citizens, is not at this point a foreign forum”).
7 Nevertheless, Homes.com brought its motion under § 1404(a) and its intent—to transfer
8 the case to a more convenient forum—aligns with the purpose of that statute. Accordingly,
9 the Court will consider Homes.com’s motion under § 1404(a). *Cf. Galvin*, 545 F. Supp.
10 2d at 1181 (“I deny Spirit’s motion to dismiss on *forum non conveniens* grounds.
11 Nonetheless, I consider Spirit’s arguments under the relevant federal statute.”).

12 Section 1404(a) allows a district court to “transfer any civil action to any other
13 district or division where it might have been brought” if a transfer would promote “the
14 convenience of parties and witnesses [and] the interest of justice.” Section 1404(a) thus
15 vests courts with the discretion “to adjudicate motions for transfer according to an
16 individualized, case-by-case consideration of convenience and fairness.” *Stewart Org.,*
17 *Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks omitted). Because
18 § 1404(a) governs transfer only in a properly venued case, the first step is to determine
19 whether the transferor and transferee courts are proper venues. *LaGuardia v. Designer*
20 *Brands, Inc.*, 2020 WL 2463385, *6 (S.D. Cal. 2020). “After it is established that venue
21 is proper in both districts, the court must then weigh multiple factors to determine whether
22 transfer is appropriate.” *Id.* at *7.

23 A. Whether Venue Is Proper In Both Districts

24 Neither party disputes that venue is proper in both the District of Arizona and the
25 Eastern District of Virginia. The Court sees no reason to disagree. Venue is proper “in a
26 judicial district in which any defendant resides.” 28 U.S.C. § 1391(b)(1). Homes.com
27 maintains its principal place of business in Norfolk, Virginia, which is in the Eastern
28 District of Virginia. (Doc. 13-1 ¶ 5.) Because “an entity with the capacity to sue and be

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