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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CAT BROOKS and RASHEED
SHABAZZ, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. 3:21-cv-01418-EMC

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO STAY DISCOVERY**

Date: July 29, 2021
Time: 1:30 p.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 29, 2021 at 1:30 p.m., or as soon thereafter as this
 3 Motion may be heard in this Court, Defendant Thomson Reuters Corporation (“Thomson
 4 Reuters”), by and through its counsel of record, will and hereby does move the Court for an order
 5 staying discovery pending (1) resolution of its Motion to Dismiss Pursuant to Fed. R. Civ. P.
 6 12(b)(6) and Motion to Strike Pursuant to California Code of Civil Procedure § 425.16
 7 (hereinafter “Motion to Dismiss”), or (2) in the event the Court grants the Motion to Dismiss with
 8 leave to amend, until there is no longer a pleading challenge that would result in the Court
 9 dismissing the case. *See* ECF No. 28. This Motion is based on this Notice, the following
 10 Memorandum of Points and Authorities, the pleadings and papers on file in this action, any
 11 argument and evidence to be presented at hearing, and any other matters that may properly come
 12 before the Court. The parties have conferred telephonically pursuant to Local Rule 37-1(a)
 13 regarding the present dispute and were unable to reach a resolution.

14 **STATEMENT OF ISSUE**

15 Whether the case-dispositive nature of Thomson Reuters’ Motion to Dismiss and the fact
 16 that discovery is unnecessary to decide the Motion to Dismiss furnish good cause for a stay of
 17 discovery pending resolution of the Motion to Dismiss.

18 **INTRODUCTION**

19 Thomson Reuters respectfully requests that the Court stay discovery in this matter until
 20 (1) the Court issues a ruling on the Motion to Dismiss, or (2) in the event the Court grants the
 21 Motion to Dismiss with leave to amend, until there is no longer a pleading challenge that would
 22 result in the Court dismissing the case. A stay is warranted because this case satisfies the two-part
 23 test that this District applies in considering a motion to stay: the pending Motion to Dismiss raises
 24 important threshold issues that are likely to dispose of the entire case, and no discovery is
 25 necessary to decide it. The Motion to Dismiss argues that Plaintiffs’ Complaint does not state a
 26 claim; that Thomson Reuters is immune from Plaintiffs’ claims under the First Amendment of the
 27 U.S. Constitution and Section 230 of the Communications Decency Act (“CDA”); and that the
 28

1 Complaint should be stricken because Thomson Reuters' activity is protected under California's
 2 anti-SLAPP statute. None of these arguments requires discovery and, if the Motion to Dismiss is
 3 granted, it will fully dispose of the case.

4 Accordingly, discovery should be stayed pending resolution of the Motion to Dismiss.

5 **BACKGROUND**

6 Plaintiffs Cat Brooks and Rasheed Shabazz ("Plaintiffs") filed this putative class action,
 7 which asserts claims for violations of the common law "right to publicity/misappropriation of
 8 likeness," and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200
 9 *et. seq.*, along with a claim for unjust enrichment. *See* ECF No. 1, Ex. 1 ("Compl.") ¶¶ 81-118.¹

10 On April 5, 2021, Thomson Reuters moved to dismiss and strike the Complaint on
 11 numerous grounds, each of which, on its own, would be fully case-dispositive. The Motion to
 12 Dismiss explains the reasons why (1) Plaintiffs have failed to allege facts that state a claim for
 13 relief under any of their claims; (2) the conduct targeted by Plaintiffs constitutes speech that is
 14 protected under the First Amendment; (3) Plaintiffs' claims fall squarely within the immunity
 15 provided by Section 230 of the CDA; and (4) the Complaint should be stricken because it
 16 constitutes a strategic lawsuit against public participation ("SLAPP") under California law.
 17 Briefing has closed on the Motion to Dismiss, which is set for hearing on June 24, 2021.

18 Under the current case schedule, the parties must confer under Federal Rule of Civil
 19 Procedure 26(f) by June 24, the same day as the hearing on this Motion to Dismiss. The current
 20 deadline to exchange initial disclosures and propose a discovery plan is July 8, 2021. *See* Case
 21 Management Conference Order, ECF No. 26. A case management conference is set for July 15,
 22 2021. *Id.* A deadline for discovery has not yet been set, nor has a trial date. *Id.*

23 **ARGUMENT**

24 A district court has "wide discretion in controlling discovery." *Little v. City of Seattle*, 863
 25 F.2d 681, 685 (9th Cir. 1988). That discretion extends to staying discovery upon a showing of
 26

27 ¹ The full background of this action is set forth in Thomson Reuters' pending Motion to Dismiss.
 28 *See* ECF No. 28.

1 “good cause” in order to “protect a party or person from annoyance, embarrassment, oppression,
 2 or undue burden or expense.” *See* Fed. R. Civ. P. 26(c)(1). The Ninth Circuit has explained that a
 3 stay of discovery pending a ruling on a motion to dismiss is consistent with “the purpose of
 4 F.R.Civ.P. 12(b)(6),” which is “to enable defendants to challenge the legal sufficiency of
 5 complaints without subjecting them to discovery.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829
 6 F.2d 729, 738 (9th Cir. 1987). In the interest of judicial efficiency and conserving the Court’s
 7 resources, it is “sounder practice to determine whether there is any reasonable likelihood that
 8 plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.”
 9 *Id.*; *see also Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (“Staying
 10 discovery when a court is convinced that the plaintiff will be unable to state a claim for relief
 11 furthers the goal of efficiency for the court and the litigants.”).

12 “Courts in this district have applied a two-pronged test to determine whether discovery
 13 should be stayed pending resolution of a dispositive motion.” *In re Nexus 6p Prods. Liab. Litig.*,
 14 No. 17-cv-02185, 2017 WL 3581188, at *1 (N.D. Cal. Aug. 18, 2017). “First, a pending motion
 15 must be potentially dispositive of the entire case, or at least dispositive on the issue at which
 16 discovery is directed.” *Id.* (citing *Pac. Lumber Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*,
 17 220 F.R.D. 349, 351-52 (N.D. Cal. 2003)). “Second, the court must determine whether the
 18 pending motion can be decided absent discovery.” *Id.* (citing *Pac. Lumber Co.*, 220 F.R.D. at
 19 352). This two-part test accounts for the fact that it “furthers the goal of efficiency for the court
 20 and the litigants” to pause discovery “when a court is convinced that the plaintiff will be unable to
 21 state a claim for relief.” *Id.* at *1 (quoting *Tradebay, LLC*, 278 F.R.D. at 601).

22 A stay of discovery is warranted here under both factors. Moreover, the balance of
 23 equities favors a stay in a complex case such as this one, where the requested stay is short and
 24 definite in duration and is unlikely to cause significant prejudice to Plaintiffs. *See, e.g., In re*
 25 *Nexus*, 2017 WL 3581188, at *2 (concluding that “limited stay of discovery does not unduly
 26 prejudice Plaintiffs, and allows all parties to commence discovery with a better understanding of
 27 which claims, if any, they must answer”); *Cellwitch, Inc. v. Tile, Inc.*, No. 19-CV-01315, 2019
 28 WL 5394848, at *2 (N.D. Cal. Oct. 22, 2019) (noting lack of prejudice when granting stay under

two factors). Finally, a stay until there are no further case-dispositive pleading challenges is warranted should the Court grant the Motion to Dismiss but allow leave to amend. *Malley v. San Jose Midtown Dev. LLC*, No. 5:20-CV-01925-EJD, 2020 WL 5877575, at *7 (N.D. Cal. Oct. 2, 2020) (dismissing complaint, granting leave to amend, and granting motion to stay discovery).

I. Thomson Reuters' MTD is potentially case-dispositive.

This case meets the first prong of this district's two-part test because the Motion to Dismiss "has the potential to be dispositive." *Cellwitch, Inc.*, 2019 WL 5394848, at *2 (granting discovery stay where "every claim in [the] complaint would be subject to dismissal" if motion to dismiss were granted); *Malley*, 2020 WL 5877575, at *7 (same).

Additionally, to the extent this Court is required to "take a 'preliminary peek' at the merits of the pending dispositive motion to assess whether a stay is warranted[,] there is a significant "potential[]" that Defendant's motion could resolve the entire matter. *In re Nexus*, 2017 WL 3581188, at *1 (citation omitted); *see, e.g., id.* at *2 (finding that the first prong was met because defendant's motion to dismiss presented "strong arguments for dismissal" even though there was no "silver bullet" defense).

Here, the Motion to Dismiss has the potential to be case-dispositive on multiple, independent grounds. In these circumstances, a stay of discovery will "alleviate wasted resources and time." *Estate of Bock v. Cnty. of Sutter*, Civ. No. S-11-0536, 2012 WL 94618, at *2 (E.D. Cal. Jan. 9, 2012) ("[I]t is quite possible that some claims and/or defendants might be eliminated by the motion, and the undersigned is reluctant to require defendants to expend resources and perform much work in responding to discovery that might be mooted by the granting of the motion in whole or in part."); *see also Rutman Wine Co.*, 829 F.2d at 738 ("[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.") (quoting *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980)); *Hamilton v. Rhoads*, No. C 11-0227, 2011 WL 5085504, at *1 (N.D. Cal. Oct. 25, 2011) (granting discovery stay where motion to dismiss, if meritorious, was *potentially* dispositive of the case).

Any one of these provides the basis to dispose of *all* claims. As explained in the Motion to Dismiss and Reply, *see* ECF Nos. 28 & 35, there is no legal basis for the unprecedented relief sought in the Complaint, which asks the Court to hold that California has made it unlawful for an information technology company to charge a fee to access factual information about people online. The foundation for all of Plaintiffs' claims for relief is their claim for violation of the right of publicity. Yet Plaintiffs fail to state any right of publicity claim (whether statutory or common law), because Thomson Reuters' actions are "categorically different" from the conduct implicating the right of publicity. *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 803 (N.D. Cal. 2019) (dismissing right of publicity claim where defendant was alleged to have sold Plaintiffs' personal information without consent). Thomson Reuters does not use Plaintiffs' identities or appropriate their names and likenesses to attract public attention or to promote Thomson Reuters' products or other endeavors, so there is no violation of the right of publicity, and the central theory of Plaintiffs' case fails. *See* ECF No. 28 at 7-9.

Plaintiffs' UCL claims fail for the same reason and for other, independent reasons, including that the California Consumer Privacy Act ("CCPA"), Cal. Civ. Code § 1798.100, *et seq.*, expressly permits the very conduct attacked here (an opt-out, rather than an opt-in, framework for the sale of personal information). *See* ECF No. 28 at 14-16. As the Ninth Circuit has recognized, in cases like this, where "the allegations of the complaint fail to establish the requisite elements," it would be wasteful to require "costly and time consuming discovery." *Rutman Wine Co.*, 829 F.2d at 738.

A stay is particularly appropriate where, as here, the dispositive motion raises immunity as a basis for dismissal. *See Malley v. San Jose Midtown Dev. LLC*, No. 20-cv-01925, 2020 WL 5877575, at *7 (N.D. Cal. Oct. 2, 2020) ("Common situations in which a court may determine that staying discovery pending a ruling on a dispositive motion occur when dispositive motions raise issues of jurisdiction, venue, or immunity.") (internal quotations omitted); *LG Corp. v. Huang Xiaowen*, No. 16-cv-1162, 2017 WL 2868416, at *1 (S.D. Cal. Feb. 23, 2017) (same). Here, there are two grounds for immunity: the First Amendment and the CDA. *See* ECF Nos. 28 at 9-14 & 35 at 8-11. Pursuant to the strict scrutiny afforded to content-based restrictions, *see*

1 *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020), the First Amendment provides
 2 immunity where, as here, the purpose of alleged misappropriation of likeness is to “inform.” *New*
 3 *Kids On The Block v. News Am. Publ’g, Inc.*, 745 F. Supp. 1540, 1547 (C.D. Cal. 1990), *aff’d*,
 4 971 F.2d 302 (9th Cir. 1992). Permitting Plaintiffs to engage in discovery would erode this
 5 immunity and create a “chilling effect” by raising the specter that any defendant like Thomson
 6 Reuters that is engaged in constitutionally protected speech may need to engage in costly
 7 discovery before disposing of non-meritorious right of publicity actions.²

8 The CDA provides a separate basis for immunity. The CDA immunizes interactive
 9 computer service providers (like Thomson Reuters) from claims (such as Plaintiffs’) that treat
 10 providers as publishers of third-party content. *See* ECF No. 28 at 19-23. And the CDA is case-
 11 dispositive where, as here, all of the Plaintiffs’ claims stem from alleged publication of third-
 12 party content. *See Callahan v. Ancestry.com, Inc.*, Case No. 20-cv-08437, 2021 WL 783524, at
 13 *5–6 (N.D. Cal. Mar. 1, 2021) (dismissing right of publicity and unfair competition claims
 14 against website on CDA grounds); Order Dismissing First Am. Compl. at 12, *Callahan*, No. 20-
 15 cv-8437, ECF No. 46 (dismissing with prejudice). The intent behind CDA immunity is not only
 16 to immunize defendants from a potentially adverse judgment, but from the burdens of litigation
 17 entirely. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d
 18 1157, 1175 (9th Cir. 2008) (“[S]ection 230 [of the CDA] must be interpreted to protect websites

20 ² Discovery’s “chilling effect” on constitutionally-protected speech motivated the California
 21 legislature to provide for an automatic stay of discovery when, as here, a defendant files an anti-
 22 SLAPP motion. Cal. Civ. Proc. Code § 425.16(a), (g); *see also Stewart v. Rolling Stone LLC*, 181
 23 Cal. App. 4th 664, 675 (2010) (“The goal [of section 425.16] is to eliminate meritless or
 24 retaliatory litigation at an early stage of the proceedings.”), *as modified on denial of reh’g* (Feb.
 25 24, 2010). Though the Ninth Circuit has held that the *automatic* stay provision of California’s
 26 anti-SLAPP statute does not apply in federal court due to conflicts with the Federal Rules of Civil
 27 Procedure, *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001), “the conflict . . .
 28 is lessened . . . where, as here, an anti-SLAPP motion challenges the legal sufficiency of
 Plaintiffs’ claims (rather than the factual basis for the claims), and is thus in the nature of a Rule
 12(b)(6) motion to dismiss,” *Mireskandari v. Daily Mail & Gen. Tr. PLC*, No. CV 12-02943,
 2013 WL 12129944, at *3 (C.D. Cal. Jan. 14, 2013); *see also Smith v. Payne*, No. C 12-01732,
 2012 WL 6712041, at *4 (N.D. Cal. Dec. 26, 2012), *aff’d*, 594 F. App’x 397 (9th Cir. 2015)
 (finding that “the discovery-limiting provisions of [the anti-SLAPP statute]” did not “collide”
 with FRCP 56 where “the only issue presented by the motion is an issue of law and the motion is
 suitable for decision as a motion to dismiss pursuant to Rule 12(b)(6)”).

not merely from ultimate liability, but from having to fight costly and protracted legal battles.”) A brief stay of discovery would therefore be consistent with the Congressional intent behind the CDA, seeking to protect websites from the high costs of litigation, characterized by the Ninth Circuit as “death by ten thousand duck-bites.” *Id.* at 1174-75.

Indeed, another Northern District of California court recently dismissed, with prejudice, a lawsuit bringing nearly identical claims for similar conduct against a similar defendant—in that case, an interactive computer service provider that allegedly sold access to California residents’ personal information from yearbooks. *See* Order Dismissing First Am. Compl., *Callahan v. Ancestry.com Inc.*, No. 20-cv-08437 (N.D. Cal. June 15, 2021), ECF No. 46 (dismissing with prejudice claims for violation of California’s Right of Publicity Statute § 3344, California Unfair Competition Law § 17200, intrusion upon seclusion, and unjust enrichment). The same result is likely in this case.

II. Discovery is not necessary to decide the Motion to Dismiss.

Second, this case also satisfies the second prong of this District’s two-part test, because no discovery is necessary to resolve the Motion to Dismiss.

The Motion to Dismiss does not raise factual issues. Rather, it argues that Plaintiffs’ claims fail as a matter of law, for several independent reasons. *See* ECF No. 28. “Discovery is only appropriate where there are factual issues raised by a Rule 12(b) motion.” *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987). Accordingly, this case meets the second prong of this district’s two-part test. *See Cellwitch*, 2019 WL 5394848, at *2 (holding the defendant “met its burden under the second prong” when “the Court only need[ed] to look at the pleadings in order to issue a decision about its motion to dismiss” and that “no other discovery is needed for the resolution of” the motion to dismiss); *see also Davis v. Elec. Arts Inc.*, No. C-10-03328, 2011 WL 2621626, at *3 (N.D. Cal. July 5, 2011) (observing that anti-SLAPP motions identify legal defects while accepting factual allegations as true).

III. A stay is warranted here.

Because this case qualifies under the district’s two-part test for stays of discovery pending a Motion to Dismiss, the Court should determine there is “good cause” for the brief stay sought

by this Motion. *See, e.g., In re Google Digital Advert. Antitrust Litig.*, No. 20-CV-03556-BLF, 2020 WL 7227159, at *3 (N.D. Cal. Dec. 8, 2020) (granting stay where court held that defendant satisfied its burden under the two-part test); *Malley*, 2020 WL 5877575, at *1 (N.D. Cal. Oct. 2, 2020) (same); *Reveal Chat Holdco, LLC v. Facebook, Inc.*, No. 20-CV-00363-BLF, 2020 WL 2843369 (N.D. Cal. Apr. 10, 2020) (same); *Cellwitch*, 2019 WL 5394848, at *2 (same); *In re Nexus*, 2017 WL 3581188, at *2 (same); *see also* Fed. R. Civ. Proc. 26(c)(1)(A)-(B) (authorizing courts to, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” including by forbidding or narrowing discovery).

Indeed, several courts in other districts have recently granted discovery stays in cases very similar to this one. *See, e.g.,* Minute Entry, *Backowski v. Peopleconnect Inc. et al*, No. 21-cv-00115 (W.D. Wash. Apr. 14, 2021) (finding good cause to vacate discovery deadlines pending court’s ruling on the motion to dismiss which argued that CDA and First Amendment barred liability for right of publicity claims); Order Granting Defendant’s Unopposed Motion to Stay Discovery Pending Resolution of Their Motion to Dismiss, *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash. May 5, 2021), ECF No. 15 (staying discovery pending resolution of motion to dismiss where defendant raised CDA and First Amendment defense to right of publicity claim); Minute Entry, *Bonilla v. Peopleconnect, Inc.*, No. 21-cv-00051 (N.D. Ill. April 6, 2021), ECF No. 31 (staying discovery pending resolution of motion to dismiss where defendant raised CDA defense to right of publicity claim); Minute Entry, *Bonilla v. Ancestry.com, Inc.*, No. 20-cv-07390 (N.D. Ill Mar. 23, 2020), ECF No. 28 (same); Joint Discovery Plan and Proposed Order, *Sessa et al v. Ancestry.com, Inc.*, No. 20-cv-02292 (D. Nev. Apr. 23, 2021), ECF No. 30 (same, where parties stipulated to stay); *see also In re Google Digital Advert. Antitrust Litig.*, 2020 WL 7227159, at *3 (“This limited stay of discovery, therefore, does not unduly prejudice Plaintiffs and allows all parties to commence discovery with a better understanding of which claims, if any, they must answer.”). The result should be the same in this case.

CONCLUSION

The pending Motion to Dismiss is potentially case-dispositive and discovery is not necessary to resolve it. Granting the brief stay requested by this Motion will not prejudice Plaintiffs, it will conserve the resources of the parties and this Court, and it will avoid the risk of undue prejudice to Thomson Reuters. Thomson Reuters' Motion should be granted.

DATED: June 21, 2021

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