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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

**REPLY IN SUPPORT OF DEFENDANT
THOMSON REUTERS' MOTION TO
STAY DISCOVERY**

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

INTRODUCTION

It would be both appropriate and fair to grant Thomson Reuters’ Motion to Stay Discovery (“Motion”). The two-part test applied by courts in this district is satisfied: a pending motion is potentially dispositive of the entire case, and can be decided without discovery. A stay is therefore warranted, and good cause exists for its issuance under Rule 26(c).

Plaintiffs cannot seriously dispute that Thomson Reuters satisfies this district’s test to determine whether a stay should issue. They do not argue they would be prejudiced by a stay. And they do not show how this case differs from the many similar cases in which discovery stays have issued. Rather, Plaintiffs simply ignore the applicable test and ask this Court to apply a new test, one that has not been applied even in many of the cases they cite.

The Court should reject Plaintiffs’ proposed approach. Granting Thomson Reuters’ Motion would avoid the burden, distraction, and expense of discovery that might be mooted by the outcome of the pending dispositive motion. In addition, proceeding with discovery before the pending motion is resolved would erode the immunity to which Thomson Reuters is entitled under the First Amendment of the U.S. Constitution and Section 230 of the Communications Decency Act (“CDA”). *See* ECF Nos. 28 at 9-14 & 35 at 8-11 (“Motion to Dismiss”).

There is ample justification to issue a stay for a short and definite duration—pending (1) resolution of the pending Motion to Dismiss or (2) in the event the Court grants the Motion to Dismiss with leave to amend, until there is no longer a pleading challenge that would result in dismissal of this case. Thomson Reuters’ Motion should be granted.

ARGUMENT

A. This district’s two-part test for a stay of discovery applies, and is satisfied here.

In deciding whether to stay discovery pending the outcome of a dispositive motion, courts in this district consider two factors: whether (1) “a pending motion [is] potentially dispositive of the entire case,” and (2) “the pending motion can be decided absent discovery.” *In re Nexus 6p Prods. Liab. Litig.*, No. 17-cv-02185, 2017 WL 3581188, at *1 (N.D. Cal. Aug. 18, 2017) (citations omitted). Both prongs are satisfied here.

1 The first prong is satisfied because the pending Motion to Dismiss targets all claims in the
 2 Complaint on numerous, independent grounds, and therefore “has the potential to be dispositive.”
 3 *Cellwitch, Inc. v. Tile, Inc.*, No. 19-CV-01315, 2019 WL 5394848, at *2 (N.D. Cal. Oct. 22,
 4 2019) (granting discovery stay where “every claim in [the] complaint would be subject to
 5 dismissal” if motion to dismiss were granted); *Malley v. San Jose Midtown Dev. LLC*, No. 20-
 6 CV-01925, 2020 WL 5877575, at *7 (N.D. Cal. Oct. 2, 2020) (same). Plaintiffs do not seriously
 7 dispute this. *Cf.* Opposition (“Opp.”) at 3 (arguing not that the Motion to Dismiss seeks dismissal
 8 of less than all the claims, only that Thomson Reuters defenses are “meritless”).

9 The second prong of this district’s test is also satisfied. Plaintiffs do not dispute this at all.
 10 The Motion to Dismiss is brought under Rule 12(b)(6) and challenges the pleadings. Discovery is
 11 not necessary to its resolution. *See Cellwitch, Inc.*, 2019 WL 5394848, at *2 (holding the
 12 defendant “met its burden under the second prong” when “the Court only need[ed] to look at the
 13 pleadings in order to issue a decision about its motion to dismiss” and that “no other discovery is
 14 needed for the resolution of” the motion to dismiss).

15 **B. The Court should reject Plaintiffs’ proposed new test.**

16 Plaintiffs ask this Court to reject the test applied by other courts in this district, advocating
 17 for a new test, one that would require Thomson Reuters to “convince this Court that its pending
 18 motion will dispose of all claims with prejudice.” Opp. at 1. Plaintiffs do not offer any authority
 19 supporting this test, and Thomson Reuters is unaware of any court in this district having adopted
 20 such a test.

21 This district requires a pending motion to have the “potential” to resolve the entire case,
 22 but does not go so far as to require that the Court be “convinced” that the plaintiff cannot state a
 23 claim for relief. *See, e.g., Reveal Chat Holdco, LLC v. Facebook, Inc.*, No. 20-cv-00363, 2020
 24 WL 2843369, at *1, *3 (N.D. Cal. Apr. 10, 2020) (recognizing that a motion to stay discovery
 25 *may* be granted when the court is “convinced that the plaintiff will be unable to state a claim,” but
 26 rejecting plaintiffs’ attempt to argue the merits of a motion to dismiss in their motion to stay
 27 discovery and instead holding that “[o]n a motion to stay discovery . . . the question is only
 28

whether [the] motion to dismiss is “potentially dispositive of the entire [case]”) (citations omitted). One court in Nevada has stated a stay should issue only if the Court is “convinced” that a plaintiff will be unable to state a claim. *See Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 585 n.9 (D. Nev. 2013). But another Nevada district court recognized that “Federal district courts in the . . . Northern Districts of California apply a two-part test in evaluating whether discovery should be stayed.” *Trzaska v. Int’l Game Tech.*, No. 10-cv-02268, 2011 WL 1233298, at *4 (D. Nev. Mar. 29, 2011) (granting motion to stay discovery after being “convinced” that the complaint was without merit). As to *this* district, Plaintiffs fail to cite a single case imposing their new proposed standard. Instead, they selectively quote decisions where the court was unconvinced by the plaintiffs’ claims, without so much as suggesting that such a showing is required. *See, e.g., Wood v. McEwen*, 644 F.2d 797, 801–02 (9th Cir. 1981) (granting request to stay discovery and noting that a court may issue a protective order where it is convinced that a plaintiff cannot state a claim for relief); *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40–41 (N.D. Cal. 1990) (declining to stay discovery *until a class was certified* where some of the defendants had not even filed a motion to dismiss). In other cases, the courts took a “preliminary peek” at a motion to dismiss to not to determine whether it would succeed, but rather to determine whether it “presents strong arguments,” *Reveal Chat Holdco*, 2020 WL 2843369, at *3; *see also Onn v. Carnival Corp.*, 2021 WL 1267264, at *1 (N.D. Cal. Apr. 6, 2021) (“The Court finds contested issues that prevent it from ruling at this time, before the motion is heard, that it is potentially dispositive of the entire case.”).

In fact, the vast majority of cases Plaintiffs cite acknowledge the two-part test adopted by this district, which is satisfied here. *See, e.g., Onn*, 2021 WL 1267264, at *1 (“Courts in this district have applied a two-pronged test to determine whether discovery should be stayed pending resolution of a dispositive motion. First, a pending motion must be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is directed. Second, the court must determine whether the pending motion can be decided absent additional discovery.”) (cleaned up and citations omitted); *Reveal Chat Holdco*, 2020 WL 2843369, at *2 (same test);

1 *Singh v. Google, Inc.*, No. 16-cv-03734, 2016 WL 10807598, at *2 (N.D. Cal. Nov. 4, 2016)
 2 (same); *San Francisco Tech. v. Kraco Enters. LLC*, No. 11-cv-00355, 2011 WL 2193397, at *3–4
 3 (N.D. Cal. June 6, 2011) (same); *Smith v. Levine Leichtman Cap. Partners, Inc.*, No. C 10-00010,
 4 2011 WL 13153189, at *2 (N.D. Cal. Feb. 11, 2011) (same); *see also Levine*, 2011 WL
 5 13153189, at *1 (“Courts are not limited” to asking whether a complaint is facially deficient,
 6 utterly frivolous or devoid of merit “in exercising their discretion to stay discovery pursuant to
 7 Rule 26(c).”).

8 Nor is there any basis to require that the pending motion result in dismissal “with
 9 prejudice.” Courts in this district have not adopted such a requirement. As “[t]he Supreme Court
 10 has stated . . . plaintiffs must satisfy the pleading requirements of Rule 8 before the discovery
 11 stage, not after it.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 593 (9th Cir. 2014) (quoting *Ashcroft v.*
 12 *Iqbal*, 556 U.S. 662, 678–79 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a
 13 plaintiff armed with nothing more than conclusions.”). Adopting the test Plaintiffs propose would
 14 undermine this fundamental principle, allowing plaintiffs to engage in discovery before stating a
 15 valid claim for relief. *See, e.g., Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 962 (N.D.
 16 Cal. 2017) (Chen, J.) (holding that a plaintiff was “putting the cart before the horse” in requesting
 17 discovery prior to amendment because a plaintiff “must first have a good faith basis (consistent
 18 with Federal Rule of Civil Procedure 11) to make [an] allegation, and only then (if there is a
 19 plausible claim) is it entitled to discovery.”).

20
 21 **C. Thomson Reuters has convincingly established that Plaintiffs’ complaint must be
 22 dismissed with prejudice.**

23 Even if Plaintiffs’ proposed test did apply (it does not), it is satisfied here. Thomson
 24 Reuters has presented multiple, convincing arguments for dismissal, *see* ECF No. 28, and
 25 dismissal with prejudice is appropriate. *See, e.g., Callahan v. Ancestry.com Inc.*, No. 20-cv-
 26 08437, 2021 WL 2433893, at *1 (N.D. Cal. June 15, 2021) (dismissing amended complaint with
 27 prejudice under the CDA and on other grounds in a similar case involving alleged violations of
 28 plaintiff’s right of publicity and the UCL).

1 **First**, the complaint does not establish violation of the right of publicity because
2 allegations that Thomson Reuters sold access to personal information are “categorically different”
3 from the type conduct covered by that tort. *See In re Facebook, Inc., Consumer Priv. User Profile*
4 *Litig.*, 402 F. Supp. 3d 767, 803 (N.D. Cal. 2019) (dismissing right of publicity claim with
5 prejudice where defendant was alleged to have sold Plaintiffs’ personal information without
6 consent).

7 Plaintiffs’ claims under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof.
8 Code § 17200, *et seq.*, fail for the same reason, and also because the California Consumer Privacy
9 Act (“CCPA”), Cal. Civ. Code § 1798.100, *et seq.*, expressly permits the very conduct attacked
10 here, so the conduct at issue is neither unlawful nor unfair. *See* ECF No. 28 at 2, 14-16. No law
11 forbids the sale of access to factual information in these circumstances, so the CCPA’s allowance
12 for laws that are more protective of privacy, *see* ECF No. 34 at 9, does not apply. Indeed, the
13 CCPA provides a “safe harbor” for the sale of factual information unless a consumer has opted
14 out, and further establishes that a private action shall lie in the event of a data breach, which is not
15 alleged here. *See* Cal. Civ. Code § 1798.150(a), (c). “[P]laintiffs may not use the general unfair
16 competition law to assault that harbor.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20
17 Cal. 4th 163, 182, 973 P.2d 527 (1999). Amendment will not cure these fundamental deficiencies
18 in Plaintiffs’ claims. ECF No. 28 at 6-18.

19 **Second**, the relief sought by Plaintiffs is barred by the First Amendment, which prohibits
20 content-based restrictions like those that Plaintiffs seek to impose on Thomson Reuters’ speech—
21 absent a compelling countervailing interest, which is not present here. *See IMDb.com Inc. v.*
22 *Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020); *see also* ECF No. 35 at 8-11; ECF No. 28 at 9-14.
23 And while a lower level of scrutiny would apply to commercial speech, *IMDb.com Inc.*, 962 F.3d
24 at 1122, Plaintiffs do not and could not argue that Thomson Reuters is engaged in commercial
25 speech here, because they do not allege use of their names or likenesses in ads or other publicity,
26 nor do they allege Thomson Reuters used their data to propose a commercial transaction. Rather,
27 they allege that Thomson Reuters sells *access to factual information* about them. *See, e.g., id.*
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(defining “Commercial speech” as that which “does no more than propose a commercial transaction”) (citation omitted).¹ Because the claims Plaintiffs assert seek to unconstitutionally restrict the free dissemination of factual information based solely on its content—i.e., information that relates to Plaintiffs—the First Amendment requires their claims to be dismissed with prejudice.

Third, Section 230 of the CDA imposes yet another barrier to Plaintiffs’ claims, justifying dismissal with prejudice. The CDA immunizes an interactive computer service like Thomson Reuters from any attempt to hold it liable for publishing content provided by others. *See* ECF No. 28 at 19-23; ECF No. 35 at 11-14. The content need not be supplied by Thomson Reuters’ users. And the CDA applies whenever a defendant like Thomson Reuters engages in publisher conduct such as sorting, filtering, or repackaging third party content, which is precisely the conduct alleged to occur here, with respect to the “Search” reports targeted by the Complaint. *See, e.g., Henderson v. Source for Pub. Data*, No. 20-cv-294, 2021 WL 2003550, at *1 (E.D. Va. May 19, 2021) (applying CDA immunity to company that created and sold reports from employers based on “public records from vendors, state agencies, and courthouses”), *appeal filed sub nom. Henderson v. Source for Pub. Data, LP*, No. 21-1678 (4th Cir. June 15, 2021).

Finally, as discussed in Thomson Reuters’ Motion to Dismiss, multiple additional defenses preclude the extraordinary relief Plaintiffs seek. *See generally* ECF No. 28 (moving to dismiss and/or strike on the grounds of copyright preemption and anti-SLAPP).

There are convincing reasons to dismiss Plaintiffs’ claims, with prejudice. Even if the Court were to apply the new standard proposed by Plaintiffs (and the Court should not do so), that standard, too, shows that a stay should issue.

¹ Nor does the fact that Thomson Reuters engages in “private sales” affect the constitutional analysis. *See* ECF No. 34 at 1-2. Speech that informs or disseminates information, including through private or commercial transactions, is still protected by the First Amendment. *New Kids On The Block v. News Am. Publ’g, Inc.*, 745 F. Supp. 1540, 1547 (C.D. Cal. 1990), *aff’d*, 971 F.2d 302 (9th Cir. 1992).

D. There is good cause to issue a stay of discovery.

When a defendant satisfies the two-pronged test applied by courts in this district, it establishes good cause for a discovery stay. A separate determination of good cause is not required, because a defendant should be permitted to “challenge the legal sufficiency of complaints without [being subjected] to discovery.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). But even if an additional showing of good cause were required, it exists here. The Motion to Dismiss raises two independent bases for immunity and, as multiple courts have recognized, immunity presents good cause for a stay. *See* ECF No. 37 at 6-7 (citing cases).

Plaintiffs do not identify a single comparable case where a court (from this district or any other) denied a motion to stay discovery where a motion to dismiss raised either the First Amendment or CDA immunity as defenses. Yet in just the last 18 months, at least four other courts have found good cause to stay discovery in cases nearly identical to this one. *See, e.g.*, 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, *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); 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). Plaintiffs do not mention any of these cases, nor do they discuss why the result should not be the same here.

1 Finally, Plaintiffs do not argue that they would be prejudiced by the requested stay of
 2 discovery.² Nor could they. This case is in its earliest stages and discovery is not required to
 3 resolve the pending Motion to Dismiss. Similarly situated plaintiffs in comparable cases have
 4 stipulated to stay discovery for these very reasons. *See, e.g.*, Plaintiffs’ Statement of Non-
 5 Opposition to Defendants’ Motion to Stay Discovery Pending Resolution of Their Motion to
 6 Dismiss, *La Fronza v. Peopleconnect, Inc.*, No. 21-cv-00280 (N.D. Ill. July 7, 2021), ECF No. 55
 7 (“Though Plaintiffs disagree with the substantive arguments raised in [the motion to dismiss] . . .
 8 Plaintiffs do not believe they will be prejudiced by a brief stay of discovery.”); Minute Entry,
 9 *Sessa v. Ancestry.com Operations Inc.*, No. 20-cv-02292 (D. Nev. Apr. 23, 2021), ECF No. 30
 10 (“The Court will construe [the joint discovery plan] as a stipulation to stay discovery, and that
 11 Motion is Granted.”).

12 CONCLUSION

13 There is good cause for a stay of discovery. For the reasons stated above, and in its
 14 motion, Thomson Reuters respectfully asks the Court to grant its Motion to Stay Discovery.
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20 ² The cases Plaintiffs cite regard “successive motions to dismiss.” Opp. at 1 n.1. By citing
 21 these cases, Plaintiffs seem to suggest that Thomson Reuters would somehow be barred from
 22 moving to dismiss any amended complaint. That, of course, is not the law. *See Fed. Agric. Mortg.*
 23 *Corp. v. It’s A Jungle Out There, Inc.*, No. C 03-3721, 2005 WL 3325051, at *5 (N.D. Cal. Dec.
 7, 2005) (“[A] Rule 12 defense that becomes available because of new matter in the amended
 complaint may be asserted by motion.”) (citation omitted).

24 Plaintiffs also assert that the language used in Thomson Reuters’ Motion to Stay
 25 Discovery would result in a stay that is “potentially lengthy and indeterminate.” Opp. at 5. But
 26 other courts have accounted for the possibility of amendment via the very language proposed by
 27 Thomson Reuters here. *See Malley*, 2020 WL 5877575, at *7 (granting motion asking that “(1)
 28 the Court stay discovery until it issues a ruling on Defendants’ Motions to Dismiss, or (2) in the
 event the Court grants the Motions with leave to amend, the Court stay discovery until there is no
 longer a pleading challenge that would result in the Court dismissing the case.”). Finally, to be
 clear, Thomson Reuters’ proposed language requests a stay until the Motion to Dismiss is either
 granted and all claims dismissed with prejudice or denied or—if the Motion to Dismiss is granted
 with leave to amend—until any subsequent Rule 12(b)(6) motions are resolved.

1
2 DATED: July 13, 2021

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