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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

IN RE PLAID INC. PRIVACY
 LITIGATION

THIS DOCUMENT RELATES TO:
 ALL ACTIONS

Master Docket No.: 4:20-cv-03056-DMR

**OPPOSITION TO DEFENDANT PLAID
 INC.'S ADMINISTRATIVE MOTION
 TO CONTINUE CASE MANAGEMENT
 CONFERENCE**

Hon. Donna M. Ryu
 Action Filed: May 4, 2020
 Trial Date: None Set

1 **I. INTRODUCTION**

2 Plaid’s motion to continue the October 7, 2020 Initial Case Management Conference (“CMC”) and
 3 stay discovery—wrongly styled as an “Administrative Motion”¹—should be denied as seeking delay for
 4 delay’s sake. Plaid has not met its heavy burden to show that its motion to dismiss will resolve any, let
 5 alone all, of the issues in the case—especially given the disputed factual issues at the core of the case
 6 (and that pervade Plaid’s motion).

7 Plaintiffs allege that Plaid collects consumers’ highly personal information by accessing—and then
 8 secretly monitoring—consumers’ bank account transactions. Plaid fails to obtain consumers’ consent for
 9 this conduct, regularly going so far as to disguise itself as a financial institution. Plaintiffs also allege
 10 that Plaid benefits from its systematic intrusion into consumers’ privacy to the detriment of consumers
 11 in the form of judicially-recognized privacy and dignitary violations and economic harm. Dkt. No. 61,
 12 Compl. at ¶¶ 1-7, 26-244 (“Compl.”). The Complaint is based on Plaintiffs’ thorough investigation that
 13 relied, among other sources, on technical processing information, interviews, industry presentations,
 14 responses to government requests for information, websites and user experience data, historical blog
 15 posts (at least one that Plaid has now deleted), press articles, and the experiences of multiple consumers.

16 Plaid’s motion to dismiss (“MTD”) largely ignores these allegations and their bases, relies on fact-
 17 based (and procedurally misplaced) arguments, and otherwise asserts that the detailed and
 18 contextualized materials Plaintiffs rely on do not mean what they say. Dkt. No. 78. These are classic
 19 arguments necessitating the development of an adequate factual record to see who is right. Plaid
 20 practically admits as much. Motion at 3 (asking this Court to “disregard[]” the allegations because its
 21 own version of facts “contradict[s] Plaintiffs’ claims”).

22 Finally, a stay will prejudice Plaintiffs: memories fade with time, and third-party discovery may be
 23 lost, while Plaid’s misconduct continues. Plaid, however, will suffer no prejudice from participating in
 24 standard steps to organize and proceed expeditiously with the litigation, and has ample options if any
 25 particular discovery request is, in its view, objectionable.

26 ¹ Plaid’s request to stay discovery and modify deadlines set by the Federal Rules is not “the sort of
 27 minor administrative matter” that justifies the filing of an Administrative Motion. *See, e.g., Morgenstein*
 28 *v. AT&T Mobility LLC*, 2009 WL 3021177, at *2 (N.D. Cal. Sept. 17, 2009) (stay request inappropriate);
Grove v. Wells Fargo Fin. Cal., Inc., 606 F.3d 577, 582 (9th Cir. 2010) (request that fails to comport
 with local rules may be summarily denied). Plaid’s motion can be denied for this reason alone.

1 **II. ARGUMENT**

2 **A. Legal Standard: A Heavy Burden to Justify a Stay.**

3 “Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6)
4 would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly
5 at odds with the need for expeditious resolution of litigation.” *Gray v. First Winthrop Corp.*, 133 F.R.D.
6 39, 40 (N.D. Cal. 1990); *Allen v. Protective Life Ins.*, No. 20-0530, 2020 WL 5074021, at *2 (E.D. Cal.
7 Aug. 27, 2020) (“delaying or prolonging discovery can create unnecessary litigation expenses and case
8 management problems”). “A party seeking a stay of discovery carries the heavy burden of making a
9 ‘strong showing’ why discovery should be denied.” *Gray*, 133 F.R.D. at 40 (citation omitted); *see*
10 *Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002) (*quoting Wood v. McEwen*, 644 F.2d 797, 801
11 (9th Cir. 1981)) (stay warranted only when no factual issues are raised by the motion to dismiss,
12 discovery is not required to address issues raised by the motion to dismiss, and the court is “convinced
13 that the plaintiff will be unable to state a claim for relief”). Courts commonly use a two-prong test:

14 A moving party meets the good cause requirement of Federal Rule of Civil Procedure 26(c) when
15 the Court finds (1) the pending motion is potentially dispositive of the entire case, and (2) it can
16 be decided absent additional discovery.... The moving party must show a particular and specific
need for the protective order, as opposed to making stereotyped or conclusory statements.

17 *Al Otro Lado v. Nielsen*, No. 17-2366, 2018 WL 679483, at *2 (S.D. Cal. Jan. 31, 2018); *see also, e.g.,*
18 *Pac. Lumber Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 220 F.R.D. 349, 351 (N.D. Cal. 2003)
19 (denying motion to stay).² Even if some claims are or may be dismissed, the possibility of amendment,
20 which courts grant liberally, renders a motion non-dispositive. *See Singh v. Google, Inc.*, No. 16-03734,
21 2016 WL 10807598, at *2 (N.D. Cal. Nov. 4, 2016) (denying motion because “the Court would consider
22 whether leave to amend should be granted, rendering Google’s motion not dispositive.”); *Nat’l Union*
23 *Fire Ins. Co. of Pittsburgh v. Res. Dev.*, No. 10-01324, 2010 WL 3746290, at * 1 (N.D. Cal. Sept. 18,
24 2010) (same).

25 **B. Plaid’s Motion to Dismiss Will Not Dispose of this Case.**

26 In applying the two-factor test, courts take only a “preliminary peek” at the merits of the pending

27 ² In *Nielsen*, cited by Plaid, the court granted the stay because, unlike here, there was an organizational
28 plaintiff that lacked standing to represent individual victims, and the plaintiff agreed the motion to
dismiss presented pure and dispositive questions of law.

1 motion to dismiss. *In re Nexus 6P Prod. Liab. Litig.*, No. 17-02185, 2018 WL 3036734, at *1-2 (N.D.
 2 Cal. June 19, 2018) (citation omitted). Here, Plaid's arguments confirm that its motion is non-dispositive
 3 because they are intertwined with factual disputes that warrant the development of a full record. Even if
 4 the Court were to dismiss any claim, Plaintiffs would and could seek leave to amend at this early stage.
 5 Plaid's specific arguments are addressed below:

- 6 • **Timeliness.** Plaid concedes that multiple Plaintiffs bring timely claims. MTD at 15; Compl. at ¶¶
 7 100, 111, 178 (Plaintiffs' data was first accessed as recently as 2019 and 2020). These Plaintiffs are
 8 well within *any* statute of limitations for *any* claim. As to others, Plaid's deceptive concealment of
 9 its true purpose and conduct, to say nothing of its ongoing misconduct by continually accessing
 10 consumers' data long after their first log-in, creates factual issues as to all Plaintiffs. Compl. at ¶¶
 11 239-44 (fact-based tolling, concealment, and estoppel).
- 12 • **Connecting through Plaid.** Plaid effectively concedes, as it must, that it collected data from
 13 Plaintiffs. Motion at 2 ("even if [Plaintiffs] did connect through Plaid . . ."). Yet Plaid at the same
 14 time asserts the opposite: that Plaintiffs somehow failed to allege that Plaid connected to Plaintiffs'
 15 bank accounts (in Plaid's misleading phrasing, that they "used Plaid" to link to their bank accounts).
 16 This is readily belied by the pleadings. In addition to the specific allegations about Plaid's role in
 17 connecting to banks when consumers use the apps at issue in the case (*see, e.g.*, Compl. at ¶¶ 3-7,
 18 26-31, 39, 66-77), Plaintiffs alleged (among other things): details about the specific Plaid-using app,
 19 such as Venmo, that they signed up for and when they signed up; the specifics of the process of
 20 linking to a bank;³ what each Plaintiff understood and intended at the time of log-in⁴ (versus the
 21 reality of what Plaid was doing); what each Plaintiff would have done had they known the truth; how
 22 the Plaintiff was injured; and details about other bank accounts linked to the Plaintiff's account, such
 23 as those of minor children, that Plaid also accessed. All Plaintiffs, contrary to Plaid's suggestion
 24 otherwise, also demand that Plaid purge the data about them and the Class. Compl. at ¶ 7 and Prayer
 25 for Relief, D. Notably, if Plaid disputes that any particular Plaintiff accessed their bank through Plaid
 when using one of Plaid's apps, *which Plaid has stopped short of claiming*, and contrary to the
 pleading, it can develop the record consistent therewith.
- **Standing.** Plaid argues that its challenge to standing gives its motion extra (or any) heft. Not so.
 Here, Plaid's specific challenge to standing is intertwined with its defense on the merits of a core
 factual issue requiring a record: whether Plaintiffs' privacy and dignitary interests have been
 invaded. MTD at 12-14. Likewise, Plaintiffs have alleged various kinds of economic harm, *see*
 Compl. at ¶¶ 208-235, and Plaid's unjust enrichment establishes standing for the Plaintiffs whose
 data Plaid used. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 600 (9th Cir. 2020)
 ("California law recognizes that individuals maintain an entitlement to unjustly earned profits, to
 establish standing"). Plaid's purported causation challenge simply repeats, in another guise, the false
 suggestion that Plaintiffs do not claim Plaid accessed their accounts. Finally, Plaid's conclusory

26 ³ *E.g.*, "Ms. Anderson does not recall being prompted to read any privacy policy from Plaid during the
 27 process of logging into her bank account and does not recall having ever read any privacy policy from
 Plaid when she linked her bank account." Compl. at ¶ 101.

28 ⁴ *E.g.*, "When [Anderson] was prompted in the Venmo and Cash App apps to log into her bank account,
 she believed she was doing so through an official connection with her bank . . . [s]he was unaware that
 she was providing her login credentials to Plaid." Compl. at ¶ 102.

redressability argument runs counter to decades, if not centuries, of common-law protections. Violations of privacy rights satisfy standing, and have “long been actionable at common law.” *Id.* at 598 (internal quotations omitted). Plaid also ignores that Congress and the State of California have codified specific types of privacy violations. Compl. at ¶¶ 270-312, 330, 349-378. Standing, which looks to *allegations* and does not require resolving merits disputes, is handily satisfied. See *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119 (9th Cir. 2020).

- **Remedies.** Plaid’s argument that Plaintiffs will be made whole by remedies at law, and are not entitled to equitable remedies, is wrong for various reasons, among them that various of Plaintiffs’ claims allow monetary equitable relief such as restitution and injunctive relief (*see, e.g.*, Compl. at ¶¶ 336-337), to say nothing of its being inconsistent with its standing argument. Yet this is not the juncture to fashion remedies, and Plaid’s argument is irrelevant.
- **Conclusory 12(b)(6) arguments.** Plaid claims that Plaintiffs do not adequately state their claims, but declines to raise specifics. Tellingly, as to various claims, Plaid disputes the allegations *on the merits* but cannot claim that any element is not alleged. *See, e.g.*, MTD at 33 (claiming the anti-phishing law should not apply because Plaid “provides valuable services to end users at their request and with their permission”). Again, these are factual defenses contrary to well-pleaded allegations, not valid legal challenges. Plaintiffs will carefully respond to all of Plaid’s arguments in the opposition, including those where Plaid wrongly states that an element of a claim is not properly alleged. Overall, though, even if Plaid were correct about one or two claims—and *it is not*—the case would go forward.
- **Consent.** Finally, Plaid drops all pretense of making legal arguments and simply proffers as a factual matter that even if it takes consumers’ private data, the factual record shows consumers consented to this. Motion at 3. Plaid repeats this bald assertion dozens of times throughout the MTD, even while begging the question by pointing to irrelevant privacy policies and app screens that were not even in place when Plaintiffs’ data was first accessed. Plaid thereby acknowledges the need for a record to determine the issues in this case.

Accordingly, Plaid has not—and cannot—demonstrate that its motion to dismiss is potentially dispositive of the entire case, and the motion for continuance should be denied. *See, e.g., Garcia v. Enter. Holdings*, No. 14-0596, 2014 WL 4623007, at *3 (N.D. Cal. Sept. 15, 2014) (denying motion because “Defendants have not convinced the Court that their motion [to dismiss] is meritorious or that it will otherwise be granted without leave to amend, which courts grant liberally.”); *Power Integrations, Inc. v. Park*, No. 16-02366, 2016 WL 10859441, at *2 (N.D. Cal. Dec. 2, 2016) (denying motion because “it is unclear whether Park’s motion to dismiss will be dispositive of the entire case”).

C. A Stay Will Prejudice Plaintiffs.

It is standard practice in this District to hold the Initial CMC before the pleadings are resolved. The Federal Rules provide that a pretrial conference expedites disposition or settlement of the action, prevents delays and discourages waste, and improves the quality of the trial. Fed. R. Civ. P. 16(a).

Plaid's own concessions and the factual nature of its arguments show that no deviation from the rules is warranted. To the contrary, Plaid's ongoing attempts to delay the CMC and stay discovery are needlessly preventing key early steps to ensure discovery is efficient.

Further, a stay would significantly prejudice Plaintiffs. Over time memories fade and evidence is lost. Plaid touts its commitment to data preservation, but ignores that discovery will be sought from third parties. Plaid also argues that discovery will be expensive and time-consuming, but participating in discovery is not prejudice,⁵ and Plaid can make specific objections to specific discovery in the context of a meet and confer and in accordance with this Court's standing order on discovery disputes. Finally, delaying discovery until well into 2021 would be particularly prejudicial given the continuing harm and important injunctive relief that Plaintiffs seek.

D. Plaid's Cases Are Distinguishable.

Notably, Plaid does not cite to any case with even roughly comparable facts and procedural posture. Many of its cases involve *pro se* plaintiffs (*e.g.*, *Carter, Gibbs*), including vexatious litigants (*Ou-Young*). In many or most of Plaid's other cases, the non-moving party agreed to or didn't contest the stay (*e.g.*, *Scandlon, Antman, Thomas*), or the court had already dismissed the complaint (finding the motion to dismiss to be meritorious) (*e.g.*, *Camacho, Perry*). In yet another (*Azad*), the court had an acknowledged practice of deferring the CMC. Plaintiffs respectfully submit that this Court should instead adopt the framework used by the majority of the courts that disfavor a stay. Under that framework, this case should move forward.

III. CONCLUSION

For the reasons set forth above and in the accompanying Declaration of Shawn M. Kennedy, Plaintiffs respectfully request that Plaid's request for a stay, and related request to vacate the CMC, be denied, and that Plaid be ordered to engage in a Rule 26(f) conference immediately to permit the CMC scheduled for October 7, 2020 to go forward, or alternatively for a CMC to go forward on a date soon thereafter at the convenience of the Court.

⁵ See, *e.g.*, *Huene v. U.S. Dep't of Treasury, I.R.S.*, No. 11-2110, 2013 WL 417747, at *8 (E.D. Cal. Jan. 31, 2013) ("That discovery may involve inconvenience and expense is not sufficient to support a stay of discovery. Rather, a stay of discovery should only be ordered if the court is convinced that a plaintiff will be unable to state a claim for relief.").

1 Dated: September 18, 2020

2 Respectfully submitted,

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