

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 14, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GLEN MORGAN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

TWITTER, INC.,

Defendant.

No. 2:22-cv-00122-MKD

ORDER GRANTING
DEFENDANT’S MOTION FOR
PROTECTIVE ORDER

ECF No. 44

Before the Court is Defendant’s Motion for Protective Order, ECF No. 44.

The Court has reviewed the record and is fully informed. For the reasons set forth below, the Court grants Defendant’s Motion for Protective Order, ECF No. 44.

BACKGROUND

A. Procedural Posture

Plaintiff filed suit on May 3, 2022, in Spokane County Superior Court. ECF

1 No. 1 at 38-51.¹ Defendant removed the action to federal court on May 19, 2022.
2 *See* ECF No. 1. On May 26, 2022, Plaintiff moved to remand the matter back to
3 state court. *See* ECF No. 8. In the Motion to Remand, Plaintiff advised why he
4 filed this action, when a nearly identical case—*Gray v. Twitter, Inc.*, No. 2:20-cv-
5 01389-LK—was already pending in the Western District of Washington as of
6 September 21, 2020. ECF No. 8 at 5-7. On August 30, 2022, Plaintiff filed a
7 notice advising that the plaintiff in *Gray v. Twitter* voluntarily dismissed that
8 action. ECF Nos. 27, 27-1; *Gray v. Twitter, Inc.*, No. 2:20-cv-01389-LK, ECF No.
9 36.

10 On February 21, 2023, without seeking leave, Plaintiff filed a first amended
11 complaint in this action. ECF No. 35. On May 2, 2023, the Court held a status
12 hearing in the above-captioned matter. *See* ECF Nos. 36, 38. At that hearing,
13 Defendant did not object to Plaintiff’s filing of an amended complaint.

14 On May 5, 2023, the Court denied Plaintiff’s Motion to Remand and ordered
15 Defendant to answer or otherwise respond to Plaintiff’s first amended complaint no
16 later than 30 days after the order’s issuance. ECF No. 39 at 35. On June 2, 2023,
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19 ¹ Throughout this Order, the Court’s citations reference the page numbers included
20 in the digital stamp provided by CM/ECF.

1 Defendant filed a motion to dismiss² and a motion for protective order. *See* ECF
2 Nos. 43, 44. Plaintiff objects to the protective order. *See* ECF No. 50.

3 **B. Plaintiff’s Claims for Relief**

4 Plaintiff brings this civil action pursuant to the Criminal Profiteering Act,
5 RCW 9A.82.010, 9A.82.100. ECF No. 35 at 4 ¶ 14. A plaintiff may bring a civil
6 suit under the Criminal Profiteering Act if the plaintiff “sustains injury to his or her
7 person, business, or property by an act of criminal profiteering that is part of a
8 pattern of criminal profiteering activity[.]” RCW 9A.82.100(1)(a). “Criminal
9 profiteering” is defined as “any act, including any anticipatory or completed
10 offense, committed for financial gain, that is chargeable or indictable under the
11 laws of the state in which the act occurred and . . . punishable as a felony and by
12 imprisonment for more than one year, regardless of whether the act is charged or
13 indicted.” RCW 9A.82.010(4). This includes the unauthorized sale or
14 procurement of telephone records in violation of RCW 9.26A.140. RCW
15 9A.82.010(4)(nn).

16 Plaintiff asserts two theories under which Defendant has violated RCW
17 9.26A.140. First, Plaintiff alleges that Defendant unlawfully obtained his and
18 other users’ cell phone numbers which he and other users register with a Twitter
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20 ² Defendant’s Motion to Dismiss, ECF No. 43, will be addressed by separate order.

1 account. *See* ECF No. 35 at 20-21 ¶¶ 115-126. Second, he asserts that Defendant
2 sold that information to third-party advertisers from which Defendant illegally
3 profited. *See* ECF No. 35 at 21-23 ¶¶ 127-139.

4 LEGAL STANDARD

5 Fed. R. Civ. P. 26(c) provides the Court with “discretion to limit discovery
6 ‘for good cause . . . to protect a party or person from annoyance, embarrassment,
7 oppression, or undue burden or expense . . .’” *Edmonds v. Amazon.com, Inc.*, No.
8 C19-1613JLR, 2020 WL 8996835, at *1 (W.D. Wash. Mar. 6, 2020) (quoting Fed.
9 R. Civ. P. 26(c)). Generally, a pending motion to dismiss does not constitute good
10 cause for staying discovery. *See id.*; *see also Gray v. First Winthrop Corp.*, 133
11 F.R.D. 39, 40 (N.D. Cal. 1990) (“Had the Federal Rules contemplated that a
12 motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules
13 would contain a provision to that effect.”). However, a district court does “not
14 abuse its discretion by staying discovery pending the outcome of [a] dispositive
15 motion” when good cause is shown. *In re Hayes*, 465 F. App’x 684, 685 (9th Cir.
16 2012) (not reported); *Dorian v. Amazon Web Servs., Inc.*, No. 2:22-CV-00269,
17 2022 WL 3155369, at *1 (W.D. Wash. Aug. 8, 2022) (citing *Little v. City of*
18 *Seattle*, 863 F.2d 681, 685 (9th Cir. 1988)) (“District courts have broad discretion
19 to stay discovery pending resolution of potentially dispositive motions.”); *see*
20 *DiMartini v. Ferrin*, 889 F.2d 922, 926 (9th Cir. 1989), *amended by*, 906 F.2d 465

1 (9th Cir. 1990).

2 “A party seeking a stay of discovery carries the heavy burden of making a
3 ‘strong showing’ why discovery should be denied.” *Gray*, 133 F.R.D. at 40
4 (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).” Good
5 cause may exist to stay discovery when there are “no factual issues require
6 immediate exploration and the motions to dismiss present purely questions of law.”
7 *In re Hayes*, 465 F. App’x at 685. A stay of discovery is generally only warranted
8 “when the dispositive motion in question raises preliminary ‘threshold’ issues that
9 may preclude a court from reaching the merits of a claim.” *Dorian*, 2022 WL
10 3155369, at *1; *see, e.g., Little*, 863 F.2d at 685 (immunity of a defendant); *Jeter v.*
11 *President of the United States*, 670 F.App’x 493, 494 (9th Cir. 2016) (jurisdiction)
12 (not reported); *Zeiger v. Hotel California by the Sea LLC*, No. C21-1702-TL-SKV,
13 2022 WL 1499670, at *2 (W.D. Wash. May 12, 2022) (enforceability of an
14 arbitration clause); *Ahern Rentals Inc. v. Mendenhall*, No. C20-0542-JCC, 2020
15 WL 8678084, at *1 (W.D. Wash. July 9, 2020) (venue).

16 Some district courts in the Ninth Circuit apply a two-part test when
17 “deciding whether to impose a stay pending disposition of a motion.” *Dorian*,
18 2022 WL 3155369, at *1 (citing *Roberts v. Khounphixay*, No. C18-0746-MJP-
19 BAT, 2018 WL 5013780, at *1 (W.D. Wash. Oct. 16, 2018)). “First, the pending
20 motion must be dispositive of the entire case.” *Roberts*, 2018 WL 5013780, at *1

1 (citing *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500,
2 503 (D. Nev. 2013)). Second, the district court “must consider whether the
3 pending motion can be decided without additional discovery.” *Id.* When a district
4 court applies this test, it “take[s] a preliminary peek at the merits of the dispositive
5 motion to assess whether a stay is warranted.” *Id.* The purpose of so-called
6 “preliminary peek” is to determine whether the motion can be decided as a matter
7 of law. *Id.*; *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (noting the
8 district court has the authority to stay discovery “*when it is convinced* that the
9 plaintiff will be unable to state a claim for relief” (emphasis added)).

10 DISCUSSION

11 Defendant argues that a stay of discovery is appropriate here for two
12 reasons. First, this action is substantially similar to *Gray v. Twitter* and the
13 magistrate judge recommended dismissing that action with prejudice. ECF No. 44
14 at 6; *Gray v. Twitter, Inc.*, No. 2:20-cv-01389-LK, ECF No. 22. The Report and
15 Recommendation indicates that there was not enough information before the court
16 for it to determine that Defendant is a telecommunications company or that a
17 telephone number is a telephone record. *Id.* at 12-14-17. As mentioned above, the
18 plaintiff voluntarily dismissed that action before a district court judge could
19 address the Report and Recommendation. Second, Defendant’s motion to dismiss
20 “raises pure questions of law” which “can be fully resolved without discovery.”

1 ECF No. 44 at 6. Given Defendant’s argument, the Court applies the two-part test
2 discussed above.

3 **A. Dispositive Nature**

4 In Defendant’s motion to dismiss, Defendant argues that Plaintiff’s claims
5 fail as a matter of law. *See* ECF No. 43 at 11-24. If Defendant’s motion prevails,
6 the case will be terminated. Accordingly, Defendant’s motion may be dispositive
7 of the above-captioned matter, and the first prong has been satisfied.

8 **B. Preliminary Peek**

9 The Court has taken a preliminary peek at the merits of Defendant’s motion
10 to dismiss to assess whether it can be decided as a matter of law. The Court finds
11 that it can.

12 Defendant argues that Plaintiff’s allegations “‘fails as a matter of law,’
13 because the conduct that ‘Plaintiff accuses [Defendant] of here falls well outside
14 the conduct that Section 140 prohibits.’” ECF No. 44 at 13 (quoting ECF No. 43 at
15 7-8). Defendant’s assertion is based in part on the rationale and conclusion in the
16 Report and Recommendation issued in *Gray v. Twitter*. ECF No. 44 at 6, 9. The
17 Court notes that there was substantial litigation surrounding that Report and
18 Recommendation—including a motion to certify questions to the State Supreme
19 Court—and questions were left unanswered when the plaintiff voluntarily
20 dismissed the action. *See Gray v. Twitter, Inc.*, No. 2:20-cv-01389-LK, ECF Nos.

1 24, 25, 26, 27, 28, 29. However, the Court finds that the Report and
2 Recommendation is instructive given the substantial similarity between the two
3 actions and the motions for the limited purpose at this stage of whether discovery
4 should be stayed pending the disposition of the motion to dismiss. *Compare* ECF
5 No. 44 with *Gray v. Twitter, Inc.*, No. 2:20-cv-01389-LK, ECF No. 17. Given
6 Defendant's motion to dismiss asserts that Plaintiff's claims fail as a matter of law,
7 no additional fact should be necessary for the Court's assessment of Defendant's
8 arguments.

9 CONCLUSION

10 For the reasons discussed above, the Court finds good cause under Fed. R.
11 Civ. P 26(c) to issue a protective order in this matter.

12 Accordingly, **IT IS ORDERED:**

- 13 1. Defendant's Motion for Protective Order, **ECF No. 44**, is
14 **GRANTED**. All discovery and discovery deadlines in this case are
15 **stayed** pending this Court's resolution of Defendant's Motion to
16 Dismiss.

17 **IT IS SO ORDERED.** The District Court Executive is directed to file this
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1 order and provide copies to the parties.

2 DATED August 14, 2023.

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s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES DISTRICT JUDGE

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