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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HA NGUYEN,

Plaintiff,

V.

BMW OF NORTH AMERICA, LLC. AND DOES
1-10,

Defendants.

Case No.: 20CV2432-JLS(BLM)

**ORDER GRANTING DEFENDANT’S EX
PARTE APPLICATION FOR AN ORDER
TO STAY DISCOVERY**

[ECF NO. 22]

Currently before the Court is Defendant’s May 24, 2021 *Ex Parte* Application for an Order to Stay Discovery [ECF No. 22-1 (“Mot.”)] and Plaintiff’s May 26, 2021 opposition to the motion [ECF No. 23 (“Oppo.”)]. For the reasons set forth below, Defendant’s motion is **GRANTED**.

PROCEDURAL BACKGROUND

The above-entitled matter was removed to this Court on December 14, 2020. ECF No. 1. The removal papers included Defendant’s answer to Plaintiff’s complaint alleging statutory violations of California Civil Code sections 1793.2(d), 1794(b), 1791.1, and 1794 and violation of California Business and Professions Code section 17200. ECF Nos. 1-5, 1-9 at 83-94; see also ECF No. 3.

On December 15, 2020, the Court issued a Notice and Order for Early Neutral Evaluation

1 Conference and Case Management Conference. ECF No. 4. The Court held the conferences on
2 January 26, 2021. ECF No. 11. That same day, the Court opened discovery and issued a
3 Scheduling Order Regulating Discovery and Other Pre-trial Proceedings. ECF No. 12.

4 On January 13, 2021, Plaintiff filed a motion to remand that is currently pending. ECF
5 No. 9.

6 On March 8, 2021, Defendant filed a motion to compel arbitration and stay action that is
7 currently pending. ECF No. 16.

8 On April 6, 2021, Plaintiff served written discovery requests, including Interrogatories,
9 Requests for Production, and Requests for Admissions, on Defendant. Mot. at 3; see also ECF
10 No. 22-2, Declaration of David M. Middleton In Support (“Middleton Decl.”) at ¶ 9. The discovery
11 requests are related to Plaintiff’s underlying claims. Id. On May 6, 2021, Defendant served its
12 objections to the requests stating that it was protecting its right to compel arbitration. Middleton
13 Decl. at ¶ 10, Exh. 1.

14 On May 21, 2021, Defendant filed an *Ex Parte* Application for Motion for Leave to File
15 Supplemental Reply that is currently pending. ECF No. 21. On May 24, 2021, Defendant filed
16 the instant motion. Mot.

17 **DEFENDANT’S POSITION**

18 Defendant requests that the Court
19 stay discovery in this case and vacate all future pretrial deadlines set forth in the
20 Court’s January 26, 2021 Scheduling Order Regulating Discovery and Other Pre-
21 Trial Proceedings (“Scheduling Order”) pending the Court’s ruling on BMW NA’s
22 Motion to Compel Arbitration.
23 Mot. at 2. Defendant argues that it should not be required to engage in discovery while the
24 motion to compel arbitration is pending because doing so may waive its right to arbitrate and
25 that “[i]t is neither prudent nor cost effective for BMW NA to engage in discovery while” the
26 motion is pending. Id. at 3-4; see also Middleton Decl. at ¶ 15. Defendant also argues that
27 policy-related reasons support a stay of discovery because a stay “protects the purpose of
28 arbitration.” Id. at 7. Finally, Defendant argues that Plaintiff will not be prejudiced by a stay
and that if the motion to compel arbitration is granted, the Federal Arbitration Act mandates a

1 stay of discovery. Id. at 8.

2 **PLAINTIFF'S POSITION**

3 Plaintiff contends that the motion to stay "amounts to little more than an effort to delay
4 adjudication of this case" and is not warranted. Oppo. at 2. Plaintiff also contends that a stay
5 would be "highly prejudicial" and that the law Defendant relies on in support of its argument
6 concerning waiver of its arbitration rights does not apply to discovery procedures available in
7 arbitration which is the discovery Plaintiff seeks. Id. Plaintiff also contends that Defendant has
8 failed to satisfy the standard required for granting a motion to stay. Id. at 4. Specifically, the
9 pending motion to compel arbitration is not case dispositive and not dispositive "on any issue at
10 which discovery is aimed." Id. at 5. Additionally, the granting or denial of the motion to compel
11 arbitration will not impact the discovery that Plaintiff conducts. Id. Plaintiff further contends
12 that Defendant's arguments regarding the cost and burden of discovery "are unfounded and
13 incorrect" and notes that the Federal Arbitration Act is not controlling of the instant matter. Id.
14 at 5-6.

15 **LEGAL STANDARD**

16 The Federal Rules of Civil Procedure do not automatically stay discovery when a
17 potentially dispositive motion is pending. See Optronic Technologies, Inc. v. Ningbo Sunny
18 Electronic Co., Ltd., 2018 WL 1569811, at *1 (N.D. Cal., Feb. 16, 2018) (quoting Skellerup Indus.
19 v. City of Los Angeles, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995) ("[t]he moving party must show
20 a particular and specific need for the protective order, as opposed to making stereotyped or
21 conclusory statements."); see also Federal Housing Finance Agency v. GR Investments, LLC,
22 2019 WL 2527563, at *1 (D. Nev., June 18, 2019) ("[b]ut the Rules do not provide for an
23 automatic stay of discovery when a potentially dispositive motion is pending. Thus, a pending
24 dispositive motion "is not ordinarily a situation that in and of itself would warrant a stay of
25 discovery.") (quoting Turner Broad. Sys., Inc. v. Tracinda Corp., 175 F.R.D. 554, 556 (D. Nev.
26 1997)); Ocean Garden Products Incorporated v. Blessings Inc., 2020 WL 4284383, at *3 (D.
27 Ariz., July 27, 2020) ("[d]iscovery stays are not automatic.") (quoting Optronic Techs., 2018 WL
28 1569811, at *1). A motion to stay discovery must be supported by good cause and a "strong

1 showing.” See United States v. Dynamic Medical Systems, LLC, 2020 WL 3035219, at *3 (E.D.
2 Cal., June 5, 2020) (quoting Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975)).
3 When deciding whether to grant a stay of discovery, the court must consider the objectives of
4 Fed. R. Civ. P. 1 to ensure a “just, speedy, and inexpensive determination of every action.”
5 Federal Housing Finance Agency, 2019 WL 2527563, at *1 (quoting Tradebay, LLC v. eBay, Inc.,
6 278 F.R.D. 597, 602-603 (D. Nev. 2011)). District courts have “wide discretion in controlling
7 discovery” and that discretion extends to staying discovery upon a showing of “good cause.”
8 Onn v. Carnival Corp., 2021 WL 1267264, at *1 (N.D. Cal., Apr. 6, 2021) (quoting Little v. City
9 of Seattle, 863 F.2d 681, 685 (9th Cir. 1988)); see also Cellwitch, Inc. v. Tile, Inc., 2019 WL
10 5394848, at *1 (N.D. Cal., Oct. 22, 2019) (“The Court has discretion to stay discovery pending
11 the resolution of dispositive motions, including motions to dismiss”).

12 The Ninth Circuit has not established a clear standard for deciding whether to stay
13 discovery when a potentially dispositive motion is pending but many federal district courts in
14 California have utilized a two-part test. Mlejnecky v. Olympus Imaging Am., Inc., 2011 WL
15 489743, at *6 (E.D. Cal. Feb. 7, 2011); see also PC Specialists, Inc. v. Micros Systems, Inc.,
16 2011 WL 3475369, at *4 (S.D. Cal. Aug. 9, 2011) (“Defendant fail[ed] to address the factors the
17 Court must consider in determining whether to . . . stay discovery, *e.g.*, Mlejnecky, 2011 WL
18 489743, at *5-6.”). “First, the pending motion must be potentially dispositive of the entire case,
19 or at least dispositive on the issue at which discovery is aimed. Second, the court must
20 determine whether the pending, potentially dispositive motion can be decided absent additional
21 discovery.” Mlejnecky, 2011 WL 489743, at *6. If either part of the test is not met, discovery
22 should proceed. Id. This two-factor test “requires the court to take a ‘preliminary peek’ at the
23 merits of the pending, potentially dispositive motion to determine whether a stay is granted.”¹
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26 ¹ The “preliminary peek” is not intended to prejudge the outcome of the motion. See Tradebay,
27 278 F.R.D. at 603 (“as the court in Mlejnecky recognized, taking a “preliminary peek” and
28 evaluating a pending dispositive motion puts a magistrate judge in an awkward position. The
district judge will decide the dispositive motion and may have a different view of the merits of
the underlying motion.”).

1 Cellwitch, Inc., 2019 WL 5394848, at *1 (citing Tradebay, 278 F.R.D. at 602).

2 “Other courts in the Ninth Circuit have applied a more lenient standard in determining
3 whether a motion to stay should be granted pending a resolution of a potentially dispositive
4 motion.” Tradebay, 278 F.R.D. at 602 (citing GTE Wireless, Inc. v. Qualcomm, Inc., 192 F.R.D.
5 284, 286 (S.D. Cal. 2000) (stating the court should “take a preliminary peek at the merits of the
6 allegedly dispositive motion to see if on its face there appears to be an *immediate and clear*
7 *possibility* that it will be granted.” (citing Feldman v. Flood, 176 F.R.D. 651, 652 (M.D. Fla. 1997)
8 (emphasis in original))). In a third approach, courts have analyzed several factors on a case-
9 by-case basis, including

10 the type of pending dispositive motion and whether it is a challenge as a matter
11 of law or to the sufficiency of the complaint allegations; the nature and complexity
12 of the action; whether counterclaims and/or cross-claims have been asserted;
13 whether some or all of the defendants join in the request for a stay; the posture
14 or stage of the litigation; the expected extent of discovery in light of the number
15 of parties and complexity of the issues in the case; and any other relevant
16 circumstances.

16 Id. (citing Skellerup, 163 F.R.D. at 600-01). These cases find that discovery should be stayed
17 “only when there are no factual issues in need of further immediate exploration, and the issues
18 before the Court are purely questions of law that are potentially dispositive.” Id. (quoting
19 Hachette Distribution v. Hudson County News Co., 136 F.R.D. 356 (E.D. N.Y. 1991)).

20 **DISCUSSION**

21 Despite Defendant’s failure to address the two-part test or any other test in its motion,
22 the two-part test, as well as other relevant considerations, support a discovery stay. Initially,
23 the “preliminary peek” at the pending motion to remand and motion to compel arbitration reveal
24 that they are potentially dispositive of the entire case. See Arik v. Meyers, 2020 WL 515843, at
25 *1 (D. Nev., Jan. 31, 2020) (“granting a motion to compel arbitration does not simply change
26 the forum for resolution of a dispute, it changes the nature and process of that resolution.
27 Potentially depriving a party of the ability to litigate in a court renders a motion to compel
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1 arbitration dispositive for purposes of determining whether to stay discovery”²; see also
2 Wilmington Savings Fund Society FSB v. El, 2019 WL 6310718, at *2 (D. Nev., Nov. 25, 2019)
3 (staying discovery after taking a preliminary peek at the pending motion to remand).³

4 Second, the pending motions are fully briefed and under submission and can be decided
5 without additional discovery.

6 Third, additional considerations support the stay. The requested stay will not unduly
7 prejudice Plaintiff as the motion to remand and motion to compel arbitration are both fully
8 briefed and under submission and any stay is likely to be brief.⁴ In addition, the case has only
9 been pending for six months so a brief delay will not greatly prejudice Plaintiff. On the other
10 hand, requiring Defendant to engage in discovery that may not be permitted or accepted later
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12 ² See also District Council 16 International Union of Painters and Allied Trades, Painters Local
13 No. 3 v. LML Enterprises, Inc., 2013 WL 3802837, at *2 (N.D. Cal., June 14, 2013) (noting that
14 “District courts are divided as to whether a motion to compel arbitration is dispositive. Some
15 have found the motion dispositive while “[o]thers have found that a motion to compel arbitration
16 is not a dispositive motion.”) (citing Amisil Holdings Ltd. v. Clarium Capital Mgmt., 622 F.Supp.2d
17 825, 827 n.1 (N.D.Cal.2007) (noting split among district courts and referring the motion with a
18 recommendation to a district judge “in an abundance of caution”); Flannery v. Tri-State Div.,
19 402 F.Supp.2d 819, 821 (E.D. Mich. 2005) (finding a motion to compel arbitration dispositive
20 because “the effect of the magistrate judge’s order is to terminate the litigation in this Court and
21 transfer the case to another forum for a determination of the merits”); and Herko v. Metropolitan
22 Life Ins. Co., 978 F. Supp. 141, 142 n.1 (W.D.N.Y.1997) (concluding that a motion to compel
23 arbitration is not a dispositive motion because “the FAA provides that there is no final exercise
24 of Article III power until after arbitration is complete and the arbitrator’s decision is either
25 affirmed, modified, or vacated by the district court judge where the actions remain lodged”).

26 ³ See also Long v. Aurora Bank, FSB, 2012 WL 2076842, at *2, n1. (D. Nev., June 8, 2012)
27 (“[t]he Ninth Circuit has not taken a position on whether a motion to remand is dispositive.
28 Other Circuit Courts of Appeal that have considered the issue have held that motions to remand
are dispositive. The reasoning is that motions to remand are equivalent to an order of dismissal
because they determine the availability of a federal forum.”) (citing Williams v. Beemiller, Inc.,
527 F.3d 259, 264–66 (2d Cir.2008); Vogel v. U.S. Office Products Co., 258 F.3d 509, 514–17
(6th Cir.2001) (noting a lack of decisions from other circuits); First Union Mortgage Corp. v.
Smith, 229 F.3d 992, 994–97 (10th Cir. 2000); In re U.S. Healthcare, 159 F.3d 142, 145–46 (3d
Cir.1998)).

⁴ The Court recognizes that there is a pending motion to file a supplemental reply, which
Defendant filed on May 21, 2021 and Plaintiff opposed on May 26, 2021. ECF Nos. 21 and 24.


1 if the matter is sent to arbitration would be prejudicial to Defendant. A stay also will allow the
2 Court to avoid any potentially unnecessary judicial expenditures such as discovery disputes that
3 may or may not be relevant if the matter is remanded or sent to arbitration.

4 **CONCLUSION**

5 For the reasons set forth above, Defendant's request to stay discovery is **GRANTED**. The
6 Court hereby **STAYS** discovery and **ORDERS** the parties to contact Judge Major's Chambers
7 within three (3) days of Judge Sammartino issuing Orders on the pending motion to remand
8 and motion to compel arbitration. See ECF Nos. 9 & 16.

9 **IT IS SO ORDERED.**

10 Dated: 6/4/2021

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12 Hon. Barbara L. Major
13 United States Magistrate Judge
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