

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Brenna Schrader,

 Plaintiff,

 v.

Wynn Las Vegas, LLC, et al.,

 Defendants.

Case No. 2:19-cv-02159-JCM-BNW

ORDER

 Before the Court are two motions to stay discovery. Defendant Alan Wynn filed a motion to stay discovery. ECF No. 101. Defendant Maurice Wooden joined this motion. ECF No. 102. Plaintiff opposed the motion (ECF No. 124), and Mr. Wynn replied (ECF No. 135). Defendants Wynn Resorts, Limited (WRL) and Wynn Las Vegas, LLC (WLV) (collectively, the “entity defendants”) also filed a motion to stay discovery. ECF No. 106. Plaintiff opposed the motion (ECF No. 124), and the entity defendants replied (ECF No. 132).

I. Background

 This is a putative class action in which Plaintiff seeks to represent nine subclasses of plaintiffs. ECF No. 90. Plaintiff generally alleges as follows: Defendants engaged in decades of sexual misconduct at WLV and WR and covered up this conduct. Many current and former female employees, including Plaintiff, were sexually harassed, sexually assaulted, and forced into sexual servitude. More specifically, Plaintiff alleges that she and others were forced to perform sex acts on Mr. Wynn and VIP clients at WR and WLV. This, and other conduct, created a hostile work environment. It also had the effect of denying these female employees the same terms and conditions of employment as male employees.

1 As a result of this conduct, Plaintiff filed suit. ECF No. 1-1. Defendants moved to dismiss.
2 ECF Nos. 35, 36, 39. Defendants simultaneously sought to stay discovery, which Plaintiff did not
3 oppose. ECF No. 38, 40, 42, 56. Accordingly, this Court granted Defendants' motion and stayed
4 discovery. ECF No. 57. The Court ordered the parties to file a scheduling order within 14 days
5 after the motions to dismiss were decided. *Id.* at 2.

6 Plaintiff then moved to amend her complaint. ECF No. 69. This Court recommended that
7 certain claims not be allowed to proceed and ordered other claims to proceed. ECF No. 81.
8 Defendants objected. ECF Nos. 82-85. The district judge assigned to the case reviewed the
9 objections, sustaining some and overruling others. ECF No. 89. Ultimately, the following claims
10 survived: (1) Plaintiff's Title VII claim against the entity defendants; (2) Plaintiff's Nevada RICO
11 claim against all Defendants; (3) Plaintiff's intentional infliction of emotional distress (IIED)
12 claim against the entity defendants and Mr. Wynn; and (4) Plaintiff's civil conspiracy claim
13 against Mr. Wynn. *Id.* at 22. The district judge also denied the motions to dismiss as moot. *Id.*

14 Once the amended complaint was filed, Defendants again moved to dismiss certain
15 claims. ECF Nos. 98, 99, 103. Mr. Wynn and Mr. Wooden each moved to dismiss all remaining
16 claims against them. ECF Nos. 98, 99. The entity defendants moved to dismiss the Nevada RICO
17 claim against them, conceding that the Title VII and IIED claims would proceed. *See* ECF No.
18 103.

19 Because there are several motions to dismiss pending, Defendants moved to continue the
20 stay of discovery. ECF Nos. 101, 106. Defendants make two general arguments regarding why
21 discovery should be stayed. First, Defendants argue that under *Kor Media Group, LLC v. Green*,
22 294 F.R.D. 579 (D. Nev. 2013) and similar cases, a discovery stay is appropriate because
23 dispositive motions are pending that are likely to succeed. *See* ECF Nos. 101, 106. Second,
24 Defendants argue that under Federal Rule of Civil Procedure 1, a continuation of the discovery
25 stay is appropriate based on the complexity and current procedural posture of this case. *See* ECF
26 Nos. 106, 132.

27 Plaintiff opposed both motions to stay discovery in a joint response brief. ECF No. 124.
28 Plaintiff also references the test laid out in *Kor Media* and argues that Defendants' motions

1 should be denied because the Court cannot be convinced that Plaintiff cannot state a claim. *Id.*
2 Additionally, Plaintiff argues that discovery is related to the dispositive motions because
3 “Plaintiff could potentially amend her complaint upon the discovery of additional facts.” *Id.* at 4.¹
4 Finally, though Plaintiff acknowledges that in deciding a motion to stay discovery the Court is
5 guided by Rule 1 of the Federal Rules of Civil Procedure, she does not address Defendants’
6 arguments about the complexity of this case. *See* ECF No. 124.

7 **II. Legal Standard**

8 The Federal Rules of Civil Procedure do not provide for automatic or blanket stays of
9 discovery because a potentially dispositive motion is pending. *Skellerup Indus. Ltd. v. City of*
10 *L.A.*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995).

11 A court may, however, stay discovery under Federal Rule of Civil Procedure 26(c). Fed.
12 R. Civ. P. 26(c)(1); *Clardy v. Gilmore*, 773 F. App’x 958, 959 (9th Cir. 2019) (affirming stay of
13 discovery under Rule 26(c)). The standard for staying discovery under Rule 26(c) is good cause.
14 Fed. R. Civ. P. 26(c)(1) (the court “may, for good cause, issue an order to protect a party or
15 person from annoyance, embarrassment, oppression, or undue burden or expense,” including
16 forbidding discovery or specifying when it will occur).

17 The Ninth Circuit has not provided a rule or test that district courts must apply to
18 determine if good cause exists to stay discovery. *Salazar v. Honest Tea, Inc.*, No.
19 213CV02318KJMEFB, 2015 WL 6537813, at *1 (E.D. Cal. Oct. 28, 2015) (“The Ninth Circuit
20 has not provided guidance on evaluating a motion to stay discovery pending resolution of a
21 potentially dispositive motion, other than affirming that district courts may grant such a motion
22 for good cause.”); *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL
23 489743, at *6 (E.D. Cal. Feb. 7, 2011) (“The Ninth Circuit Court of Appeals has not announced a
24 clear standard against which to evaluate a request or motion to stay discovery in the face of a
25 pending, potentially dispositive motion.”).

26
27 ¹ The Court will not address this argument except to say that Plaintiff provides no authority for the proposition that
28 discovery should be allowed if plaintiffs could potentially discover additional information to amend their complaints.
See ECF No. 124 at 4. Further, the standard Plaintiff cites for staying discovery asks whether the dispositive motion
can be decided without additional discovery, not whether additional discovery could lead to amendment. *See id.* at 3.

1 The Ninth Circuit has, however, identified one scenario in which a district court may stay
2 discovery and one scenario in which a district court may *not* stay discovery. The Ninth Circuit has
3 held that a district court *may* stay discovery when it is convinced that the plaintiff will be unable
4 to state a claim upon which relief can be granted. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th
5 Cir. 1981) (“A district court may limit discovery ‘for good cause’, Rule 26(c)(4), Federal Rules of
6 Civil Procedure, and may continue to stay discovery when it is convinced that the plaintiff will be
7 unable to state a claim for relief.”); *B.R.S. Land Invs. v. United States*, 596 F.2d 353, 356 (9th Cir.
8 1979) (“A district court may properly exercise its discretion to deny discovery where, as here, it is
9 convinced that the plaintiff will be unable to state a claim upon which relief can be granted.”).²
10 The Ninth Circuit has also held that a district court may *not* stay discovery when discovery is
11 needed to litigate the dispositive motion. *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d
12 378, 383 (9th Cir. 1993) (district court would have abused its discretion in staying discovery if
13 the discovery was relevant to the dispositive motion); *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205,
14 210 (9th Cir. 1975) (same).

15 Based on this Ninth Circuit law, district courts in the District of Nevada typically apply a
16 three-part test to determine when discovery may be stayed.³ *See, e.g., Kor Media Group, LLC v.*
17 *Green*, 294 F.R.D. 579 (D. Nev. 2013). This Court will refer to this test as the “preliminary peek
18 test.” The preliminary peek test asks whether (1) the pending motion is potentially dispositive, (2)
19 the potentially dispositive motion can be decided without additional discovery, and (3) after the
20 court takes a “preliminary peek” at the merits of the potentially dispositive motion, it is
21 “convinced” that the plaintiff cannot state a claim for relief. *Id.* at 581. If all three questions are
22 answered affirmatively, the Court may stay discovery. *Id.* The point of the preliminary peek test
23 is to “evaluate the propriety of an order staying or limiting discovery with the goal of
24 accomplishing the objectives of Rule 1.” *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D.
25

26 ² The Court interprets both these Ninth Circuit cases as providing one scenario in which it is appropriate to stay
27 discovery but not the only scenario. *See also Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming stay of
28 discovery without discussing whether court was convinced plaintiff could not state a claim before entering stay); *Rae*
v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (same); *Clardy v. Gilmore*, 773 F. App’x 958, 959 (9th Cir. 2019)
(same).

³ The Court notes that these District of Nevada cases are persuasive authority, and the Court is not bound by them.

1 Nev. 2011). Rule 1 provides that the Federal Rules of Civil Procedure should be construed “to
2 secure the just, speedy, and inexpensive determination of every” case. Fed. R. Civ. P. 1.

3 This Court, however, has found the preliminary peek test to be problematic because it is
4 often inaccurate and inefficient.

5 First, applying the preliminary peek test does not always lead to “accurate results” in
6 which the cases that will ultimately be dismissed are stayed and vice versa. This is so for two
7 primary reasons. In the District of Nevada, a magistrate judge applies the preliminary peek test
8 and decides whether discovery should be stayed; however, a district judge decides the dispositive
9 motion. These judges sometimes have different views on the merits of the dispositive motion,
10 leading to discovery being stayed in some cases it should not have been stayed in and vice versa.

11 *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay*
12 *Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 97 (2012)
13 (identifying same issue). Additionally, the test requires the magistrate judge to take a
14 “preliminary peek” (i.e., a superficial look) at the dispositive motion and be *convinced* that the
15 plaintiff cannot state a claim for relief before staying discovery. *Kor Media*, 294 F.R.D. at 583-84
16 (discovery stay inappropriate when there is only “a possibility” defendant will succeed on its
17 dispositive motion; “[g]enerally, there must be *no question* in the court’s mind that the dispositive
18 motion will prevail . . .”). When the preliminary peek test is applied as written, it leads to
19 discovery being stayed in only the simplest, legally baseless cases. For most cases, and certainly
20 complex cases, it is impossible for the Court to do a “preliminary peek” and be *convinced* that the
21 plaintiff cannot state a claim. This is problematic because complex cases, in which discovery will
22 be extremely costly, are the types of cases where discovery stays may be particularly appropriate
23 while a dispositive motion is pending (to accomplish the goals of Rule 1). Nevertheless, the
24 preliminary peek test, applied as written, leads to most motions to stay discovery being denied.
25 Accordingly, the preliminary peek test is not well-suited for sorting which cases will be dismissed
26 (and thus should have discovery stayed) from those cases that will proceed (and thus should *not*
27 have discovery stayed).

1 *Second*, the preliminary peek test is inefficient. As just explained, if the preliminary peek
2 test is applied as written (i.e., the Court must be *convinced* after a superficial look at the
3 dispositive motion that the plaintiff cannot state a claim), it often fails to accurately sort those
4 cases that will be dismissed (and should have discovery stayed) from those cases that will proceed
5 (and should not have discovery stayed). To improve the accuracy of the preliminary peek test
6 (and allow discovery stays in cases in which this Court believes the dispositive motion will be
7 granted), this Court has in the past engaged in a full analysis of the dispositive motion. This takes
8 considerable time and delays providing the parties with a decision on the motion to stay
9 discovery.⁴ It is also an inefficient use of judicial resources because both the magistrate judge and
10 the district judge fully analyze the same dispositive motion. And, even after all this effort, the
11 magistrate judge and district judge may still have different views on the merits of the dispositive
12 motion. *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to*
13 *Stay Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 101 (2012)
14 (noting that having two different judges decide the dispositive motion and the motion to stay
15 discovery introduces burden and error into the preliminary peek test). In short, doing a full
16 analysis of the dispositive motion may improve the accuracy of the preliminary peek test but it
17 takes significant time, duplicates effort, delays providing the parties a decision on whether
18 discovery is stayed, and may still lead to discovery being inappropriately stayed or allowed to
19 proceed.

20 This Court believes a better analytical framework exists for determining when motions to
21 stay should be granted. As the Court previously discussed, the Court may grant motions to stay
22 discovery when a dispositive motion is pending if (1) the dispositive motion can be decided
23 without further discovery; and (2) good cause exists to stay discovery. *See Alaska Cargo Transp.*,
24 5 F.3d at 383 (district court would have abused its discretion in staying discovery if
25 the discovery was relevant to the dispositive motion); *Kamm*, 509 F.2d at 210 (same); Fed. R.
26 Civ. P. 26(c)(1) (the Court “may, for good cause, issue an order to protect a party or person from
27 annoyance, embarrassment, oppression, or undue burden or expense,” including forbidding

28 ⁴ This delay often also creates a *de facto* stay of discovery, which is problematic in and of itself.

1 discovery or specifying when it will occur); *Tradebay*, 278 F.R.D. at 601 (discussing discovery
2 stays in the context of Rule 26(c)).⁵ “The burden is upon the party seeking the order to ‘show
3 good cause’ by demonstrating harm or prejudice that will result from the discovery.” *Rivera v.*
4 *NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). As the Court will discuss in more detail
5 below, good cause may be established using the preliminary peek test, but it may also be
6 established by other factors, not related to the merits of the dispositive motion.

7 The Ninth Circuit has held that good cause to stay discovery may exist when the movant
8 can convince the Court that plaintiff cannot state a claim. *See Wood*, 644 F.2d at 801 (district
9 court may stay discovery when it is convinced that plaintiff will be unable to state a claim); *B.R.S.*
10 *Land Invs.*, 596 F.2d at 356 (same). These cases remain valid authority, and litigants may still
11 move for a discovery stay under the preliminary peek test. However, as previously discussed, this
12 will only result in discovery stays in the simplest, legally baseless cases.

13 That said, good cause may exist based on other factors unrelated to the merits of the
14 dispositive motion. In many cases, the movant seeks a stay of discovery to prevent “undue burden
15 or expense.” *See Fed. R. Civ. P. 26(c)(1)*. Accordingly, the movant must establish what undue
16 burden or expense will result from discovery proceeding when a dispositive motion is pending.
17 Movants are encouraged to be specific about the realistically anticipated costs of discovery (based
18 on factors such as the complexity of the claim(s) at issue, the number of claims asserted, the
19 number of parties involved in the litigation, the number of witnesses including experts, the
20 volume of documents at issue, etc.). Non-movants opposing a stay of discovery should discuss
21 their position on these same factors. Additionally, though parties opposing a motion to stay
22 discovery carry no burden to show harm or prejudice if discovery is stayed, they are encouraged
23 to discuss any specific reasons why a discovery stay would be harmful (e.g., the case is old and
24 evidence is getting stale, a witness is sick and may die before discovery begins, the public has an
25 interest in the speedy resolution of the issues presented, the claimant’s resources and ability to
26 wait for a judgment, etc.). Ultimately, guided by Rule 1 of the Federal Rules of Civil Procedure,
27 the Court is trying to determine “whether it is more just to speed the parties along in discovery

28 ⁵ The Court notes that both parties cite *Tradebay*. *See* ECF No. 106 at 8, 9; ECF No. 124 at 3, 4.

1 and other proceedings while a dispositive motion is pending, or whether it is more just to delay or
2 limit discovery and other proceedings to accomplish the inexpensive determination of the case.”
3 *Tradebay*, 278 F.R.D. at 603.

4 **III. Analysis**

5 Here, Defendants move to stay discovery based on the preliminary peek test and based on
6 the complexity of the case. *See* ECF Nos. 101, 106. As discussed below, the Court is not
7 convinced that Plaintiff cannot state a claim/Defendants will be successful on their motions to
8 dismiss. However, the Court is persuaded that good cause exists to stay discovery given the
9 complexity of the case and the current, unique procedural posture.

10 First, the Court reviewed the parties’ briefs on the motion to stay discovery and took a
11 preliminary peek at Defendants’ dispositive motions. Having conducted this preliminary peek, the
12 Court is not convinced that Plaintiff will be unable to proceed with the claims Defendants seek to
13 dismiss. (As discussed above, it is virtually impossible for the Court to be convinced that
14 Defendants will succeed on their motions based on a preliminary peek, especially given that the
15 district judge already found several of the claims sought to be dismissed not futile.) The Court
16 will not, however, provide an in-depth analysis of its evaluation of the motions to dismiss.

17 The district judge will decide the dispositive motion and may have a different view
18 of the merits of the underlying motion. Thus, this court’s “preliminary peek” at the
19 merits of the underlying motion is not intended to prejudge its outcome. Rather,
20 this court’s role is to evaluate the propriety of an order staying or
limiting discovery

21 *Tradebay*, 278 F.R.D. at 603.

22 Second, the Court reviewed the parties’ briefs and heard argument on the complexity of
23 the matter. The Court finds that Defendants demonstrated harm or prejudice will result if
24 discovery proceeds now, and as such, good cause exists to continue the stay of discovery. As
25 Defendants argue, this is a complex case. ECF Nos. 106, 132. It is a putative class action with
26 nine, broadly defined subclasses. *See* ECF No. 106 at 7; ECF No. 90 at 4. The allegations span
27 multiple decades and implicate dozens of witnesses. *See* ECF No. 90; ECF No. 106 at 7. Likely, a
28 large volume of documents will need to be reviewed and produced. *See* ECF No. 106 at 7.


1 Additionally, three dispositive motions are pending, which have the potential to simplify, or at
2 least solidify, the parties, claims, and scope of discovery in this case. *See* ECF Nos. 98, 99, 103. If
3 the dispositive motions are granted, the two individual defendants and the Nevada RICO claim
4 will be dismissed (leaving only Title VII and IIED claims against the entity defendants). *See id.*
5 As counsel argued at the October 12, 2021 hearing, beginning discovery now will likely lead to
6 unnecessary or duplicative discovery (if claims are dismissed or discovery is bifurcated until the
7 motions to dismiss are decided). As such, the Court finds it would be prejudicial to Defendants to
8 proceed with discovery now.⁶ Good cause exists to stay discovery pending the determination of
9 the pending dispositive motions.

10 **IV. Conclusion**

11 **IT IS THEREFORE ORDERED** that Defendants' motions to stay discovery (ECF Nos.
12 101, 106) are GRANTED.

13 **IT IS FURTHER ORDERED** that the parties are to file a joint, proposed discovery plan
14 and scheduling order within 14 days after ECF Nos. 98, 99, and 103 are decided.

15
16 DATED: October 14, 2021

17 
18 BRENDA WEKSLER
19 UNITED STATES MAGISTRATE JUDGE

20
21
22
23
24
25
26
27
28

⁶ While the parties did not address this issue, the Court also notes that this discovery stay is likely to be short, given when the dispositive motions were filed.