IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Mohammad S. Galaria, individually and on behalf of all others similarly situated,	:	
	:	Civil Action 2:13-cv-00118
Plaintiff	:	Judge Watson
v.	:	Magistrate Judge Abel
Nationwide Mutual Insurance Company,	:	
	:	
Defendant	:	
	:	
Anthony Hancox, individually and on behalf of all others similarly situated,	:	Civil Action 2:13-cv-00257
Plaintiff	:	Judge Watson
v.	:	Magistrate Judge Abel
Nationwide Mutual Insurance Company,	:	
	:	
Defendant	:	

ORDER

This matter is before the Magistrate Judge on defendant Nationwide Mutual Insurance Company's ("Nationwide") May 14, 2013 motion to stay discovery (doc. 25).

Background. The complaints in these cases plead class action Fair Credit Reporting Act, 15 U.S.C.§ 1681 et seq. claims against Nationwide Mutual Insurance

Company arising out of an October 3, 2012, unauthorized intrusion into a portion of Nationwide's computer network. During the intrusion the class members' personal identifiable information was stolen and disseminated to unauthorized persons.

Arguments of the Parties. Nationwide seeks to stay discovery pending the Court's ruling on its motion to dismiss. Defendant maintains that plaintiffs are not entitled to discovery because they lack standing under Article III of the Constitution, and in the alternative, even if plaintiffs had standing, defendants maintain that their allegations fail to state a claim.

Defendant maintains that a stay is justified because the burden of responding to discovery pending a decision on the motion to dismiss clearly outweighs its benefits, and plaintiffs will not be prejudiced by the stay. Defendant argues that a stay of discovery is appropriate where a pending dispositive motion is predicated on a legal questions that are unaffected by discovery. Nationwide further argues that permitting discovery would substantially vitiate issues raised in its motion to dismiss.

Nationwide argues that the discovery requests are overbroad. The requests span a timeframe of over five years, and Nationwide maintains that responding to such requests would require it to review vast amounts of electronically stored information and to conduct interviews of a broad range of personnel. For instance, plaintiff's requests seek documents and information relating to Nationwide's "Computer Systems." "Computer Systems" are defined as "servers, mainframes, web portals, hard drives, desktops, laptops, any other device capable of storing electronic data in the

possession, custody, or control of Nationwide." Under this definition, Nationwide would be forced to take into account numerous computer devices in responding to these requests whether or not the devices were the subject of the criminal attack. Nationwide also argues that plaintiff's discovery request are not relevant to their allegations or seek information that is otherwise protected. Plaintiffs seek information concerning intrusions other than the data breach; companies other than Nationwide, protections of computer systems; third-party consulting services, hardware and software; security reviews; security updates; and information and documents sent to or received from governmental authorities concerning the data breach. Nationwide also contends that information about how Nationwide discovered the data breach includes information protected by the attorney-client privilege, work product doctrine, and other applicable protections.

Plaintiffs argue that Nationwide's motion should be denied because defendant has not shown that there is a particular and specific need for the protective order. Instead, plaintiffs contend that Nationwide fails to sufficiently explain why responding to their discovery requests will be unduly burdensome. According to plaintiffs, Nationwide makes no effort to detail the specific burdens it will face from discovery in this case or explain how the prejudice it allegedly would face differs from that of the position of any other party that files a case-dispositive motion before the court.

Plaintiffs further argue that Nationwide raises a multitude of factual issues in its motion to dismiss, the majority of which can be resolved through plaintiffs' pending

discovery. Plaintiffs maintain that Nationwide's responses to their discovery requests will shed light on aspects of the data breach that Nationwide has kept secret. Plaintiffs maintain that factual issues exist, such as whether defendant's conduct in giving unauthorized third parties access to plaintiffs' personal identifying information was reckless; whether Nationwide had reasonable procedures in place; whether Nationwide provided third parties with plaintiffs' consumer reports; and whether plaintiffs' personal identifying information was communicated to the public at large or some other large group of individuals and/or entities.

Plaintiffs contend that their discovery requests are not burdensome, costly, overbroad or irrelevant. Plaintiffs maintain that Nationwide previously agreed to respond to much of the pending discovery requests and can do so on short notice. Nationwide made no effort to confer with counsel regarding the allegedly overbroad nature of the pending discovery requests. Had Nationwide made an effort to communicate with plaintiffs' counsel, many of its concerns could have been addressed. Plaintiff maintains that as a result of its investigation into the data breach, Nationwide already has in its possession and has likely identified all or a significant port of the relevant documents.

Decision. Rule 26(c) permits a district court to issue a protective order staying discovery during the pendency of a motion for "good cause shown." Fed. R. Civ. P. 26(c). "Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Hahn v. Star Bank*,

190 F.3d 708, 719 (6th Cir.1999). Limitation of discovery may be appropriate where claims are subject to dismissal "based on legal determinations that could not have been altered by any further discovery." *Muzquiz v. W.A. Foote Mem'l Hosp., Inc.*, 70 F.3d 422, 430 (6th Cir. 1995). Whether to authorize a stay of discovery pending a preliminary ruling is discretionary. *Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304-05 (6th Cir.2003). In ruling upon a motion for stay, a court weighs the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery. *Ohio Bell Telephone Co., Inc. v. Global NAPs Ohio, Inc.*, No. 2:06-cv-0549, 2008 WL 641252, at *1 (S.D. Ohio, Mar. 4, 2008). When a party seeks a stay, rather than a prohibition, of discovery, the burden upon the party requesting the stay is lighter than it would be if the party was seeking total freedom from such discovery. *Marrese v. Am. Acad. of Orthopedic Surgeons*, 706 F. 2d 1488, 1493 (7th Cir. 1983).

Here, contrary to defendant's argument, the party resisting discovery has the burden of demonstrating that it would be unreasonably burdensome. It has failed to do so. First, defendant's counsel did not engage in any meaningful attempt to see whether plaintiffs' counsel would be willing to modify their broad discovery requests to meet defendant's concerns about the expense of the discovery. Second, defendant has offered no evidence by affidavit or otherwise of facts that would show what Nationwide would need to do to gather, review and produce the documents plaintiffs seek and the expense of that production. Third, plaintiffs argue that it is likely that many of the documents

have already been gathered, analyzed and organized by Nationwide in response to the breach and in meeting their obligations to governmental agencies. Defendant has made no response to that argument.

Although the fact that a party has filed a case-dispositive motion is usually deemed insufficient to support a stay of discovery, *Ohio Bell Telephone Co.*, 2008 WL 641252 at *1, I make no decision now about whether Nationwide can demonstrate that proceeding with discovery now would be unreasonably burdensome. I do note that the duty of preservation--which arises when a party knows that litigation is likely-- imposes a cost that is not insubstantial. If documents or other information come into a party's possession as a result of meeting its obligation to preserve evidence or to respond to requests for information from governmental agencies, it would be difficult to argue that production of that document would be burdensome.

Whether a discovery request is burdensome within the meaning of Rule 26(b)(2)(C)(iii) is best determined in a concrete factual matrix. Here I can best understand the relevance of discovery requests and the burden of responding to them when confronted with specific discovery requests/deposition requests. Further, in my experience, some discovery imposes little burden–whether directed to the merits or non-merits issues. For example, if a document request can be answered easily by searching the file cabinets of one employee or, by a routine business operations, one database, it is not burdensome. Once discovery requests are served, defendant may well determine that it would not be burdensome to respond to many of them. A further benefit of serving

discovery now is that it will inform and assist the opposing party in meeting its obligation to preserve all documents and other evidence relevant to the claims and defenses of the parties in this lawsuit. Because there has been no meaningful discussion between counsel for the parties about the scope of the discovery requests and because defendant has not provided any information from which I could determine whether responses to individual discovery requests would be unreasonably burdensome, I am not in a position to rule on that argument.

Consequently, I will not limit discovery now. If defendant believes a particular discovery request is burdensome, it may so respond, supporting that position with sufficient information for plaintiffs' counsel to decide whether to bring the issue to the court for resolution. If, after counsel consult, they cannot agree as to whether the discovery should be provided, they should call my office (614.719.3370) and schedule a telephone discovery conference. S.D. Ohio Civ. Rule 37.1. The letters exchanged by counsel and the discovery requests at issue should be emailed (Mark_Abel@ohsd.uscourts.gov) before the conference.

s/Mark R. Abel
United States Magistrate Judge