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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 INFODELI, LLC,

11 Plaintiff,

12 v.

13 AMAZON WEB SERVICES, INC.,

14 Defendant.

CASE NO. C17-0281JLR

ORDER DENYING MOTION TO
COMPEL

15 **I. INTRODUCTION**

16 Before the court is Plaintiff InfoDeli, LLC's motion to compel compliance with a
17 *subpoena duces tecum*. (Mot. (Dkt. # 2); *see also* Pet. (Dkt. # 1).) Defendant Amazon
18 Web Services, Inc. ("Amazon") opposes the motion. (Resp. (Dkt. # 13); *see also* Answer
19 (Dkt. # 12).) The court has considered the motion, Amazon's opposition to the motion
20 (Resp. (Dkt. # 13)), InfoDeli's reply in support of its motion (Reply (Dkt. # 21)), the
21 parties' supplemental briefing (Amazon Supp. (Dkt. # 27); InfoDeli Supp. (Dkt. # 28)),

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1 the relevant portions of the record, and the applicable law. Being fully advised,¹ the court
2 DENIES InfoDeli’s motion to compel for the reasons set forth below.

3 II. BACKGROUND

4 A. The Underlying Action

5 InfoDeli’s motion arises from a copyright infringement action currently pending
6 before the United States District Court for the Western District of Missouri (“the
7 Underlying Action”). (See Mot. at 1; Rosemergy Decl. (Dkt. # 3) ¶ 1); *InfoDeli, LLC v.*
8 *W. Robidoux, Inc.*, No. C15-364BCW (W.D. Mo.), Dkt. # 1. In the Underlying Action,
9 InfoDeli alleges that the defendants have misappropriated computer code that InfoDeli
10 wrote. (See Mot. at 2.) InfoDeli further alleges that one of the defendants—Engage
11 Mobile Solutions, LLC (“Engage”)—“permanently stored archival versions of code,
12 including infringing code,” on Amazon’s servers. (*Id.*)

13 In the Underlying Action, the Honorable Brian C. Wimes stayed discovery on all
14 matters unrelated to InfoDeli’s copyright infringement claim. *InfoDeli v. W. Robidoux*,
15 Dkt. # 141 at 5-6 (granting the defendants’ motion for “a stay of discovery of all issues
16 that are unrelated to their liability under Count I, for copyright infringement”).
17 Accordingly, Judge Wimes’s scheduling orders allowed the parties to conduct discovery
18 related only to InfoDeli’s copyright infringement claim. See *id.*, Dkt. ## 49, 151, 206,
19 281, 297, 327, 378 (scheduling orders). After extending the initial discovery cutoff at the

20
21 ¹ InfoDeli requested oral argument for the first time in its reply brief. (See Reply at 1; see
22 also InfoDeli Supp. at 1.) However, the court determines that oral argument would not be
helpful to the court’s disposition of the motion and denies InfoDeli’s request. See Local Rules
W.D. Wash. LCR 7(b)(4).

1 parties' request, Judge Wimes issued his final scheduling order related to the copyright
2 infringement phase of the case and ordered that discovery be completed no later than
3 February 20, 2017. *Id.*, Dkt. # 378 at 1.

4 **B. InfoDeli's Subpoena**

5 To obtain Engage's allegedly infringing code, InfoDeli served Amazon, who is not
6 a party to the Underlying Action, with a subpoena to produce the archival data Engage
7 allegedly stored on Amazon's servers.² (*See* Mot. at 1-2; Rosemergy Decl. ¶ 5, Ex. 2
8 (Dkt. # 3-1) ("Subpoena").) The subpoena directed Amazon to produce responsive
9 material no later than September 14, 2016. (Rosemergy Decl. ¶ 6; Subpoena at 7.) On
10 September 19, 2016, Amazon served objections to the subpoena.³ (Rosemergy Decl. ¶ 9,
11 Ex. 5 ("Obj."))

12 After Amazon objected, the parties met and conferred several times between
13 October 2016 and December 2016 and attempted to compromise on InfoDeli's requests.
14 (*See* Mot. at 3; Rosemergy Decl. ¶ 10.) Nevertheless, on December 16, 2016, Amazon
15 advised InfoDeli that Amazon "intended to stand on its objections to the subpoena" and
16 "would not be complying with the subpoena." (Mot. at 3; Rosemergy Decl. ¶ 10.)

17 ² InfoDeli first served Amazon by email on August 12, 2016. (Mot. at 2; Rosemergy
18 Decl. ¶ 2.) When InfoDeli's counsel followed up with Amazon by email, Amazon informed
19 InfoDeli that Amazon would not accept service by email and directed InfoDeli to serve the
20 subpoena by mail. (Rosemergy Decl. ¶ 4.) Accordingly, on August 30, 2016, InfoDeli served
Amazon with the subpoena by certified mail. (*Id.* ¶ 5, Ex. 3.)

21 ³ In addition to serving objections, Amazon also "produced approximately 300 pages of
22 responsive information including account registration details and records describing [Engage's]
account usage history including data transfers by date and size, dating back to January 1, 2014."
(Chock Decl. (Dkt. # 14) ¶ 7.) InfoDeli contends that this production is inadequate (Reply at 5
n.3) and that Amazon's objections were untimely (Mot. at 3).

1 InfoDeli filed its motion to compel on February 21, 2017. (*See generally* Dkt.)
2 On April 11, 2017, the court ordered the parties to file supplemental briefing addressing
3 the timeliness of InfoDeli’s motion. (4/11/17 Order (Dkt. # 25) at 5-6.) The court now
4 analyzes that issue and InfoDeli’s motion.

5 III. ANALYSIS

6 The parties first dispute whether InfoDeli’s motion to compel is timely and if not,
7 whether the court should nonetheless consider the motion. (Resp. at 4-7; Mot. at 1 (filing
8 motion to compel on February 21, 2017); Reply); *see also InfoDeli v. W. Robidoux*, Dkt.
9 # 378 at 1 (setting discovery deadline of February 20, 2017). After analyzing the issue,
10 the court concludes that InfoDeli’s motion is untimely and declines to consider it.⁴

11 A. Legal Standard

12 “A [third-party] subpoena pursuant to Federal Rule of Civil Procedure 45 . . . is
13 not exempt from discovery deadlines in scheduling orders.” *See Dell Inc. v. Acacia Res.*
14 *Grp. LLC*, No. SA MC 15-00025-JVS (DFMx), 2015 WL 12791389, at *1 (C.D. Cal.
15 Oct. 26, 2015) (quoting *Dag Enters., Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 104
16 (D.D.C. 2005)). Courts generally deny as untimely motions to compel filed after the
17 close of discovery unless the court’s scheduling order sets a different date. *See, e.g.*,
18 *Short v. Equifax Info. Servs. LLC*, No. 3:14-CV-0471-YY, 2016 WL 6683563, at *3 (D.
19 Or. Nov. 14, 2016); *Rogers v. Brauer Law Offices, PLC*, No. CV-10-1693-PHX-LOA,

21 ⁴ Because the court denies InfoDeli’s motion as untimely, the court does not address the
22 merits of the parties’ other arguments in support of or opposition to InfoDeli’s motion. *See infra*
III.B; (*see generally* Resp.; Reply.)

1 2011 WL 3665346, at *4 (D. Ariz. Aug. 22, 2011) (collecting cases); *Voter v. Avera*
2 *Brookings Med. Clinic*, No. Civ. 06-4129-KES, 2008 WL 4372707, at *1 (D.S.D. Sept.
3 22, 2008) (same); *David v. Signal Int’l, LLC*, No. 08-1220, 2014 WL 6612598, at *2
4 (E.D. La. Nov. 19, 2014) (same). Courts determine whether to allow an otherwise
5 untimely motion to compel by considering and balancing the following factors: (1) how
6 long after the discovery deadline the moving party filed its motion to compel; (2) the
7 amount of time the moving party knew about the discovery; (3) whether the court has
8 previously extended the discovery deadline; (4) the moving party’s reason for its delay or
9 tardiness; (5) whether dispositive motions have been filed or scheduled; (6) the age of the
10 case; (7) any prejudice to the party from whom the moving party seeks untimely
11 discovery; and (8) whether the untimely motion disrupts the court’s schedule. *See Short*,
12 2016 WL 6683563, at *3; *Rogers*, 2011 WL 3665346, at *4; *David*, 2014 WL 6612598,
13 at *3; *Days Inn Worldwide, Inc. v. Sonia Invs.*, 237 F.R.D. 395, 398 (N.D. Tex. 2006).
14 These factors inform whether good cause exists to consider the untimely motion because
15 the “untimely discovery motion . . . , if granted, would necessarily result in a *de facto*
16 modification of the scheduling order.” *Rogers*, 2011 WL 3665346, at *4.

17 **B. InfoDeli’s Motion**

18 On February 21, 2017, InfoDeli filed this motion to compel Amazon to produce
19 materials responsive to the subpoena. (Mot. at 1.) Amazon argues that the court should
20 deny InfoDeli’s motion because InfoDeli filed the motion the day after discovery closed
21 in the Underlying Action. (Resp. at 4-7); *InfoDeli v. W. Robidoux*, Dkt. # 378 at 1.

22 Although InfoDeli acknowledges that infringement-related discovery closed on February

1 20, 2017, it contends that its February 21, 2017, motion is “not untimely because the
2 discovery at issue is not solely related to the issue of infringement.” (Reply at 8.)
3 Rather, InfoDeli argues that the discovery it seeks from Amazon is “relevant to
4 willfulness [and] spoliation” and “was also identified in a Rule 56(d) [d]eclaration as
5 being necessary to respond to a currently pending [m]otion for [s]ummary [j]udgment.”
6 (*Id.*; *see also* Haring-Larson Decl. (Dkt. # 29) ¶ 2, Ex. 1 (“Rule 56(d) Decl.”).)

7 In its supplemental briefing, InfoDeli acknowledges that discovery on the
8 copyright infringement issue closed on February 20, 2017, but contends that the
9 discovery is “relevant to other issues for the stayed Defendants and for other
10 issues . . . for which discovery will still be permitted.” (*See* InfoDeli Supp. at 2.)
11 InfoDeli characterizes this discovery as being “unquestionably . . . permissible at some
12 point, whether now or later.” (*Id.*) Although InfoDeli maintains that the court should
13 rule on the merits of its motion—despite filing the motion after the discovery cutoff and
14 the fact that discovery unrelated to the copyright infringement issue is stayed—InfoDeli
15 suggests that if the court disagrees, the court continue consideration of the motion “until
16 broader discovery reopens” or deny the motion without prejudice so that “it can be
17 renewed at a later time.” (*Id.* at 2 n.1.)

18 1. Timeliness

19 The court concludes that InfoDeli did not timely file its motion to compel. Rather,
20 InfoDeli filed its motion to compel one day after the discovery cutoff, even though Judge
21 Wimes’s scheduling order set a date certain—February 20, 2017—for the close of
22 discovery on the copyright infringement issue. (*See* Mot. at 1); *Sloan v. Country*

1 *Preferred Ins. Co.*, No. 2:12-CV-01085-KJD-PAL, 2013 WL 1405852, at *1 (D. Nev.
2 Apr. 4, 2013) (“When the Court specifies a date for a response, the response is not
3 untimely when it is filed on or before that date.”). In addition, Judge Wimes has not
4 lifted the stay on discovery of any of InfoDeli’s non-copyright infringement claims, *see*
5 *InfoDeli v. W. Robidoux*, Dkt. ## 141 at 5-6, 358, or ruled on InfoDeli’s Rule 56(d)
6 request, *see id.*, Dkt. # 417-3; *see also* Fed. R. Civ. P. 56(d)(2) (“If a nonmovant shows
7 by affidavit [that] it cannot present facts essential to justify its opposition, the court
8 may . . . allow time to obtain affidavits or declarations or to take discovery . . .”).⁵ For
9 these reasons, the motion is untimely.

10 2. Consideration of the Merits

11 The court considers whether it should nevertheless reach the merits despite the
12 untimeliness of the motion to compel. *See, e.g., Short*, 2016 WL 6683563, at *3. The
13 court concludes that the balance of factors weigh in favor of denying InfoDeli’s motion to
14 compel.

15 a. *Length of Time*

16 The first two factors the court considers are (1) how long after the discovery
17 deadline the moving party filed its motion to compel and (2) the amount of time the

18 ⁵ InfoDeli cites *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th
19 Cir. 2006) for the proposition that a motion to compel is not untimely where the moving party’s
20 counsel identifies the discovery sought in a Rule 56(d) affidavit. (*See id.* at 3.) However, the
21 Ninth Circuit stated that if the moving party had sought to “compel discovery only after the
22 deadlines for discovery or submission of dispositive motions had passed,” it may be appropriate
to rule on a motion for summary judgment without allowing the additional discovery. *Clark*, 460
F.3d at 1178-79; *see also id.* at 1178 (citing *Garrett v. City & Cty. of S.F.*, 818 F.2d 1515, 1518
(9th Cir. 1987) (“[S]ummary judgment should not be granted while the opposing party timely
seeks discovery of potentially favorable information.”)).

1 moving party knew of the discovery. *Short*, 2016 WL 6683563, at *3; *Rogers*, 2011 WL
2 3665346, at *4. The court finds that the first factor tips in InfoDeli’s favor and the
3 second factor tips slightly against InfoDeli.

4 InfoDeli argues that “the time after the close of discovery before the filing was
5 minimal.” (InfoDeli Supp. at 4.) The court agrees that the delay was minimal because
6 InfoDeli filed its motion only one day after the discovery cutoff. This short length of
7 time militates in favor of considering InfoDeli’s motion to compel despite its
8 untimeliness.

9 As to the second factor, the parties agree that InfoDeli knew of the discovery it
10 seeks from Amazon well in advance of bringing its motion to compel. (*See id.* at 5-6
11 (stating that InfoDeli first sought this discovery in August 2016); Amazon Supp. at 3
12 (stating that InfoDeli first knew of this discovery in April 2016 at the earliest and
13 December 2016 at the latest).) InfoDeli contends that it delayed moving to compel
14 because its counsel “spent several months diligently attempting to secure Amazon’s
15 compliance in an effort to avoid engaging the resources of this [c]ourt.” (InfoDeli Supp.
16 at 5.) Amazon, on the other hand, argues that even though InfoDeli knew that Amazon
17 intended to stand on its objections, InfoDeli waited more than two months to file this
18 motion. (Amazon Supp. at 3.)

19 The court concludes that this factor tips slightly in favor of declining to consider
20 the motion. InfoDeli knew of the discovery it sought from Amazon in August 2016 at the
21 latest, received Amazon’s objections on September 19, 2016, and knew by December
22 2016 that Amazon did not intend to relent in its objections. (*See Subpoena*; *Rosemergy*

1 Decl. ¶¶ 9-10.) Accordingly, InfoDeli could have moved to compel Amazon’s
2 compliance earlier than February 21, 2017. However, the court recognizes that InfoDeli
3 attempted to address Amazon’s concerns and avoid unnecessarily utilizing the court’s
4 resources. (*See* Rosemergy Decl. ¶ 10.) The court therefore finds that this factor tips
5 only slightly in favor of declining to consider the motion.

6 *b. Impact on the Court’s Schedule*

7 The third, fifth, sixth, and eighth factors examine the impact of the late motion on
8 the court’s schedule. Specifically, these factors address whether the discovery deadline
9 has been extended, whether dispositive motions have been scheduled or filed, the case’s
10 age, and whether the untimely motion will disrupt the court’s schedule. *Short*, 2016 WL
11 6683563, at *3; *Rogers*, 2011 WL 3665346, at *4.

12 InfoDeli argues that these factors are “largely inapplicable” because the court “is
13 not presiding over” the Underlying Action. (InfoDeli Supp. at 5.) InfoDeli contends that
14 considering the motion will have no impact on the court’s docket because the court would
15 be considering only a “single, discrete issue.” (*Id.*) Amazon argues that these factors
16 disfavor InfoDeli because a ruling on the merits of the motion will affect the court’s
17 docket in the Underlying Action. (*See* Amazon Supp. at 4-5.)

18 The court agrees that the proper focus of these factors is the impact the late-filed
19 motion will have on the Underlying Action. *See Dell*, 2015 WL 12791389, at *2 (“Given
20 Judge Schroeder’s deadlines [in the underlying proceeding], the Court is unable to find a
21 basis for any conclusion but that it is unable to hear Dell’s motion to compel.”).

22 Although considering the motion to compel may only minimally impact this court’s

1 docket, the discovery InfoDeli seeks will likely have a significant effect on the
2 Underlying Action. When viewing these factors in terms of the Underlying Action, the
3 court concludes that all four factors militate sharply against InfoDeli.

4 Judge Wimes issued seven scheduling orders and ultimately extended the
5 discovery cutoff to February 20, 2017. *See InfoDeli v. W. Robidoux*, Dkt. ## 49, 151,
6 206, 281, 297, 327, 378. The court finds that these repeated extensions counsel against
7 considering a discovery motion that may further impact timely resolution of the
8 Underlying Action. In addition, the court may not alter Judge Wimes's scheduling order
9 and reopen discovery in a case pending before him. *Argento v. Sylvania Lighting Servs.*
10 *Corp.*, No. 2:15-cv-01277-JAD-NJK, 2015 WL 4918065, at *6 (D. Nev. Aug. 18, 2015)
11 (“The Court can think of few intrusions more disruptive to the issuing court’s ability to
12 manage the underlying litigation than an order from this Court that may well impact the
13 ability of the case to move forward in the District of Arizona on the timetable preferable
14 to Judge Holland.”); *Dell*, 2015 WL 12791389, at *2 (“[I]t is for Judge Schroeder and not
15 this Court to determine whether good cause exists to allow the filing of [a] motion [to
16 compel after the deadline.]”). This factor therefore tips against considering the motion.

17 Second, at the time InfoDeli filed the motion to compel, Judge Wimes had already
18 set a dispositive motions deadline. Although that deadline did not pass until March 2,
19 2017, this factor nonetheless tips against InfoDeli. *See InfoDeli v. W. Robidoux*, Dkt.
20 # 378. InfoDeli should have been aware that its motion before this court would not be
21 ripe for decision by the time the Underlying Action’s dispositive motions deadline had
22 passed. *See Local Rules W.D. Wash. LCR 7(b)(5), (d)* (stating that the court endeavors

1 to decide all motions within 30 days of their noting dates and instructing on noting dates
2 for motions).

3 Third, the age of this case militates against considering the motion. InfoDeli
4 instituted the Underlying Action on May 12, 2015. *See InfoDeli v. W. Robidoux*, Dkt.
5 # 1. Not only has the case been pending for quite some time, but the copyright
6 infringement portion of the case is at a late stage. *See, e.g., id.*, Dkt. ## 393, 397, 398
7 (pending summary judgment motions). Accordingly, the age of this case supports
8 declining to consider the motion.

9 Finally, the court finds that InfoDeli's untimely motion to compel could
10 potentially disrupt the Underlying Action. As the court previously noted, discovery
11 closed on February 20, 2017, and several dispositive motions on the copyright
12 infringement claim are currently pending. *See id.*, Dkt. ## 49, 151, 206, 281, 297, 327,
13 378, 393, 397, 398. Absent a decision by Judge Wimes to grant InfoDeli's Rule 56(d)
14 request with respect to Amazon or to otherwise reopen discovery, this court's ruling on
15 the motion to compel could disrupt the schedule in the Underlying Action. This factor
16 therefore tips against considering the motion.

17 For these reasons, the court concludes that the third, fifth, sixth, and eighth
18 factors—which address whether the motion to compel affects the court's schedule—tip
19 sharply against ruling on the merits.

20 *c. Reason for the Delay*

21 The fourth factor addresses why the moving party delayed in seeking to compel
22 the discovery. *Short*, 2016 WL 6683563, at *3; *Rogers*, 2011 WL 3665346, at *4.

1 InfoDeli contends that it delayed filing its motion because of a mistaken belief that it had
2 an extra day because February 20, 2017, was a federal holiday. (InfoDeli Supp. at 4.)
3 The court agrees that InfoDeli’s misreading of Federal Rule of Civil Procedure 6 lacked
4 bad faith and concludes that InfoDeli’s mistake supports considering the motion.⁶

5 *d. Prejudice to Amazon*

6 The seventh factor asks whether an order compelling discovery would prejudice
7 the party from whom discovery is sought. *Short*, 2016 WL 6683563, at *3; *Rogers*, 2011
8 WL 3665346, at *4. Amazon argues that such an order would be prejudicial because
9 “any ‘urgency’ at this stage is self-created by InfoDeli.” (Amazon Supp. at 5.) InfoDeli
10 contends that nothing about the timing of its motion prejudices Amazon. (InfoDeli Supp.
11 at 6.)

12 The court agrees with InfoDeli. Amazon’s general and vague statement that
13 InfoDeli’s urgent need for the discovery will potentially prejudice Amazon is insufficient.
14 Accordingly, this factor tips in InfoDeli’s favor.

15 *e. Balance of the Factors*

16 The court concludes that the balance of the factors supports denying InfoDeli’s
17 motion. The first, fourth, and seventh factors tip in InfoDeli’s favor, the second factor
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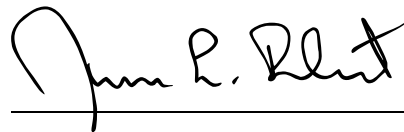
19 ⁶ In the Underlying Action, InfoDeli moved to sanction Engage for failing to produce
20 discovery by the February 20, 2017, deadline, and Judge Wimes sanctioned Engage for its
21 failure. *InfoDeli v. W. Robidoux*, Dkt. ## 354, 382 (“Engage was instructed to produce certain
22 categories of evidence by a particular date, and by its own admission, failed to do so.”).
Accordingly, it is not entirely clear whether InfoDeli truly believed that it could bring a motion
to compel after the February 20, 2017, deadline. However, in light of the lack of affirmative bad
faith, the court credits InfoDeli’s representation.

1 tips slightly against InfoDeli, and the third, fifth, sixth, and eighth factors tip sharply
2 against InfoDeli. In reaching this conclusion, the court affords significant deference to
3 Judge Wimes's management of his docket. Accordingly, the court denies InfoDeli's
4 motion to compel.⁷

5 IV. CONCLUSION

6 Based on the foregoing analysis, the court DENIES InfoDeli's motion to compel
7 (Dkt. # 2).

8 Dated this 21st day of April, 2017.

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11 JAMES L. ROBERT
12 United States District Judge

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21 ⁷ The court's ruling does not preclude InfoDeli from bringing another motion to compel
22 should Judge Wimes order further discovery on the copyright infringement claim or lift the
discovery stay such that InfoDeli may seek discovery relevant to InfoDeli's other claims. *See*
supra n.4.