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

9 WILMINGTON TRUST COMPANY, et al.,

10 Plaintiffs,

11 v.

12 THE BOEING COMPANY, et al.,

13 Defendants.

CASE NO. C20-0402-RSM-MAT

ORDER RE: THE BOEING
COMPANY'S MOTION FOR
PROTECTIVE ORDER

14
15 INTRODUCTION

16 Plaintiffs Wilmington Trust Company, F & L Aviation IV, LLC, and Brilliant Aviation
17 Limited raise claims in this lawsuit associated with their allegation defendant The Boeing
18 Company ("Boeing") sold them defective 737 MAX aircraft. (See Dkt. 1-2.) Now pending before
19 the Court is Boeing's Motion for Protective Order. (Dkt. 43.) Boeing seeks a stay on all discovery
20 until the Court resolves its pending motion to dismiss plaintiffs' non-contractual claims (see Dkt.
21 41). In the alternative, Boeing requests that the Court allow only discovery into plaintiffs' breach
22 of contract claim and stay additional discovery until the Court resolves the motion to dismiss.
23 Plaintiffs oppose the motion, including both the request for a stay and the alternative proposal.

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1 (Dkt. 50.) The Court herein DENIES the request for a stay, but GRANTS the request for
2 alternative relief as set forth below.

3 BACKGROUND

4 The Court previously denied plaintiffs’ request for early discovery, finding an absence of
5 good cause to deviate from the Court’s standard pretrial scheduling practices, and observing that
6 “a production responsive to plaintiffs’ expansive discovery requests would impose a significant
7 burden on Boeing.” (Dkt. 39 at 7-8.) Shortly thereafter, Boeing filed its Motion to Dismiss,
8 seeking dismissal of plaintiffs’ fraud, material misrepresentation, Washington Consumer
9 Protection Act, and Washington Product Liability Act claims and leaving only plaintiffs’ breach
10 of contract claim in dispute. (Dkt. 41.) A week later, Boeing filed the current motion, seeking a
11 stay of discovery pending resolution of its motion to dismiss. (Dkt. 43.)

12 The motion for a protective order is directed towards plaintiffs’ two outstanding sets of
13 written discovery. (*See* Dkt. 50 at 3.) Responses to the first set of discovery requests were due on
14 August 10, 2020, while responses to the second set were due on August 21, 2020. (*Id.*; Dkt. 46 at
15 7-8.) Both the motion to dismiss and the motion for a protective order are now ripe for
16 consideration, having noted on August 21, 2020. (*See* Dkts. 41 & 45.)

17 DISCUSSION

18 Under Federal Rule of Civil Procedure 26(c), the court may limit discovery “for good cause
19 . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or
20 expense[.]” Fed. R. Civ. P. 26 (c)(1); *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). The
21 Court has broad discretion to control discovery and its decision is subject to review only for clear
22 abuse of discretion. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). That discretion
23 includes a decision to relieve a party of the burdens of discovery while a dispositive motion is

1 pending. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

2 The Court must construe and administer the Federal Rules of Civil Procedure to “secure
3 the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P.

4 1. A party seeking to stay discovery bears a “heavy burden” to make a “strong showing” of why
5 discovery should be denied. *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554,
6 556 (D. Nev. 1997) (internal quotation marks and quoted sources omitted). Neither the mere
7 existence of a potentially dispositive motion, nor mere inconvenience and expense suffice to
8 establish good cause for a stay. *See, e.g., Rosario v. Starbucks Corp.*, C16-1951-RAJ, 2017 WL
9 4122569 at *1 (W.D. Wash. Sep. 18, 2017) (finding a failure to show good cause in the argument
10 a stay would “free the parties from the burden and expense of unnecessary discovery” without any
11 other reason for a delay). The decision to relieve a party from the burdens of discovery while a
12 dispositive motion is pending “is the exception and not the rule.” *Northwest Immigrant Rights*
13 *Project v. Sessions*, C17-0716-RAJ, 2017 WL 11428870 at *1 (W.D. Wash. Sep. 18, 2017) (stay
14 not warranted where order on preliminary injunction revealed the possibility at least some claims
15 had the potential to succeed). A party “must show a particular and specific need for the protective
16 order, and broad or conclusory statements concerning the need for protection are insufficient.”
17 *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601-02 (D. Nev. 2011) (citation omitted).

18 Balancing concerns of delay in the proceedings and prejudice to the party opposing a
19 dispositive motion, with the savings in time and costs where such a motion would obviate the need
20 for discovery, courts often consider two factors in deciding whether to issue a stay: “(1) whether
21 the pending motion could dispose of the entire case, and (2) whether the motion can be decided
22 without additional discovery.” *Travelers Property Casualty Company of America v. H.D. Fowler*
23 *Company*, C19-1050-JCC, 2020 WL 832888 at *1 (W.D. Wash. Feb. 2, 2020) (staying discovery

1 where both factors were satisfied) (citations omitted). *See also Simms v. Sinclair*, C19-5323, 2019
2 WL 5862812-RBL-JRC at *1 (W.D. Wash. Nov. 8, 2019) (granting stay where judgment on the
3 pleadings, including the asserted shield of qualified immunity, would dispose of case and stay
4 would not prejudice plaintiff given need to address the motion on its face) (citing *Ministerio Roca*
5 *Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 506 (D. Nev. 2013) (considering whether
6 “a pending dispositive motion is (1) potentially dispositive of the entire case or at least dispositive
7 of the issue on which discovery is sought” and (2) can be decided without additional discovery.”))
8 Assessment of these factors entails a “preliminary peek” at the pending motion to dismiss.
9 *Travelers Property Casualty Company of America*, 2020 WL 832888 at *1 (quoting *Tradebay*,
10 278 F.R.D. at 603).

11 Here, the pending motion to dismiss can be decided without additional discovery, but will
12 not be dispositive of this case. The fact that this matter will necessarily proceed on plaintiffs’
13 breach of contract claim even with a ruling favorable to Boeing on the motion to dismiss argues
14 against issuing a stay. This is not, moreover, an instance in which a preliminary peek at the
15 pending motion to dismiss supports a contrary conclusion. *Cf. Wenger v. Monroe*, 282 F.3d 1068,
16 1077 (9th Cir. 2002) (trial court did not err in granting a protective order staying discovery pending
17 a motion to dismiss when it was convinced plaintiff would be unable to state a claim).¹ A thorough
18 analysis of the parties’ arguments in relation to the motion to dismiss is necessary, as well as a
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20 ¹ Boeing argues a stay is particularly warranted in this case because it moves to dismiss several
21 claims subject to the heightened pleading standard in Federal Rule of Civil Procedure 9(b), which “weighs
22 in favor of granting the stay.” *United States v. Ctr. for Diagnostic Imaging, Inc.*, C05-0058-RSL, 2010 WL
23 11682231 at *1-2 (W.D. Wash. Dec. 16, 2010). As plaintiffs observe, the case relied on in support of that
proposition is distinguishable. Among other factors, the decision addressed a stay on third-party discovery,
in a case that had been pending for five years and in which defendants showed discovery by the third party
could cause them additional competitive harm they were unlikely to fully regain even with later success on
a motion to dismiss. *Id.*

1 determination by the assigned district judge following consideration of a report and
2 recommendation by the undersigned. *See Tradebay*, 278 F.R.D. at 603 (“[T]aking a ‘preliminary
3 peek’ and evaluating a pending dispositive motion puts a magistrate judge in an awkward position.
4 The district judge will decide the dispositive motion and may have a different view of the merits
5 of the underlying motion. Thus, this court’s ‘preliminary peek’ at the merits of the underlying
6 motion is not intended to prejudge its outcome.”; finding the Court’s role properly directed towards
7 determining “whether it is more just to speed the parties along in discovery and other proceedings
8 while a dispositive motion is pending, or whether it is more just to delay or limit discovery and
9 other proceedings to accomplish the inexpensive determination of the case.”) (internal citation
10 omitted); *accord Bosh v. United States*, C19-5616-BHS-TLF, 2019 WL 5684162 at *1 (W.D.
11 Wash. Nov. 1, 2019).

12 Nor is it entirely clear how a dismissal of the non-contractual claims would impact
13 plaintiffs’ requests for discovery. Plaintiffs maintain the continuing relevance of all of its
14 discovery requests to its breach of contract claim, while Boeing appears to assert only documents
15 directly related to the contracts between the parties would be subject to discovery. The actual
16 impact on the discovery requests would likely fall somewhere between these contentions. In either
17 event, a mere narrowing of discovery to save the parties time and expense does not suffice to
18 warrant a complete stay. The Court, for this reason and for the reasons stated above, finds an
19 absence of good cause shown for Boeing’s request to stay discovery pending a ruling on the motion
20 to dismiss.

21 The Court does, however, find some relief from discovery warranted. As previously
22 observed, the discovery requests at issue are “broad and sweeping” and a response will impose a
23 significant burden on Boeing. (Dkt. 39 at 4-7.) For example, the first set of discovery requests

1 seeks production of documents produced in other litigation and government investigations relating
2 to the 737 MAX and would entail review of some 1.5 million documents, many of which plaintiffs
3 concede are already in the public domain. (*Id.*) Should Boeing succeed in dismissing all but the
4 non-contractual claims, a significant reduction in the materials properly subject to discovery
5 appears likely. Also, should Boeing not prevail, any additional delay in the resumption of full
6 discovery is not likely to be significant because the motion to dismiss has been fully briefed and
7 is ripe for consideration. Because it is clear the parties disagree on the proper scope of discovery,
8 a partial stay will serve to preserve judicial resources to allow for consideration of the dispositive
9 motion without the need to address discovery disputes. Finally, there do not appear to be any
10 concerns regarding document preservation given Boeing's existing "litigation holds and
11 document-storage redundancies" covering the documents at issue. (*See* Dkt. 43 at 5 & Dkt. 31,
12 ¶¶2-5.)

13 Boeing requests, in the alternative to a stay, entry of a protective order sequencing
14 discovery. Specifically, Boeing asks the Court to limit the first stage of discovery to plaintiffs'
15 breach of contract claim and to stay all remaining discovery pending a ruling on the motion to
16 dismiss. Boeing further proposes limiting the first stage of discovery to materials identifiable
17 without searches of individual custodians' electronically stored information ("ESI"), and delaying
18 such ESI discovery until after resolution of the motion to dismiss to allow for the use of one set of
19 electronic search terms and protocols for all discovery.² Boeing clarifies in its reply that this
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21 ² Boeing points to *Timaero Ireland Limited v. The Boeing Company*, No. 19-cv-8234 (N.D. Ill.)
22 (Dkt. 37), as a similar case in which a court chose this alternative path. (*See* Dkt. 44, Ex. C (attaching
23 transcript of proceedings).) In that case, prior to the parties' exchange of initial disclosures under Rule
26(a)(1), the district judge limited the parties to written discovery on a breach of contract claim pending
rulings on Boeing's motion to dismiss all other claims and/or its motion to transfer the case to this Court
pursuant to 28 U.S.C. § 1404(a) (change of venue). *Timaero Ireland Limited*, 19-cv-8234 (Dkts. 37-38).

1 proposal does not preclude discovery of all ESI and, instead, provides for the production of both
2 hard-copy and electronic documents relevant to the breach of contract claim, while excluding
3 production of ESI requiring keyword search of individual custodians' electronic files.

4 The Court finds this alternative proposal a reasonable compromise and to adequately
5 address both the concerns of the parties and the Court. However, in effectuating this sequenced
6 discovery, Boeing is advised to provide for a more generous reading of the relevance of plaintiffs'
7 discovery requests to the breach of contract claim than that reflected in the briefing on the motion
8 to stay. *See generally* Fed. R. Civ. P. 26(b)(1) (providing for discovery of any nonprivileged matter
9 relevant to a claim or defense and proportional to the needs of the case). The Court anticipates the
10 parties will promptly meet and confer and reach an agreement as to the proper scope of this
11 sequenced discovery without any need for Court intervention.

12 CONCLUSION

13 In sum, while Boeing fails to demonstrate good cause for a stay of all discovery, the Court
14 finds some relief from discovery warranted pending a ruling on Boeing's motion to dismiss.
15 Boeing's Motion for Protective Order (Dkt. 43) is therefore GRANTED in part and DENIED in
16 part. The parties shall limit discovery to plaintiffs' breach of contract claim and to materials
17 identifiable without searches of individual custodians' ESI, and remaining discovery is herein
18 STAYED pending a ruling on the motion to dismiss.

19 DATED this 14th day of October, 2020.

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22 Mary Alice Theiler
23 United States Magistrate Judge