

1 EMILY JOHNSON HENN (SBN 269482)
2 ehenn@cov.com
3 COVINGTON & BURLING LLP
4 3000 El Camino Real
5 5 Palo Alto Square, 10th Floor
6 Palo Alto, CA 94306-2112
7 Telephone: + 1 (650) 632-4700
8 Facsimile: + 1 (650) 632-4800

9 SIMON J. FRANKEL (SBN 171552)
10 sfrankel@cov.com
11 MATTHEW Q. VERDIN (SBN 306713)
12 mverdin@cov.com

13 JENNA L. ZHANG (SBN 336105)
14 jzhang@cov.com
15 COVINGTON & BURLING LLP
16 Salesforce Tower
17 415 Mission Street, Suite 5400
18 San Francisco, CA 94105-2533
19 Telephone: + 1 (415) 591-6000
20 Facsimile: + 1 (415) 591-6091

21 *Attorneys for Defendants*
22 *Nike, Inc. and FullStory, Inc.*

23 **UNITED STATES DISTRICT COURT**
24 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

25 BURHAAN SALEH, individually and
26 on behalf of all others similarly situated,

27 Plaintiff,

28 v.

NIKE, INC., and FULLSTORY, INC.,

Defendants.

Civil Case No.: 2:20-cv-09581-FLA-RAO
**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO STAY
DISCOVERY; MEMORANDUM OF
POINTS AND AUTHORITIES**

Hearing Date: June 11, 2021
Hearing Time: 1:30 p.m.
Honorable Fernando L. Aenlle-Rocha

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 11, 2021 at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Fernando Aenlle-Rocha in Courtroom 6B of the United States District Court for the Central District of California, located at 350 W. 1st Street, 6th Floor, Los Angeles, CA 90012, Defendants FullStory, Inc. (“FullStory) and Nike, Inc. (“Nike”), will and hereby do move for an order staying discovery in this matter pending resolution of defendants’ motion to dismiss (Dkt. 30).

The Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Matthew Q. Verdin and accompanying exhibits, and such further evidence and argument as may be presented to the Court at or before the hearing on this matter.

The Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on April 29, 2021.

DATED: May 6, 2021

COVINGTON & BURLING LLP

By: /s/ Matthew Q. Verdin

Matthew Q. Verdin

Attorney for Defendants

Nike, Inc. and FullStory, Inc.

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

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. ARGUMENT..... 3

 A. A Stay of Discovery is Warranted Because the Pending Motion to Dismiss Is Potentially Dispositive. 4

 B. FullStory’s Challenge to Personal Jurisdiction Strongly Favors a Stay of Discovery. 5

 C. A Temporary Stay of Discovery Will Not Prejudice Plaintiff and Will Preserve the Parties’ Resources. 6

IV. CONCLUSION..... 8

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants FullStory and Nike respectfully request a stay of all discovery pending resolution of their motion to dismiss. If granted, that motion will entirely dispose of the suit against defendants, obviating the need for the wide-ranging and burdensome discovery campaign that plaintiff has commenced. The court in two very similar cases (filed by the same counsel as here) has postponed the commencement of discovery while dismissing, with leave to amend, virtually identical complaints that are predicated, as here, on the use by website operators like Nike of FullStory’s software and services to improve their websites. *Graham v. Noom, Inc.*, 2021 WL 1312765, at *10 (N.D. Cal. Apr. 8, 2021); *Johnson v. Blue Nile, Inc.*, 2021 WL 1312771, at *3 (N.D. Cal. Apr. 8, 2021).

The grounds articulated by the Northern District of California for dismissal of the *Noom* and *Blue Nile* complaints apply equally here, and provide sufficient good cause for a temporary stay of discovery. *First*, FullStory, as Nike’s vendor, was a party to plaintiff’s communications with Nike and not a third-party eavesdropper and, thus, plaintiff fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Second*, because plaintiff’s only asserted basis for personal jurisdiction over FullStory in California is its alleged eavesdropping, plaintiff fails to establish personal jurisdiction over FullStory under Federal Rule of Civil Procedure 12(b)(2) for the same reasons that plaintiff fails to state a claim.

Imposing costly and burdensome discovery on defendants at this juncture would thus undercut the purpose of a motion to dismiss, which is “to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Nor will plaintiff suffer any prejudice from a temporary stay of discovery while the Court resolves defendants’ potentially dispositive motion. To the extent plaintiff suggests he should be able to embark on a fishing expedition in an attempt to find some facts that could support

1 his claims prior to the filing of any amended complaint, that position, as the Ninth Circuit
2 observed, “is unsupported and defies common sense.” *Id.*

3 **II. BACKGROUND**

4 ***This Lawsuit.*** In October 2020, plaintiff filed this putative class-action lawsuit
5 against FullStory, which provides software-based services to the other named defendant,
6 Nike, designed to improve Nike’s website and the user experience on the website. *See* Dkt.
7 1 (“*Compl.*”) ¶ 15; Dkt. 24 (“*Am. Compl.*”) ¶¶ 35–36.¹ Nike embedded FullStory’s
8 software code on its website (nike.com) to collect data regarding a user’s interactions with
9 the website (*e.g.*, keystrokes, mouse clicks, and page scrolling). *Am. Compl.* ¶¶ 17, 37–
10 38. Plaintiff’s core allegation is that FullStory eavesdropped on—and Nike aided and
11 abetted the eavesdropping of—plaintiff’s communications with Nike when he visited
12 Nike’s website, and that this conduct violated his right to privacy under California’s
13 Invasion of Privacy Act and the California Constitution. *See Am. Compl.* ¶¶ 59–89.
14 Plaintiff filed the operative amended complaint after, and instead of opposing, defendants’
15 motion to dismiss the original complaint. *See* Dkts. 19, 22.

16 ***Defendants’ Pending Motion to Dismiss.*** FullStory and Nike moved to dismiss
17 plaintiff’s amended complaint in its entirety, arguing that plaintiff failed to state a claim,
18 in part, because FullStory, as Nike’s vendor, was a party to plaintiff’s communications
19 with Nike and not an eavesdropper. *See* Dkt. 30 at 2, 11–15; Dkt. 32 at 6–9, 12–13, 15.
20 FullStory also moved to dismiss plaintiff’s claims against FullStory for lack of personal
21 jurisdiction arguing, in part, that plaintiff failed to allege sufficient facts under a theory of
22

23
24 ¹ Plaintiff previously filed a virtually identical complaint, save for swapping defendant
25 Nike, Inc. for previous defendant Hudson’s Bay Company. *Saleh v. Hudson’s Bay*
26 *Company*, Case No. 2:20-cv-9095-PA-KS (C.D. Cal. Oct. 2, 2020) (Dkt. 1). The
27 Honorable Percy Anderson dismissed the previous complaint with leave to amend based
28 on plaintiff’s failure to adequately plead diversity jurisdiction. *Id.* (Dkt. 9). Rather than
file an amended complaint, plaintiff filed the virtually identical complaint in this case,
which was assigned to a different judge.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.