

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STEVEN VANCE, *et al.*,  
Plaintiffs,  
v.  
MICROSOFT CORPORATION,  
Defendant.

2:20-cv-01082-JLR

**PLAINTIFFS' FED. R. CIV. P.  
56(D) MOTION TO DENY OR  
STRIKE DEFENDANT'S  
SUMMARY JUDGMENT  
MOTION TO ALLOW TIME FOR  
NECESSARY DISCOVERY**

**NOTE ON MOTION CALENDAR:  
January 21, 2022**

**ORAL ARGUMENT REQUESTED**

1 Pursuant to Federal Rule of Civil Procedure 56(d) and the Court’s January 3, 2022 Minute  
2 Order (Dkt. 98), Plaintiffs Steven Vance and Tim Janecyk (collectively, “Plaintiffs”) hereby move  
3 the Court for an Order denying or striking Defendant Microsoft Corporation’s Motion for  
4 Summary Judgment (Dkt. 84) without prejudice to allow Plaintiffs time to obtain necessary  
5 discovery. In support of this motion, Plaintiffs state as follows:

### 6 INTRODUCTION

7 On December 10, 2021, Defendant Microsoft Corporation (“Defendant” or “Microsoft”)  
8 prematurely moved for summary judgment, contending that: (a) Illinois’ Biometric Information  
9 Privacy Act (“BIPA”) “does not apply extraterritorially here because Microsoft *did not engage in*  
10 *any action in Illinois . . .*”; (b) applying BIPA here would violate the Dormant Commerce Clause;  
11 and (c) Plaintiffs have no unjust enrichment claim because Defendant did not use the biometric  
12 identifiers and information (collectively, “biometrics”) in the biometric dataset at issue (the  
13 “Dataset”) at all. *See* Dkt. 84 at 7, 22.<sup>1</sup> Discovery is ongoing, and there is no discovery cutoff date.

14 Even though Plaintiffs have continuously pursued discovery throughout the case, they  
15 currently cannot present facts essential to justify their opposition to Defendant’s summary  
16 judgment motion. Despite Plaintiffs having served discovery seeking information regarding  
17 Defendant’s conduct in Illinois and its unjust enrichment, Defendant has not provided complete  
18 responses, and in some instances, has not provided substantive responses at all. Because Defendant  
19 has yet to provide proper responses to Plaintiffs’ written discovery, Plaintiffs have not yet begun  
20 taking non-class certification depositions.

21 Submitted in connection with this motion is the Declaration of Scott R. Drury which  
22 specifically identifies the relevant information Plaintiffs seek and sets forth the basis for believing  
23 that the information sought actually exists. Based on that declaration, and because this motion is  
24 timely, this Court should grant this motion, deny or strike Defendant’s motion without prejudice  
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<sup>1</sup> Citations to docketed entries are to the CM/ECF-stamped page numbers at the top of the page.

1 and grant Plaintiffs sufficient time – which Plaintiffs respectfully suggest should not be less than  
2 180 days – to complete the discovery needed to oppose the motion.

### 3 FACTUAL BACKGROUND

4 Plaintiffs have pending claims against Defendant for: (a) collecting and obtaining the  
5 biometrics of Plaintiffs and class members without providing written notice or obtaining written  
6 consent in violation of BIPA § 15(b), 740 Ill. Comp. Stat. 14/15(b); and (b) unjust enrichment. *See*  
7 Dkt. 1 (Complaint), 43 (Order on Motion to Dismiss), 47 (Supplemental Motion to Dismiss Order).  
8 Defendant obtained the biometrics at issue when it downloaded the Dataset from a link provided  
9 by International Business Machines Corporation (“IBM”). Dkt. 1 ¶¶ 40-44, 55-58. IBM created  
10 the Dataset by performing facial geometric scans on photographs that had been uploaded to Flickr  
11 (a photograph-sharing website), including Plaintiffs’ photographs. *Id.* ¶¶ 28-32, 40-44. At relevant  
12 times, Plaintiffs were and remain Illinois residents, and uploaded the photographs to Flickr from  
13 their computers in Illinois. *Id.* ¶¶ 60-62, 69-70. Defendant used the Dataset to improve its facial  
14 recognition software and generate profits. *Id.* ¶¶ 52-59, 77. Defendant failed to notify or receive  
15 the consent of the individuals appearing in the photographs regarding the collection of their  
16 biometrics. *Id.* ¶¶ 43, 45-46, 64-66, 72-74, 94.

17 Defendant previously sought dismissal of Plaintiffs’ claims on the same grounds presented  
18 in its summary judgment motion, namely, that: (a) BIPA, as applied to this case, violated Illinois’  
19 extraterritoriality doctrine and the Dormant Commerce Clause; and (b) Plaintiffs failed to state a  
20 claim for unjust enrichment. *See* Dkt. 25 at 12-30. The Court rejected each of those contentions.  
21 Dkt. 43 at 6-19; Dkt. 47 at 12-21. In rejecting Defendant’s extraterritoriality argument, this Court  
22 found, *inter alia*, that such a determination required a “highly fact-based analysis.” *See* Dkt. 43 at  
23 7, quoting *Avery v. State Farm Mut. Auto. Ins. Co.*, 853 N.E.2d 801, 854 (Ill. 2005). Similarly, in  
24 rejecting Defendant’s Dormant Commerce Clause argument, the Court, again, found that the  
25 analysis was fact-based and that it needed “more information about the technology behind how  
26 Microsoft obtained, stores or uses the [Dataset]” before determining whether BIPA, as applied to  
27 this case, violates the Dormant Commerce Clause. *Id.* at 11-12. Regarding the remaining claim,

1 the Court found that Plaintiffs properly pleaded an unjust enrichment under Illinois law. Dkt. 47  
2 at 20.

### 3 ARGUMENT

#### 4 I. Legal Standards.

5 Federal Rule of Civil Procedure 56(d) sets forth a procedure for a party against whom a  
6 motion for summary judgment has been filed to seek a continuance pending completion of  
7 discovery. *See* Fed. R. Civ. P. 56(d); *see also Burlington N. Santa Fe R.R. Co. v. Assiniboine and*  
8 *Sioux Tribes of the Fort Peck Res.* (“*Burlington*”), 323 F.3d 767, 773 (9th Cir. 2003). Pursuant to  
9 Rule 56(d), “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot  
10 present facts essential to justify its opposition, the court may: (1) defer considering the motion or  
11 deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any  
12 other appropriate order.” *Id.*

14 Where a party opposing summary judgment “makes (a) a timely application which (b)  
15 specifically identifies (c) relevant information, (d) where there is some basis for believing that the  
16 information sought actually exists,” a court should grant its request for relief under Rule 56(d).  
17 *See Atigeo LLC v. Offshore Ltd. D.*, No. C13-1694JLR, 2014 WL 1494062, at \* 3 (W.D. Wash.  
18 Apr. 16, 2014) (internal quotation marks and citations omitted); *see also Burlington*, 323 F.3d at  
19 774-75. Unless a non-movant has not diligently pursued discovery, a court should grant a request  
20 for a continuance of a summary judgment motion for purposes of discovery “almost as matter of  
21 course.” *Burlington*, 323 F.3d at 773-74 (internal quotation marks and citations omitted); *see also*  
22 *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (noting that the Supreme Court  
23 has restated Rule 56(d) as requiring, not merely permitting, discovery where the nonmovant has  
24 not had the chance to discover essential information).  
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1 **II. Defendant Agrees that Plaintiffs Are Entitled to Some Discovery.**

2 Prior to filing this motion, Plaintiffs met and conferred with defense counsel regarding the  
3 discovery Plaintiffs need to respond to Defendant's summary judgment motion. Drury Decl. ¶ 32.  
4 During the meet and confer, defense counsel stated that they had no objection to Plaintiffs deposing  
5 the non-attorney witnesses who submitted declarations in support of the summary judgment  
6 motion. *Id.* Defendant further agreed to produce documents relied on by those witnesses in  
7 connection with preparing their declarations. *Id.*  
8

9 **III. Plaintiffs Satisfy All Four Requirements for Relief Under Rule 56(d).**

10 **A. Plaintiffs' Request Is Timely.**

11 This motion is timely. Discovery is ongoing, and no dates have been set for overall  
12 discovery cutoff, dispositive motions or trial.<sup>2</sup> *See* Dkt. 58. The initial Order Setting Trial Date  
13 and Related Dates in this matter was entered on October 21, 2020. Dkt. 33. Shortly thereafter, on  
14 November 5, 2020, Plaintiffs served interrogatories and requests for production on Defendant.  
15 Drury Decl. ¶ 2 and Ex. A (first interrogatories), Ex. B (first production requests). Plaintiffs have  
16 continued to actively pursue discovery throughout, including: (a) serving a second set of  
17 interrogatories and requests for production (*id.* ¶ 5 and Ex. E (second interrogatories), Ex. F  
18 (second production requests); (b) serving numerous third-party subpoenas (*id.* ¶ 10); and (c)  
19 deposing Michele Merler, one of the IBM employees who developed the Dataset. *Id.* ¶ 13. In  
20 addition to their own documents, Plaintiffs have produced over 500,000 pages of documents  
21 obtained from third parties. *Id.* ¶ 11.  
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24 On May 17, 2021, the Court entered the parties' stipulated scheduling order in which it set  
25 a schedule for class certification-related events and vacated all other deadlines (including the  
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<sup>2</sup> Class certification discovery closed on September 13, 2021. Dkt. 68 at 2.

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