The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN VANCE, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

No. 2:20-cv-01082-JLR

MICROSOFT'S OPPOSITION TO PLAINTIFFS' FED. R. CIV. P. 56(d) MOTION TO DENY OR STRIKE SUMMARY JUDGMENT MOTION

NOTE ON MOTION CALENDAR:
January 21, 2022

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Court should deny Plaintiffs' Rule 56(d) Motion because Plaintiffs (a) have not exercised due diligence in discovery, and (b) do not identify the specific facts relevant to Microsoft's Motion for Summary Judgment that their wide-ranging requests would "likely" reveal. Microsoft has no objection, however, to allowing Plaintiffs until March 18 to file their opposition brief, which will afford ample time to take depositions of Microsoft's seven declarants (as well as the six declarants Amazon has offered for deposition in its case). Microsoft proposes to re-note its motion for April 1, when its reply brief would be due.

This case boils down to a simple set of facts that can be addressed on this schedule, without the disproportionate discovery Plaintiffs' Motion demands. In 2019, two individuals associated with Microsoft—one a contractor, the other an intern—downloaded IBM's Diversity in Faces ("DiF") Dataset. In short order, they decided the DiF Dataset was useless for their research projects, and they moved on. The contractor and the intern were in Washington and New York, respectively, and neither they nor their work had any connection with Illinois. Microsoft has provided discovery responses, documents, and declarations corroborating these facts. And these straightforward facts form the basis for its Motion for Summary Judgment.

Now, after their own inexcusable delays, Plaintiffs invoke Rule 56(d) in hopes of getting at least six more months to engage in wide-ranging discovery before responding to Microsoft's Motion. But Plaintiffs' request relies on pure conjecture, and they fail to carry their Rule 56(d) burden. Plaintiffs filed this case on July 14, 2020, and discovery has been ongoing since November 2020. Microsoft told Plaintiffs the facts on which it relies in its Motion for Summary Judgment in December 2020. Plaintiffs have had more than a year to take depositions to explore those facts. Despite that, they now seek a delay of briefing for "not less than" six months so they can pursue thirteen broad categories of additional discovery, which they speculate *might* turn up something they can use to oppose Microsoft's Motion. But Rule 56(d) requires that a party seeking to defer a summary judgment motion must identify *specific* facts discovery is *likely* to unearth and are *essential* to oppose the motion. Plaintiffs' Motion falls far short of this standard.

Microsoft does not object to Plaintiffs deposing witnesses who submitted declarations in support of its Motion, all but one of whom Plaintiffs have known about for at least six months. Further, Microsoft will produce any previously unproduced documents on which its witnesses relied in preparing their declarations. But for the other categories of discovery Plaintiffs demand, they fail to demonstrate: (1) the facts they expect to elicit from their proposed discovery; (2) that these facts *exist*; and (3) that the facts are essential to opposing Microsoft's Motion. The Court should deny Plaintiffs' Motion and adopt Microsoft's proposed schedule.

II. FACTUAL BACKGROUND

A. The DiF Dataset and Microsoft's Download

The essential facts are undisputed. In 2018, IBM created its DiF Dataset to "advance the study of fairness and accuracy in face recognition technology." M. Merler, et al., DIVERSITY IN FACES, IBM Research AI at 2 (Feb. 22, 2019) (Dkt. 70-6). IBM did not create the Dataset with an eye toward commercial applications, and it did not annotate the faces appearing in photos linked in the DiF Dataset for the purpose of identifying any individuals. *Id.* Rather, IBM created a facial coding scheme to provide a baseline for measuring diversity in datasets, and its data likely cannot be used for identification at all. *See* Dkt. 85 (Merler Decl.) ¶ 7. IBM made the DiF Dataset available to researchers only, and its DiF Dataset Terms of Use "made clear that the DiF Dataset could only be used for non-commercial, research purposes." *Id.* ¶ 9.

Reports indicate IBM received over 250 requests for the DiF Dataset. *See* Dkt. 80 at 18 (Vance Dep. 100:18-19). Only two came from people who stated their research was related to Microsoft. One of those requests came from an outside contractor for Microsoft working in Redmond, Washington, Ben Skrainka, who told IBM he would "use the DiF Dataset to evaluate the bias of different facial recognition algorithms." Dkt. 85 Ex. C at 2-3. The other came from a post-graduate intern at Microsoft Research in New York City, Samira Samadi, who told IBM she "need[ed] a diverse image data set to be able to study the effect of different factors" that affect "how well people can evaluate the output of a facial recognition system." *Id.* Ex. D at 2-3. Both downloaded the DiF Dataset in February 2019.

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