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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 KAEI GARNER, *et al.*,

8 Plaintiffs,

9 v.

10 AMAZON.COM, INC., *et al.*,

11 Defendants.
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Cause No. C21-0750RSL

ORDER DENYING
DEFENDANTS' MOTION
FOR A STAY AND
PROTECTIVE ORDER

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14 This matter comes before the Court on defendants' "Motion to Stay All Discovery
15 Pending Decision on Amazon's Motion to Dismiss and for Protective Order Against
16 Enforcement of 39 Non-Party Subpoenas." Dkt. #73. Having reviewed the memoranda,
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18 declarations, and exhibits submitted by the parties, as well as the underlying motion to dismiss,¹
19 the Court finds as follows:

20 **A. Stay of Discovery**

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22 The Federal Rules of Civil Procedure impose clear duties to disclose that are triggered by
23 certain, specified events. *See* Fed. R. Civ. P. 26(a)(1) and 26(d)(1). The rules do not provide an
24 automatic stay of discovery if a motion to dismiss is filed: such motions are often unsuccessful
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27 ¹ This matter can be decided on the papers submitted. Defendants' request for oral argument is
28 DENIED.

1 and a stay could cause unnecessary and significant delays at the outset of the litigation. The
2 Court nevertheless has discretion to stay discovery if defendants show that they are entitled to a
3 protective order under Rule 26(c) “to protect a party or person from annoyance, embarrassment,
4 oppression, or undue burden or expense” *See Lazar v. Kroncke*, 862 F.3d 1186, 1203 (9th
5 Cir. 2017) (“District court[] orders controlling discovery are reviewed for an abuse of
6 discretion.”). Defendants argue that it would be an undue burden to have to respond to discovery
7 related to claims which may be dismissed under Rule 12(b)(6).
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10 The pending motion to dismiss asserts that Washington law governs the claims of
11 registered users, all of whom agreed to Amazon’s Conditions of Use, that all claims brought by
12 registered users under other states’ laws must be dismissed, and that the registered users have
13 consented to the recordings at issue in the First Amended Complaint. With regards to non-
14 registrant users, defendants argue that they impliedly consented to the voice recordings under
15 Washington law² because they knew or should have known the way Alexa works and the
16 recordings are inherent in the technology plaintiffs used. Defendants seek dismissal of plaintiffs’
17 Washington Consumer Protection Act claims for failure to plausibly allege an unfair or
18 deceptive practice or injury to business or property, dismissal of the Federal Wiretap Act claims
19 because defendants were the intended recipient of the communications, and dismissal of the
20 Federal Stored Communications Act claims for failure to plausibly allege that Alexa is an
21 electronic communication service, that the recordings are in electronic storage, or that they were
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28 ² Defendants do not explain why Washington law applies to the claims of non-registrant users.

1 divulged to a third party. A brief review of the moving papers suggest that they raise “a real
2 question whether” portions of plaintiffs’ claims will survive. *Wood v. McEwen*, 644 F.2d 797,
3 802 (9th Cir. 1981).
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5 Such a showing is only half of the analysis, however. To determine whether the expense
6 and burden of discovery regarding claims that may ultimately be dismissed is “undue” and
7 therefore justifies a protective order, the Court must also consider whether plaintiff will be
8 prejudiced if a stay is ordered. *Id.* In this regard, plaintiff argues that the discovery it seeks will
9 bolster allegations in the First Amended Complaint that defendants challenge as conclusory,
10 such as the allegation that defendants disclosed Alexa recordings to third parties. In addition, the
11 parties have less than ten months to complete fact discovery. A delay of unknown length at the
12 start of discovery would likely prejudice plaintiffs’ ability to support their class certification
13 motion, which is due in January 2023. In light of the risk of prejudice to plaintiff, the apparent
14 merit of some of defendants’ arguments does not justify the requested stay of discovery.
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18 **B. Protective Order**

19 Defendants also seek a protective order relieving the recipients of 39 third-party
20 subpoenas from having to respond until after the motion to dismiss is ruled upon. “The court
21 may, for good cause, issue an order to protect a party or person from annoyance, embarrassment,
22 oppression, or undue burden or expense” under Rule 26(c). Defendants assert that the subpoenas
23 seek information that could be obtained from defendants themselves and are, therefore, designed
24 to harass defendants’ business partners. They do not, however, discuss any particular discovery
25 request, and plaintiffs have shown that at least some of the information sought is within the sole
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1 control of the third parties on whom the subpoenas were served. Nor do defendants provide any
2 facts suggesting that the discovery requests annoy, embarrass, oppress, or impose an undue
3 burden or expense on the third parties, other than to repeat that production may not be necessary
4 if defendants’ motion to dismiss is granted. As discussed above, this risk is not “undue” in the
5 circumstances presented here.
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9 For all of the foregoing reasons, defendants’ request for a stay of discovery (Dkt. # 73) is
10 DENIED.

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13 Dated this 10th day of March, 2022.

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16 Robert S. Lasnik
17 United States District Judge
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