

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACINDA DORIAN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

AMAZON WEB SERVICES, INC.,

Defendant.

CASE NO. 2:22-cv-00269

ORDER DENYING DEFENDANT’S
MOTION TO STAY DISCOVERY

I.

INTRODUCTION

This matter comes before the Court on Defendant Amazon Web Services Inc.’s (“AWS”) Motion to Stay Discovery. Dkt # 29. Plaintiff Jacinda Dorian opposes the motion. *See* Dkt. # 31. Having reviewed the filings in support of and in opposition to the motion, the file herein, and the applicable law, the Court DENIES the motion.

II.**BACKGROUND**

1
2
3 Plaintiff Jacinda Dorian is an Illinois resident who took multiple remote tests while
4 attending two colleges in Illinois. Dkt. # 1 at ¶¶ 37–38. Both colleges used a proctoring
5 software developed by ProctorU, Inc. to administer the tests. *Id.* at ¶ 38. The ProctorU software
6 required Plaintiff to submit her image as well as an image of a valid identification document. *Id.*
7 at ¶ 39. ProctorU then used AWS’s facial recognition program Rekognition to analyze and
8 compare Plaintiff’s images to verify her identity. *Id.* at ¶ 40. Plaintiff alleges that AWS violated
9 section 15(a) and 15(b) of the Illinois Biometric Information Privacy Act (“BIPA”) by
10 possessing her biometric data without publishing a “publicly-available retention and deletion
11 schedule,” and collecting the same data without providing adequate notice and obtaining her
12 consent. *Id.* at ¶¶ 41–43. Plaintiff asserts claims on behalf of herself and a putative class defined
13 as “[a]ll Illinois residents who had their biometric information or biometric identifiers collected,
14 captured, received, possessed, or otherwise obtained by Amazon’s Rekognition service and
15 stored in AWS’s servers.” *Id.* at ¶ 44.

16 Defendant filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) and
17 Motion to Strike Class Allegations under Rule 12(f) on May 16, 2022. Dkt. # 21. Plaintiff
18 responded to the motion on July 6, 2022. Dkt. # 27. Defendant then filed a Motion to Stay
19 Discovery on July 12, 2022. Dkt. # 29.

III.**ANALYSIS**

20
21
22 AWS seeks a stay of discovery until after this Court rules on its motion to dismiss (Dkt. #
23 21) and/or until the Northern District of Alabama resolves *Thakkar v. ProctorU, Inc.* No. 2:21-
24 cv-01565-NAD (N. D. Ala.), a case it argues “overlaps substantially” with this case. Dkt. # 29.

1 In the alternative, it requests that the Court stay discovery until after discovery is complete in
2 *Thakkar* or until after the *Thakkar* court rules on ProctorU’s motion to dismiss. *Id.* For the
3 reasons below, the Court declines to exercise its discretion to grant a stay of discovery on either
4 of these bases.

5 A. The Court Declines to Stay Discovery Based on Defendant’s Pending Motion to Dismiss.

6 District courts have broad discretion to stay discovery pending resolution of potentially
7 dispositive motions. *See Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). However,
8 “[a] pending motion to dismiss is generally not grounds for staying discovery.” *See Edmonds v.*
9 *Amazon.com, Inc.*, No. C19-1613JLR, 2020 WL 8996835, at *1 (W.D. Wash. Mar. 6, 2020); *see*
10 *also Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (“Had the Federal Rules
11 contemplated that a motion to dismiss under Fed[eral] R[ule of] Civ[il] P[rocedure] 12(b)(6)
12 would stay discovery, the Rules would contain a provision to that effect.”). In deciding whether
13 to impose a stay pending disposition of a motion, courts consider (1) whether the pending motion
14 would dispose of the entire case, and (2) “whether the pending motion can be decided without
15 additional discovery.” *See Roberts v. Khounphixay*, No. C18-0746-MJP-BAT, 2018 WL
16 5013780, at *1 (W.D. Wash. Oct. 16, 2018) (*citing Ministerio Roca Solida v. U.S. Dep’t of Fish*
17 *& Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013)). “In applying this test, courts take a
18 preliminary peek at the merits of the dispositive motion to assess whether a stay is warranted.”
19 *Id.*; *see also Zeiger v. Hotel California by the Sea LLC*, No. C21-1702-TL-SKV, 2022 WL
20 1499670, at *2 (W.D. Wash. May 12, 2022). “The ‘preliminary peek,’ however, is not intended
21 to prejudge the outcome of the motion.” *Id.*

22 The Court cannot say—after taking a “preliminary peek”—that a stay is warranted in this
23 case. First, in such a situation, courts in this jurisdiction typically stay discovery only when the
24 dispositive motion in question raises preliminary “threshold” issues that may preclude a court

1 from reaching the merits of a claim. *See, e.g., Jeter v. President of the United States*, 670
2 F.App'x 493, 494 (9th Cir. 2016) (jurisdiction); *Little*, 863 F.2d at 685 (immunity of a
3 defendant); *Zeiger*, 2022 WL 1499670, at *2 (enforceability of an arbitration clause); *Ahern*
4 *Rentals Inc. v. Mendenhall*, No. C20-0542-JCC, 2020 WL 8678084, at *1 (W.D. Wash. July 9,
5 2020) (venue). AWS's motion to dismiss (Dkt. # 21)—which includes arguments regarding the
6 scope of BIPA as it relates to “back-end service providers,” the legal definitions of several terms
7 of the Act such as “collect” and “possess,” and the applicability of the Illinois extraterritoriality
8 doctrine and the Constitution's Dormant Commerce Clause—does not present such threshold
9 issues. *See generally* Dkt. # 21.

10 Further, several of Plaintiff's arguments, as well as AWS's defenses, appear to require
11 fact-based analyses that discovery would inform. *C.f. Alaska Cargo Transp., Inc. v. Alaska R.R.*
12 *Corp.*, 5 F.3d 378, 383 (9th Cir. 1993) (finding that the district court would have abused its
13 discretion in staying discovery if the discovery was relevant to whether the court had subject
14 matter jurisdiction). For example, the parties dispute whether Plaintiff's claims violate the
15 extraterritoriality doctrine, which implicates the factual question of whether Defendant's alleged
16 violations occurred primarily and substantially in Illinois. Dkt. # 21 at 21–23; Dkt # 27 at 14–19.
17 Similarly, AWS's Dormant Commerce Clause argument also hinges on the location of the
18 alleged violations. Dkt. # 21 at 24; Dkt. # 27 at 19–20. Additional information regarding the
19 methods and technology AWS uses in its Rekognition software would inform both these
20 questions. Accordingly, the Court cannot say at this point that “the pending motion can be
21 decided without additional discovery.” *See Roberts*, 2018 WL 5013780, at *1.

22 Lastly, the Court is not convinced that Defendant's Motion to Dismiss will prevail and,
23 accordingly, dispose of the case. The Court notes that numerous actions have been filed in this
24 district and others challenging the collection of biometric information under BIPA, and the

1 defendants in those cases made similar arguments at the motion to dismiss phase that were
2 rejected by the court. *See, e.g., Vance v. Amazon.com, Inc.*, 525 F.Supp.3d 1301 (W.D. Wash.
3 Mar. 15, 2021) (rejecting defendant’s arguments regarding extraterritoriality, the Dormant
4 Commerce Clause, and the definition of “collect” under § 15(b) at the motion to dismiss phase,
5 and explaining that dismissal without more information regarding how the defendant obtained,
6 stored, or used biometric data would be inappropriate); *Vance v. Microsoft Corp.*, 525 F.Supp.3d
7 1287, 1294 (W.D. Wash. 2021) (same); *see also Monroy v. Shutterfly, Inc.*, No. 16 C 10984,
8 2017 WL 4099846, at *6 (N.D. Ill. Sept. 15, 2017); *Vance v. Int’l Bus. Machines Corp.*, No. 20 C
9 577, 2020 WL 5530134, at *6 (N.D. Ill. Sept. 15, 2020). Although the Court’s preliminary look
10 is not intended to prejudice the outcome of the motion, the actions of other federal district courts
11 in similar actions at the motion to dismiss phase are instructive. Accordingly, the Court declines
12 to exercise its discretion to stay discovery based on AWS’s pending motion to dismiss.¹

13 B. The Court Declines to Stay Discovery Based on *Thakkar*.

14 Although district courts have discretionary power to stay proceedings pending the
15 outcome of parallel proceedings in another district court under *Landis v. N. Am. Co.*, 299 U.S.
16 248, 254 (1936), “[o]nly in rare circumstances will a litigant in one cause be compelled to stand
17 aside while a litigant in another settles the rule of law that will define the rights of both.” *Id.* at
18 255.² In determining whether such a stay is appropriate, “the competing interests which will be

19
20 ¹ The Court notes that AWS includes a Motion to Strike Class Allegations Under Rule
21 12(f) along with their motion to dismiss. Dkt # 21 at 28. The request to strike the class
22 allegations appears premature at this stage of the proceedings. Generally, the Court reviews
23 class allegations through a motion for class certification. *See Hoffman v. Hearing Help Express,*
24 *Inc.*, No. 3:19-CV-05960-RBL, 2020 WL 4729176, at *2 (W.D. Wash. Mar. 27, 2020). Further,
the shape and form of a class action typically evolves through the process of discovery. *Id.*

² The *Landis* line of cases typically applies to stays of proceedings, and here Defendant
seeks a stay of discovery. However, the practical effect of staying discovery—a potential delay
in litigation—is similar to the effect of staying proceedings and thus the logic of these cases
applies.

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.