

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

MICHAEL SMART, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Case No: 5:21-cv-153-JSM-PRL

HOME DEPOT, INC.,

Defendant.

_____ /

ORDER

THIS CAUSE comes before the Court upon Defendant Home Depot, Inc.’s Motion to Stay Discovery (Dkt. 25) and Plaintiff’s Response in Opposition (Dkt. 26). The Court, having reviewed the motion, response, and being otherwise advised in the premises, concludes that the motion should be granted. Specifically, discovery is stayed pending the resolution of Defendant’s motion to dismiss.

DISCUSSION

Plaintiff Michael Smart filed this putative class action alleging that Defendant Home Depot, Inc.’s business practice of monitoring website activity through “session replay” software violates the Florida Security of Communications Act (“FSCA”), Fla. Stat. § 934.03. The FSCA, in relevant part, prohibits “intentionally intercept[ing]” any “electronic communication.” Fla. Stat. § 934.03(4)(a). To date, no Florida court has

ruled on whether session replay software violates the FSCA. Plaintiff's First Amended Complaint, which is the operative pleading in this case, seeks to pursue these wiretapping claims individually and on behalf of all persons residing within Florida who visited Home Depot's website and whose electronic "communications" were allegedly intercepted by the software.

On April 7, 2021, Home Depot moved to dismiss Plaintiff's original complaint for failure to state a claim. The next day, Plaintiff filed his First Amended Complaint. Home Depot again moved to dismiss on the basis that the FSCA does not apply to Home Depot's use of session replay software because (1) the FSCA does not cover general internet browsing on commercial websites, (2) Plaintiff's interactions with the Home Depot website are not the "contents" of a communication, and (3) session replay software is not a "device." Home Depot also argues, in the alternative, that Plaintiff consented to the collection of information concerning his interactions with the Home Depot website.

Home Depot now seeks a stay of discovery pending the outcome of its motion to dismiss. Home Depot states that after the parties held their Rule 26(f) conference and discussed a potential case schedule, Home Depot proposed a stay of discovery given the "untested nature of Plaintiff's claims" and the fact that Home Depot's motion to dismiss was potentially case dispositive. (Dkt. 25). Plaintiff did not agree to a stay and served discovery on Home Depot, including 44 requests for production of documents, 30 requests for admission, and 12 interrogatories. In light of this pending discovery, Home Depot

asks the Court to exercise its discretionary authority to temporarily stay discovery pending a ruling on Home Depot's motion to dismiss. *Id.* Plaintiff opposes the motion.

The Court has broad discretion to stay discovery under Fed. Rule Civ. P. 26(c) where there is good cause and a stay would be reasonable. *See McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006) (“good cause” to stay discovery exists when there is a potentially meritorious motion that would be case dispositive); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997) (“any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible”); *Redford v. Gwinnett Cty. Jud. Cir.*, 350 Fed. App'x 341, 346 (11th Cir. 2009) (affirming stay of discovery where motion to dismiss “raised serious questions regarding the viability of [the] complaint”); *Safeco Ins. Co. of Am. v. Amerisure Ins. Co.*, No. 8:14-cv-774-T35-MAP, 2014 WL 12621558, at *2 (M.D. Fla. Sept. 9, 2014) (staying discovery pending ruling on motion to dismiss).

The Middle District of Florida disfavors discovery stays. *See* M.D. Fla. Discovery Handbook § I.E.4 (Feb. 1, 2021)), so the Court should take a “preliminary peek” at the merits of a dispositive motion and then balance the potential harm in delaying discovery against the possibility that the motion will be granted, thereby avoiding the attendant burden and cost of discovery. *See Rutland Guttering, Inc. v. Amerisure Mut. Ins. Co.*, No 6:14-cv0117-Orl-22GJK, 2014 WL 12617789, at *3 (M.D. Fla. Aug. 14, 2014).

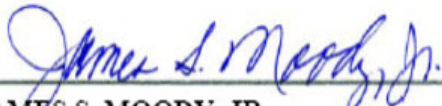
The Court has preliminarily reviewed Home Depot's motion to dismiss and concludes that Home Depot has established good cause to warrant a brief stay of discovery.

The Court is persuaded by the fact that Home Depot's motion raises serious questions about the viability of Plaintiff's FSCA claim. Although the Court expresses no opinion on the merits of the claim at this juncture, the Court notes that there is no case law as of right now that applies the FSCA in this context. The Court is also persuaded by the fact that this case is still in its early stages so there is nothing unreasonable or unfair to Plaintiff with a temporary stay of discovery. *See Mid-Continent Cas. Co. v. G.R. Constr. Mgmt., Inc.*, 2:17-cv-55-FtM-38CM, 2017 WL 3394231, at *2 (M.D. Fla. Aug. 8, 2017) (staying discovery pending resolution of motion to dismiss where "case is still in its early stage because Amended Complaint was filed . . . [and] Plaintiff will have ample opportunity and time to engage in discovery.").

It is therefore **ORDERED AND ADJUDGED** that:

1. Defendant Home Depot, Inc.'s Motion to Stay Discovery (Dkt. 25) is granted.
2. Discovery in this matter is stayed pending the Court's ruling on Defendant's Motion to Dismiss (Dkt. 24).

DONE and **ORDERED** in Tampa, Florida, this June 3, 2021.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record