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March 10, 2021

VIA ECF

Honorable Peggy Kuo, U.S.M.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East, Courtroom 11C
Brooklyn, New York 11201

Re: *Kalman Rosenfeld v. AC2T, Inc., et al.*
Case No. 20-cv-4662 (E.D.N.Y.)

Dear Judge Kuo:

Defendants Bonner Analytical Testing Co. (“Bonner Analytical”), AC2T, Inc. (“AC2T”), and Jeremy Hirsch (“Hirsch”, and together with AC2T, the “Spartan Defendants”) jointly submit, in accordance with the Court’s January 12, 2021 minute order, this letter motion seeking a stay of discovery pending the resolution of Defendants’ respective motions to dismiss Plaintiff’s complaint. (Dkt. Nos. 24, 28.)

In this action, Plaintiff, on behalf of himself and a putative national class of all other purchasers of the Spartan Mosquito Eradicator manufactured and sold by AC2T, asserts claims for deceptive business practices and false advertising in violation of New York General Business Law §§ 349 and 350 (Counts I and II); unjust enrichment (Count III); breach of express warranty (Count IV); violation of the Magnuson-Moss Warranty Act (Count V); and fraud (Count VI). (Dkt. No. 1.) Plaintiff has withdrawn Counts III, IV, and V as against Bonner Analytical (Dkt. No. 15 at 2.), as well as Count III as against the Spartan Defendants. (Dkt. No. 18 at 3.)

A. Discovery May Be Stayed for Good Cause

Under Fed. R. Civ. P. 26(c), courts have discretion to stay discovery for good cause pending the determination of a motion to dismiss. *Telesca v. Long Island Hous. P’ship, Inc.*, No. 05-cv-5509(ADS)(ETB), 2006 WL 1120636, at *1 (E.D.N.Y. Apr. 27, 2006). Courts in this circuit “have routinely held that a stay of discovery is appropriate . . . where the motion [to dismiss] appears to have substantial grounds.” *King v. City of N.Y.*, Nos. 12-cv-2344

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(NGG)(RER), 13-cv-0037 (NGG)(RER)2014 WL 4954621, at *6 (E.D.N.Y. Sept. 30, 2014) (quoting *Johnson v. N.Y. Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002)). In deciding whether to grant a stay of discovery, courts also look to the burden that discovery would place on defendants and the risk of unfair prejudice to the plaintiff. *See Joglo Realities Inc. v. Dep't of Env't. Conservation*, No. 16-cv-1666 (ARR)(CLP), 2016 WL 11480895, at *2 (E.D.N.Y. Oct. 17, 2016) (granting stay of discovery pending forthcoming motion to dismiss). Finally, courts consider whether some or all of defendants request a stay.¹ *Id.*

B. There Is Good Cause to Stay Discovery Here

In their respective motions to dismiss, Defendants have shown that Plaintiff's claims have no merit; his complaint fails to state any claim upon which relief can be granted. Moreover, the Court lacks personal jurisdiction over Bonner Analytical and Hirsch. (Dkt. Nos. 24, 28.) Amendment would be futile, as the nature of the complaint's defects cannot be cured.

As shown in Bonner Analytical's motion to dismiss, Plaintiff does not and cannot allege, as he must on Counts I and II, that Bonner Analytical, which is alleged to have "tested" a "former iteration" of the product (Dkt. No. 1 ¶ 27), engaged in any consumer-oriented or advertising conduct at all, let alone deceptive conduct. Nor does or can he allege, as he must on his Count VI fraud claim, that Bonner Analytical made any representation at all to any putative class member. And contrary to plaintiff's conclusory argument, his claims are in no way saved by "conspiracy allegations – he has pleaded no facts establishing a "conspiracy." (Dkt. No. 28 at 5.) Moreover, as shown, this Court lacks personal jurisdiction over Bonner Analytical, which has no contacts with New York that could conceivably support either general or specific jurisdiction. (Dkt. No. 28 at 4-5.)

Similarly, as shown in the Spartan Defendants' motion to dismiss, this Court lacks personal jurisdiction over Hirsch under any theory. (*See* Dkt. No. 24 at 12-15; *see also* Dkt. No. 30 at 2-4.) What is more, Plaintiff's complaint fails to plausibly allege that the Spartan Mosquito Eradicator's advertising is false. Plaintiff includes snippets of various inapposite scientific sources and asks the Court to not review them. The Court may take notice of the cited sources and use its judicial experience and common sense to determine they do not bear on the Spartan Mosquito Eradicator's efficacy. *See Kardovich v. Pfizer, Inc.*, 97 F. Supp. 3d 131, 136-37 (E.D.N.Y. 2015). The failure to plausibly allege that the product's advertising is false is fatal to Plaintiff's complaint as against the Spartan Defendants.

A stay is also warranted because of the burden that discovery will impose on the Defendants (who reside in Mississippi) if discovery proceeds, even though it is likely that some or all of Plaintiff's claims will be dismissed.² *See Giminez v. Law Offices of Hoffman &*

¹ Under Rule 26, the Court has the discretion to grant the stay as to fewer than all the defendants.

² Defendants anticipate that discovery will seek electronic documents and data, as well as deposition testimony. These methods of discovery are a burden of both time and expense.

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Hoffman, Nos. 12-cv-0669 (JFB)(ETB), 12-cv-2844 (JFB)(ETB), 2012 WL 2861014, at *2 (E.D.N.Y. July 11, 2012) (discovery stay granted where defendants “present substantial reasons for why plaintiffs’ complaint should be dismissed” and defendants reside in California); *see also Richards v. N. Shore Long Island Jewish Health Sys.*, No. CV 10-4544 LDW ETB, 2011 WL 4407518, at *2 (E.D.N.Y. Sept. 21, 2011) (discovery stay “prudent” where the “outcome of the pending motion to dismiss may substantially affect the scope of discovery”).

Plaintiff cannot identify any prejudice that he will suffer if this Court stays discovery pending resolution of the motions to dismiss that outweighs the burden on Defendants. Courts generally find no prejudice where, as here, the action is in its early stages. *See, e.g., Contracto Ltd. v. Fast Search & Transfer Int’l, AS*, No. 12-cv-1930 (JS)(ARL), 2012 WL 12252587, at *2 (E.D.N.Y. July 12, 2012); *Giminez*, 2012 WL 2861014, at *2 (because the “actions are in their infancy [and] [n]o discovery has taken place . . . there is little prejudice to plaintiffs in staying discovery”). Moreover, delay alone does not constitute prejudice. *Cf. Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983) (delay alone, where it will not result in loss of evidence, “is not a sufficient basis for establishing prejudice”).

For the foregoing reasons, good cause exists to stay discovery in this action until the Court renders its decision on Defendants’ motions to dismiss. We thank the Court for its consideration of this matter.

Respectfully,

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