STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

WML GRYPHON FUND, LLC, et al.,

Plaintiffs,

v.

Case No: 12-CV-1704
Hon. Mitchell J. Metropulos

WOOD, HAT & SILVER, LLC, et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR STAY OF DISCOVERY

Defendant AXA Equitable Life Insurance Company ("AXA" or "Defendant"), by its undersigned attorneys, respectfully moves to stay all proceedings in the above-captioned action (the "Action"), pending a decision by the United States District Court for the District of Wisconsin regarding the motions by defendant The Lincoln National Life Insurance Company ("Lincoln") to intervene and disqualify Receiver Faye Feinstein, Esq. and Quarles & Brady, LLP (collectively, the "Motion to Disqualify" or "Motion").

Postponing the mediation and staying all proceedings pending the district court's decision will avoid the pervasive uncertainty caused by the contested Receiver's continued participation in this Action. The requested stay would conserve judicial resources by preventing duplicative discovery and potentially unnecessary expense. Furthermore, plaintiffs will not be prejudiced by a brief stay pending the district court's decision. Conversely, absent a stay, defendants would be prejudiced because they would be forced to spend time and resources to conduct the deposition

of the Receiver on April 18, 2019 and attend the mediation scheduled for April 25, 2019; if the district court grants Lincoln's Motion, defendants would have to conduct a second deposition of any newly appointed Receiver (assuming one is appointed). Moreover, a newly appointed receiver may have a different strategic approach and may, in turn, seek to revisit the manner in which plaintiffs have conducted discovery to date. Furthermore, concerns shared by *both* parties as to the Receiver's true allegiances will plague the mediation. Finally, there is also the strong possibility that the Motion will be granted, which would nullify the Receiver's settlement authority both prospectively and potentially retroactively.

Accordingly, AXA respectfully requests that this Court enter an order staying all proceedings in the Action and vacating all current deadlines pending the district court's decision on the Motion to Disqualify.

BACKGROUND

On March 11, 2019, Lincoln filed the Motion to Intervene and Motion to Disqualify in the action styled *Securities and Exchange Commission v. Wealth Management LLC*, Civil Action No. 09-cv-506. Lincoln, one of the four remaining insurer defendants in this Action, filed courtesy copies of both motions and all supporting papers with this Court on March 13, 2019. *See* Dkt. 359-363. The Motion to Disqualify alleges that the Receiver and Receiver's counsel, Quarles & Brady, LLP ("Q&B"), committed serious, incurable ethical violations. *See generally* Dkt. 360, Mot. to Disqualify ("Mot."). Ms. Feinstein was appointed Receiver for Wealth Management, LLC ("WML") and the hedge funds formerly managed by WML (together, the "WML Entities") on May 20, 2009; as Receiver, Ms. Feinstein began to investigate litigation on behalf of the WML Entities against Lincoln and other insurance companies as early as March 2010. Mot. 5-6. Despite knowingly assuming a role adverse to Lincoln through her role as

Receiver, Ms. Feinstein continued to represent Lincoln in other matters from 2010 through 2015, including with respect to Lincoln's practices and procedures regarding the distribution of life insurance benefits, *without* disclosing the conflict and *without* obtaining a written waiver of the conflict. *Id.* at 4, 27. The Motion to Disqualify asserts that Ms. Feinstein's conduct is in violation of Wisconsin Rule of Professional Conduct 1.7 and seeks not only her disqualification as Receiver but the disqualification of Q&B as Receiver's counsel. *See* Mot. 15-24.

At the time the Motion to Disqualify was filed, the parties had engaged in significant discovery: AXA and its co-defendants have produced approximately 170,000 documents, plaintiffs have produced approximately 30,000 documents, and the parties have collectively taken 19 depositions. *See* Dkt. 361, Aff. of Matthew I. Vahey, at 11. In addition, Ms. Feinstein's deposition as Receiver is scheduled for April 18, 2019, the parties are scheduled to engage in mediation on April 25, 2019, and plaintiffs have noticed numerous additional depositions.

ARGUMENT

Under Wisconsin's Statutes, a circuit court has the full authority to address scheduling and planning of the proceedings of a case. *See* Wis. Stat. § 802.10. The Wisconsin Statutes also confer courts with the discretion to manage discovery as justice requires. The statute provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

Wis. Stat. § 804.01(3)(a); *see also State v. Bausch*, 2014 WI App 12, ¶ 26, 352 Wis. 2d 500, 842 N.W.2d 654 (circuit courts have broad discretion in determining whether to limit discovery).

Here, a stay is strongly favored as (1) the stay would not prejudice plaintiffs but defendants would be gravely prejudiced if the proceedings were not stayed; (2) the stay would serve the interests of the Court by conserving judicial resources; and (3) the stay would be brief.

A. The Balance of Interests Favors Granting A Stay Because A Stay Would Not Prejudice Plaintiffs.

Ms. Feinstein admitted that she is "the ultimate client with authority to approve settlements." Mot. 13. Therefore, a stay would actually *benefit* plaintiffs by providing much needed clarity as to whether the Receiver has authority to bind plaintiffs in any settlement, whether at the mediation or otherwise. Certainly the plaintiffs, along with their ultimate beneficiaries, the investors in the WML Entities, cannot be prejudiced by a pause in this matter to ensure that their interests are appropriately represented.

In contrast, defendants would be significantly prejudiced if a stay is not entered. As explained in the Motion to Disqualify, Ms. Feinstein's alleged conflicts have "taint[ed] the integrity" of this action. Mot. 16, 25. Critically, Lincoln asserts that "Ms. Feinstein has gained crucial insight into Lincoln's litigation and settlement strategies through each of her personal representations of Lincoln." *Id.* at 27. It is fundamentally unfair to Lincoln and the other insurer defendants—who have been accused of engaging in a conspiracy with Lincoln—that their opponent, the Receiver, has privileged information related to Lincoln through their representation of Lincoln for years. And AXA and the other insurer defendants are completely in the dark as to what that information may be—whether helpful to their defense or not. Indeed, even if the Motion is unsuccessful, defendants will likely need to re-open the deposition, and seek additional document discovery, to test the Receiver's credibility following the disclosure of Lincoln's allegations.

The insurer defendants should not be required to mediate with and litigate against the key representative of plaintiffs—the Receiver—while her authority to act for these plaintiffs is in serious question. No settlement can be achieved under these circumstances. And, all the allegedly improper knowledge obtained by the Receiver could be used as leverage during the mediation not only against Lincoln but against AXA and the other insurer defendants. Further, the Receiver may disclose Lincoln's privileged information to the mediator, thereby tainting the process and requiring the scheduling of another expensive mediation. In addition, if the Motion is successful, the parties will have to prepare and take a *second* deposition upon the appointment of a new Receiver.

Thus, a postponement of the mediation and a stay of all proceedings pending the district court's decision would impose no prejudice on plaintiffs, but would alleviate the serious prejudice AXA and the other defendants face by having to litigate against a Receiver who may ultimately be disqualified.

For these reasons, the balance of the parties' interests counsels in favor of a stay.

B. A Stay Would Conserve Judicial Resources.

Courts in this State have a preference to make "reasonable decision[s] based on a reasonable preference for conserving judicial resources." *Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 773 (Ct. App. 1998). It is eminently reasonable that neither the Court nor the parties should expend additional, scarce resources until the district court rules on the Motion to Disqualify.

C. The Requested Stay Will Be Brief.

As noted, Lincoln filed the Motion on March 11, 2019. The opposition to the Motion to Intervene is due on April 12, 2019, and any opposition to the Motion to Disqualify is due within 21 days of any order granting Lincoln's Motion to Intervene. *See SEC v. Wealth Management,*

LLC et al., No. 09-C-506, Dkt. 476. Once the district court has issued its decision on the Motion, this Action can move forward and all deadlines in the current Scheduling Order can be reset. In light of both the Receiver's significance to this Action as the "ultimate client" *and* the seriousness of the ethical violations levied against Ms. Feinstein and Q&B in Lincoln's Motion, the relative brevity of the requested stay weighs in its favor.

CONCLUSION

For the foregoing reasons, AXA respectfully requests that the Court enter an order vacating all current deadlines and staying all proceedings in the Action until the district court rules on the pending Motion to Disqualify.

Date: March 27, 2019

By: *Electronically signed by Adam E. Witkov*

Jarman D. Russell
(admitted *pro hac vice*)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500 (phone)
(212) 262-1910 (fax)

Ted A. Wisnefski SBN 1038316
Adam E. Witkov SBN 1066529
MICHAEL BEST & FRIEDRICH LLP
100 East Wisconsin Ave.
Milwaukee, Wisconsin 53202-4108
(414) 271-6560 (phone)
(414) 277-0656 (fax)

Attorneys for Defendant AXA Equitable Life Insurance Company