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Outagamie County
2012CV001704

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

WML GRYPHON FUND, LLC, et al.,

Plaintiffs,

v.

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

Defendants,

THE BAETIS FUND, L.P., et al.,

Nominal Defendants.

Case No. 12-CV-1704

Case Code: 30106, 30301, 30703

GREATER THAN \$10,000

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR STAY OF DISCOVERY

INTRODUCTION

Plaintiffs WML Gryphon Fund, LLC, WML Palisade Partners, L.P., WML Pantera Partners, L.P., and WML Watch Stone Partners, L.P. (collectively the "WM Funds") and Dr. John Leschke and Ms. Julie Leschke (collectively "Plaintiffs") respectfully submit this Brief in Opposition to AXA Equitable Life Insurance Company's (herein "AXA") Motion for Stay of Discovery.¹

Although AXA titled its motion a Motion for Stay of Discovery, it is actually requesting a broad and indefinite litigation freeze (*i.e.*, "[A]XA 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"). Mot. for Stay at 6 (emphasis added); *see also* Transamerica's Joinder in AXA's Motion for Stay of Discovery at 1; Phoenix's Joinder in

¹ AXA's Mot. for Stay was been joined by Transamerica Life Insurance Company ("Transamerica"), Phoenix Life Insurance Company and PHL Variable Insurance Company (together "Phoenix"), and Lincoln National Life Insurance Company ("Lincoln"). Collectively, with AXA, these companies are "Insurer Defendants."

AXA's Motion for Stay of Discovery at 1. Evaluating AXA's motion requires the Court to balance the parties' respective interests with an eye toward simplifying litigation. *Grice Eng 'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010). AXA identifies only one remaining alleged hardship: mediation with the Receiver. Br. Supp. Mot. for Stay at 4-5. But even were this prejudicial, it can be resolved easily, and without a stay, by postponing the mediation deadline. In contrast, the indefinite litigation hold AXA requests would prejudice Plaintiffs—not only the WM Funds and John and Julie Leschke, but the aging investors in the WM Funds—particularly given Insurer Defendants' many months of deposition scheduling delays to date. With the prejudice scale tipping toward Plaintiffs and recognizing that the stay will not simplify issues for trial, AXA's motion should be denied. *Grice Eng 'g, Inc.*, 691 F. Supp. 2d at 920.

STATEMENT OF FACTS

AXA's Motion for Stay is the result of nearly six months of uncertainty instigated by Lincoln's untimely accusations against the Receiver Faye B. Feinstein and her law firm in the U.S. District Court for the Eastern District of Wisconsin before the Honorable William C. Griesbach (*SEC v. Wealth Management LLC et al.*, Civil Action No. 1:09-cv-506 WCG (E.D. Wisconsin)) (the "SEC Action"). As Plaintiffs outlined in their October 31, 2018, Notice of Motion and Motion to Amend Scheduling Order, Lincoln wrote to the Receiver on October 19, 2018, alleging that the Receiver had a conflict of interest under Rule 1.7 of the Model Rules of Professional Conduct. Affidavit of Faye B. Feinstein dated October 31, 2018 (herein "Feinstein Aff."), ¶ 2. As a result of Lincoln's allegations, Plaintiffs postponed then-scheduled mediation (November 29, 2018) and moved the Court to amend the scheduling order to allow Lincoln to resolve its alleged conflict. Oct. 31 Not. of Mot. and Mot. to Amend, ¶ 12. Five months later,

after a subsequent stipulation to amend the scheduling order, Lincoln filed the Motion to Intervene and Motion to Disqualify Receiver Faye Feinstein, Esq. and Quarles & Brady, LLP, on March 11, 2019. *See* Ltr. to Court from C. Sitzmann dated March 13, 2019.

Lincoln's Motion to Intervene is predicated on Lincoln's claim that it first became aware of the Receiver's involvement in the Litigation² in July 2018. Lincoln's Mot. to Intervene at 4. Nonetheless, the Receiver has been identified by name in pleadings throughout the Litigation, including but not limited to, for example, in Plaintiffs' Responses to Defendant The Lincoln National Life Insurance Company's First Set of Interrogatories dated December 2016, filings accompanying Plaintiffs' Opposition to Defendant Insurance Companies' Motion to Dismiss dated October 14, 2013, and filings supporting Plaintiffs' Motion to Distribute Riek Settlement Funds dated October 5, 2015.

Moreover, the Receiver is referenced in documents produced by Lincoln to Plaintiffs in this Litigation. *Melnick Aff., Ex. A.* For example, Kenneth Elder, a longtime Lincoln employee who verified Lincoln's responses to Plaintiffs' interrogatories and who Lincoln's counsel identified as the individual who will serve as corporate designee in this Litigation, emailed colleagues regarding the Securities and Exchange Commission's complaint against Wealth Management LLC as early as June 2009. *Id., Melnick Aff., ¶ 6.* News articles included in the same document containing Mr. Elder's correspondence identify Ms. Feinstein as the Receiver of the Wealth Management LLC funds dating back to 2009. *Melnick Aff., Ex. A.*

² "Litigation" references *WML Gryphon Fund, LLC, et al. v. Wood, Hat & Silver, LLC, et al.*, Case No. 12-CV-1704 pending in Outagamie County.

I. THIS COURT SHOULD REJECT AXA'S REQUEST TO STAY ALL PROCEEDINGS PENDING THE DISTRICT COURT'S DECISION.

Courts have inherent authority to “ensur[e] that the court functions efficiently and effectively to provide the fair administration of justice.” *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749, 595 N.W.2d 635, 641 (1999). Whether to grant a stay is a discretionary determination. *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶ 20, 334 Wis. 2d 23, 34, 798 N.W.2d 467, 473. Courts properly exercise discretion by examining relevant facts, applying a proper legal standard, and reaching a “conclusion that a reasonable judge could reach.” *Backus Elec., Inc. v. Hubbartt Elec., Inc.*, 2015 WI App 52, ¶ 6, 364 Wis. 2d 408, 866 N.W.2d 405 (citations omitted). But, “[t]he court’s power to stay cases before it is not boundless. A stay that is so extensive as to be ‘immoderate’ is an abuse of discretion.” *Grice Eng’g, Inc.*, 691 F. Supp. 2d at 920 (citations omitted).

AXA has the burden to demonstrate that the circumstances of the case and related balancing of interests justify a stay. *Grice Eng’g, Inc.*, 691 F. Supp. 2d at 920. AXA relies on Wis. Stats. §§ 802.10 and 804.01(3)(a) in support of its Motion for Stay. Br. Supp. Mot. for Stay at 3. But neither statute provides an applicable legal standard for the stay AXA seeks. Wis. Stat. § 802.10(3) allows a court to enter a scheduling order after consultation with attorneys and pro se parties. But, AXA is requesting the opposite—to vacate the existing scheduling order and suspend the case indefinitely. Br. Supp. Mot. for Stay at 6. Wis. Stat. § 804.01(3)(a) outlines the standard for protective orders. But, AXA does not frame its request for a stay as a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue expense” Br. Supp. Mot. for Stay at 3-5; Wis. Stat. § 804.01(3)(a). Instead, AXA’s argument is a purported balancing of interests, the parties’ and the Court’s. Br. Supp. Mot. for Stay at 3-5. Accordingly, the statutes

AXA relies on are inapplicable and cannot arm the Court with a legal standard sufficient to justify a discretionary stay.

Deciding whether to impose a stay requires courts to “balance interests favoring a stay against interests frustrated by the action.” *Grice Eng’g, Inc.*, 691 F. Supp. 2d at 920. Courts consider the following factors when deciding whether to impose a stay: “(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.” *Id.* Courts also consider whether the moving party will be prejudiced without a stay. *Cooper Notification, Inc. v. Twitter, Inc.*, No. CIV. 09-865-LPS, 2010 WL 5149351, at *2 (D. Del. Dec. 13, 2010).

A. Insurer Defendants Will Not Be Prejudiced If The Court Denies AXA’s Motion.

Absent a stay, AXA claims Insurer Defendants would be prejudiced because they “would be forced to spend time and resources” to depose the Receiver on April 18, 2019, and to attend mediation scheduled for April 25, 2019. Br. Supp. Mot. for Stay at 1-2. Sensitive to AXA’s claims of prejudice, Plaintiffs postponed the Receiver’s deposition set for April 18 and offered to reschedule same when Insurer Defendants are ready. Melnick Aff., Ex. B. Having postponed the Receiver’s deposition, AXA’s only other articulated prejudice is mediating with the Receiver. Br. Supp. Mot. for Stay at 4-5. But, addressing this alleged prejudice does not require an indefinite stay of discovery; it only requires extending the deadline for mediation.³

³ The parties agreed to mediate on April 25 with Judge Morton Denlow. Melnick Aff., ¶ 6. However, AXA’s motion to stay caused uncertainty such that Plaintiffs were unable to commit to a non-refundable payment to Judge Denlow by April 1, as he required. *Id.*, ¶ 7. Accordingly, our reservation with Judge Denlow on April 25 was canceled. *Id.* Plaintiffs recognize that the March 12 scheduling order requires the parties to mediate by April 30. Were the Court to refuse AXA’s request to stay mediation, Plaintiffs request an extension of the mediation deadline so the parties can reschedule mediation with Judge Denlow.

B. Balancing Of Interests Favors Plaintiffs.

1. An Indefinite Stay Pending Resolution Of Lincoln's Federal Court Motions Will Not Be Brief.

Although the limits of AXA's stay request are unclear (*supra* at 1-2), AXA insists that the "requested stay will be brief," citing the briefing schedule established for Lincoln's Motion to Intervene and Motion to Disqualify pending in the SEC Action.⁴ Br. Supp. Mot. for Stay at 5-6. But, resolution of Lincoln's federal court motions is a two-step process. Briefs concerning Lincoln's Motion to Intervene will be filed by April 26; but, we cannot determine when the federal court will issue its decision. Melnick Aff., Ex. C. Moreover, if the Court grants Lincoln's Motion to Intervene,⁵ briefs must be filed, perhaps a hearing held, and the parties wait again, for an unknown and unpredictable amount of time, until the Court decides Lincoln's Motion to Disqualify. The bottom line is that AXA, based on the federal court's briefing schedules, cannot accurately promise a short stay when the time period for the Court to issue its decision(s) is unknown and outside even Lincoln's control.⁶ Accordingly, AXA's "the stay will be brief" is optimistic spin and is not something on which the Court should rely. The truth is that a decision on just Lincoln's Motion to Intervene will take at least three months (assuming Judge Griesbach turns around the decision relatively quickly). And, if the Motion to Intervene is granted, a decision on Lincoln's Motion to Disqualify will take months longer. What AXA defines as a "brief stay" is

⁴ Judge Griesbach set a briefing schedule for Lincoln's motions to intervene and to disqualify. Melnick Aff., Ex. C. Responses to the motion to intervene are due April 12 and replies are due on April 26. *Id.*; U.S. District Court for the Eastern District of Wisconsin Civil L. R. 7(c). If the Court grants Lincoln's Motion to Intervene, the response to the Motion to Disqualify is due 21 days after the order granting the Motion to Intervene is entered and the reply is due 14 days thereafter. *Id.*

⁵ Were Lincoln's Motion to Intervene denied, it could immediately appeal the district court's decision to the U.S. Court of Appeals for the Seventh Circuit. *U.S. v. City of Milwaukee*, 144 F.3d 524, 528 (7th Cir. 1998). Just briefing a federal court appeal will take almost three months from the date the appeal is docketed. Fed. R. App. P. 31(a). Oral argument would not occur until sometime after the Court of Appeals' summer break.

⁶ The only way something resembling a brief stay (*e.g.*, 90 days or less) is possible is if Lincoln's Motion to Intervene were denied. Presumably at least Lincoln, although it joined AXA's motion promising a "brief stay," believes this to be unlikely. See Lincoln's Joinder in AXA's Motion for Stay of Discovery.

unclear, but for Plaintiffs—John and Julie Leschke and the WM Funds, plus the investors in the WM Funds—freezing this case for upwards of six month or more is prejudicial.

2. AXA’s Motion To Stay Unreasonably Delays Plaintiffs’ Discovery Efforts.

Plaintiffs have outstanding, but unscheduled, deposition notices pending against all four Insurer Defendants, half of which have been pending since October 2018. Specifically, Plaintiffs served corporate designee deposition notices on each Insurer Defendant on the dates indicated: AXA (January 11, 2019)⁷, Lincoln (October 18, 2018)⁸, Phoenix (October 18, 2018), and Transamerica (November 16, 2018). Supplemental Affidavit of Stephanie L. Melnick dated February 6, 2019, ¶¶ 24-26; Affidavit of Stephanie L. Melnick dated October 31, 2018, ¶ 6. Although we have met and conferred with all but Lincoln concerning the topics listed and sent revised notices to Lincoln, Phoenix, and Transamerica, *none* of these depositions have occurred and are not currently scheduled. Melnick Aff., ¶ 7. Moreover, starting in February, Plaintiffs requested dates from counsel for AXA, Lincoln, and Phoenix to depose various employees of their respective clients. Melnick Aff., ¶ 8. None of those depositions have been scheduled either. *Id.*

Insurer Defendants’ delays in scheduling depositions have occurred during the same period Lincoln raised the conflict allegations against the Receiver. Lincoln wrote to the Receiver alleging a conflict on October 19, 2018 (the day *after* Plaintiffs served a deposition notice on Lincoln) and first disclosed same to Plaintiffs’ counsel on October 23, 2018. Melnick Aff. (October 31, 2018), ¶¶ 6-7; Feinstein Aff., ¶ 2. Lincoln then waited nearly five months, until March 11, 2019, to file its motions to intervene and disqualify the Receiver in federal court—notwithstanding two

⁷ Plaintiffs received most of AXA’s document production in October 2018. Supp. Aff. of S. Melnick (Feb. 6, 2019), ¶ 26.

⁸ On October 24, 2018, Lincoln refused to produce a witness in response to Plaintiffs’ Notice of Deposition to Lincoln until its dispute with the Receiver is resolved. Melnick Aff. (October 31, 2018), ¶ 10. Lincoln changed its position on January 3, 2019. Supp. Aff. of S. Melnick (Feb. 6, 2019), Ex. P.

scheduling order modifications in the interim. Ltr. to Court from C. Sitzmann dated March 13, 2019; Scheduling Orders dated November 26, 2018 and March 12, 2019. Over two weeks later, on March 27, 2019, AXA moved to stay this case pending the outcome of Lincoln's long-anticipated motions. Insurer Defendants' failure to schedule a single corporate designee or employee deposition since October is suspicious considering: (1) Lincoln delayed five months before moving to intervene and disqualify the Receiver in the SEC Action, (2) Insurer Defendants stalled Plaintiffs' deposition efforts for the same five months, which culminated in (3) AXA's motion, joined by Lincoln, Phoenix, and Transamerica, to stay this case until Lincoln's federal court motions are finally resolved.

Delay is also at issue in Lincoln's motion to intervene. "A prospective intervenor must move to promptly intervene as soon as it knows or has reason to know that its interests *might* be adversely affected by the outcome of the litigation." *State v. City of Chicago*, 912 F.3d 979, 985 (7th Cir. 2019) (emphasis in original) (citations omitted). Lincoln claims it did not learn about the Receiver's involvement in this litigation until July 2018. Mot. to Intervene at 4. In reality, the identity of the Receiver was disclosed in various pleading going back to October 14, 2013 (Plaintiffs' Opposition to Defendant Insurance Companies' Motions to Dismiss). *Supra* at 3.⁹ Insurer Defendants seem set on forcing the receivership to spend down its finite resources and stonewalling Plaintiffs' discovery efforts. Now, Lincoln's pending federal court motions give AXA, and joining Insurer Defendants, the cover needed to stall by requesting an indefinite delay.

⁹ Evidence in Lincoln's document production demonstrates that Kenneth Elder—a longtime Lincoln employee identified as Lincoln's corporate designee witness and the person who verified Lincoln's interrogatory responses—was familiar with the SEC Action in June 2009, after the Receiver had been appointed, suggesting that Mr. Elder may have known of Ms. Feinstein's involvement. Melnick Aff., Ex. A; *see supra* at 3.

C. After Six Years Of Litigation, A Stay Will Not Simplify The Issues To Be Tried.

After six plus years, this case is long past the early stages of litigation. *Cf. Seaquist Closures LLC v. Rexam Plastics*, No. 08C0106, 2008 WL 4691792, at *1 (E.D. Wis. Oct. 22, 2008) (Court recognized that patent case was in early stage, before entry of a scheduling order, which weighed in favor of a stay). Moreover, stays are often imposed to simplify issues for trial. “[T]he most important factor bearing on whether to grant a stay in this case is the prospect that the IPR proceeding will result in simplification of the issues before the Court.” *Milwaukee Elec. Tool Corp. v. Hilti, Inc.*, 138 F. Supp. 3d 1032, 1038 (E.D. Wis. 2015); *Cooper v. Cooper v. Rick's Blacktop & Paving Co.*, 2015 WI App 32, ¶ 4, 361 Wis. 2d 789, 794, 864 N.W.2d 99, 101 (insurance company successfully moved to bifurcate coverage issues and stay discovery on the merits pending resolution of the coverage dispute); *Weinke v. Microsoft Corp.*, 84 F. Supp. 2d 989, 990 (E.D. Wis. 2000) (stay of proceedings granted while Judicial Panel on Multidistrict Litigation determined whether to transfer case to be heard with similar cases in a different district); *Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶ 9, 326 Wis. 2d 421, 426, 784 N.W.2d 683 (proceedings stayed and arbitration ordered pursuant to enforceable arbitration agreement); *De Smet v. Snyder*, 653 F. Supp. 797, 799 (E.D. Wis. 1987) (stay of discovery granted pending resolution of qualified immunity question); Wis. Stat. § 801.63(1) (a court may stay a Wisconsin state court proceeding if it finds that “as a matter of substantial justice” the case should be tried in a foreign forum).

The issues underlying Lincoln’s motions (conflict allegations against the Receiver) do not relate to Plaintiffs’ claims against Insurer Defendants (unjust enrichment and antitrust). Accordingly, staying this case will not reduce or simplify the disputed issues to be tried and therefore will not conserve judicial resources as AXA proclaims. Br. Supp. Mot. for Stay at 5. Quite the opposite, a stay would only delay ultimate resolution and further harm the Plaintiffs and

aging WM Funds investors. On balance, therefore, AXA's motion for a stay should be denied because Plaintiffs would be prejudiced with no corresponding upside. *Grice Eng'g, Inc.*, 691 F. Supp. 2d at 920 (court denied defendants' motion to stay because "it is not certain whether the state court action will simplify or resolve the issues of this case so as to substantially advance judicial economy and because granting a stay would prejudice plaintiff . . .").

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that AXA's Motion for Stay be denied.

Dated: April 7, 2019

Respectfully submitted,

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