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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARK AVALONE, individually,
and TRACY HUBRIGHT, as Parent
and Legal Guardian of NICOLAS
AVALONE, an infant,

Plaintiffs,

v.

CONAGRA FOODS, INC., a
Delaware corporation,

Defendants.

CASE NO. 07-cv-6084-CJS-MWP

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR A STAY OF ALL PROCEEDINGS**

COME NOW the above-named plaintiffs, by and through their attorneys, to respond to the defendant's ConAgra's Motion For a Stay of All Proceedings, and oppose it as follows:

I. INTRODUCTION.

The defendant has moved for a stay of all proceedings in this Court based solely on the fact that a motion for transfer is pending before the Judicial Panel on Multidistrict

Litigation (“MDL”). The defendant’s motion should be denied for three reasons. First, the motion is based on speculation and conclusory statements, and thus fails to show that good cause exists for a stay—*i.e.*, beyond the presumption that a pending transfer motion is good cause enough. Second, the defendant’s motion is inconsistent with the positions that it has taken in seeking an order from this Court regarding retention and disposal of recalled and other peanut butter relevant to this action. Third, it would be prejudicial to the plaintiffs if, as the defendant asks, “mutually agreed-to” discovery is allowed to occur without the Court being available for oversight and dispute-resolution, if such were to be necessary. The plaintiffs thus respectfully request that the defendant’s motion be denied.

II. THE PLAINTIFFS’ ARGUMENTS IN OPPOSITION TO A STAY.

A. Courts Do Not, and Should Not, Routinely Stay Proceedings Just Because a Motion for Transfer Is Pending Before the Judicial Panel on MDL.

The decision to grant or deny a temporary stay of proceedings pending a decision in another judicial proceeding lies within a court's discretion. *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 81 L. Ed. 153 (1936).¹ Under the Rules of the Judicial Panel on MDL:

The pendency of a motion ... before the Panel concerning transfer ... of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

J.P.M.D.L. Rule 1.5. Consequently, a “putative transferor court need not automatically postpone rulings, or in any way generally suspend proceedings, merely on grounds that an MDL transfer motion has been filed.” *Tortolla Restaurants, L.P. v. Kimberly-Clark*

¹ The *Landis* case, a factual precursor to the MDL litigation of present day, involved stays sought in over forty-seven lawsuits, brought in thirteen U.S. District Courts. *Id.*, 299 U.S. at 253, 57 S. Ct. at 165. It was argued, in favor of the stays at issue in *Landis*, that a decision pending before the U.S. Supreme Court on the constitutionality of a certain Act would dispose all of the other lawsuits. *Id.*

Corp., 987 F. Supp. 1186, 1188-89 (N.D. Cal. 1997) (citing Manual for Complex Litigation 3rd § 31.131, at 252 (1995)). In fact, as the Judicial Panel on MDL has stated:

The Panel's experience indicates that the use of stay orders by the district courts, particularly in the area of discovery, is usually undesirable. Any discovery obtained prior to the Panel decision will benefit the parties to the action if transfer is denied and will presumably be made available to all other parties if transfer is ordered.

In re Penn Central Securities Litigation, 333 F. Supp. 382, 384 (J.P.M.D.L. 1971).

Despite being generally disfavored, the defendant has moved the Court for a stay of all proceedings in the present case. The defendant's motion is premised near-solely on the fact that a motion for transfer is pending before the Judicial Panel on MDL. Thus, according to the defendant, *ipso facto*, a stay should be granted. But such a conclusion is not only counter to Rule 1.5, it ignores the need for this Court to exercise its discretion in ruling on the defendant's motion. As Justice Cardozo explained in *Landis*:

the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Landis, 299 U.S. at 254-55, 57 S. Ct. at 166.²

Because the defendant has made no such "clear case," and it seeks instead a grant of a "routine" based only on the pending motion for transfer, it is respectfully submitted that the defendant's request for a stay should be denied.

² See also *Kron Medical Corp. v. Groth*, 119 F.R.D. 636, 637 (M.D.N.C. 1988) ("moving party bears the burden of showing good cause and reasonableness for such an order."); *Hussey v. State Farm Lloyds Insurance Co.*, 216 F.R.D. 591, 595-96 (E.D. Tex. 2003) (moving party "must show good cause and specific need" for stay of discovery); *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) ("A party seeking a stay of discovery carries the heavy burden of making a 'strong showing' why discovery should be denied.")(citation omitted);

B. Judicial Economy is Served Only If the Court's Involvement Would Be Plainly a Waste of Time, And Truly Duplicative Efforts Are Avoided.

The defendant asserts a stay “will eliminate unnecessary duplication of litigation, serving the interests of judicial economy.” Motion at 6. It does not, however, offer a real example of a “duplication of litigation” that will be avoided by a stay. In the next section of its memorandum, the defendant asserts—perhaps by way of example—that:

Without a stay, both this case and other cases pending transfer will proceed in parallel, forcing, *inter alia*, duplicative briefing on motions to dismiss, and potentially, duplicative discovery should those motions be denied.

Motion at 7.³ But there are no motions to dismiss pending in this case that require briefing, or that the Court is called upon to review or decide.⁴ Indeed, the defendant says as much when it states that “this case is in the very early pleadings stage.” *Id.* at 8. And it is, at this stage, that the case may mostly remain by the time the Judicial Panel rules. But if that proves not to be the case, then the defendant would be better justified in seeking a stay when the risk of “duplicative briefing on motions” is real, rather than conjecture.

Similarly, there is no duplicative discovery now burdening the parties in this case. Indeed, the only discovery-related activity in this case that is reasonably likely to happen before Judicial Panel rules on the transfer motions is the planning contemplated by Rule 26(f), and the disclosures required by Rule 26(a)(1). Neither of these activities needs the Court to expend unnecessary resources, and both will need to happen even after transfer.

³ See also Motion at 8 (“a stay will preclude the possibility of conflicting and perhaps contradictory rulings on such matters as Rule 12 motions, pre-trial and discovery procedures and other matters”).

⁴ Contrast the present case with those where numerous courts faced near-identical remand motions. See, e.g. *Michael v. Warner-Lambert Co.*, 2003 U.S. Dist. LEXIS 21525, **3-4 (S.D. Cal. 2003) (citing the “general rule... for federal courts to defer ruling on pending motions to remand in MDL litigation until after the JPMDL has transferred to the MDL panel.”). Or those where courts had already ruled on motions to dismiss, and were near ruling on other substantive motions. *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358 (C.D. Cal. 1997) (granting motion to stay to avoid “rul[ing] upon more substantive motions, like class certification”).

So this hardly represents “onerous discovery” that might otherwise justify granting a stay. *Evans v. Yum Brands, Inc.*, 326 F. Supp. 2d 214, 226 (D.N.H. 2004) (denying a motion for stay where discovery being faced was “limited”).⁵

Finally, denying the motion for a stay in no way leaves the defendant defenseless to burdensome discovery or duplicative briefing if the threat of such becomes real in the future. Thus, if, for example, the plaintiffs for some implausible reason were to move for summary judgment, the defendant might then justifiably move for a stay. But to seek a stay now seeks a remedy for a problem that does not yet exist, and may never be. It is therefore respectfully submitted that the motion should be denied for failing to make the necessary showing of good cause and reasonableness.

C. Defendant’s Motion For a Stay of All Proceedings Is Inconsistent With Its Request for the Court to Enter An Order Regarding the Preservation of the Peanut Butter Relevant to This and Other Actions.

Although the doctrine of judicial estoppel is more narrowly applied in this District than elsewhere, it nonetheless “applies equally to inconsistent positions asserted earlier in the same litigation.” *Schwab v. Phillip Morris USA, Inc.*, 449 F. Supp. 992, 1088 (E.D. N.Y. 2006) (deciding whether defendant was precluded, based on a prior statement, from arguing that “light” cigarettes are safer). It is thus open to question whether the defendant should be heard to be here arguing for a stay while at the same time it is asking the Court to enter an order on a complicated process for the retention and disposal of peanut butter relevant to this and related cases. Indeed, the Agreed Rule 16(e) Order that the defendant sought contemplates this Court’s continuing jurisdiction over the matter—*e.g.*, in ruling on the reasonableness of the notice to be provided regarding the disposal of peanut butter.

⁵ See also *In re Currency Conversion Fee Antitrust Litig.*, 2002 U.S. Dist. LEXIS 974, 2002 WL 88278 at *1 (S.D.N.Y. 2002) (holding that an appropriate factor to consider in weighing whether to grant a stay of discovery is the burden of responding to the discovery).

Consequently, it is inconsistent for the defendant to seek a stay of all proceedings while simultaneously asking for a form of relief, and the Court's continuing involvement on an issue of evidentiary importance. For this additional reason, the plaintiffs ask the Court to deny the defendant's motion for a stay.

D. So Long As the Defendant Wants to Retain the Option of Discovery Proceeding By the Agreement of the Parties, the Court Should Continue To Be Available for Oversight and Dispute-Resolution.

The defendant has moved for a stay of all proceedings, *except*, that is, for the proceedings that can be "mutually agreed-to...to inspect, test, preserve, or document that which the parties believe may be material or relevant evidence in this and related matters." Motion at 1. Thus, in other words, the defendant wants the parties to proceed with discovery by agreement, but without the Court's involvement or availability. If discovery is to continue to occur at all in this case, even if only by agreement of parties, the Court should remain available to resolve legitimate disputes that may arise. It would be unfair and prejudicial to allow discovery to proceed without the prospect of Court oversight. There is, for example, nothing to be gained by allowing the parties to serve a request for production by agreement if there is no way to bring a motion to compel if a response, after meeting and conferring in good faith, is still deemed to be insufficient.

In sum, by requesting a stay that is expressly contingent on a continuing, unfettered right to conduct discovery by agreement, without the risk of court-supervision, the defendant is trying to have its cake and eat it too, providing a final additional reason for the motion to be denied.

III. CONCLUSION.

Granting the stay here sought would result in the administrative closure of the file, and make the Court unavailable to the plaintiffs, unless a motion to lift the stay was filed and granted. That is both unfair and unjustified. Accordingly, the plaintiffs respectfully ask that the defendant's motion for a stay be denied.

RESPECTFULLY SUBMITTED this 24th day of MAY, 2007.

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CERTIFICATE OF SERVICE

I, PAUL V. NUNES, hereby certify that on May 24, 2007, I caused the foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENANT'S MOTION FOR A STAY OF ALL PROCEEDINGS to be electronically filed with the Clerk of the District Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

DATED: May 24, 2007

Yours, etc.

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