

NORTH CAROLINA)	IN THE GENERAL COURT OF JUSTICE
)	SUPERIOR COURT DIVISION
FORSYTH COUNTY)	09 CVS 4007
BB&T BOLI PLAN TRUST,)	
)	
Plaintiff)	
)	BRIEF IN SUPPORT OF DEFENDANT
v.)	MASSACHUSETTS MUTUAL LIFE
)	INSURANCE COMPANY’S MOTION TO
MASSACHUSETTS MUTUAL LIFE INS. CO.)	STAY DISCOVERY AND FOR
and CLARK CONSULTING, INC.,)	PROTECTIVE ORDER
)	
Defendants.)	
)	

Defendant Massachusetts Mutual Life Insurance Company (“MassMutual”) submits this brief in support of its motion pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure for an order staying all discovery until the Court has ruled on the Defendants’ soon to be filed motions to dismiss.

I. INTRODUCTION

Plaintiff BB&T BOLI Plan Trust (“BB&T”) sued MassMutual and Clark Consulting, Inc. (“Clark”) in the Superior Court of Forsyth County, North Carolina on May 9, 2009. BB&T’s claims are based on a bank-owned life insurance policy it purchased from MassMutual and the performance of a “separate account” investment division (the Falcon Fund) to which BB&T allocated half of its premiums. BB&T asserted six counts against the Defendants: breach of fiduciary duty (Count I), negligence (Count II), negligent misrepresentation (Count III), breach of contract (Count IV) (against MassMutual only), fraud (Count V), and violation of North Carolina’s Unfair and Deceptive Trade Practices Act (Count VI). Each claim was premised on MassMutual and Clark’s alleged failure to monitor the Falcon fund’s performance and advise BB&T of its rights regarding reallocation out of the fund. [See, e.g., Complaint ¶¶ 81, 86, 91, 101, 104, 111].

On July 20, 2009, MassMutual and Clark filed separate motions to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) because each of the claims asserted against them failed to state a claim upon which relief could be granted. MassMutual and Clark also filed separate motions to stay discovery while their motions to dismiss were pending before the Court.¹

On August 4, 2007, BB&T filed a Consent Motion for Extension of Time that extended Plaintiff's deadline to respond to the motions to dismiss until August 31, 2009. However, two days later, on August 6, 2009, BB&T filed a First Amended Complaint, asserting its original claims and a new claim for aiding and abetting breach of fiduciary duty (Count II). Because the Amended Complaint relies on conclusory allegations, masquerading as facts, that are, in many instances, rebutted by the underlying contractual documents on which BB&T relies, and because the Amended Complaint fails to cure the deficiencies in BB&T's pleading, MassMutual will file a motion to dismiss the Amended Complaint on or before the current due date of September 11, 2009. MassMutual understands that Clark will also file a motion to dismiss on or before September 11.

Specifically, BB&T's contract claim against MassMutual fails because MassMutual owed no duty to BB&T to effect a reallocation—even if a "Reallocation Event" occurred in August 2007. Instead, any reallocation obligation arose, if at all, *only* under the terms of a "Stable Value Agreement" ("SVA") between MassMutual and Bank of America. The SVA expressly notes that Bank of America may unilaterally waive a Reallocation Event. Further, BB&T is neither a party to nor a third party beneficiary of the SVA. As a result, BB&T's contractual claim is based on alleged contractual rights BB&T does not possess.

¹ On August 20, 2009, defendants voluntarily withdrew their motions to dismiss and motions to stay as moot after BB&T filed its Amended Complaint. Therefore, these motions were not considered by the Court in entering the Case Management Order dated August 25, 2009.

Second, BB&T's five tort claims are deficient because BB&T (1) improperly attempts to recast its breach of contract claim as tort claims, and (2) BB&T's claims of fraud, negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty fail to state a claim under Delaware substantive law. Third, BB&T's UDTPA claim is deficient under both Delaware and North Carolina law. If granted, these motions would dispose of the entirety of BB&T's claims in this case.

Plaintiff has indicated that it will not agree to a stay of discovery pending resolution of the upcoming motions to dismiss. Because this Court's ruling on the motions to dismiss may either eliminate the need for any discovery or significantly narrow the proper subjects of discovery, MassMutual moves this Court for an order staying discovery pending the Court's resolution of the motions to dismiss.

II. ARGUMENT

The North Carolina Rules of Civil Procedure give the Court broad discretion to enter orders governing the timing and sequence of discovery. *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006); *George W. Shipp Travel Agency, Inc. v. Dunn*, 20 N.C. App. 706, 709, 202 S.E.2d 812, 815 (1974). Upon a showing of good cause, the Court may enter an order staying discovery to protect a party from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including that the discovery be conducted only on specified conditions. N.C. R. Civ. P. 26(c).

The federal courts in the Fourth Circuit² have recognized that a stay of discovery is appropriate when the Court is considering a dispositive motion. *Cleveland Constr., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 WL 903564 (W.D. N.C.

² Federal decisions interpreting Rule 26 of the Federal Rules of Civil Procedure are instructive for North Carolina state courts. *Willoughby v. Kenneth W. Wilkins, M.D., P.A.*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99 (1983).

Mar. 31, 2009) (granting stay of discovery pending defendant's motion to dismiss pursuant to Rule 26(c)); *Yongo v. Nationwide Affinity Ins. Co. of Am.*, No. 5:07-CV-94-D, 2008 WL 516744, at *2 (E.D. N.C. Feb. 25, 2008) ("A court may properly exercise its discretion under Rule 26(c) to stay discovery pending resolution of dispositive motions."); *Tilley v. United States*, 270 F. Supp. 2d 731, 734-35 (M.D. N.C. 2003) (same).³ Factors favoring the issuance of a stay include (1) the potential for the dispositive motion to dispose of all the claims in the case, (2) strong support for the dispositive motion on the merits, and (3) irrelevancy of the discovery at issue to the dispositive motion. *Yongo*, 2008 WL 516744, at *2. Each of these factors favors the issuance of a stay of discovery here.

First, if granted, Defendants' Rule 12(b)(6) motions to dismiss will dispose of the entire Amended Complaint. Second, as will be set forth in their respective briefs in support of the motions to dismiss, Defendants have strong support for their argument that BB&T's Amended Complaint fails to state a claim under either Delaware or North Carolina law. Third, any discovery requested is irrelevant in addressing the outstanding motions to dismiss, as a Rule 12(b)(6) motion is decided based on the allegations in the Complaint. Therefore, "[a] stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Chavous v. Distr. of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (citations omitted).

³ See also, e.g., *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) (affirming the district court's stay of discovery pending resolution of defendant's 12(b)(6) motion to dismiss); *Farmer v. Employment Sec. Comm'n of N.C.*, 4 F.3d 1274, 1278 (4th Cir. 1993) (noting that the trial court granted the motion to stay discovery pending resolution of the 12(b) motion to dismiss); *Jackson v. Charles County Community College*, 915 F.2d 1564 (Table) (4th Cir. 1990) (affirming defendant's motion for stay of discovery pending resolution of its motion to dismiss); *Bellamy v. Ford Motor Co.*, No. 3:07-cv-00287, 2007 WL 2582224, at *2 (W.D. N.C. Sept. 6, 2007) (granting motion for stay of discovery pending resolution of motion to dismiss).

Additionally, good cause exists for the entry of a stay of discovery. This case has the potential for significant discovery, including discovery of electronically stored data. Although Defendants are unable to ascertain at this time the amount of documents at issue in this case (because BB&T has not yet served any discovery requests), Defendants will have to incur significant costs to comply with any foreseeable discovery requests because of the amount and nature of potentially relevant electronically stored information and the possible need to hire third party consultants relating to electronic document production. In addition, the Case Management Order permits each party to ask any other party 25 interrogatories, to take up to 12 fact witness depositions, and the parties anticipate each party may designate at least three expert witnesses, requiring potentially nine additional expert depositions. Thus, if discovery is not stayed and Defendants' motions to dismiss are granted, the discovery conducted would be wasteful and inefficient for all parties (and the Court).

Further, this case is in its very early stages as the parties have not yet engaged in any discovery and the pleadings are not yet closed. The Case Management Order does not set a trial date and explicitly provides that the Court may amend the Order as it deems appropriate. Thus, Defendants' request for a stay is reasonable under the circumstances. *See, e.g., Cleveland Constr., Inc.*, 2009 WL 903564, at *2 (finding good cause existed to grant motion for stay when the defendant had strong support for its dispositive motion, the case had the potential for voluminous discovery, and the case was in the early stages of discovery).

III. CONCLUSION

For all the foregoing reasons, defendant Massachusetts Mutual Life Insurance Company respectfully requests that this Court enter an order staying discovery pending the Court's ruling on Defendants' respective motions to dismiss.

This the 9th day of September, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Michael L. Robinson, certify that the foregoing **BRIEF IN SUPPORT OF
DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S
MOTION TO STAY DISCOVERY** complies with Rule 15.8 of the General Rules of Practice
and Procedure for the North Carolina Business Court.

ROBINSON & LAWING, LLP

By: /s/ Michael L. Robinson
MICHAEL L. ROBINSON
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CERTIFICATE OF SERVICE

The undersigned, as counsel for Defendant Massachusetts Mutual Life Insurance Company, hereby certifies that, on this date, he served a copy of the foregoing document upon all other parties to this action, pursuant to stipulation, by emailing same to the following individuals:

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This the 9th day of September, 2009.

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