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

Defendant Massachusetts Mutual Life Insurance Company ("MassMutual") submits this brief to reply to the points raised in plaintiff BB&T BOLI Plan Trust's ("BB&T") brief filed in opposition to MassMutual's motion for stay. A stay is warranted pending the resolution of the outstanding motions to dismiss both because (1) MassMutual's motion to dismiss has an immediate and clear possibility of dismissing the entire case against it, and (2) BB&T has failed to demonstrate that it will suffer any prejudice from the Court granting the motion to stay discovery, a conclusory allegation by BB&T that its own actions belie.

A. MassMutual's Motion to Dismiss Has More Than a "Possibility" of Being Granted In Its Entirety And Therefore a Stay of Discovery is Appropriate.

BB&T relies heavily on the three-word phrase "immediate and clear" used by one court in stating the standard for a motion to stay. BB&T argues that because "it is very unlikely" that MassMutual's motion to dismiss would dispose of the entire case, this Court should deny the motion to stay discovery. [*See* Response at 3 (quoting *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988)]. But BB&T's characterization of *Simpson* is both wrong and taken out of context. The court in that case stated that, in deciding a motion to stay, it "*may* be helpful to take a *preliminary peek* at the merits of the allegedly dispositive motion to see

if on its face there appears to be an immediate and clear *possibility* that it will be granted." *Simpson*, 121 F.R.D. at 261 (emphasis added). In interpreting this standard, one court has stated that a "clear possibility" means less than fifty percent chance of success:

> "[C]lear possibility" is significantly less stringent than "immediately evident" or "foregone conclusion" and indicates that Defendant's motion is nearly below but does not necessarily exceed a "fifty percent chance" of success. If the chance of success is above a "fifty percent chance," then the chance of success would properly be characterized as "probable" rather than "clearly possible."

GTE Wireless, Inc. v. Qualcomm, Inc., 192 F.R.D. 284, 287 (S.D. Cal. 2000) (holding that it was clearly erroneous for the magistrate judge to assess the motion to stay using an "immediately certain" standard).

Consistent with this interpretation, the Court in *Simpson* emphasized that it was not required to definitively evaluate the motion to dismiss; instead, it could assess whether there was a reasonable *possibility* that the motion to dismiss would be successful in its balancing of any harm to plaintiff in staying discovery against the possibility the motion to dismiss would be granted and eliminate the need for any discovery. *Id.*; *see also Cleveland Constr., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 WL 903564, at *3 (W.D.N.C. Mar. 31, 2009) (granting the motion to stay because "[t]he motion to dismiss here *has the potential* to dispose of the case . . . without the need for discovery" (emphasis added)).

Contrary to BB&T's assertions, MassMutual's motion to dismiss is meritorious (and, in any event, easily exceeds the "fifty percent" chance of success standard). Again, BB&T's First Amended Complaint fails to state a claim against MassMutual under well-settled Delaware and North Carolina law. Among other things, BB&T (1) improperly re-casts its breach of contract claim as a number of tort claims and an UDTPA claim; (2) premises its breach of contract claim on a duty that MassMutual did not owe BB&T and rights which BB&T does not possess;

(3) attempts to turn an arms-length commercial transaction into a fiduciary relationship; and (4) claims as relief purely economic losses for its tort claims without accompanying property damage or bodily injury. These issues are not mere pleading technicalities that can be corrected by filing a second amended complaint but are, instead, systemic legal deficiencies evident from the contractual documents upon which BB&T bases its claims.

For this reason, among others,[1] *Simpson* is distinguishable. In *Simpson*, the Court specifically noted that the pending motion to dismiss was not going to end the case, as the motion alleged failure to plead fraud with specificity rather than substantive legal deficiencies that could not be corrected by filing an amended complaint. Here, MassMutual raises deficiencies in the underlying legal basis of the claims themselves.

Even BB&T itself tacitly acknowledged the validity of MassMutual's motion to dismiss when, rather than waiting to respond to defendants' motions to dismiss the original Complaint, it filed an amended complaint that attempted to address the issues raised in MassMutual's motion. These are not the actions of a party that believes MassMutual's motion to dismiss is "wholly without merit." [Response at 1]. Therefore, as in *Cleveland Construction*, *Yongo v. Nationwide Affinity Ins. Co.*, No. 5:07-CV-94-D, 2008 WL 516744, at *2 (E.D. N.C. Feb. 25, 2008), *Tilley v. United States*, 270 F. Supp. 2d 731, 734-35 (M.D. N.C. 2003), and the other cases cited in MassMutual's motion, a stay of discovery under these circumstances is proper.

B. BB&T Has Failed to Articulate Any Prejudice It Will Suffer If Discovery Is Stayed.

BB&T also claims that it "would be greatly prejudiced should the Court stay discovery until the resolution of the pending motions to dismiss." [Response at 6]. BB&T's Response

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[1] In addition, in *Simpson* the motion to stay arose in conjunction solely with a motion to quash a deposition. Here, in contrast, there is no pending discovery and the discovery contemplated is not so limited.

contains no explanation of this conclusion and appears to rely on the fact that any stay would shorten the discovery period ordered by the Court. [*Id.* at 6-7].

BB&T forgets, however, that these deadlines were set because of its own silence. BB&T requested (and was given) an extension to respond to the defendants' motions to dismiss and never mentioned to the Court at the case management conference on August 4, 2009 that it was contemplating filing an amended complaint. BB&T also prevented the Court from addressing the then-pending motions to stay at the conference by requesting an opportunity to brief the issues. Consequently, BB&T cannot credibly claim to have been surprised by the Court's decision to adopt a seven month discovery period when BB&T gave the Court no reason to believe the scheduling would be complicated by its decision to file an amended complaint only two days after the conference (thereby restarting the clock on the motions to dismiss).

Additionally, the Case Management Order itself does not set a trial date and provides that the Court may amend the Order as appropriate. Thus, it is, at a minimum, premature for BB&T to claim prejudice from the seven month discovery deadline when BB&T has not asked to extend the deadline in light of the amended complaint. Indeed, BB&T has not even served any discovery. BB&T's claim of prejudice is therefore based on mere assumptions about how the Court might handle the schedule going forward.

In addition to failing to present any credible argument of prejudice, BB&T fails to rebut MassMutual's argument that discovery in this case has the potential to be voluminous, time-consuming, and expensive. In addition to extensive document production, the Case Management Order permits each party to ask any other party up to 25 interrogatories, to take up to 12 fact witness depositions, and designate at least three expert witnesses each, resulting in as many as nine expert depositions. BB&T also does not argue that it needs any discovery to address the

motions to dismiss, nor can it dispute that this case is in its initial stages, with the pleadings not yet closed and discovery not yet started. *See, e.g.*, *Spencer Trask Software & Info. Sys. v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting stay of discovery because "at this point in the litigation, proceeding with discovery while the motion to dismiss is pending would unnecessarily drain the parties' resources" and determining that staying discovery would not substantially delay the action). Good cause thus exists for the stay of discovery in this case.

CONCLUSION

BB&T's arguments in opposition to MassMutual's motion to stay discovery are based on nothing more than assumptions: BB&T assumes that the Court will rule in its favor on the motions to dismiss and deny the motions in their entirety and that if it bothered to ask for a modification of the scheduling order its request would be denied. Yet there are many possible outcomes to the motions to dismiss, and any action taken by the Court could have an impact on discovery issues in this case. Therefore, Defendant Massachusetts Mutual Life Insurance Company respectfully requests that this Court enter an order staying discovery while the Court decides MassMutual's pending motion to dismiss to avoid substantial litigation costs and use of judicial resources on discovery that might prove unnecessary or irrelevant.

This the 12th day of October, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Michael L. Robinson, certify that the foregoing **REPLY BRIEF IN FURTHER 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
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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 12th day of October, 2009.

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