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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARC HARRIS, an individual; on behalf of himself and all others similarly situated, Plaintiff, v. DEAN MEILING, et al., Defendants.	CASE NO.: 3:19-cv-00339-MMD-CBC **PLAINTIFFS' RESPONSE TO THE MOTION TO STAY DISCOVERY FILED BY THE MEILING DEFENDANTS AND THE RECEIVER DEFENDNTS [ECF NO. 106]** [Declaration of Marc Lazo, Evidentiary Objections, and Request for Judicial Notice filed concurrently herewith]

Plaintiff Marc Harris ("Mr. Harris"), individually and on behalf of all others similarly situated (together, "Plaintiffs"), by and through their undersigned counsel, hereby submit this Response (the "Response") to the Motion to Stay Discovery [ECF No. 106] (the "Motion") filed by Defendants CHEMEON Surface Technology, LLC, Dean Meiling, Madylon Meiling, DSM Partners, LP, DSM P GP LLC, and

Suite B LLC ("Meiling Defendants" or "Movants"). Plaintiffs base this Response on the pleadings and records on file herein, the Memorandum of Points and Authorities set forth below, Declarations, Evidentiary Objections and Request for Judicial Notice submitted herewith, the exhibits attached hereto and incorporated herein by this reference, and any oral argument presented to this Court.

I. INTRODUCTION

It should come as no surprise to this Court that the Meiling Defendants' litigation tactics have them filing, yet again, another pleading seeking to delay this litigation. They will go to no end to delay Plaintiffs' day in court, in this action and every other case pending between the same parties, in order to avoid having to answer to Plaintiffs' claims. As set forth below, Plaintiffs' First Amended Complaint sets forth viable causes of action and the circumstances of this case are not in any way extraordinary so as to warrant a stay of discovery.

The vexatious history and delay games employed by the Meiling Defendants continue to come to light as evidenced by, for example, the (1) Order of Affirmance[1] entered by the State Supreme Court in the Meiling Defamation Action, (2) Defendants' actions resulting in the Order Setting Aside Default, Denying Default Judgment, Dismissing Action and Awarding Attorney's Fees[2] entered in the Receivership Action, and most recently, the Order Denying Rehearing entered by the State Supreme Court in the Defamation Action[3]. As such, all Defendants should

[1] A true and accurate copy of the Order of Affirmance is attached as **Exhibit A** to the Request for Judicial Notice filed concurrently herewith. This Court may take judicial notice of the Order of Affirmance pursuant to Fed. R. Evid. 201 (Court may take judicial notice of a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Lee v. City of L.A.*, 250 F.3d 668, 688–90 (9th Cir. 2001).

[2] A true and accurate copy of the Dismissal Order is attached as **Exhibit B** to the Request for Judicial Notice filed concurrently herewith. This Court may also take judicial notice of the Dismissal Order pursuant to Fed. R. Evid. 201 (Court may take judicial notice of a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Lee v. City of L.A.*, 250 F.3d at 688–90.

[3] A true and accurate copy of the Order Denying Rehearing is attached as **Exhibit C** to the Request for Judicial Notice filed concurrently herewith. This Court may also take judicial notice of the Order Denying Rehearing pursuant to Fed.

be ordered to file an answer to the FAC and this Court should expedite a trial of this action consistent with Plaintiffs' request in their pending Motion to Specially Set Trial.

This Court cannot sanction such conduct, the latest example of which is the instant Motion, which must be denied in its entirety as further set forth below.

II. FACTUAL AND PROCEDURAL BACKGROUND

Much of the history underlying this action, the Receivership Action, the *Alexander* action and the Proctor Action, has been recounted to the Court numerous times. Accordingly, Plaintiff hereby incorporates the factual allegations set forth in the FAC and relies on the factual and procedural background set forth in the Opposition to Motion for Judgment on the Pleadings (ECF No. 49).

III. LEGAL ARGUMENT

A. LEGAL STANDARDS GOVERNING THE MOTION

The Court has broad discretion in controlling discovery, including staying discovery. *Little v. City of Seattle* (9th Cir. 1988) 863 F.2d 681, 685. Under the Federal Rules of Civil Procedure, the court may stay or limit the scope of discovery only upon a showing of good cause by the moving party. Fed. R. Civ. P. 26(c). A stay is appropriate where it "furthers the goal of efficiency for the court and the litigants." *Little*, 863 F.3d at 685 (approving a stay pending resolution of the issue of immunity, where discovery would not have affected the decision). Indeed, broad statements about inconvenience, cost, or a need for protection are insufficient to warrant a stay. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013).

R. Evid. 201 (Court may take judicial notice of a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Lee v. City of L.A.*, 250 F.3d at 688–90.

Here, no circumstances exist to warrant a stay. There is no "good cause" to stay any proceedings, as the Meiling Defendants have made no "strong showing" – or *any* showing - as to why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013).

While the purpose of a 12(b)(6) motion[4] is "to enable defendants to challenge the legal sufficiency of a complaint without subjecting themselves to discovery," *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (citing *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987), a pending motion to dismiss ordinarily will not justify a stay of discovery, *Ministerio Roca Solida*, 288 F.R.D. at 502. This is true even where the underlying motion appears meritorious. *Id.* Rather, courts within this District have consistently held that "a district court may stay discovery only when it is *convinced* that the plaintiff will be unable to state a claim for relief." *Id.* at 502–04 (discussing *Twin City Fire Ins. Co. v. Emp'rs Ins. of Wasau*, 124 F.R.D. 652, 653 (D. Nev. 1989); *Turner Broad. Sys., Inc. v. Tracinda Cop.*, 175 F.R.D. 554, 556 (D. Nev. 1997); and *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981)) (emphasis in original). The most common situations in which a stay is justified are those in which a dispositive motion raises preliminary issues of jurisdiction, venue, or immunity. *Twin City Fire*, 124 F.R.D. at 653.

To determine if a stay of discovery is appropriate, the court must consider whether the pending motion is potentially dispositive of the entire case; whether the motion can be decided without additional discovery; and whether the court is convinced that the plaintiff cannot state a claim for relief. *Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013); *First Am. Title Ins. Co. v. Commerce Assocs., LLC*, No. 2:15-cv-832-RFB-VCF, 2015 WL 7188387, at *2 (D. Nev. Nov. 13, 2015). This evaluation requires the court to take a "preliminary peek" at the

[4] Rule 12(c) is "functionally identical" to Rule 12(b)(6), and the "same standard of review" applies to a motion brought under either rule. *Cafasso v. General Dynamics C4 Systems, Inc*., 637 F.3d 1047, 1054 n. 4 (9th Cir.2011).

merits of the underlying dispositive motion. *Tradebay,* 278 F.R.D. at 602–03. However, as Judge Leen observed in *Tradebay*, "taking a 'preliminary peek' and evaluating a pending dispositive motion puts a magistrate judge in an awkward position." 278 F.R.D. at 602. "The district judge will decide the dispositive motion and may have a different view of the merits of the underlying motion." *Id.*

As such, the court is to keep in mind the objectives of Rule 1 of the Federal Rules of Civil Procedure: "to secure the just, speedy and inexpensive determination of every action and proceeding." *Ministerio Roco Solida,* 288 F.R.D. at 504 (quoting Fed. R. Civ. P. 1). This is particularly true in a post-*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) litigation world, where the "explosion of Rule 12(b)(6) motions . . . has made speedy determinations of cases increasingly more difficult." *Id.* at 504.

In this regard, this Court must require Movants to satisfy a two-part test before granting a motion to stay discovery when a dispositive motion is pending: "First, the pending motion must be potentially dispositive of the entire case or at least dispositive of the issue on which discovery is sought. Second, the court must determine whether the pending potentially dispositive motion can be decided without additional discovery." *Foley v. Pont (D. Nev*., June 27, 2012, No. 2:11-CV-01769-ECR) 2012 WL 2503074, at *6. Movants' failure to meet both prongs requires discovery to move forward. *Id.*

Additionally, contrary to the Meiling Defendants' contention, the Ninth Circuit has concluded that because the "discovery-limiting aspects" of Cal. Code Civ. Pro § 425.16(g) "collide with the discovery-allowing aspects of [Federal] Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court." *Metabolife Intern., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 846 (quoting *Rogers v. Home Shopping Network, Inc.* (C.D. Cal. 1999) 57 F.Supp.2d 973, 982.) Unlike § 425.16 which limits discovery, Rule 56 does not limit discovery; rather "it ensures that adequate discovery will occur before summary judgment is considered." *Id.*

Moreover, Section 425.16(g) provides that "the court, on noticed motion and for good cause shown, may order that specified discovery be conducted" notwithstanding any stay otherwise imposed by that statute. However, it is the Meiling Defendants, not Plaintiffs, who have the burden to demonstrate good cause as to why a stay should be imposed. As set forth below, they fall egregiously short. Accordingly, the Motion must be denied.

B. THE PENDING MOTIONS DO NOT JUSTIFY A STAY OF DISCOVERY

Plaintiffs' complaint makes nine claims. Plaintiffs allege that they, and other similarly situated individuals, invested significant amounts of money in Metalast International, LLC (hereinafter referred to as "Investment LLC"). (ECF No. 10 at ¶30.) In count I, Plaintiffs allege that the Meiling Defendants in conspiracy with the other defendants committed financial elder abuse by engaging in a fraudulent scheme to convert and transfer the assets of Investment LLC to themselves. (ECF No. 10 at ¶49-53.) Count II alleges that the defendants breached their fiduciary duties to Plaintiffs in committing such conduct. (*Id.* at ¶55-61.) Count III alleges the resulting constructive fraud by the defendants. (*Id.* at ¶63-70.) Count IV alleges intentional misrepresentation by all defendants (*Id.* at ¶72-78), while Count V alleges professional negligence by all defendants except the Meiling Defendants. (*Id.* at ¶80-84.) Count VI requests the imposition of a constructive trust against all defendants (*Id.* at ¶86-87) and Count VII alleges that defendants violated California Business and Professions Code section 17200. (*Id.* at ¶89-91.) Count VIII alleges that all defendants misappropriated Plaintiffs' funds. (*Id.* at ¶93-96), and Count IX alleges the accompanying conversion by all defendants. (*Id.* At ¶ 98-101.)

Movants' Special Motion to Strike (ECF No. 51), joined by Defendants Kaempfer Crowell (ECF No. 59) and Janet Chubb, Tiffany Schwartz and Armstrong Teasdale (ECF No. 66), responds that (1) Movants' conduct arises out of protected

activity; (2) Plaintiffs cannot make out a *prima facie* case for any of their claims; and (3) Movants' affirmative defenses cannot be overcome.

The Attorney Defendants' motion to dismiss (ECF Nos. 49 and 53), joined by Defendant Kaempfer Crowell (ECF Nos. 60, 62), responds that (1) the Complaint attempts to re-litigate the state court Receivership Action; (2) Plaintiff Harris lacks standing to assert claims derivatively on behalf of Metalast; (3) Plaintiffs fail to meet Rule 9(b)'s heightened pleading standards for fraud; (4) the Court lacks subject matter jurisdiction under CAFA; (5) the Complaint fails to allege facts sufficient to establish the elements of some of the claims asserted; and (6) some of the claims are untimely.

The Meiling Defendants raise similar arguments in their Motion for Judgment on the Pleadings, joined by Attorney Defendants, contending that (1) the claims asserted in the FAC are time-barred; (2) the claims are barred by issue/claim preclusion; (3) Plaintiffs lack standing to bring this action; (4) the "*Noerr Pennington* doctrine" applies; (5) defendants' conduct is protected by the litigation privilege; and (6) the complaint fails to allege facts sufficient to establish the elements of the claims asserted. (ECF No. 48.)

For the reasons set forth in Plaintiffs' oppositions to these sundry motions, the motions raise the same arguments that have been repeatedly raised by the Meiling Defendants in the pending related matters in this and other Courts in this State, which have been denied at the trial, appellate and even Supreme Court levels. Apparently, by plaguing this and other Courts' dockets with their endless motion practice, the Meiling Defendants believe they can cause a stay to be issued in this case. If such vexatious litigation could legitimately form the basis of a Rule 26(c) motion, it would allow for an avalanche of motion practice in every case in which a defendant seeks a stay, which virtually every defendant does, and certainly the Meiling Defendants have across the plethora cases in which they are involved (even as plaintiffs). As set forth below, Movants fail to meet their burden to make a "strong

showing" necessary to support a stay of discovery. Accordingly, the Motion must be denied.

1. Plaintiffs Have Made a Prima Facie Case for Each Cause of Action

Plaintiffs incorporate the arguments espoused in their Opposition to Special Motion to Strike and Response to Motion for Judgment on the Pleadings. (ECF No. 84 at 6-21; ECF No. 74 at 12-18.) As Plaintiffs have shown, the FAC makes a *prima facie* case for each cause of action. Even if any pleading deficiencies did exist, the Court must grant Plaintiffs leave to amend the complaint, particularly because the pending motions constitute the first challenge to the alleged pleading deficiencies. Therefore, even if Movants are correct that Plaintiffs have not yet met the relevant pleading standards, a stay is unwarranted on these grounds.

2. Movants' Claim of Immunity From the Instant Action is Meritless and Does Not Warrant a Stay

Movants assert that if their Special Motion to Strike is granted, it would establish that they are immune from Plaintiffs' civil action, thus warranting a stay. (Motion at 7:8-22.) As demonstrated in Plaintiffs' Opposition to Special Motion to Strike, it is Movants' conduct *prior* to the Receivership Action that serves as the basis for the claims asserted by Mr. Harris and the putative class for which they seek relief for the harms they suffered. (ECF No. 84 at 8:12-24.)

As Plaintiffs demonstrate in their Opposition to Special Motion to Strike, Proctor's fraudulent conduct occurred prior to his appointment as receiver and is not a "normal judicial function;" thus, he would not be immune from all the allegations in the suit. *See id.*; *see also* Opposition to Special Motion to Strike, ECF No. 84 at 5:24-25 to 6:1-18. It is no surprise that virtually the same arguments were made in the *Alexander* lawsuit unsuccessfully. *See* February 22, 2017, Order denying Defendants' Meilings Motion to Stay in the *Jerry Alexander, et al., v. Dean Meiling, et al.*, matter attached as Exhibit "E" to the Request for Judicial Notice filed

concurrently herewith. Accordingly, Movants' argument fails to warrant a stay and the Motion should be denied.

3. A Stay of Discovery is Not Warranted by the Pending Action in State Court, and the Meiling Defendants' Broad Statements of Inconvenience and Cost Are Insufficient

First, the state court's Dismissal Order entirely dismissed the Receivership Action with prejudice. (See Request for Judicial Notice, Exhibit B). Similarly, the Nevada Supreme Court's Order of Affirmance and Order Denying Rehearing largely eviscerated the basis for the Defamation Action. Given these orders, the Proctor Preliminary Injunction Action should be dismissed outright, insofar as the contentions for injunctive relief in that matter mirror arguments rejected by the Nevada Supreme Court in its Order of Affirmance, and it is only a matter of when (not if) the state court dismisses the Proctor Preliminary Injunction Action in its entirety.

Put simply, there is virtually no litigation left to occur at the state court level—and certainly no litigation having any bearing on the claims asserted in this action-that would warrant a stay of this action on the basis of any pending state court matters.

Second, resolution of the remainder of the *Alexander* Action is not determinative of resolution of this action. The parties in the two lawsuits are not identical (*see* Motion at 11:19-21), and certainly the claims and issues raised in the two actions are not identical. Furthermore, staying this action pending resolution of the *Alexander* Action precludes Plaintiffs' statutory ability to obtain an accelerated adjudication of this case, to which Plaintiffs are plainly entitled as set forth in their pending Motion to Expedite (ECF No. 56), which arguments are incorporated herein by this reference. As such, this Court should not stay this action pending resolution of the *Alexander* Action. The Meiling Defendants' request to stay this action should be denied *in toto*.

C. THERE IS NO OTHER JUSTIFICATION FOR A STAY.

As set forth above, while this Court may take a "preliminary peek" at the viability of Plaintiffs' claims in assessing this motion, doing so may lead to inconsistent findings. Nevertheless, this Court cannot be convinced at this time that Plaintiffs will be unable to state any claim for relief. Proceeding with discovery while Defendants' Motion to Strike and Motion for Judgment on the Pleadings is pending will further the just and speedy determination of this case. This is further warranted by virtue of the fact that Plaintiffs herein are entitled to a preferential trial date (ECF No. 56), such that each day of delay comes with the danger of irrevocable harm to one or members of the putative class.

Further, at minimum *some* discovery could be had while the motions to dismiss are being decided, such as the depositions described in the Declaration of Marc Lazo filed in support of Plaintiffs' Response to Motion to Dismiss First Amended Class Action Complaint (ECF No.89-1) and those described in the Declaration of Marc Lazo filed in support of the instant Response.

The party seeking the stay must make a "strong showing" as to why discovery should be denied; broad statements such as those made by Movants here (Motion at 9:13-23 to 10:1-2) about inconvenience, cost, or a need for protection are insufficient. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013). Therefore, the Court should order the parties to proceed with a discovery plan and scheduling order forthwith based on an expedited trial date.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court summarily deny Movants' Motion, as well as deny the Joinders filed by Defendants Kaempfer Crowell LTD (ECF No. 109) and Defendants Armstrong Teasdale LLP, Janet Chubb and Tiffany Schwartz (ECF No. 110). Movants have not proffered any legitimate grounds to impose a stay in this action. As such, Movants (and all of the other

Defendants) should be ordered to file an answer to the First Amended Complaint and this Court should expedite a trial of this action consistent with Plaintiffs' request in their Motion to Expedite.

Dated: September 6, 2019

THE KIM LAW FIRM

By: _____

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