

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: THE ALLSTATE CORPORATION
SECURITIES LITIGATION

Case No. 16-cv-10510

Hon. Robert W. Gettleman

**DEFENDANTS' MOTION TO STAY DISCOVERY PENDING APPEAL
FROM THE COURT'S CLASS CERTIFICATION ORDER**

Pursuant to Rules 16(a)(4) and 23(f) of the Federal Rules of Civil Procedure, defendants The Allstate Corporation (“Allstate”), Thomas J. Wilson, and Matthew E. Winter respectfully move for entry of an order staying discovery and all other proceedings in this action, with limited exceptions, until the United States Court of Appeals for the Seventh Circuit has ruled on defendants’ pending appeal from this Court’s class certification order entered on March 26, 2019. ECF No. 172.

For the reasons that follow, an order should be entered suspending the discovery cut-off date in this action and staying until the final disposition of the appeal: (1) all depositions, (2) any interrogatories, requests for admission, or non-party subpoenas not already served, and (3) all expert disclosures and discovery. Such a narrowly focused stay of proceedings will still allow the parties to complete any open document discovery and to resolve any disputes concerning document discovery, and would not unduly delay these proceedings.

I. INTRODUCTION

In an order entered on April 25, 2019, the Seventh Circuit granted defendants’ petition under Rule 23(f) for leave to brief an immediate interlocutory appeal from this Court’s March 26, 2019 class certification order. *See* ECF No. 177. The appellate court’s order is

significant. The Seventh Circuit rarely grants leave to appeal under Rule 23(f).¹ The fact that the appellate court did so here – only *one day* after defendants filed a reply in further support of their petition for leave to appeal – illustrates the strong likelihood of success on the merits or, at a minimum, the importance of the legal issues presented on appeal. *See In re Amgen Inc. Sec. Litig.*, No. CV-07-2536, 2010 WL 11469044, at *4 (C.D. Cal. Feb. 2, 2010) (appellate order granting Rule 23(f) petition supported entry of stay).

The Supreme Court has established the standard for entry of a stay pending appeal: a likelihood of success on the merits; irreparable injury absent a stay; that entry of a stay will not substantially injure another party; and that the public interest favors, or is at least not opposed to, the entry of a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (stay pending appeal appropriate where “the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting”). That standard is easily met here.

First, defendants’ appeal raises significant issues concerning the evidence that a district court must consider in evaluating the predominance requirement in a putative securities class action under *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284 (2014) (“*Halliburton II*”). The Seventh Circuit has not yet addressed that question, which itself is a powerful reason to enter a stay pending appeal. *See IBEW Local 98 Pension Fund v. Best Buy Co.*, No. Civ. 11-429, 2014 WL 4540228, at *2 (D. Minn. Sept. 11, 2014) (entering stay pending appeal where Eighth Circuit had not previously addressed *Halliburton II*). Similar appeals in

¹ *See* David L. Balsler, *et al.*, *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource*, Bloomberg BNA (March 16, 2017).

other Circuits addressing the evidentiary showings required by *Halliburton II* have resulted in reversal of class certification orders.²

Second, defendants will suffer irreparable injury without a stay. Although document discovery is substantially complete, and any open document discovery issues would be resolved during the stay defendants are seeking, defendants face the prospect of significant and avoidable burden and expense from other discovery if a stay pending appeal is not entered. Plaintiffs have served notices of (or stated their intention to serve notices of) ten depositions of Allstate witnesses, including several of the Company's most senior executives, to begin in early June. In addition, during the pendency of the appeal, absent a stay, the parties will be required to disclose experts and engage in expert discovery as well as serving and responding to interrogatories and requests for admission and pursuing non-party discovery. Proceeding with these matters would impose considerable expense, require Allstate's senior leadership to expend valuable time on deposition preparation and testimony that otherwise would be used to manage the Company, and could burden the Court with discovery disputes or other collateral motions. All of that effort, burden, and expense may prove unnecessary, depending on the Seventh Circuit's ruling. There is ample authority holding that the foregoing amounts to irreparable injury.

Third, plaintiffs will not be unduly harmed by a stay. The Seventh Circuit has moved quickly in acting on the petition, and merits briefing will be concluded within two and half months. This is not a significant delay, especially in comparison to the importance of the legal issues raised in the appeal and their potential impact on the course of these proceedings. Defendants already have substantially completed their production of documents, and Magistrate Judge Weisman has established a schedule for the parties to present any unresolved disputes

² See *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 486 (2d Cir. 2018); *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 785 (8th Cir. 2016).

relating to defendants' document productions and privilege log. *See* ECF No. 185. Those proceedings would not be affected by the stay that defendants are requesting here. Any inconvenience caused to plaintiffs by a limited delay will be minor in comparison to the significant wasted expense and effort imposed on defendants if they prevail on appeal.

Finally, the public interest favors judicial economy and the uniform application of Supreme Court authority. A stay pending appeal furthers those interests.

For all of these reasons, the Court should enter an order suspending the current discovery cutoff date and staying until the final resolution of the Seventh Circuit appeal: (1) all depositions, (2) service of interrogatories, requests for admission, or non-party subpoenas not already served, and (3) all expert disclosures. Such a stay would not affect ongoing production of documents or the resolution of any discovery disputes relating to it.

II. ARGUMENT

In determining whether to grant a stay pending interlocutory appeal, courts consider “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Andrews v. Chevy Chase Bank, FSB*, 474 F. Supp. 2d 1006, 1007 (E.D. Wis. 2007) (quoting *Hilton*, 481 U.S. at 776); *see Nken v. Holder*, 556 U.S. 418, 434 (2009) (revisiting standards for stay pending appeal). As the Seventh Circuit has noted, “this is the same kind of question that a court asks when deciding whether to issue a preliminary injunction or a stay of an administrative decision.” *Equifax Check Servs.*, 181 F.3d at 835. Each of these factors strongly favors the tailored stay of proceedings that defendants request here.

A. Defendants Have a Strong Likelihood of Success on the Merits.

A “strong showing” of success on the merits “requires something less than a fifty percent chance of success,” and only “relates to the success of the appeal, not the ultimate outcome of the litigation.” *Abbott Labs. v. Sandoz, Inc.*, 500 F. Supp. 2d 846, 849–50 (N.D. Ill. 2007). “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the stay applicant] will suffer absent the stay. Simply stated, more of one excuses less of the other.” *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (granting stay).

The Seventh Circuit’s recent order granting defendants’ petition for leave to appeal the class certification order under Rule 23(f) is *prima facie* evidence that there is a likelihood of success on the merits. *Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-2353-DDC-TJJ, 2014 WL 5817323, at *2 (D. Kan. Nov. 10, 2014) (“the Tenth Circuit has already granted both [d]efendants’ petitions for permission to appeal under Rule 23(f), thus satisfying the first layer of the inquiry”); *Amgen*, 2010 WL 11469044, at *4 (order granting leave to appeal under Rule 23(f) supported stay because “[t]he Ninth Circuit rarely permits Rule 23(f) appeals to proceed”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 5 (D.D.C. 2002) (likelihood of success where appellate court showed “a willingness to address the merits of this Court’s certification decision”); *see also Pena v. Taylor Farms Pac., Inc.*, No. 2:13-cv-01282-KJM-AC, 2015 WL 5103157, at *3 (E.D. Cal. Aug. 31, 2015) (“By granting the defendants’ petitions to appeal under Rule 23(f), the Ninth Circuit has already weighed in on the substantiality of their case for relief.”); Joseph M. McLaughlin, *McLaughlin on Class Actions Law and Practice* § 7:1 (12th ed. 2015) (“Even if a stay is denied when the application is based solely on the filing of a Rule 23(f) petition, courts have been more willing to re-evaluate whether a stay should issue once the petition is granted.”).

Defendants' appeal provides the Seventh Circuit its first opportunity to address the allocations of burden and the weighing of evidence required by *Halliburton II* when a district court is assessing whether defendants in a securities fraud action have rebutted the presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), for the purpose of the predominance requirement for class certification in Rule 23(b)(3). The "existence of an important legal issue raised in a Rule 23(f) petition that needs immediate resolution" also supports a finding of a likelihood of success on the merits. *Lorazepam*, 208 F.R.D. at 5. Indeed, facing an identical situation in the Eighth Circuit, the district court in *Best Buy* concluded that a stay pending appeal was warranted. *Best Buy*, 2014 WL 4540228, at *2; *see also Amgen*, 2010 WL 11469044, at *4 (granting stay pending appeal of class certification order addressing *Basic Inc.* presumption of reliance).

Further evidencing the likelihood of success in this case, the Eighth and Second Circuits have reversed class certification orders in substantially similar circumstances when a district court did not follow *Halliburton II*. *See Goldman Sachs*, 879 F.3d at 485 (vacating class certification order because it was unclear whether district court required defendants to establish lack of price impact by more than a preponderance of the evidence); *Best Buy*, 818 F.3d at 782 (reversing class certification order where evidence rebutted *Basic Inc.* presumption of reliance and rejecting plaintiffs' "inflation maintenance" argument as insufficient); *see also In re Petrobras Sec.*, No. 16-CV-1914, ECF No. 169 (2d Cir. Aug. 2, 2016) (slip op.) (overruling district court and staying all further proceedings in that court pending resolution of Rule 23(f) appeal).

Both the Seventh Circuit and the Supreme Court have held that "when factual disputes bear on matters vital to certification . . . the court must receive evidence . . . and resolve the

disputes before deciding whether to certify the case.” *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see Halliburton II*, 573 U.S. at 277 (defendants have the right to “rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage . . . but also before class certification”).

Contrary to these authorities, this Court did not consider defendants’ evidence of a lack of price impact for the challenged statements because, it concluded, that evidence was “merits-based” and “hotly contested.” *See* ECF No. 172 at 3. Defendants will show on appeal that this ruling misapplied governing law and that the class certification order therefore should be reversed.

B. Defendants Will Suffer Irreparable Harm Absent a Stay.

A stay pending appeal is necessary to prevent irreparable harm to defendants that would result from proceeding with depositions, responses and objections to interrogatories or requests for admission, service and enforcement of non-party subpoenas, and expert disclosures and discovery before the Seventh Circuit has ruled. In fact, the Seventh Circuit’s ruling on appeal could end the litigation, because plaintiffs did not *actually* rely on any of the public statements challenged in this action and therefore will not be able to prove an essential element of their claims without the *Basic Inc.* presumption of reliance. *See* ECF No. 126 Ex. I at 33:14-36:19; *id.* Ex. J at 30:2-31:25. Even if the litigation is not effectively ended, the appellate court ruling could dramatically reshape the remaining contours of plaintiffs’ claims and the scope of appropriate discovery.

Defendants have now substantially completed the production of documents in response to plaintiffs’ requests and will produce the final installment of their privilege log on the date of this filing. In anticipation of the July 22, 2019 discovery cut-off date, plaintiffs have served notices of eight depositions of present or former Allstate executives, including the Company’s current

chief executive officer, its current chief financial officer, and its vice chairman, to be taken between June 13 and mid-July. *See* Declaration of Kenneth L. Schmetterer Ex. A. Plaintiffs also intend to take two representative depositions of Allstate under Rule 30(b)(6). *See id.* Ex. B.

Defendants anticipate that plaintiffs also will serve interrogatories and requests for admission before the discovery cut-off date (which they have not yet done), and defendants will need to serve similar discovery requests on plaintiffs. Non-party subpoenas of relevant witnesses, including the “confidential witnesses” alluded to in the complaint, also are likely. After the conclusion of fact discovery, the parties expect to exchange expert disclosures and engage in depositions and related discovery of any experts who are disclosed. *See* ECF No. 178 at 4. Securities actions typically involve a number of experts addressing issues such as loss causation and alleged damages in addition to experts concerning the subjects of the alleged misstatements or omissions at issue.

These proceedings will impose significant burden and expense on defendants and will require Allstate’s senior leadership to devote substantial time to discovery that they otherwise could spend on the management of the Company. This burden and expense would be wasted if the Seventh Circuit were to reverse or substantially modify the class certification order, as defendants anticipate it will do. As in similar matters where a stay pending appeal has been granted, “proceeding headlong with discovery and other matters . . . has the very real potential of unnecessarily wasting significant resources of all parties . . . and the Court, because [] significant issues are currently pending before the Court of Appeals” that “could dispose of this litigation” or “substantially reshape it.” *Lorazepam*, 208 F.R.D. at 6.

“In similar circumstances, many courts have found the costs of pretrial litigation, incurred unnecessarily, would constitute irreparable harm.” *Pena*, 2015 WL 5103157, at *5; *see, e.g.*,

Nieberding, 2014 WL 5817323, at *4 (defendants “will be harmed if they are required to incur significant costs in proceedings that may result in duplicative and wasteful litigation if the Tenth Circuit decertifies or alters the class”); *Best Buy*, 2014 WL 4540228, at *3 (finding irreparable harm where defendants “would be forced to engage in costly discovery and motion practice pending the Eighth Circuit’s decision”); *Amgen*, 2010 WL 11469044, at *3 (“further discovery during the Rule 23(f) appeal may cause substantial prejudice to [d]efendants”); *Andrews*, 474 F. Supp. 2d at 1010 (finding irreparable harm where defendants “would have to . . . provide discovery and respond to claims even though the class action might not proceed”).

In addition, as Judge Easterbrook has observed, requiring defendants to continue to defend a class action even when the viability of the class is in doubt puts “considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight.” *Equifax Check Servs.*, 181 F.3d at 834. Class action defendants face “intense pressure to settle” so-called “blackmail settlements” where they face “a small probability of an immense judgment in a class action.” *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (collecting authorities). “Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.” *Equifax Check Servs.*, 181 F.3d at 834.

This inordinate settlement pressure, even in the face of strong factual defenses, presents “legitimate” cause for “[j]udicial concern.” *Rhone-Poulenc Rorer*, 51 F.3d at 1298. Rule 23(f) was adopted, in part, to address this problem. *See Equifax Check Servs.*, 181 F.3d at 835. A stay of proceedings until the Seventh Circuit has ruled is consistent with the rule’s intent to prevent such inequity.

C. Plaintiffs Will Not Be Substantially Injured by a Stay.

Plaintiffs will suffer comparatively little harm from the requested stay pending appeal. The Seventh Circuit already has moved quickly, and any stay will be limited in time. *See Best Buy*, 2014 WL 4540228, at *3 (“Although the Court takes seriously the delay to [p]laintiffs’ ‘day in court,’ [d]efendants only seek a stay pending the Eighth Circuit’s decision on the Rule 23(f) petition. There is no reason to think that the Eighth Circuit will not resolve [d]efendants’ petition in a timely manner.”).

Defendants filed their petition for leave to appeal on April 9, and the Seventh Circuit granted leave to appeal less than three weeks later, on April 25. *See* ECF No. 180. On Monday, April 29, the appellate court issued its docketing statement setting June 10, 2019 as the deadline for defendants to file their opening brief on the merits. Consequently, the merits briefing called for by the Federal Rules of Appellate Procedure will be completed by July 31, 2019. *See* Fed. R. App. P. 31(a)(1). Moreover, because document discovery will have been completed, if the Seventh Circuit rules in a manner that does not require dramatic revisions to the remaining schedule of proceedings in this Court, the parties will be able to resume where they left off without significant delay.

“[A]ny inherent harm stemming from [a brief] stay, when juxtaposed to the potential magnitude of a decision by the Court of Appeals on the issues before it, is simply *de minimis*.” *Lorazepam*, 208 F.R.D. at 6; *see also Nieberding*, 2014 WL 5817323, at *4 (“While staying this case in its entirety will cause delay, the Court finds this harm to [p]laintiffs is outweighed by the greater harm to [d]efendants in requiring them to proceed with a scheduling conference, discovery . . . , and preparing for a class trial during the interlocutory appeal of the order granting class certification.”). Moreover, “[a] stay will also prevent all parties from litigating discovery disputes that later prove irrelevant or unnecessary.” *Pena*, 2015 WL 5103157, at *6.

D. The Public Interest Favors a Stay.

Finally, the public interest favors granting a stay. “[C]onsiderations of judicial economy are frequently viewed as relevant to the public interest, and . . . weigh against the investment of court resources that may prove to have been unnecessary.” *Estate of Heiser v. Deutsche Bank Tr. Co.*, No. 11 Civ. 1608, 2012 WL 2865485, at *5 (S.D.N.Y. July 10, 2012); *see also Gray v. Golden Gate Nat’l Recreational Area*, No. C 08-00722, 2011 WL 6934433, at *3 (N.D. Cal. Dec. 29, 2011) (“The public interest lies in proper resolution of the important issues raised in this case, and issuance of a stay would avoid wasting resources on a class action litigation which might be changed in scope on appeal.”); *Nieberding*, 2014 WL 5817323, at *5 (“the public interest is best served by not requiring [d]efendants to incur significant costs that may in the end be unnecessary and duplicative”).

A stay also is in the public interest where “it will avoid unnecessary litigation and suspend the case in place while the [Seventh Circuit] resolves the defendants’ appeal” because “[t]he landscape going forward will depend heavily on the circuit court’s decision: the appeal tests this court’s order granting class certification, the applicable evidentiary standard, and whether the evidence plaintiffs offered with their motion can support class certification.” *Pena*, 2015 WL 5103157, at *6.

III. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court suspend the existing discovery cut-off date in this action and enter an order staying until the final disposition of the pending appeal before the Seventh Circuit: (1) all depositions, (2) any interrogatories, requests for admission, or non-party subpoenas not already served, and (3) all expert disclosures and discovery.

Dated: Chicago, Illinois
May 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on May 7, 2019, I electronically filed the foregoing document using the ECF System for the United States District Court for the Northern District of Illinois. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record registered on the ECF system.

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