

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE: WHOLESALE GROCERY PRODUCTS ANTITRUST LITIGATION	MDL No. 09-md-02090 (ADM/TNL) ORDER
THIS DOCUMENT RELATES TO: ALL ACTIONS	

I. INTRODUCTION

This matter comes before the Court on the “Cross Motion of the Village Markets for a Stay of the Requirement that Expert Disclosures, Reports and Motions Relating to the Merits of Their Claims Pending Appeals” (Cross Motion, ECF No. 666). The Court has determined that no hearing is necessary on the motion and will issue its decision on the papers. *See* D. Minn. LR 7.1(b).

II. BACKGROUND

This antitrust litigation has been brought by plaintiff retail grocers falling generally into two groups based on the geographic market in which they purchased the products and services of defendant grocery wholesalers: the Midwest market and the New England market. (*See* Am. Redacted Mem. Op. & Order (“Am. Mem. Op. & Order”) at 6, ECF No. 651.) Both of these two groups also include a subclass of retail grocers who entered into an arbitration agreement with a grocery wholesaler. (Am. Mem. Op. & Order at 6 n.3.)

Previous appeals to the Eighth Circuit Court of Appeals in this matter have involved the arbitration subclasses, certification of a Midwest class, and a summary judgment ruling. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014), *cert. denied* (June 8, 2015); *King Cole Foods, Inc. v. SuperValu, Inc.*, 707 F.3d 917 (8th Cir. 2013); *see In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-md-2090 (ADM/TNL), 2015 WL 4992363, at *1-3 (D. Minn. Aug. 20, 2015), *appeals filed, JFM Market, Inc. v. SuperValu, Inc.*, No. 15-3174 (8th Cir. Sept. 29, 2015), *Colella's Super Market, Inc. v. SuperValu, Inc.*, No. 15-3089 (8th Cir. Sept. 21, 2015). Outside of matters related to the arbitration subclasses, the New England retail grocers did not appeal the district court's rulings. *In re Wholesale Grocery Prods. Antitrust Litig.*, 2015 WL 4992363, at *1-2.

Among other things, these appeals ultimately resulted in the return of the arbitration subclasses and reversal of the grant of summary judgment against the Midwest retail grocers. "Because there had been no appeal by [the New England retail grocers], the Eighth Circuit did not address any claims related to the proposed New England class." *In re Wholesale Grocery Prods. Antitrust Litig.*, 2015 WL 4992363, at *2. Following another ruling by the district court regarding the arbitration subclasses, another appeal was made to the Eighth Circuit, which remains pending. *In re Wholesale Grocery Prods. Antitrust Litig.*, 97 F. Supp. 3d 1101 (D. Minn. 2015) (arbitration not compelled under a successor-in-interest theory), *appeal filed, Millennium Operations, Inc. v. SuperValu, Inc.*, No. 15-1786 (8th Cir. Apr. 16, 2015) (argued and submitted May 17, 2016); *see In re Wholesale Grocery Prods. Antitrust Litig.*, 2015 WL 4992363, at *2.

Around or about the time of these proceedings, another New England retail grocer, Collella's, filed a motion to intervene. (ECF No. 489.) The undersigned denied Collella's motion to intervene, a ruling subsequently affirmed by a memorandum opinion and order of the district court. *In re Wholesale Grocery Prods. Antitrust Litig.*, 2015 WL 4992363, at *3, 8-9. In the same memorandum opinion and order, the district court also ruled that the New England retail grocers could not relitigate certification of a New England class. *Id.* at *4-5. Collella's and the New England retail grocers have appealed these rulings and those appeals likewise remain pending. *See JFM Market, Inc.*, No. 15-3174, *Colella's Super Market, Inc.*, No. 15-3089 (argued and submitted May 17, 2016).

The Second Amended Pretrial Scheduling Order (ECF No. 598) entered in this matter provided that certain deadlines would be determined by measuring a certain number of days from the issuance of the district court's class-certification order regarding distribution-center-based classes in the Midwest market. In September 2016, the district court certified Midwest distribution-center-based classes. (Am. Mem. Op. & Ord. 8-32.) Following the issuance of the class-certification order, the undersigned issued a Third Amended Pretrial Scheduling Order (ECF No. 653), which provided specific dates for those deadlines previously measured in a certain number of days from the issuance of the class-certification order. In relevant part, the Third Amended Pretrial Scheduling Order provided certain dates for expert discovery as well as dispositive motions.

III. MOTION TO STAY

JFM Inc. and MJF Market, Inc. ("the Village Markets") seek relief from the deadlines for expert discovery and dispositive motions set forth in the Third Amended

Pretrial Scheduling Order while the New England retail grocers' appeals are pending. The Village Markets contend that the pending appeals will decide whether any New England retail grocers will be able to participate in this matter. (Cross Motion at 2 ("At present there are three appeals pending which will decide whether or not any New England [p]laintiffs will participate in this case," describing one appeal as "decid[ing] the Village Markets' right to participate *de jure*" and two appeals as "decid[ing] whether the Village Markets or any other New England plaintiffs may participate *de facto*."))

According to the Village Markets, they should not be required "to spend hundreds of thousands of dollars [on expert discovery] before knowing whether or not they [a]re actually going to participate in the case." (Cross Motion at 2; Mem. in Supp. at 3, ECF No. 668.) The Village Markets point out that, as a practical matter, if the New England retail grocers lose on appeal regarding class certification, the New England retail grocers will dismiss their claims voluntarily because it is too costly to pursue individual actions. (Mem. in Supp. at 4 ("The New England plaintiffs represented to the Magistrate Judge that, if the result of the pending appeals was that New England was barred from bringing a class action motion, they would voluntarily dismiss the case, because the cost of litigation as an individual plaintiff made prosecution of it impracticable.")) Counsel for the Village Markets previously made this representation to the undersigned at a hearing on December 3, 2015,¹ "stat[ing] that their case would be voluntarily dismissed if they

¹ On December 3, the Village Markets and Defendants were before undersigned on a similar motion to stay. (*See* Court Minutes, ECF No. 564.) Ultimately, that motion was withdrawn without prejudice based on an agreement of the parties. (Court Minutes; ECF No. 576 at 47-50.) The parties' agreement was twofold. First, in the event that the Eighth Circuit permitted the New England retail grocers to seek certification of a narrower New England class, a briefing schedule for certification of a narrower New England class would be established consistent with the Eighth

failed on appeal,” and “made the same representation to the [Eighth Circuit] Court of Appeals on May 17, 2016.” (Mem. in Supp. at 5; *see* ECF No. 576 at 6, 12, 29-30, 32.) The Village Markets further contend that, absent a stay, they will be “effect[ively] . . . clos[ed] out” while the appeals are pending. (Mem. in Supp. at 10.)

Defendants do not oppose the requested stay, but contend that any stay should be universal, citing their own motion to stay proceedings while they seek to appeal the district court’s order certifying the Midwest distribution-center-based classes.² (*See* ECF Nos. 655, 657.) Defendants assert that granting a stay only as to the New England retail grocers “would essentially bifurcate litigation . . . potentially resulting in two rounds of expert reports and depositions, two sets of *Daubert* motions, and two separate dispositive motion deadlines—one for the Midwest plaintiffs and one for New England.” (Jt. Mem. in Resp. at 4, ECF No. 671.) Defendants assert that there are no efficiencies gained by staying these proceedings with respect to the New England retail grocers only.

“[T]he 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.” *Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *accord BAE Sys. Land & Armaments L.P. v. Ibis Tek, LLC*, 124 F. Supp. 3d 878, 889 (D. Minn. 2015) [hereinafter *BAE*]; *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-md-2090 (ADM/TNL), 2013 WL 6533154, at *1 (D. Minn. Dec. 13, 2013); *see also* Fed. R. Civ.

Circuit’s mandate. (ECF No. 576 at 48.) Second, the Village Markets would be permitted to renew their request to stay expert discovery after the district court ruled on the motion for distribution-center-based class certification. (ECF No. 576 at 48.)

² Defendants’ motion is not before the undersigned.

P. 1 (requiring the Rules of Civil Procedure to be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”). The Court’s inherent power to manage its docket results in broad discretion in determining whether to grant a stay. *BAE*, 124 F. Supp. 3d at 889; see *In re Wholesale Grocery Prods. Antitrust Litig.*, 2013 WL 6533154, at *1. The party requesting the stay bears the burden of establishing the need for a stay. *BAE*, 124 F. Supp. 3d at 890; accord *Stratasys, Inc. v. Microboards Tech., LLC*, No. 13-cv-3228 (DWF/TNL), 2015 WL 1608344, at *1 (D. Minn. Apr. 10, 2015) (“The burden of establishing that a stay is appropriate is with the party seeking the stay.”). “Because a stay of proceedings has the potential to damage the party opposing it, the decision to stay should weigh the ‘competing interests and maintain an even balance,’ recognizing that the Supreme Court has counseled moderation in use.” *In re Wholesale Grocery Prod. Antitrust Litig.*, 2013 WL 6533154, at *1 (quoting *Landis*, 299 U.S. at 255).

Here, the equities favor granting the Village Markets’ motion. A stay preserves the status quo while the appeals relevant to the New England retail grocers’ participation in this case are being decided. Requiring the Village Markets’ to expend significant resources on expensive expert discovery at this juncture does not comport with the principles of Rule 1. Moreover, Defendants do not oppose the requested stay. And, while Defendants argue that it will be inefficient to grant the Village Markets’ motion to stay but not grant Defendants’ motion to stay with respect to the Midwest retail grocers, classes have been certified for the Midwest market whereas classes have not been certified with respect to the New England market. Defendants have not articulated any

particularized harm that would result if the stay were granted. Any burdens identified by Defendants are couched in hypotheticals and possibilities. Finally, the Village Markets' counsel has represented to the Court that the New England retail grocers will dismiss their claims voluntarily if they lose on appeal regarding class certification. The Court takes Village Markets' counsel at his word. Accordingly, the Court concludes that the Village Markets have meet their burden and a stay of the deadlines for expert discovery and dispositive motions pending resolution of the appeals related to the New England retail grocers is appropriate at this time.

IV. ORDER

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that the "Cross Motion of the Village Markets for a Stay of the Requirement that Expert Disclosures, Reports, and Motions Relating to the Merits of Their Claims Pending Appeals" (ECF No. 666) is **GRANTED**.

Date: October 20, 2016

s/ Tony N. Leung
Tony N. Leung
United States District Court
for the District of Minnesota

*In re Wholesale Grocery Products Antitrust
Litigation*
Case No.09-md-2090 (ADM/TNL)