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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

Jeremy Estrella, a consumer residing in Oregon, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Convergent Outsourcing, Inc., a foreign corporation,

Defendant.

Case No. 3:17-cv-00117-BR

RESPONSE IN OPPOSITION TO MOTION TO STAY

Oral Argument Requested

FACTUAL BACKGROUND

Plaintiff Jeremy Estrella (Mr. Estrella) filed this proposed class action against defendant Convergent Outsourcing, Inc. (Convergent) on January 24, 2017. Mr. Estrella brought a claim under the Fair Debt Collection Practices Act (FDCPA) on behalf of himself and other Oregonians who were similarly harmed by Convergent's unlawful collection scheme. Specifically, Mr. Estrella alleged that Convergent, a large national debt collection company, unlawfully attempted to collect time barred defaulted consumer debt from himself and other Oregonians through telephone calls and the mail. Complaint ¶¶ 3, 12, 29, 45, 50. Mr. Estrella alleged that Convergent's attempt to collect time barred debts by offering to "settle" the debts, without disclosing that the debts were time barred and not legally enforceable, and offering to accept periodic payments to settle the debts, without disclosing that state law may restart the limitations period, violated numerous provisions of the FDCPA. Complaint ¶¶ 59-62.

The overwhelming majority of courts that have addressed the issue agree that Convergent's conduct as alleged in Mr. Estrella's complaint may violate the FDCPA. See, e.g., *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 513 (5th Cir. 2016); *Luther v. Convergent Outsourcing, Inc.*, No. 15-10902, 2016 U.S. Dist. LEXIS 56456 (E.D. Mich. Apr. 28, 2016), etc.

After being served with a copy of the complaint in this matter, Convergent appeared through counsel and filed a motion to stay on February 3, 2017. Doc. #6. Convergent asks this Court for a comprehensive and indefinite stay pending possible nationwide class action certification and settlement in a Colorado case called *Ross v. Convergent Outsourcing, Inc., et al.*, Case No: 1:16-cv-00825-PAB-KLM (*Ross*). The motion to stay argues that "allowing both actions to proceed simultaneously will subject Convergent to significant prejudice and unnecessary expense" and would "offend[] the principles of judicial economy and consume[] the resources of the Court." Doc. #6, p. 4.

Ms. Ross filed her original complaint in the District of Colorado on April 12, 2016, attached as Exhibit 4. The original complaint sought relief for Colorado residents only. Then Ms. Ross filed a motion for leave to file a first amended complaint (FAC) on November 8, 2016, attached as Exhibit 5. The motion for leave was granted. Ms. Ross's FAC was similarly limited to certification for a Colorado class.

Then Ms. Ross sought leave to file a second amended complaint (SAC) on February 23, 2017, attached as Exhibit 6. Convergent attached a copy of the proposed SAC to its motion to stay in this case (Doc. #6-1) but did not attach a copy of Ms. Ross's second motion for leave. In the second motion for leave, Ms. Ross stated that the deadline to file amended pleadings was September 30, 2016. See Exhibit 6, p. 2. Ms.

Ross has not been granted leave to file her SAC. Thus, as of the date of the instant response, there is no complaint filed by Ms. Ross that seeks to certify a national class. On March 2, 2017, after Convergent filed its motion to stay in the instant action, it filed a joint notice of class settlement in *Ross*, attached as Exhibit 7.

ARGUMENT

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of action on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). A district court's decision to grant or deny a *Landis* stay is a matter of discretion, see *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007), but "that discretion is abused by a stay of indefinite duration in the absence of a pressing need," *King v. Deutsche Bank AG*, No. CV 04-1029-HU, 2005 U.S. Dist. LEXIS 11317, at *19 (D. Or. Mar. 8, 2005) (citing *Landis*, 299 U.S. at 255). Moreover, "[o]nly in rare circumstances will a litigant in one case be compelled to stand aside while a litigant in another settles the rule

of law that will define the rights of both" and the party seeking a stay "shoulders a heavy burden" and "must make out a clear case of hardship or inequity in being required to go forward[.]" *Landis*, 299 U.S. at 255.

Within these parameters, in deciding whether to grant a stay, a court should weigh: (1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). In regard to the hardship or inequity element, "being required to defend a suit, without more, does not constitute a clear case of hardship or inequity" for purposes of a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (internal quotations omitted). "If a stay is especially long or its term indefinite, we require a greater showing to justify it." *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000).

1. Mr. Estrella and the putative Oregon class members may likely suffer damage and be prejudiced if a stay, especially an indefinite or a lengthy stay, is granted.

Convergent's request to stay the case "pending certification of a national class" in *Ross* equates to an indefinite stay. Although Mr. Estrella has not had the opportunity to evaluate any terms of the nationwide class settlement proposal in *Ross* (as it has yet to be filed or

produced), the amended class definition in Ms. Ross's proposed SAC forecasts stormy weather ahead for class certification and/or settlement approval in Colorado. The circumstances and timing strongly suggest Convergent went shopping, and found itself a very accommodating seller. The class definition in Ms. Ross's original complaint stated:

> All persons in the State of Colorado to whom Convergent sent, within one year before the date of this complaint and in connection with the collection of a debt, a collection letter based upon the Template upon which no suit could be filed due to it being outside the applicable statute-of-limitations.
>
> Exhibit 4, p. 7.

The amended class definition in Ms. Ross's FAC stated:

> All persons in the State of Colorado to whom Convergent sent, within one year before the filing date of the original complaint in this action, a collection letter based upon the Template in connection with the collection of a time barred debt.
>
> Exhibit 5, p. 8.

The class definition in Ms. Ross's proposed SAC states:

> All persons in the United States to whom Convergent sent, within one year before the filing date of the original complaint in this action, a collection letter that uses the term "settlement offer" proposes a partial payment on the debt, or requires the consumer to contact it within 45 days to obtain a discount on the debt.
>
> Doc. #6-1, pg. 8.

Ms. Ross's proposed SAC not only asserts a national class for the very first time[1], but critically removes any nexus between the collection letters and the time barred status of the debts that the letters were seeking to collect. See *Id.* Merely sending a collection letter that uses the term "settlement offer[]" or "proposes a partial payment," when the debt can still be legally enforced through litigation, does not violate the FDCPA. *Id*. Clearly, Ms. Ross (and her counsel) knew this basic FDCPA rule when she filed her original complaint. Ms. Ross even attempted to tighten up her class definition language in her FAC. But then Ms. Ross seemingly ignored this basic FDCPA rule upon seeking leave to file her SAC.[2] The amendments to the class definition in Ms. Ross's proposed SAC now stand to render the class grossly over-inclusive. For various reasons that need not be discussed in this response, certification or settlement of Ms. Ross's proposed class should never be granted or approved. The only logical reason for amending the class definition as

[1] The "first-to-file" rule does not lend support to Convergent's argument. In addition to the fact that there are different parties, and that the class periods do not significantly overlap, Ms. Ross has yet to file an actual complaint proposing anything but a Colorado-wide class. And, even if she did so in the future, such filing would be after Estrella's complaint was filed.

[2] In Ms. Ross's motion for leave to file her SAC, her counsel stated that "the parties' in-person meeting on February 27, 2017, has necessitated the proposed amendment to Plaintiff's complaint." Exhibit 6, pg. 3.

Ms. Ross's SAC seeks to do is to provide Convergent with an absurdly overly-broad release.

Mr. Estrella recognizes that the instant response is not the proper venue to attack the fairness of the yet-to-be-filed joint class certification motion or settlement agreement struck between Ms. Ross and Convergent. However, it is important to highlight these obvious road blocks to class certification and settlement approval that have already surfaced in *Ross*. These apparent issues augment the probability of harms facing Mr. Estrella and the putative Oregon class members if Convergent's request for stay is granted indefinitely pending the speculative certification of a nationwide class or approval of a settlement on the SAC's proposed definition. A stay of the instant action is premature and unsupportable, given that no operative complaint alleging a national class has been filed in *Ross*, and no class has been certified in *Ross*.

The class definition in the *Ross* proposed SAC would dramatically dilute the recovery each aggrieved individual would receive, given its unnecessary expansion of the class size. This dilution would be the result of individuals receiving compensation as members of a class that did not suffer any cognizable harm at all, at the expense of those who did. Further, unnamed class members who are unable to participate in the settlement process will be waiving a wide variety of unknown

potential claims (presumably without adequate compensation), and will be precluded from bringing such claims in the future. More likely than not, the Colorado court will find the ambiguous and over-inclusive proposed class definition unfit for certification or settlement approval. See generally *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010). Thus, granting a stay in this case "pending class certification" in *Ross*, as Convergent requests, could mean forcing Mr. Estrella and the Oregon class to wait a potentially indefinite amount of time for justice.

In the meantime, the putative Oregon class members' chances of obtaining adequate relief decrease. The FDCPA limits statutory damages in a class action to $1,000 for the named plaintiff, and limits class recovery to the lesser of $500,000 or 1% of the net worth of the debt collector. See 15 U.S.C. § 1692k(a)(2). The statute does not specify whether the debt collector's net worth is to be assessed at the time of the violation, upon a finding of liability, or upon judgment. However, the sparse case law on point holds that the applicable time to evaluate net worth is assessed at the time liability is established. See *Seawell v. Universal Fid. Corp.*, No. 05-479, 2007 U.S. Dist. LEXIS 25163, at *6 (E.D. Pa. Apr. 2, 2007). A national settlement may never come to fruition in *Ross*, or, even if it does, could take years. In the meantime, if this Oregon action is stayed indefinitely pending certification or settlement in *Ross*, it is foreseeable (given its conduct) that Convergent's net worth

may substantially deteriorate, as a result of litigation expenses, reduced profits, or asset transfers, by the time the stay is finally lifted in this case.

Also, given the legitimate concerns that have already surfaced in the *Ross* litigation, Mr. Estrella needs to participate in class discovery as soon as possible in order to determine how many putative Oregon class members there may be, and what level of intervention in the *Ross* action is practicable. Moreover, as in any litigation, memories of witnesses will fade the longer the litigation is stayed. *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2016 U.S. Dist. LEXIS 38641, at *67 (N.D. Cal. Mar. 22, 2016) ("A prolonged delay will inevitably result in fading memories and require substantial efforts to once again become familiar with the details of the case."). There is also the distinct possibility of loss, destruction, or deterioration in the quality of evidence including electronically stored data that may be necessary for class certification and proof on the merits. "If there is 'even a fair possibility of harm' to the opposing party, the moving party 'must make out a clear case of hardship or inequity in being required to go forward.'" *N. Fork Rancheria v. California*, No. 1:15-cv-00419-AWI-SAB, 2016 U.S. Dist. LEXIS 105825, at *11 (E.D. Cal. Aug. 9, 2016) (quoting *Landis*, 299 U.S. at 255; *Lockyer*, 398 F.3d at 1112).

2. Allowing the instant action to proceed will not present a legally sufficient or significant hardship or inequity for Convergent.

The motion for stay asserts that "without a stay of this action, Convergent will be forced to incur significant and unnecessary legal expense" and that "the financial burden on Convergent will increase exponentially if this action proceeds concurrently with the Ross action and other similar actions across the country." Doc. #6, pp. 7-8. Convergent also argues that "allowing both actions to proceed simultaneously will subject Convergent to significant prejudice and unnecessary expense." *Id.* at p. 3. However, being required to defend a suit, without more, does not constitute a clear case of hardship or inequity" for purposes of a stay. *Lockyer*, 398 F.3d at 1112 (internal quotations omitted); see also *Perry v. Bloomberg*, No. 1:15-cv-00408-CL, 2015 U.S. Dist. LEXIS 72141, at *8 (D. Or. June 4, 2015) ("Though litigation can be costly, this is not [a case] where a stay was granted as arbitration would significantly reduce costs."). Despite Convergent's various alternative phrasings of the alleged hardships that it would suffer if a stay is not granted, it is merely restating the same reasons that are insufficient as a matter of law: having to defend itself against claims seeking redress for the harms it caused will cost it time and money.

Convergent also argues that it "will be forced to engage in duplicative class discovery and motion practice in multiple class actions." Doc. #6, p. 8. But this assumption, at least in regard to discovery, is contradicted by Convergent's statements that "Ross is nearing the completion of discovery and approaching class certification" and that "Ross should resolve the claims of all putative class members and reduce the cost of litigation for all parties, including Plaintiff." *Id.* at p. 7.

Convergent also claims that the proposed SAC "alleges a putative nation-wide class that, if certified, will absorb the putative class members in the instant action." As of March 3, 2017, Ms. Ross and Convergent have apparently reached a nationwide class settlement agreement that they hope to obtain court approval for. See Exhibit 7. If class discovery has indeed been completed, on a nationwide basis, in order to reach a settlement on a nationwide basis that will provide adequate relief to a proposed nationwide class in *Ross*, it should be a relatively modest undertaking for Convergent's counsel to forward on relevant discovery relating to the identity of the putative Oregon class in this case, and to any affirmative defenses. Otherwise, the discovery in this case should be fairly minimal as the letter/template speaks for itself. See *Cartwright v. Viking Indus.*, No. 2:07-CV-02159-FCD-EFB, 2008 U.S. Dist. LEXIS 120850, at *6 (E.D. Cal. June 18, 2008)

("[D]efendant has failed to present any evidence that engaging in discovery in this case will cause undue prejudice to Viking. Rather, it appears that the information sought by plaintiffs in this case is similar that Viking has already produced to the plaintiff in the Deist action."); see also *King*, 2005 U.S. Dist. LEXIS 11317, at *19 ("Deutsche seeks a stay of indefinite duration, but has made no showing of hardship or inequity in being required to go forward. The possibility that, at some point in the indefinite future, the plaintiffs' claims will either be resolved as part of the class action in Denney or subject to arbitration is not sufficient to justify a stay, particularly when the Denney court has not yet certified a litigation class." (citation omitted)).

Presumably, in its reply, Convergent will argue now that a joint notice of settlement has been filed in *Ross*, the justification for a stay of this action is even more warranted, and that it will somehow suffer an even greater hardship if it has to engage in discovery in this action while a settlement is pending in *Ross*. As discussed above, this argument should be rejected. Convergent can offer nothing but hopeful sentiment that the proposed class is certified and that a class settlement is approved. Not only is granting a stay based upon the mere possibility of certification and a settlement unsupported in the law; it is even less persuasive given the facts already known leading up to the proposed settlement in *Ross*. See, e.g., *La. Pac. Corp. v. Money Mkt. 1 Institutional*

Inv. Dealer, No. 09-03529, U.S. Dist. LEXIS 162971 (N.D. Cal. Nov. 14, 2012) (refusing to enter stay even when requested by both parties because settlement is purely speculative); *Keystone Coke Co. v. Pasquale*, 1999 U.S. Dist. LEXIS 2591, at *4-5 (E.D. Pa. Mar. 9, 1999) (refusing to grant stay just because settlement was proffered because approval of settlement was not automatic and reasoning that "[i]f courts were to impose a stay when a defendant was negotiating a potential settlement … litigation could be prolonged indefinitely").

3. A stay of the instant action will not effectuate the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

In addition to the serious concerns already present in *Ross* as set forth above, even if a nationwide class is actually certified and a settlement class is approved by the *Ross* court adopting the SAC's broad class definition, Mr. Estrella would not even be a member of that proposed nationwide class. The class definition as amended in the proposed *Ross* SAC states: "[a]ll persons in the United States to whom Convergent sent, within one year before the filing date of the original complaint in this action…." The original Ross complaint was filed on April 12, 2016. See Exhibit 4. The initial collection letter that was sent to Mr. Estrella was dated June 16, 2016. See Doc. #1-1. Thus, Mr.

Estrella would not be included in the proposed *Ross* class definition or settlement because his claim arose after April 12, 2016.

Moreover, the proposed *Ross* nationwide class does not even significantly overlap with the Oregon class proposed in the instant case. The proposed *Ross* class would cover persons who were sent specified letters within the period from April 12, 2015 to April 12, 2016. The proposed class in the instant case would cover Oregonians to whom Convergent sent letters (actually violating the FDCPA) from approximately January 24, 2015 to February 13, 2017. See Doc. #1, ¶ 51. Thus, the proposed class periods only overlap for a little over three months of the one-year periods. Given that Mr. Estrella, and, presumably, a substantial percentage of the putative Oregon class members in this case, will not benefit from, or be precluded from, asserting claims against Convergent even if certification and settlement in *Ross* come to fruition, a stay in the instant case will not effectuate the orderly course of justice.

In regard to the simplifying or complicating of issues, proof, and questions of law, this is not a case where a stay would allow time for a higher court, or administrative body, to reach a decision to help this Court to determine pertinent legal or factual issues. See, e.g., *Williams v. Nationstar Mortg., LLC*, No. 6:16-cv-0137-TC, 2016 LEXIS 162362, at *6-7 (D. Or. Nov. 18, 2016). The joint notice of class settlement recently

filed by the parties in *Ross* confirms that no factual or legal issues whatsoever will be adversarially litigated or decided in that case going forward. When another pending case is "unlikely to decide, or to contribute to the decision of, the factual and legal issues before the district court," a stay is not justified. *Lockyer*, 398 F.3d at 1112.

As a last resort, Convergent dedicates significant time appealing to the Court that a stay is in the interest of judicial economy and will help reduce the Court's docket. To be certain, this Court's docket is continually burdened with numerous important, complex, time consuming, high profile cases. However, as Convergent is aware, "case management alone is not necessarily a sufficient ground to stay proceedings." *Dependable Highway*, 498 F.3d at 1066.

CONCLUSION

Convergent has failed to meet its burden to show a clear case of a rare hardship or inequity to justify the extreme remedy of staying this action, especially for an indefinite period. For all the reasons above, Convergent's motion to stay should be denied.

March 9, 2017

RESPECTFULLY FILED,

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CERTIFICATE OF SERVICE

I certify that I served this document and all attachments on the following by ECF via email:

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March 9, 2017

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