

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

JOSHUA SITZER, et al., on behalf of)
themselves and all others similarly situated,)

Plaintiffs,)

Case No: 4:19-cv-00332-SRB

v.)
THE NATIONAL ASSOCIATION OF)
REALTORS, et al.,)

Defendants.)

MOTION TO STAY PROCEEDINGS AND SUGGESTIONS IN SUPPORT

Defendant RMLLC, LLC (“RMLLC”), on behalf of itself, Realogy Holdings Corp., Keller Williams Realty, Inc., and the National Association of Realtors®, respectfully moves this Court for a sixty-day stay of all proceedings in this case so that the Defendants’ employees may protect themselves and comply with the stay-at-home orders during the unprecedented national emergency resulting from the COVID-19 virus. Attempting business-as-usual proceedings will divert Defendants’ resources from attempting to manage their businesses through this crisis and impair their ability to cost-efficiently conduct the intensive fact discovery sought in this case at just the time that their business has suffered a massive hit. A sixty-day stay is necessary to give the Defendants some breathing room to cope with the financial and personal difficulties imposed by the coronavirus “war,” as it is frequently called. This stay will not cause any prejudice to Plaintiffs or their putative class, who can be recompensed with money damages. RMLLC offers the following Suggestions in Support.

Background

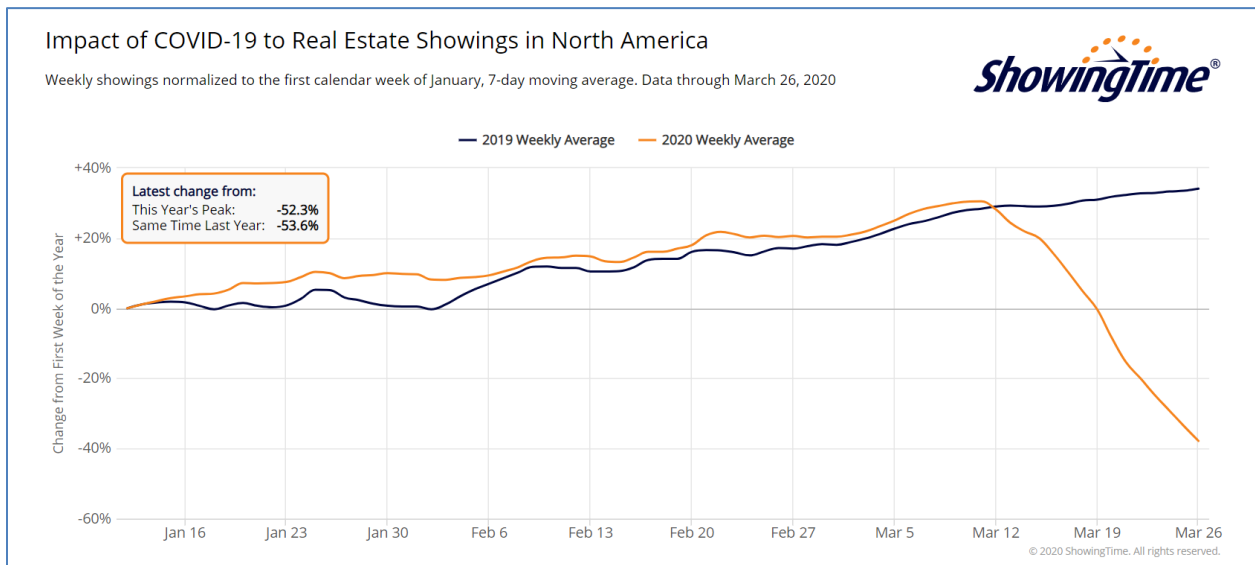
1. As the Court is well aware, President Trump declared a national emergency on March 23, 2020, in response to the global COVID-19 pandemic that continues to spread across the United States in exponential fashion. Many states, counties and municipalities, including the State of Illinois where NAR and most defense counsel are located, have ordered members of the public to stay at home for the coming weeks, to try to prevent the spread of the virus and to “flatten the curve” of sickness and death that the virus is causing. The stay at home orders are being extended, not lifted. For example, on March 31, 2020, the Illinois Governor extended the stay-at-home order until April 30, 2020, consistent with President Trump’s mandate.

2. This Court has recognized the exigent circumstances created by the outbreak of COVID-19. The Court’s General Order dated March 24, 2020 specifically indicates that the Court is monitoring the guidance from the Centers for Disease Control and Prevention (“CDC”). That guidance “includes multiple types of mitigation strategies for communities with local COVID-19 transmission, with such strategies generally aimed at reducing or avoiding exposure to infected individuals.” *March 24, 2020 General Order*, available at <https://www.mow.uscourts.gov/sites/mow/files/DC-SupersedingOrderCovid19.pdf>.

3. All non-essential activities have been shut down in response to the virus. The vast majority of people in the shut-down areas are required to stay at home as much as possible and to avoid as much personal contact with others as possible. Schools, businesses and places of worship are either effectively or totally closed. Public transportation has been discouraged. And while the Western District of Missouri remains open for certain business, the General Order expressly encourages the public “to follow all applicable public health guidelines and precautions.” *Id.* at p. 2.

4. All of the local attorneys, court personnel, and their respective support staff in the Kansas City Metropolitan area are also under “stay at home” orders through April 24, 2020. Those orders just went into effect on March 24, 2020. As the situation continues to evolve, confirmed COVID-19 cases continue to mount in numbers and spread geographically. Even those businesses that are trying to maintain some continuing operations are encountering novel, unprecedented challenges with workers who are now home-bound, caring for children who cannot go to school. As aspirational as the “business as usual” goal might be, the global socio-economic reality is that the virus has had, and continues to have, a crippling effect on business, commerce, health and day-to-day activities for literally everyone in the country and beyond.

5. Like many businesses and industries, the real estate industry has been devastated by both the known situation and the unknown risks that remain ahead. Real estate showings are already down by over 50 percent:



See ShowingTime, Impact of COVID-19 to Real Estate Showings in North America,

<https://www.showingtime.com/impact-of-coronavirus/>

6. The chief economist at Lending Tree recently predicted that there will be a “shutdown in the housing market because people aren’t out there seeing the houses.” See Sara Paynter, “*Economist: We’re gonna have a shutdown in the housing market*,” available at <https://finance.yahoo.com/news/economist-were-gonna-have-a-shutdown-in-the-housing-market-154833204.html>.

7. This real estate market shutdown is devastating the Corporate Defendants’ brokerages and franchisees, and poses a serious risk to the Corporate Defendants’ businesses and employees. With the sharp downturn in the real estate business, the Corporate Defendants’ executive teams are focused on cost-cutting to save their employees’ jobs and to help franchisees save their businesses. At the same time, every aspect of this business must be reinvented almost overnight. House showings must become virtual, and brokers must acquire the technology and ability to make that happen. Corporate Defendant employees must be equipped to work remotely and must adapt their jobs to working from home. To require management to focus on discovery issues in the midst of a national emergency is a distraction from efforts that are better focused on the necessary operational transformation and the preservation of their employees’ jobs, and helping their brokerages and franchisees stay afloat.

8. Nationwide, courts have recognized that these are not business-as-usual times. For example, the Northern District of Illinois, where the *Moehrl* case is pending, has extended all civil deadlines twice, for a total of seven weeks. See N. D. Ill., General Admin. Order 2020-01, Subject: COVID-19 Emergency Measures, as amended March 30, 2020. The District of Minnesota recognized these extraordinary circumstances in a decision last week staying discovery because “[t]he disruption caused by the pandemic, and the greater disruption that is likely in the next few days, are extraordinary.” See *El Sharif v. Mayo Clinic*, 2020 WL

1441959, at *1 (D. Minn. Mar. 24, 2020) (staying discovery due to pandemic where there was no prejudice to the opponent of the stay). Other courts have likewise stayed discovery and suspended deadlines due to the pandemic.

9. To ignore the national crisis and insist that Defendants proceed on a business-as-usual basis will unduly prejudice Defendants by forcing them to defend themselves at a time when they are fighting to avoid layoffs and to support their franchisees and affiliated brokers. In *El Sharif*, the court recognized that because the “disruption caused by the pandemic” presented challenges to the party seeking a stay of discovery and there was no prejudice to the opponent of the stay, it was “simply unnecessary” to “press ahead” with the existing schedule. *Id.* True enough, the party seeking the stay in *El Sharif* was a small law firm, whereas here the Defendants are large corporations – but in *El Sharif*, the challenge faced by the party seeking the stay was just two depositions. Here, the Defendants are faced with massive document discovery and dozens of depositions – all while they, unlike a small law firm, are also faced with getting hundreds of employees geared up to work remotely and with supporting hundreds or thousands of franchisees and affiliated brokerages in staying afloat notwithstanding the impact the pandemic has had on the real estate business. The court’s reasoning in *El Sharif* applies with even more force here.

10. Attempting to conduct discovery remotely will not just distract Defendants from attempting to continue operations during the crisis. Doing so will also substantially and unnecessarily increase the costs and time required for discovery. Document collection cannot always be done remotely and always requires involvement by the client’s information technology (“IT”) staff (the same IT staff that already stretched thin trying to manage a remote work environment for hundreds of employees who have never worked remotely before now). Once

documents are collected, training contract reviewers and performing quality control – both usually conducted entirely or largely in person – is not nearly as simple a matter as moving an in-person meeting or hearing to the telephone. Normally, contract reviewers are trained in a face-to-face session and spend at least a week or two reviewing documents in person rather than remotely. This enables on-site supervising attorneys to answer questions immediately, adjust training to address frequent questions, and adjust coding as the team gains more familiarity with the documents. Without this in-person, real-time communications, reviewers will code documents incorrectly at a much higher rate and mistakes will not get caught as quickly, which in turn will require expensive rework. All of this will prejudice Defendants in protecting their interests in the discovery process and more generally to defend themselves under these circumstances.

11. These problems will be exacerbated in the massive review Plaintiffs are demanding here. Plaintiffs' demands to RMLLC, for example, are a massively broad time period, search terms that returned an extraordinarily high hit rate of 74 percent against RMLLC custodian ESI, and 47 custodians. To undertake this enormous discovery at a time when everything may very well cost several times as much as in normal times, at a time when the Defendants' revenues have fallen due to the real estate industry freeze and when Defendants' managers need to focus on operating their businesses in unprecedented circumstances, makes no sense here where Plaintiffs will not suffer any prejudice from a brief stay.

12. Each Defendant has specific circumstances, as described below.

RMLLC

13. A stay-at-home order went into effect in Colorado, where RMLLC is headquartered, on March 25, 2020. RMLLC's offices are closed and employees must stay home to comply with the stay-at-home order.

14. RMLLC's IT team is struggling to maintain support for the operations that are critical to keeping the business going. Several team members have hospitalized family members, and the team is now attempting to support 500 employees newly working remotely. The team barely has sufficient bandwidth to keep the business going and has none for any IT work that is not mission-critical. Diverting resources from keeping the business going to collecting documents for the lawsuit will impair RMLLC's ability to function. For example, downloading custodian ESI is a process that requires multiple days, depending on the volume, and continuous monitoring and potential intervention by IT people whose time and attention is needed for the deluge of employee support requests they are receiving every day.

15. Many documents cannot be collected remotely. Collecting these would thus require RMLLC and its employees to risk employee health and violate the Colorado stay-at-home order. These include: (i) documents stored on employees' hard drives; (ii) a portion of the franchise agreements; (iii) documents stored in off-site physical storage which are required by Plaintiffs' timeframe; and (iv) documents stored on shared drives.

16. Moreover, the expense of collecting, hosting, processing, reviewing, privilege logging, and producing custodian ESI, at a time when revenues have plummeted and the company is incurring significant expenses to conduct operations remotely will further impair RMLLC's efforts to avoid layoffs. All of these tasks require the involvement of employees, but will distract those employees from business operations just when they are needed most.

KELLER WILLIAMS

17. Keller Williams is based in Austin, Texas, which also has been under a stay-at-home order since March 25. From remote locations in their homes, company employees are attempting to address a deep crisis that has forced Keller Williams to consider any and all outcomes, including even its survival. Over the tumultuous past weeks, Keller Williams' executives have focused all of their time and attention on ways to cut costs to reduce the need for staff changes, and, more fundamentally to the future prospects of the company, on what the company can do to keep as many of its 160,000 affiliated agents as possible afloat financially. These efforts have included educating agents on how they can take advantage of the tools and resources available under the recently passed stimulus legislation, many of which have time-sensitive applications and require immediate guidance and support from company employees.

18. Discovery demands of this case fall heavily on in-house counsel and other company executives who must coordinate the extensive information gathering over custodian roles, document retention, and file locations necessary to engage meaningfully with plaintiffs. Events such as Court hearings and the upcoming mediation also demand the attention of counsel and other executives. None of these employees, including counsel, are exempt from efforts to support Keller Williams agents, which, at this critical juncture, have to be the company's highest priority. A short pause in the case would allow Keller Williams employees to focus on doing what they can to address the crisis to their company and the industry, without fear that they are short-changing the proper defense of this case by doing so.

19. A pause in the case would not only allow Keller Williams' executives to focus their attention where it is needed most at this important moment, it would also acknowledge

how, even in today's well-connected world, some activities require more than just remote interactions. As just one example, Keller Williams counsel spent a week in Austin in January interviewing Keller Williams employees concerning their roles in the company and where they store information potentially responsive to Plaintiffs' discovery demands, and supervising the collection of documents and electronically stored information. This process, which necessarily involved constant in-person interaction with company executives, is not yet complete, and further visits, necessitating further in-person engagement, will be necessary. This work is simply not possible to perform under existing conditions. As the case continues, further in-person activities will undoubtedly arise. A short pause now will allow the parties to postpone these activities to a point at which they can convene safely and lawfully.

REALOGY

20. Realogy's corporate headquarters located in Madison, New Jersey, are closed pursuant to New Jersey's Executive Order, signed March 21, 2020, except for very limited essential on-site operations. That Order closed all non-essential retail businesses and ordered all businesses to accommodate their workforce, wherever practicable, for telework or work-from-home arrangements. See New Jersey Executive Order No. 107, <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf>. As a result, almost all Realogy employees are working remotely to the extent they can. Realogy's leadership is located in several other states, including New York, California, and Illinois. Literally thousands of Realogy employees went to remote working in a matter of dates. Realogy's IT resources personnel, who would be critical to collecting documents from custodians, are inundated dealing with operating a remote working environment, and do not have capacity for matters that are not mission-critical to Realogy's business.

21. As one of the early states to feel the effect of the health crisis, the number of confirmed COVID-19 cases in New Jersey is staggering and has continued to rise, with the Governor of New Jersey estimating that the state could hit 80,000 cases by mid-May. See <https://nj.gov/governor/news/news/562020/approved/20200330e.shtml>. Through the evening prior to this filing, New Jersey has reported 18,696 confirmed COVID-19 cases and 267 coronavirus related deaths, both of which are the second worst in the entire country behind only New York, and more than double the any other state, which includes approximately 2,000 new cases and 70 new deaths reported in the past twenty-four hours. See <https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/> (statistics as of 10:00pm 3/31/2020) As a result, the situation is affecting Realogy's employees and their families directly, and the situation will get worse before it improves. This makes remote working a greater challenge for this tri-state area, even overcoming the many other impediments to conducting Realogy's business remotely.

22. Many of the categories of documents Plaintiffs request cannot be collected remotely. Just two weeks ago Plaintiffs identified fifty or so documents custodians and demanded that Realogy produce documents from those custodians. Even if the parties reduced that number in half, collecting ESI remotely presents unworkable hurdles and would tax Realogy's already overburdened IT team. And many documents cannot be collected remotely. In order to collect those documents Realogy would be required to ask its employees to risk their own health (and the health of their families) and violate New Jersey's stay-at-home order. Examples of documents that cannot be collected remotely include documents stored on the hard drives of employees' work computers, documents stored on a company shared drives, and

physical files that are stored in off-site (particularly if burdened with the unreasonable and arbitrary look-back timeframe requested by Plaintiffs).

23. Moreover, because the mandatory closure of non-critical businesses across the nation does not exempt residential real estate closings in many large markets, Realogy, whose revenue derives entirely from an active residential real estate market, is facing an existential threat that is fully consuming its executives' time.

24. In response to this pandemic and in attempt to avoid layoffs, as reported in Realogy's 8K filed on March 25, 2020 (<https://ir.realogy.com/static-files/d1fbf266-8499-48a8-af4f-0481e5b53f63>), Realogy is taking a series of proactive measures intended to preserve liquidity to support its operations, to provide liquidity to its franchisees (to Realogy's detriment), and to implement cost-saving measures. These actions include borrowing an additional \$400 million under its Revolving Credit Facility this month, accelerating franchisee rebates scheduled for payment on April 15, 2020, to April 1, 2020, agreeing to retain franchisee rebate tiers at 2019 levels for the duration of 2020, waiving all domestic U.S. Brand Marketing Fund fees for all home sale transactions closing in the second quarter of 2020, and waiving applicable domestic U.S. monthly minimum royalty fees due in the second quarter of 2020. Realogy has also implemented a series of cost-savings actions to preserve capital, including temporary salary and work-week reductions for a majority of its employees, marketing expense pullbacks, and delaying investments in certain strategic initiatives. For example, Realogy's CEO and each of its executive officers who reports directly to him have agreed to a temporary reduction in base salary (effective April 4, 2020), including a 90% reduction for the CEO and a 50% reduction for each of his direct reports.

25. Proceeding with discovery over the next two months would require Realogy to incur immediate and significant expense to collect, review, and produce custodian ESI. Worse, it will divert management and in-house counsel time from dealing with the extraordinary business challenges and the daily issues that arise, but instead require an immediate focus on the litigation. Distracting Realogy's executives from their efforts to cut costs and avoid layoffs will have drastic consequences on its workforce, and diverting them from the core essential business needs in this critical time would devastate its already crippled business.

26. A brief stay will give Realogy some breathing room to navigate through this extraordinary time, and should be granted given that it will not result in any prejudice to Plaintiffs.

NATIONAL ASSOCIATION OF REALTORS® (“NAR”)

27. A stay-at-home order went into effect in Illinois, where NAR's main office is located, on March 20, 2020, and in D.C., where NAR also has an office, on March 30, 2020. NAR's offices are closed and employees must stay home to comply with the stay-at-home order.

28. NAR's IT team is now newly forced to support over 300 employees working remotely, while they themselves are also working remotely. NAR IT is responsible for the connectivity of all remote tools, including VPNs; access to network drives; and meeting support and moderation.

29. Further, NAR's 2020 REALTOR® Legislative Meetings and Trade Expo were scheduled in person in May 2020 in Washington, D.C. Since those events can no longer occur in person, NAR is now working on delivering that previously-planned programming and committee meetings virtually. NAR is also developing new virtual opportunities for member participation within all of its meetings and events. In addition to their normal work, NAR IT staff are tasked

with supporting this effort, which will require “virtualizing” two major meetings (one for 20,000 attendees) and numerous smaller meetings of 150-plus attendees. The IT team is already working around the clock to keep NAR functioning and supporting its members, in addition to dealing with the personal and health concerns that face our entire society. They simply cannot be stretched further.

30. Collecting ESI under these conditions would be an incredible burden for the NAR IT staff. Collecting remotely requires greater logistical coordination than collecting in the office, as there will be greater challenges in coordinating a time when the custodian and the IT staff are both available. Custodians are likely to have limited network infrastructure at home, which will mean data transfers will take longer and have greater potential for error and delay. To the extent custodians have external drives that were left at the NAR offices before their closure, NAR IT will not be able to collect those documents. The same will of course be true of hard copy documents.

31. Beyond NAR’s IT staff, NAR as a whole is consumed with the task of providing support to Realtors® and to state and local Realtor® associations as they deal with the new health, social, economic and legal issues that this pandemic has created. Asking staff to divert their attention from these important issues to work on this litigation would prevent NAR and its IT staff from fulfilling their responsibilities to members and the clients they serve.

LEGAL STANDARDS

32. “[T]he power to stay proceedings is incidental to 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)). In exercising its judgment, the Court “must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 255.

33. The granting of a stay must be kept within the “bounds of moderation.” *Id.* at 256. The issuance of a stay is discretionary, and that discretion is abused only if the Court issues an indefinite stay in the absence of a pressing need. *Id.* at 255.

A SIXTY-DAY LIMITED STAY IS WARRANTED HERE

34. No harm would result from a stay of discovery and all related proceedings in this case. In fact, requiring the parties to move forward in these unknown waters is treacherous, risky and outweighed by the public interests of safety and caution at all levels. On the other hand, absent a brief stay, all Defendants will be prejudiced for the reasons set forth above.

35. Plaintiffs in this case seek monetary compensation for commercial claims related to the buying and selling of homes. No emergency, injunctive or other time-sensitive relief is sought, and there is no pending urgency that requires this case to be accelerated or that weighs in favor of requiring all of the parties and counsel to conduct “business as usual” in this litigation as the rest of the country is responding cautiously and proactively to the volatile national and international COVID-19 crisis, which continues to evolve on a daily basis. Simply stated, a sixty-day pause in the proceedings here will result in no prejudice to Plaintiffs. In *El Sharif*, the court refused to “press ahead” with requested discovery in the extraordinary circumstances of the coronavirus pandemic, where it was “simply unnecessary” because there was no undue prejudice to the plaintiff. *See El Sharif*, 2020 WL 1441959 at *1. It is similarly unnecessary here.

36. The harm and impact to Defendants, though, is disproportionately high if discovery and case activity progresses, as set forth above.

37. This case must progress within reason in comparison to the global crisis. Defendants thus respectfully request that Plaintiffs acknowledge the ongoing, emerging and dynamic national crisis and agree to a stay of this case to allow the Court, the parties, all counsel and everyone involved in this case at whatever level to concentrate their efforts on honoring the stay-at-home/shelter in place mandates so equilibrium and stability can be restored.

38. Absent Plaintiffs' consent to a temporary, sixty-day stay of the proceedings in this case, Defendants have no alternative but to request that relief from this Court to stay the action and to give Defendants much needed breathing room.

WHEREFORE, for the foregoing reasons, RMLLC, Realogy Holdings Corp., Keller Williams Realty, Inc., and the National Association of Realtors® respectfully requests that this Court enter a sixty (60) day stay of all proceedings in this action. The Court has already set a status conference on Thursday, June 11 in this case, and that conference could be used by the Court and the parties to re-evaluate the current status of the COVID-19 virus situation.

HORN AYLWARD & BANDY, LLC

/s/ Danne W. Webb

Danne W. Webb MO #39384
Andrea S. McMurtry MO #62495
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Telephone: 816-421-0700
Facsimile: 816-421-0899
dwebb@hab-law.com
amcmurtry@hab-law.com

And

Paula W. Render (admitted *pro hac vice*)
Eddie Hasdoo (admitted *pro hac vice*)
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
prender@jonesday.com
ehasdoo@jonesday.com
Attorneys for Defendant
RMLLC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2020, the foregoing was served by operation of the Court's CM/ECF system upon counsel of record.

/s/ Danne W. Webb

Attorney for Defendant
RMLLC, LLC