

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

JOSHUA SITZER and AMY WINGER,)
SCOTT and RHONDA BURNETT, and)
RYAN HENDRICKSON, on behalf of)
themselves and all others similarly situated,)

Plaintiffs,)

v.)

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

THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF AMERICA,)
INC., BHH AFFILIATES, LLC, HSF)
AFFILIATES, LLC, RE/MAX LLC, and)
KELLER WILLIAMS REALTY, INC.)

Defendants.)

**PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO
DEFENDANTS' MOTION TO STAY**

Pending before the Court is Defendants' Motion to Stay Proceedings for sixty days. [Doc. # 231].¹ For the reasons set forth herein, the Court should deny the Motion.

Plaintiffs agree that the Court has discretion to issue a stay. Whether to grant a stay is “dependent upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations omitted). “The party requesting a stay bears the burden of showing circumstances justify” the imposition of a stay. *Id.* (internal quotation omitted). Defendants have not met their burden.

COVID-19 undoubtedly has changed the current manner of litigating cases, but courts are adjusting to these changed circumstances. Indeed, this Court has issued Orders related to the

¹ The defendants affiliated with HomeServices of America, Inc. did not join the pending Motion.

pandemic and allowed civil motions to proceed, and preserved each judge’s ability to conduct proceedings “as may be necessary and appropriate to ensure the fairness of the proceedings and to preserve the rights of the parties.” *See* W.D. Mo. General Order (March 24, 2020).

Like this Court, other courts also demonstrate flexibility in the face of COVID-19. For example, in *In re RFC and RESCAP Liquidating Trust Action*, No. 16-CV-4070, 2020 WL 1280931 (D. Minn. March 13, 2020), the court declined to postpone a bench trial, but allowed the trial’s final witnesses from other jurisdictions to appear via videoconference. Similarly, in *Lipsey v. Wal-Mart, Inc.*, No. 19-7681, 2020 WL 1322850 (N.D. Ill. March 20, 2020), the court adopted a deposition protocol for medical professionals and treatment providers in light of the COVID-19 situation. None of these courts entered a stay of all proceedings.

In the few cases where courts have stayed discovery due to COVID-19, the parties have jointly requested the stay,² or the non-moving party did not respond to the motion.³ Again, circumstances that are not present here. In fact, Defendants do not cite a single order where a court imposed a stay of all discovery over the objection of the non-moving party.

Defendants do cite one case in support of their Motion, but misstate its holding. *Elsherif v. Mayo Clinic*, No. 18-2998, 2020 WL 1441959 (D. Minn. March 24, 2020).⁴ In that case, the parties were scheduled to conduct two depositions in late March, and fact discovery was scheduled to

² *See Garbutt v. Ocwen Loan Servicing, LLC*, No. 20-136, 2020 WL 1476159 (M.D. Fla. March 26, 2020) (granting unopposed motion to stay discovery until June 1); *Libutan v. MGM Grand Hotels, LLC*, No. 20-304, 2020 WL 1434440 (D. Nev. March 24, 2020) (granting joint motion to stay discovery).

³ *Bryant v. Boyd*, No. 18-117, 2020 WL 1493548 (E.D. Mo. March 27, 2020) (granting stay of *pro se* inmate’s case where the pending motion to dismiss was colorable, the plaintiff did not respond to the motion for stay, the plaintiff had not responded to the defendant’s discovery requests, and the defendants had filed several motions to compel discovery from the plaintiff).

⁴ *Elsherif* did not dispose of a motion to stay; the pending motion was a “Motion to Take Defendants’ Depositions Out of Time Due to COVID-19.” 2020 WL 1441959, *1 (identifying the Motion). Thus, the movant in *Elsherif* did not even seek a stay of all discovery proceedings.

close on March 31. Counsel for the plaintiff requested a continuance of the depositions, citing his own family's status as "high-risk" for COVID-19 and his time obligations "managing that emergency." The defendant objected. The court granted the postponement of the depositions and temporarily stayed the deadlines in the scheduling order—including the imminent fact discovery deadline. But the Court also directed the parties to "meet and confer about when those depositions might be set, and [] file a stipulation regarding any needed adjustments to the schedule." *Id.* at *1. If counsel could not agree, then the court directed that it would "hold a telephonic status conference." *Id.*

Elsherif presented compelling circumstances for a stay because of imminent depositions and important discovery deadlines, but even in the face of those circumstances the court did not stay the entire litigation and directed the parties to continue to make progress to the extent they could.

This Court should do the same and deny Defendants' Motion. Unlike *Elsherif*, there are no imminent in-person proceedings scheduled for this case and no looming scheduling deadlines. Instead, the parties are working on written discovery and engaging in a series of meet and confer sessions related to several overarching issues, including document custodians, search terms for ESI, and other issues applicable to all discovery (i.e., discovery cutoff dates, lookback periods, etc.). All of this work is occurring remotely and via telephone conference, and Defendants have taken the position that these discovery issues need to be resolved before Defendants can materially produce any discovery and before depositions can start.⁵ A stay of discovery would substantially sidetrack any progress that the parties are making, and almost certainly necessitate that the parties

⁵ This case has been pending for nearly a year. NAR has produced approximately 450 documents—the same documents it has produced to the Department of Justice. The other four Defendants have *collectively* produced fewer than 100 documents.

“start over” when discovery begins again after June 1. Such a move would derail the litigation and jeopardize every remaining deadline in the case.

The main crux of Defendants’ Motion is that they cannot defend the litigation while also managing their businesses. *See* Motion at 1 (discovery will “divert Defendants’ resources from attempting to manage their businesses . . .”). Defendants do not cite any authority that a business inconvenience constitutes a basis for a stay. Moreover, they do not submit any declarations or other actual evidence to substantiate their claims. *See Nken*, 556 U.S. at 433 (“The party requesting a stay bears the burden of showing circumstances justify” the imposition of a stay.”).

Defendants’ public statements also undermine their “sky is falling” assertions. For example, Keller Williams has touted that it is “fully positioned to stay digitally connected” despite the pandemic, and “going virtual in the real estate world won’t be stopping Keller Williams agents from selling homes.” *Keller Williams adapts to workplace changes, starts virtual home showings* (March 17, 2020).⁶ RE/MAX has assured its brokers that its “100% franchised business model, primarily recurring revenue streams from dues and fees and strong balance sheet provide financial flexibility to navigate challenging conditions.”⁷ RE/MAX’s local agents in Kansas City agree, and they “don’t foresee anything that’s going to slow it down” and do not “anticipate COVID-19 will cause the housing market to crash.” *Kansas City Realtor anticipates strong housing market despite COVID-19* (March 23, 2020).⁸

⁶ Available at <https://www.housingwire.com/articles/keller-williams-adapts-to-workplace-changes-starts-virtual-home-showings/> (last visited April 1, 2020).

⁷ *RE/MAX Holdings Provides New Tools, Enhanced Training, And Financial Support To Assist Its Affiliates Amid COVID-19 Outbreak* (March 19, 2020) (available at <https://investors.remax.com/investor-relations/press-releases/financial-releases/press-release-details/2020/REMAX-Holdings-Provides-New-Tools-Enhanced-Training-And-Financial-Support-To-Assist-Its-Affiliates-Amid-COVID-19-Outbreak/default.aspx>) (last visited April 1, 2020).

⁸ Available at <https://www.kshb.com/news/local-news/investigations/kansas-city-realtor-anticipates-strong-housing-market-despite-covid-19> (last visited April 1, 2020).

These forecasts are consistent with industry-wide predictions. The Kansas City Regional Association of Realtors stated, “While we anticipate that the current situation will have a temporary impact on real estate activity throughout the Kansas City Region, the strong buyer demand that’s been a constant for many years will still remain” and, after a temporary period while individuals adjust to COVID-19 restrictions, “we expect to see market activity normalize as well.” *See* KCRAR Statement (March 25, 2020), attached hereto as Exhibit 1.

COVID-19 undoubtedly will impact the real estate industry just as it has every other industry, but the doom and gloom in Defendants’ Motion is not supported by their public statements elsewhere. Nevertheless, Defendants are financially well-positioned to manage COVID-19 and continue the limited written discovery that is underway in this case. In 2019 alone:

- Realogy generated revenue of \$5.6 billion;⁹
- RE/MAX reported total revenue of \$282.3 million;¹⁰
- Agents with Keller Williams in the United States and Canada closed \$351.2 billion in sales volume;¹¹ and
- the National Association of Realtors generated revenue in excess of \$200 million in 2018.

Simply put, Defendants have the financial wherewithal to continue to litigate this case during these peculiar times.

⁹ https://www.realogy.com/assets/docs/EarningsReleases/final---press-release-12.31.19_2.24.20_430pm.pdf (last visited April 1, 2020).

¹⁰ <https://investors.remax.com/investor-relations/press-releases/financial-releases/press-release-details/2020/REMAX-Holdings-Inc-Reports-Fourth-Quarter-And-Full-Year-2019-Results/default.aspx> (last visited April 1, 2020).

¹¹ <https://outfront.kw.com/performance/2019-a-standout-year-for-keller-williams/> (last visited April 1, 2020).

In conclusion, Defendants have not offered any factual circumstances or legal authority to justify a total stay of the litigation. If there are issue-specific concerns, then Defendants should confer with Plaintiffs about those and, if that process is unsuccessful, raise them with the Court under the procedures afforded to them (i.e., Local Rule 37.1 or this Court's regularly-scheduled discovery hearings). But the circumstances and posture of this particular case do not justify a stay of all proceedings.

The Court should deny the Motion.

Dated: April 3, 2020

Respectfully submitted,

WILLIAMS DIRKS DAMERON LLC

/s/ Matthew L. Dameron

Matthew L. Dameron MO Bar No. 52093

Eric L. Dirks MO Bar No. 54921

Amy R. Jackson MO Bar No. 70144

Courtney M. Stout MO Bar No. 70375

1100 Main Street, Suite 2600

Kansas City, Missouri 64105

Tel: (816) 945-7110

Fax: (816) 945-7118

matt@williamsdirks.com

dirks@williamsdirks.com

amy@williamsdirks.com

cstout@williamsdirks.com

Brandon J.B. Boulware MO Bar No. 54150

Jeremy M. Suhr MO Bar No. 60075

Erin D. Lawrence MO Bar No. 63021

BOULWARE LAW LLC

1600 Genessee, Suite 416

Kansas City, MO 64102

Tel: (816) 492-2826

Fax: (816) 492-2826

brandon@boulware-law.com

jeremy@boulware-law.com

erin@boulware-law.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2020, a copy of the foregoing was filed on the Court's electronic filing system which sends notification of the same to all counsel of record.

/s/ Matthew L. Dameron

Attorney for Plaintiffs

Exhibit 1

For more information contact:
Kyla Barcus 913-266-5917
kylab@kcrar.com



Kansas City Regional Association of REALTORS® Offers Guidance on Local Real Estate Services Amid COVID-19 “Stay at Home Orders” Across the Region

Leawood, KS – March 25, 2020 — The Kansas City Regional Association of REALTORS® (KCRAR) has been working with local government officials in recent days to establish industry health and safety protocols and ensure that local citizens maintain access to essential real estate services during the COVID-19 pandemic.

“The health and safety of the public is paramount, and because of that, REALTORS® are using alternative methods to continue to provide services to buyers and sellers who have urgent needs during this time. While some customers are able to pause on the sale of or search for a home, others have more pressing needs, so it’s essential that REALTORS® are able to assist them while also exercising extreme caution for the health of everyone involved,” said Bobbi Howe, president of KCRAR.

This is particularly important for the more than 6,350 families in the Greater Kansas City Region that are currently in the process of completing transactions for the purchase of a home and the 5,300 families that currently have their homes on the market and may have urgency to sell, due to relocation or other circumstances.

“Real estate services and public and private support services such as title, inspection services, deed recordings, and others that are required to complete transactions are essential and continue to operate in order to facilitate pending transactions. The local real estate community is working together to safely and responsibly provide necessary services to ensure citizens can obtain shelter, whether it be for purchase or lease, which is especially important in times like these,” Howe said.

In alignment with local Stay at Home orders, KCRAR has developed guidelines for its more than 11,000 REALTOR® members across the Kansas City Region, including the discontinuation of open house activity and options for conducting essential business without face-to-face contact by utilizing virtual technology including virtual home tours in lieu of traditional showings.

“While we anticipate that the current situation will have a temporary impact on real estate activity throughout the Kansas City Region, the strong buyer demand that’s been a constant for many years will still remain. Once we safely return to a more normal daily atmosphere, we expect to see market activity normalize as well. Our immediate concern remains the health and safety of our members and general public,” said Kipp Cooper, CEO of KCRAR and Heartland MLS.

About Kansas City Regional Association of REALTORS®

The Kansas City Regional Association of REALTORS®, “The Voice for Real Estate in the Kansas City Region,” is the largest professional business association in the greater Kansas City area. KCRAR serves more than 11,500 REALTORS® members across 34 counties throughout Kansas and Missouri. Visit KCRAR.com for local market information or to connect with a REALTOR®.

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