No. 16-3562

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMANDA LABRIER,

Plaintiff-Appellee,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellant.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION (NO. 2:15-CV-04093-NKL)

STATE FARM'S MOTION FOR A COMPLETE STAY PENDING RESOLUTION OF THE INSTANT MOTION AND ITS APPEAL

Consolidated With Case No. 16-3185

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September 16, 2016

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INTRODUCTION

Pending resolution of this Motion and its Appeal, and pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Local Rule 27A(b)(4),[1] Defendant-Appellant State Farm Fire and Casualty Company ("State Farm") hereby requests entry of a stay as to all remaining proceedings.

This Appeal involves State Farm's Petition for Writ of Mandamus (Case No. 16-3185) challenging certain of the district court's discovery orders, and State Farm's further challenge to the district court's recent order certifying a class pursuant to Rule 23(b)(3) (Case No. 316-3562).[2] This Court already has ordered a stay of the discovery State Farm challenged. *See* Order Granting State Farm's Emergency Motion for a Stay, Case No. 16-3185 (August 9, 2016). The district court subsequently stayed nearly all remaining proceedings before it, but has allowed Plaintiff to proceed with a motion for

[1] Local Rule 27A(b)(4) allows "one judge of the court … [to] order[] a temporary stay of any proceeding pending the court's determination of a stay application."

[2] State Farm's Petition for Writ of Mandamus was filed on July 25, 2016. *See* Petition for Writ of Mandamus of State Farm Fire and Casualty Company, Case No. 16-3185 (July 25, 2016). State Farm's Rule 23(f) petition was filed on August 8, 2016. *See* Petition of State Farm Fire and Casualty Company for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f), Case No. 16-8013 (August 8, 2016). This Court granted State Farm's Rule 23(f) Petition, accepted State Farm's writ petition, and consolidated the two proceedings on September 9, 2016. *See* Order Accepting State Farm's Petition for Writ of Mandamus, Case No. 16-3185 (August 9, 2016); Order Granting State Farm's Rule 23(f) Petition, Case No. 16-3562 (September 9, 2016); Order Consolidating State Farm's Petition for Writ of Mandamus and 23(f) Rule 23(f) Petition, No. 16-3185 (September 9, 2016).

partial summary judgment as to certain "defenses" State Farm had raised as to potential class members *other* than Plaintiff. Dkt. 272.[3]

State Farm objected to the summary judgment proceedings Plaintiff now is pursuing, arguing that under Rule 23(c)'s protection against "one-way intervention," Plaintiff's motion could not properly be considered or decided until after issuance of notice to the class, if any, and expiration of the class opt-out period. *See* Dkt. 270 at 4-5 (citing Fed.R.Civ.P. 23(c); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547-48 (1974)). The district court nevertheless allowed Plaintiff to file her motion, ordered the parties to brief the issue of one-way intervention in their submissions on summary judgment, and stated that the summary judgment motion would be taken "under advisement" while commenting that "[c]ertainly there is no problem with one-way intervention if the Court has not ruled *prior to the time that we hear from the Eighth Circuit*." *See* Dkt. 272; Dkt. 273 at 7:22-8:4 (emphasis supplied).

State Farm respectfully submits that the district court abused its discretion in allowing Plaintiff to proceed with her motion for partial summary judgment. The "defense" Plaintiff purports to attack by her motion does not even apply to her

[3] Parallel citations to "Dkt. __ (A__)" refer to the district court docket number and the Appendix to State Farm's Petition for Writ of Mandamus, filed in Case No. 16-3185 on July 25, 2016. Page references following "Dkt." cites are the pages appearing in the file-stamped footers supplied by the district court. Citations to "Ex. __" refer to exhibits to the Declaration of Heidi Dalenberg, filed concurrently herewith. State Farm has adopted this citation format due to the size of the record in this matter, and in consultation with the office of the Clerk of the Court.

individual claim. Thus, she lacks standing to assert it either individually *or* as a class representative. At the same time, State Farm faces the danger of substantial prejudice resulting from "one-way intervention" if the summary judgment proceedings are not stayed. Plaintiff's motion seeks to adjudicate State Farm's defenses as to tens of thousands of other insureds in the nearly 150,000-member class *before* any class notice and *before* the conclusion of any opt-out period. The district court's order suggests that it may issue such a premature ruling despite the severe prejudice to State Farm's interests that such an order would cause. As set forth more fully below, all of the factors relevant to entry of a stay weigh heavily in favor the relief State Farm has requested. *See Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 423 (8th Cir. 1996). State Farm accordingly requests that this Court order a stay of *all* remaining proceedings before the district court.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE UNDERLYING SUIT

Plaintiff Amanda LaBrier is a State Farm policyholder whose roof was damaged in a hail storm. Dkt. 1-6 at 2 ¶¶ 6-7 (A0056). State Farm issued an actual cash value ("ACV") payment to Plaintiff pursuant to her homeowners insurance policy for the estimated value of the roof prior to the loss. *Id.* at 2-3 ¶¶ 10, 13 (A0056-57). State Farm calculated that payment by applying depreciation to the estimated cost of both materials and labor to repair the roof. *Id.* at ¶¶ 10, 13, 16 (A0056-57). Thereafter, Plaintiff repaired her home at a higher cost than State Farm had estimated, but she

made no request for replacement cost benefits. Dkt. 160-3 at 17-18 (A2948-49); Dkt. 160-7 at 30, at 116:10-17 (A3123). Plaintiff now claims that State Farm's method of calculating ACV breached her policy because depreciation supposedly should only have been applied to the materials component of her estimated cost of repair. Dkt. 1-6 at 3-4 ¶¶ 13-18 (A0057-58), 8 at ¶¶ 35-37 (A0062). She framed her suit as a class action. *Id.* at 5 ¶ 26 (A0005), 8 at ¶ 38 (A0059).

State Farm timely moved to dismiss Plaintiff's action pursuant to Rule 12(b)(6), arguing that "labor depreciation" (as Plaintiff termed it) is permitted under Missouri law. Dkt. 21 at 1 (A0069). The district court denied State Farm's motion. Dkt. 67 (A0161). In its Order, the district court observed that under State Farm's homeowners policy language, "[f]or purposes of an actual cash value payment, [an insured] is only entitled to receive the actual cash value of her loss, or the actual cost to repair or replace the damaged property, *whichever is less*." Dkt. 67 at 10 n.6 (A0170) (emphasis supplied). The district court ruled, however, that State Farm's invocation of that policy language would constitute the raising of a "defense,"[4] and that Plaintiff's pleading stated a viable claim for breach of contract. *Id.* at 10-11 (A0170).

[4] State Farm does not concede that the question of whether an insured has been fully paid for his full incurred cost of repair for a covered loss, whether through replacement cost benefit payments or otherwise, is an "affirmative defense," as to which State Farm has the burden of proof. It contends that full payment of actual repair costs constitutes full performance under the policies, and that the burden to demonstrate both breach and resulting injury remain part of Plaintiff's (and the class') affirmative

State Farm then answered Plaintiff's pleading. Among other things, State Farm asserted in its answer and further defenses that *regardless* of the amount of any particular ACV payment or the manner in which it was calculated, the policies at issue cap State Farm's liability for a covered loss to no more than an insured's reasonable cost for necessary repairs. *See* Dkt. 72 at 13-16. Because Plaintiff pursued repairs and incurred repair costs in excess of the costs State Farm had estimated, however, the policy language capping State Farm's obligation to pay ACV at no more than the cost of repair does not apply to Plaintiff's individual claim against State Farm.[5] Dkt. 160-3 at 17-18 (A2948-49).

II. STATE FARM'S PENDING PETITIONS IN THIS COURT AND THE STAY ORDERS ENTERED TO DATE.

A. State Farm's Mandamus Petition and the Accompanying Stay Entered by This Court.

On July 25, 2016, State Farm filed a petition for writ of mandamus in this Court challenging a series of discovery orders that compelled State Farm's response to interrogatories Plaintiff had propounded. *See* Dkt. 236-1; Case No. 16-3185. Those interrogatories demanded that State Farm (i) identify all putative class members who received an ACV payment where labor depreciation was applied; (ii) separately state for

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case. *See, e.g.*, *Pepsi Midamerica v. Harris*, 232 S.W.3d 648, 653 (Mo. Ct. App. 2007); *see also Fire Ins. Exch. v. Bowers*, 994 S.W.2d 110, 112 (Mo. Ct. App. 1999).

[5] Rather, State Farm has asserted that Plaintiff's failure to request additional payment from State Farm for her actual cost of repair constitutes a failure to mitigate her claimed damages. *See* Dkt. 72 at 17.

each person the date and amount of all labor depreciation "withholdings;" (iii) separately state for each person the date and amount of all replacement cost benefit payments that later addressed previously applied labor depreciation amounts; and (iv) separately state for each person the particular affirmative defenses State Farm was raising as to him or her and all facts supporting those individualized defenses. *See* Dkt. 210-22 at 2-4.

On the same day it filed the writ petition, State Farm filed an emergency motion in the district court requesting a stay of proceedings related to the discovery orders it had challenged. Dkt. 236. The next day, on July 26, 2016, the district court heard argument on State Farm's stay motion for the mandamus proceeding and denied it. *See* Dkt. 242. State Farm accordingly filed a motion seeking that same relief before this Court on July 27, 2016, and briefing on that motion was completed on August 7, 2016. *See* State Farm's Emergency Motion for a Stay, Case No. 16-3185 (July 27, 2016); LaBrier's Opposition to State Farm's Emergency Motion for a Stay, Case No. 16-3185 (August 3, 2016); State Farm's Reply in Support of Emergency Motion for a Stay, Case No. 16-3185 (August 7, 2016).

B. State Farm's Rule 23(f) Petition and the Partial Stay Entered by the District Court.

Shortly after State Farm filed its petition for writ of mandamus, the district court entered its order granting Plaintiff's motion for class certification. *See* Dkt. 238; *see also* Notices of Activity in Case, attached hereto as Ex. A. On August 8, 2016, State Farm

timely filed its 23(f) Petition in this Court. *See* Petition of State Farm Fire and Casualty Company for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f), Case No. 16-8013. That same day, State Farm again moved in the district court for a stay of all proceedings in that court pending full resolution of the 23(f) Petition and any additional appellate proceedings allowed in connection therewith. *See* Dkts. 256-57 (the "Stay Motion"). State Farm's Stay Motion again addressed each factor pertinent to the entry of that stay as articulated by *Iowa Utilities*. *See* Dkt. 257 at 6-7, 10-18.

One day later, on August 9, 2016, this Court granted a stay of the discovery proceedings State Farm it sought to challenge through its writ petition. *See* Order granting stay of proceedings related to challenged discovery, Case No. 16-3185 (August 9, 2016). Because that stay was limited in scope, it did not fully moot State Farm's motion in the district court for a complete stay of *all* proceedings.

Plaintiff responded to State Farm's second Stay Motion on August 15, 2016. *See* Dkt. 269. Plaintiff opposed entry of the complete stay that State Farm requested in just one respect. *Id.* She agreed that "a great deal of work and expense" would be required if remaining proceedings in the action were not stayed, and that much of that work and expense could be unnecessary were this Court to grant the 23(f) Petition. *Id.* at 2. She did not, however, agree that the case should be stayed in its entirety:

> [T]he stay should not extend to anticipated motions on State Farm's Fifth Additional Defenses or the question of interpretation of the phrase "the cost to repair or replace" as used in Paragraph 1(a)(1) of Section I, Coverage A, of [Plaintiff's] policy.

Id. at 8. Plaintiff described the subject of her anticipated summary judgment motion as "State Farm's key defense in this case" and the "heart of State Farm's objections to class certification." *Id.* at 3. She professed to be already "in the process of preparing a motion for partial summary judgment on these issues," and proposed that the district court should consider her motion without delay. *Id.* at 4. Notably, Plaintiff made no attempt to show that her interests or those of the class would be prejudiced if summary judgment proceedings were stayed. Her response likewise was devoid of any analysis as to whether her proposed "carve-out" from the stay would be prejudicial to State Farm. And Plaintiff made no mention of the potential problem of one-way intervention posed by the proceedings she envisioned.

On reply, State Farm presented extensive case authority showing that under Rule 23(c), a defendant in an asserted class suit has a *right* to deferral of summary judgment rulings until *after* the class notice process (if any) is complete, and that State Farm had not waived that right of protection. *See* Dkt. 270.

The district court heard argument from the parties as to State Farm's motion on August 19, 2016. Without citing any authority, Plaintiff asserted that in her view there was no need to delay full resolution of her anticipated summary judgment motion before the class notice process because State Farm had "affirmatively push[ed]" its contract interpretation argument in its initial motion to dismiss, subsequently in seeking discovery, and also in defending against class certification. *See* Dkt. 273 at 4:17-5:5. She proposed however, that the parties could simultaneously brief her summary judgment

motion and the issue of one-way intervention State Farm had raised. *Id.* at 4:1-4, 5:1-6:4. Plaintiff further stated her intention to file her summary judgment motion within the next week. *Id.* at 5:25-6:4. State Farm objected to Plaintiff's proposal, noting that the protection against one-way intervention is not waived by the mere filing of a Rule 12(b)(6) motion at the outset of a case, that it would be months before the parties could even begin the process of issuing class notice, and that deferral of summary judgment proceedings until after completion of the class notice process was of critical importance to protection of State Farm's rights. *Id.* at 6:11-7:12.

The district court asked Plaintiff if her individual claim would be impacted by the contract interpretation issue she sought to raise on summary judgment. *Id.* at 8:9-11. Plaintiff said yes. *Id.* at 8:12-15. The district court then gave Plaintiff leave to file her anticipated summary judgment motion, and ordered that State Farm should respond under the usual briefing schedule for such motions. *See id.* at 8:16-19. The district court stated that there could be no problem with one-way intervention if State Farm's 23(f) Petition and petition for writ of mandamus were resolved before the district court issued any summary judgment ruling, but did *not* say that such a ruling would actually be deferred at all. *See id.* at 8:2-4. Rather, the district court instructed the parties to brief the one-way intervention issue simultaneously with Plaintiff's summary judgment motion. *Id.* at 7:22-8:2, 8:16-19; Dkt. 272. The district court did not alter or amend its decision after State Farm clarified that Plaintiff's individual claim in fact was *not* subject to the specific defense as to which she sought summary judgment, as discovery already

had confirmed that Plaintiff had performed at least some repairs to her property and that her actual cost of repair exceeded the ACV payment State Farm already had made for her loss. *Id.* at 9:13-21; Dkt. 272.

At present, the stay that the district court has ordered applies to "all proceedings, except [the court] will permit Plaintiff to file a motion for summary judgment with respect to the affirmative defense." Dkt. 272. Plaintiff filed her motion for partial summary judgment on September 6, 2016. Under the current briefing schedule, State Farm's opposition is due on September 30, 2016 and Plaintiff will have 14 days thereafter to reply. *See* Dkt. 274; W.D. Mo. Local Rule 56.1(c).

LEGAL STANDARD

"Federal Rule of Appellate Procedure 8(a) governs the power of a court of appeals to stay an order of a district court pending appeal." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). Pursuant to Rule 8(a), this Court considers four factors in deciding whether to stay district court proceedings: (1) whether the movant has shown it is likely to succeed on the merits of the appeal; (2) whether the movant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the non-moving party; and (4) where the public interest lies. *See id.* (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also, e.g.*, *Iowa Utilities*, 109 F.3d at 423. No single factor governs this analysis. Rather, this Court "must consider the relative strength of the four factors, balancing them all." *Brady*, 640 F.3d at 789 (quotation marks omitted). Thus, for example, "[c]lear evidence of irreparable injury should result in a less stringent

requirement of certainty of victory." *Id.* (quoting Developments in the Law, *Injunctions*, 78 Harv. L. Rev. 994, 1056 (1965)).

Here, all four factors weigh in favor of a *full* stay of *all* proceedings in the district court pending resolution of the issues raised in State Farm's 23(f) Petition. The same showing equally supports a temporary stay while this Court considers this motion.

ARGUMENT

I. STATE FARM IS LIKELY TO SUCCEED ON THE MERITS OF ITS PETITION

State Farm respectfully submits that it sufficiently has demonstrated a likelihood of success on the merits of its 23(f) Appeal under *Iowa Utilities*. To satisfy this standard, State Farm is not required to establish "an absolute certainty of success." *Iowa Utilities*, 109 F.3d at 423 (quotation marks omitted). Instead, State Farm need only "present a *strong argument*," which this Court deems "sufficient to satisfy [this] prong." *Id.* (emphasis added). State Farm has met this test.

This Court already has accepted State Farm's Rule 23(f) Petition. State Farm argued therein that the district court's class certification order conflicts with settled law in this Circuit holding **both** that a plaintiff who has not sustained an actual loss lacks standing, *see* Pet. at 8-9, 11 (discussing *Indigo LR LLC v. Advanced Ins. Brokerage of Am. Inc.*, 717 F.3d 630, 634 (8th Cir. 2013)), **and** that even if only "some" class members lack standing, class certification is still "improper," *see id.* at 11 (quoting *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779-80 (8th Cir. 2013); *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). State Farm's 23(f) Petition shows that the

class certified by the district court includes, even under Plaintiff's theory of liability, numerous class members who sustained no injury and have no standing to sue. Pet. at 7-9.

In addition, State Farm's Petition demonstrated that the district court abused its discretion in finding that Rule 23's predominance and superiority requirements were satisfied because individual issues – including how much State Farm paid its insureds and whether and for what cost its insureds completed repairs – could be resolved through interrogatories and mini-trials. *Id.* at 12-19. State Farm submits that these repair issues are critical to the determination of liability and the fact and amount of damages for every class member because, as the district court agreed (Dkt. 67 at 10 n.6 (A0170)), the policies at issue cap State Farm's payment obligations to no more than an insured's actual repair cost. The district court also acknowledged that "defenses" State Farm had raised would require individualized fact-finding, but opined that such issues could be addressed through "mini-jury trials." *See* Dkt. 238 at 28.

The district court's assertion that such individual issues could be dealt with through mini-trials is impractical, as they concern tens of thousands of class members. It also conflicts with numerous cases holding that such excessive mini-trials defeat predominance and superiority. Pet. at 18-19. Many thousands of mini-trials would be required to resolve affected class members' claims on the merits. *Id.* at 20. The district court recognized the implausibility of conducting thousands of mini-trials, conceding

that its "experience is that litigants quickly tire of these mini-trials once a clear trend is established." Dkt. 238 at 28.

Moreover, as the United States Supreme Court has held, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Because it is practically impossible for a jury to decide the individual merits of the claims of 144,900 class members, the district court's class certification order improperly deprives State Farm of its right to have a jury determine the merits of each individual's claim. Pet. at 18-19.

On these and additional bases, State Farm's Petition at the very least presents a "strong argument" in favor of reversal. *Iowa Utilities*, 109 F.3d at 423. Indeed, when conceding the propriety of at least a partial stay pending resolution of State Farm's 23(f) appeal, Plaintiff did not contest that State Farm had demonstrated a sufficient likelihood of success on the merits.[6] Accordingly, State Farm submits that it should be found to have demonstrated a likelihood of success on the merits for purposes of the instant motion.

[6] When issuing its partial stay, the district court stated that its action had "nothing to do with" the district court's "opinions about the outcome of the appeal." *See* Dkt. 273 at 8:25-9:4.

II. STATE FARM FACES A RISK OF IRREPARABLE HARM ABSENT A STAY

State Farm further has demonstrated a threat of irreparable harm unless a complete stay is ordered. The harm State Farm initially demonstrated in connection with its petition for writ of mandamus was financial, as it related to the burden and expense of the discovery it has challenged. The irreparable harm State Farm *now* faces is the threat that the district court will enter a summary judgment ruling *before* class notice has issued and expiration of the required opt-out period, thereby subjecting State Farm to the prejudicial effect of one-way intervention.

As the United States Supreme Court explained in *American Pipe & Constr. Co.*, 414 U.S. at 545-50, the 1966 amendments to Rule 23 were designed in part to address the problem of one-way intervention. Prior to the rule amendments, there was "no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment." *Id.* at 545-46. That resulted in unfair prejudice to defendants:

> A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way intervention,'—aroused considerable criticism upon the ground that it was unfair to allow

> members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.

Id. at 547. The solution to this problem now is provided through Rule 23(c), under which the class determination *and* prompt issuance of notice are to be made as soon as "practicable," *before* the trial court entertains a summary judgment motion brought by a class representative. *Id.* at 547-48.

This rule has teeth. Even in the context of a Rule 23(b)(2) class, where *no* notice to a class is required (which is not applicable here), it is "rarely appropriate for a court to delay the certification decision until after a trial on the merits," for such timing is "'fraught with serious problems of judicial economy, and of fairness to both sides.'" *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 558-59 (8th Cir. 1982) (quoting in part *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 (4th Cir. 1980)). As for Rule 23(b)(3) actions like the instant case, a defendant like State Farm has the ***right*** to insist that decisions on summary judgment sought by a proposed class representative be issued only ***after*** notice to the certified class (should notice ever be required) and expiration of the opt-out period for class members. *See, e.g.*, *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) ("If a class action defendant insists upon early class action determination and notice [before merits rulings], he is, under the rule, ***entitled to it***.") (emphasis supplied); *Mendez v. The Radec Corp.*, 260 F.R.D. 38, 48 (W.D.N.Y. 2009) ("[D]efendants have ***the right***—should they choose to exercise it—to have class certification issues decided first.") (emphasis supplied).

Circuit Courts repeatedly have recognized that under Rule 23(c), merits determinations sought by a proposed class representative *must* be delayed until after class certification and notice to the class to prevent one-way intervention.[7] As the Ninth Circuit explained:

> The language of Rule 23(c)(2) supports the view that notice must be sent *before* a judgment has been granted. First, it applies only to a class action "maintained" before the district court. Second, the rule states that the notice must advise the member that "the judgment, whether favorable or not, *will* include all members who do not request exclusion." … The rule thus clearly contemplates that the notice requirement will be met *before* the parties are aware of the district court's judgment on the merits.

Schwarzschild, 69 F.3d at 296 (emphasis in original) (internal citations omitted). The protection against one-way intervention thus applies *unless* the defendant explicitly waives that right, or waives it implicitly by filing a summary judgment motion of its own, neither of which has happened here. *See, e.g.*, *Katz*, 496 F.2d at 760-62 (court could

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[7] *See, e.g., Isaacs v. Sprint Corp.*, 261 F.3d 679, 681-82 (7th Cir. 2001) (reversing grant of class certification and case management plan providing for summary judgment proceedings *prior* to issuance of class notice because, among other things, "one-way intervention is forbidden" under Rule 23(c)(2)); *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("The purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated.") (emphasis original); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 362 (7th Cir. 1987) (explaining that under Rule 23 as amended in 1966, "a person's decision whether to be bound by the judgment" in a class suit, "like the court's decision whether to certify the class—would come well in advance of the decision on the merits. Under the scheme of the revised Rule 23, a member of the class must cast his lot at the beginning of the suit and all parties are bound, for good or ill, by the results"); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975) (Rule 23(c) "makes it plain" that the class determination *and* notice to the class must occur before judgment on the merits).

defer issuing notice to certified class until after trial of a "test case" on the merits where defendant expressly requested that procedure and thereby waived the protection that Rule 23(c) otherwise would have afforded against one-way intervention).

Plaintiff suggested in the district court that State Farm's mere filing of a Rule 12(b)(6) dismissal motion at the outset of this action constituted a waiver of State Farm's otherwise-available protection against one-way intervention. Not so. *See Villa v. San Francisco Forty-Niners, Ltd.*, 104 F. Supp. 3d 1017 (N.D. Cal. 2015) (defendant's earlier filing of a rule 12(b)(6) motion did not waive defendant's entitlement to have consideration of plaintiff's partial summary judgment motion deferred until after a decision on class certification and notice, if any). And State Farm has not found any authority to support the notion that implicit waiver of the protection against one-way intervention occurs through a defendant's pursuit of discovery in a case, or its assertion that a class cannot be certified in an action because resolution of claims or defenses therein will require individualized proofs to such an extent that predominance and / or superiority are not satisfied.

State Farm has demonstrated that its rights could be substantially prejudiced if the Court entertains Plaintiff's partial summary judgment motion prior to issuance of class notice and expiration of the opt-out period for class members, if any. That establishes a risk of irreparable harm. This factor thus weighs in favor of a *complete* stay of proceedings in the district court, *including* any proceedings on dispositive motions.

III. PLAINTIFF WILL NOT BE SUBSTANTIALLY INJURED BY A STAY

The risk of irreparable harm to State Farm stands in stark contrast to the lack of harm to Plaintiff if a complete stay is granted. As discussed above, the "defense" Plaintiff challenges in her motion for partial summary judgment does not even apply to her individual claim. *See supra* at 2-3, 5, 9-10. Thus, Plaintiff should not be allowed to proceed with her summary judgment motion *at all* due to her lack of standing to complain of the policy language her motion challenges. It is well-settled that courts do not reach out to address issues that are not actually at issue in a case.[8] Plaintiff's insistence on proceeding with her motion in the district court despite her lack of standing and the pendency of State Farm's appeal is both inefficient and wasteful.

Plaintiff certainly has no right to have her summary judgment motion considered early, where Rule 23(c) and the rule against one-way intervention clearly apply to forbid exactly the process she requests. Conversely, no harm will result if the proper, fair procedure is followed. There is no reason to think that the Eighth Circuit will not resolve State Farm's appeal promptly. *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. CIV. 11-429 DWF/FLN, 2014 WL 4540228, at *3 (D. Minn. Sept. 11, 2014). And

[8] *See, e.g., Krantz, Inc. v. Nissan N. Am., Inc.*, 408 F. Supp. 2d 854, 859 (D.S.D. 2005) ("To put it more succinctly, a federal court does not issue advisory opinions on general principles of law. We do not write opinions as law review articles are written. '[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402 (1971)).

thereafter, the parties still will have extensive work to do before consideration of summary judgment motions will be proper *even if* this action proceeds on a class basis, as members of the asserted class cannot be identified absent further discovery, the parties have not even begun to draft class notice papers, and still further time will be required after court approval of any such notice for issuance of that notice and an appropriate opportunity for individuals to opt out. *See* Dkt. 160-6 at 13-14 (A3069-70); Dkt. 270 at 1-9.

IV. THE PUBLIC INTEREST SUPPORTS A STAY OF PROCEEDINGS

Finally, the public interest factor weighs in favor of a stay. A movant satisfies this factor when, among other things, the requested stay will conserve judicial resources. *See Perrin v. Papa Johns Int'l, Inc.*, No. 4:09CV01335 AGF, 2014 WL 306250, at *3 (E.D. Mo. Jan. 28, 2014). That is the case here. As discussed above, proceeding with Plaintiff's motion for partial summary judgment now despite the pendency of State Farm's Appeal is both inefficient and unfair. Plaintiff's motion for partial summary judgment addresses issues *unrelated* to her individual claim. The public interest will be ill-served by the expenditure of scarce judicial resources on a motion that only implicates the rights of insureds other than Plaintiff, and which can properly be addressed *after* issuance of class notice and the required opt-out period if the district court's class certification order is not reversed.

CONCLUSION

For the reasons set forth above, State Farm respectfully requests that this Court stay all remaining proceedings in the district court – including the briefing on summary judgment and one-way intervention and the district court's consideration of Plaintiff's motion – pending this Court's resolution of State Farm's Appeal. State Farm further requests that this Court issue a temporary stay pending this Court's resolution of this motion.

Dated: September 16, 2016

Respectfully submitted,

/s/ Heidi Dalenberg

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 16, 2016, Petitioner, State Farm Fire and Casualty Company caused the foregoing MOTION FOR A STAY PENDING CONSIDERATION OF THE PETITION AND A TEMPORARY STAY PENDING CONSIDERATION OF THIS MOTION and the DECLARATION AND EXHIBITS referenced therein to be filed and served through the Court's electronic filing system on the following attorneys of record for Plaintiff:

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