UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Wells Fargo Insurance Services USA, Inc., Plaintiff, v. Kyle King and Sherman Insurance Agency, Inc., Defendants.	Case No. 15-cv-4378 (PJS/HB) **MEMORANDUM AND ORDER**

HILDY BOWBEER, United States Magistrate Judge

This matter is before the Court on Plaintiff's Motion to Stay Discovery [Doc. No. 45]. The Court heard oral argument on July 11, 2016. For the reasons set forth below, the Court grants the motion in part and denies it in part.

I. Background

Plaintiff Wells Fargo Insurance Services USA, Inc. ("WFIS") filed suit against Kyle King and Sherman Insurance Agency, Inc. ("Sherman") on December 16, 2015, seeking damages and a preliminary injunction. King is a former employee of WFIS, and now works for Sherman, a competitor of WFIS. The Complaint alleges that King has breached non-solicitation and confidentiality obligations to which he was bound by way of an employment agreement, that Sherman tortiously interfered with that agreement, and that King and Sherman have misappropriated WFIS's trade secrets. King and Sherman answered, and King asserts a counterclaim for unpaid commissions earned prior to his departure from WFIS.

WFIS's allegations and claims for relief are set forth in further detail in the Order issued by the Honorable Patrick J. Schiltz denying WFIS's motion for a preliminary injunction [Doc. No. 26], but the allegations of particular relevance to this motion are summarized here. King previously worked for Acordia of Minnesota, Inc. ("Acordia") and signed an employment agreement with Acordia. (Compl. ¶ 14 [Doc. No. 1].) WFIS claims it subsequently acquired Acordia's rights under the employment agreement. (Compl. ¶ 14.) The "Employment and Non-Piracy Agreement" King signed with Acordia restricts his ability to sell insurance after his employment ends and prohibits him from using or disclosing Acordia's confidential and proprietary information at any time after ending his employment. (Compl. ¶ 15, 16.) The agreement also contains a dispute resolution mechanism, in which either party may demand arbitration if the parties fail to settle a dispute within sixty days of written notice of that dispute. (Paulnock Dec. Ex. 1 at 4 [Doc. No. 9].) Once a demand for arbitration is made, the arbitration must "take place in Minneapolis, Minnesota, at a time and location designated by the arbitrator, but not exceeding 60 days after a demand for arbitration has been made." (Paulnock Dec. Ex. 1 at 4.) The dispute resolution clause contains a "carve-out," however, allowing either party to seek a preliminary injunction in court without waiving its right to demand arbitration. (Compl. ¶ 12; *see also* Paulnock Dec. Ex. 1 at 4 (Arbitration "shall be the sole and exclusive procedure[] for the resolution of disputes between the parties relating to or arising out of the Employment Agreement; provided, however, that a party may seek a preliminary injunction or other provisional judicial relief if in its judgment such action is necessary to avoid irreparable damage or to preserve the status quo.").)

WFIS acquired Acordia, and King became an employee of WFIS. (Compl. ¶ 14.) The parties dispute, however, whether WFIS succeeded to Acordia's rights under the agreement. King resigned from WFIS in December 2015 and began working for Sherman shortly thereafter. (Compl. ¶ 17.) This suit followed.

On January 25, 2016, Judge Schiltz denied WFIS's motion for a preliminary injunction, finding that although WFIS was "virtually certain to succeed on its claims that King breached—and that Sherman tortiously interfered with—the restrictive covenant in the Agreement, and [that it was] likely to succeed on its claim that the restrictive covenant is valid and enforceable" (Order at 19 [Doc. No. 26]), it had not satisfied the other requirements for a preliminary injunction, particularly as to the elements of irreparable harm and the balance of harms. (*Id.* at 24, 26.)

At the preliminary injunction hearing, counsel for both parties discussed the expectation that all claims involving King (both the claims against him and his counterclaims against WFIS) would go to arbitration under the employment agreement. (Tr. 65:1-2; 65:10-13; 65:21-25; 71:8-11; 123:13-19 [Doc. No. 33].) Subsequently, however, counsel met and conferred pursuant to Federal Rule of Civil Procedure 26(f), and submitted a report to Magistrate Judge Jeffrey J. Keyes in which Defendants asserted that WFIS had waived its right to arbitrate [Doc. No. 34]. The Rule 26(f) Report reflected the parties' now-diverging views of the forum and schedule for the case, with WFIS taking the position that because it intended to file a motion to compel arbitration, the claims against King would go to arbitration, further activity in the federal litigation should be stayed until the arbitration concludes, and King and Sherman arguing for an aggressive schedule for discovery,

dispositive motion practice and trial. On February 26, 2016, Judge Keyes entered a scheduling order that adopted Defendants' proposed schedule, setting a deadline for the close of fact discovery of August 1, 2016, and for dispositive motions of December 15, 2016. [Doc. No. 37.] The scheduling order did not, however, mention the parties' dispute regarding arbitration or discuss whether an order compelling arbitration would affect the schedule.

Following the Rule 16 conference, the parties exchanged initial disclosures and served and responded to initial written discovery. (Schoenwetter Aff. at 1-2 [Doc. No. 58].) In early June, Defendants served a second set of written discovery and noticed five depositions. (Kahnke Aff. ¶ 9 [Doc. No. 48].) WFIS responded by filing this motion to stay all discovery until Judge Schiltz rules on WFIS's anticipated motion to compel arbitration and to stay the litigation, which, because of the difficulty in finding an available date acceptable to all counsel, is not scheduled for hearing until September 9, 2016. Defendants have expressed their intention to file a motion for summary judgment to be heard on that date as well [Doc. No. 44].

Following the Rule 16 conference, the parties continued to discuss arbitration. In a March 16, 2016, email, WFIS counsel Randall Kahnke summarized a recent conversation with Defendants' counsel C.J. Schoenwetter: "In an effort to encourage resolution of this matter, and to prevent needlessly spending additional resources on litigation and/or arbitration, you have requested, and I have accepted, defendant's proposal that WFIS not move to stay the litigation or to compel arbitration until after the settlement conference. . . ." (Kahnke Aff. Ex. B at 1 [Doc. No. 48-2].) Schoenwetter responded, "I think you have

captured the essence of our agreement."[1] (Kahnke Aff. Ex. B at 1.) The parties participated in a settlement conference on April 18, 2016, but did not reach a resolution. In mid-May, WFIS obtained from Judge Schiltz's chambers the September 9 hearing date for its planned motion to compel arbitration [Doc. Nos. 48-3, 48-4], but has not yet filed that motion or otherwise served a demand for arbitration.

II. Discussion

Federal Rule of Civil Procedure 26(c) requires a party who seeks a protective order precluding or limiting discovery to establish good cause, but it grants the trial court broad discretion to decide when a protective order is appropriate and what degree of protection is necessary. *May Coating Tech., Inc. v. Illinois Tool Works*, 157 F.R.D. 55, 57 (D. Minn. 1994) (citations omitted). Good cause exists when justice requires the protection of "a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Courts use a balancing test to determine whether good cause exists, weighing the moving party's potential burden against the opposing party's interest in the discovery at issue. *Brosdahl-Nielsen v. Walden Automotive Group, Inc.*, No. 04-cv-1363 (JMR/JSM), 2004 WL 6040018, at *2 (D. Minn. Nov. 24, 2004). Regarding whether good cause exists to stay litigation pending proceedings in another forum, courts in this district consider, among other things, whether a stay would unduly prejudice or give a clear tactical advantage to one party, whether a stay will simplify the issues in question and the trial of the case, and whether discovery is complete and a trial date has been set. *Pacesetter, Inc. v.*

[1] Schoenwetter's email made a clarification to Kahnke's summary on a point unrelated to the quoted sentence.

Cardiac Pacemakers, No. 02-cv-1337 (DWF/SRN), 2003 WL 23303473, at *2 (D. Minn. Nov. 19, 2003) (citing *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999)); *see also TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, No. 13-cv-1356 (ADM/FLN), 2013 WL 4487505, at *2 (D. Minn. Aug. 20, 2013) (noting courts have discretion in deciding whether to stay discovery and can consider the breadth of pending discovery and the possibility that a dispositive motion will dispose of the case).

WFIS contends there is good cause in this case to stay all discovery at least until the decision on its forthcoming motion to compel arbitration.[2] It points out that if that motion is granted and all of the claims involving King are submitted to arbitration, the scope of discovery in arbitration will be subject to the discretion of the arbitrator and is likely to be more limited than the more comprehensive discovery permitted under the federal rules. It argues, therefore, that if full discovery on those claims is permitted in the interim, WFIS would be deprived of one of the significant benefits of its agreement, and Defendants would have received an unwarranted tactical advantage. WFIS also argues that if arbitration is ordered, the outcome of the arbitration will be dispositive of most if not all of the claims against Sherman as well, thus simplifying the remainder of the litigation and limiting the scope, burden, and cost of any subsequent discovery. Thus, it reasons, a stay in the interim

[2] The Court notes that the only issue before it is whether discovery should be stayed until Judge Schiltz can hear and rule on Plaintiff's anticipated motion to compel arbitration, which was set for hearing on September 9 rather than at an earlier date because of scheduling issues for both sides' counsel. If Judge Schiltz denies that motion, discovery will proceed with regard to all parties. If he grants the motion, he will then determine (or refer the question to this Court) whether discovery should be stayed in whole or in part as to Sherman while the arbitration proceeds with King.

will benefit both parties by avoiding what may well turn out to be unnecessary burden and expense.

Defendants argue WFIS has failed to show good cause for several reasons. First, they point out that a motion to compel arbitration is a dispositive motion, and a pending dispositive motion does not by itself warrant a stay of discovery. Second, they argue WFIS is unlikely to succeed in its motion to compel arbitration because it has waived its right to arbitrate, and therefore discovery in this case – not to speak of the dispositive motion practice and trial that must await the completion of discovery – should not be delayed. They note that not only did they intend to bring a dispositive motion for hearing before Judge Schiltz on September 9, but the scheduling order entered by Judge Keyes sets a deadline for fact discovery to be complete by August 1, 2016, and all dispositive motions to be heard no later than December 15, 2016. They contend that a stay, far from benefiting both sides, would require a delay of those deadlines, unfairly prejudicing Defendants and giving WFIS a tactical advantage by delaying a final resolution on the merits, leaving Defendants' business until then in limbo. Relatedly, they argue that, regardless of whether the claims involving King are arbitrated, the claims against Sherman must be litigated in this Court, and Sherman should be permitted to proceed with full discovery. Finally, they argue that even if full discovery is stayed, the Court should permit discovery in specific areas, including on the issue of the enforceability of the arbitration clause itself.

A. Whether the Court Should Stay Full Discovery

There is relatively little precedent in this District on the question of whether and under what circumstances to stay discovery pending a decision on whether certain claims

will be arbitrated. Defendants are correct that motions to compel arbitration are treated as motions to dismiss for lack of subject matter jurisdiction. *See, e.g.*, *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 970 n.3 (D. Minn. 2012). But all motions to dismiss for lack of subject matter jurisdiction are not created equal when it comes to the decision to stay, or not stay, discovery. It may often make sense for discovery to continue while a federal court considers whether a case that will probably be litigated no matter what will proceed before it or in some other court, but courts have regularly stayed discovery while the court considers whether a case must instead proceed in arbitration. *See, e.g.*, *Advocat Inc. v. Blanchard*, No. 4:11CV00895 JLH, 2012 WL 1893735, at *5-6 (E.D. Ark. May 24, 2012); *Richardson v. Virgin Islands Port Auth.*, No. CIV.A. 2009-136, 2010 WL 1641154, at *10 (D.V.I. Apr. 21, 2010); *Honig v. Comcast of Georgia I, LLC*, 537 F. Supp. 2d 1277, 1284 (N.D. Ga. 2008); *O.N. Equity Sales Co. v. Emmertz*, 526 F. Supp. 2d 523, 528–29 (E.D. Pa. 2007); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 829 (S.D. Miss. 2001), *aff'd sub nom. Bank One NA v. Coates*, 34 F. App'x 964 (5th Cir. 2002).

Defendants cite two cases from this district in which the court declined to stay discovery while a motion to compel arbitration was pending. Neither of these cases is particularly helpful to Defendants, however. In *Minnesota Odd Fellows Home Found. v. Engler & Budd Co.*, 630 F. Supp. 797, 800 (D. Minn. 1986), the district judge declined to stay "reasonable" discovery pending decision on a motion to compel arbitration of certain federal claims because existing Eighth Circuit precedent suggested arbitration was likely to be denied. The court ruled that "[r]easonable discovery should go forward to avoid a long delay in the resolution of these claims. If the parties disagree during the course of discovery

as to what constitutes reasonable discovery under the circumstances, they may make an appropriate motion." *Id.* at 800-01. And in *Bailey v. Ameriquest Mortgage Co.*, No. 01-cv-545 (JRT/FLN), 2002 WL 100388, at *2 n.2 (D. Minn. Jan. 23, 2002), the district judge upheld the magistrate judge's order compelling the defendant to respond to a single interrogatory seeking names of possible participants in the asserted collective action while the motion to compel arbitration was pending. But what Defendants do not mention is that in *Bailey*, the magistrate judge *stayed* all discovery other than the five interrogatories directed to identifying and giving notice to those possible participants. Order, July 23, 2001, *Bailey v. Ameriquest Mortgage Co.*, No. 01-cv-545 (JRT/FLN), Doc. No. 17.

Defendants argue that even if it is appropriate to stay discovery as to the merits of the claims involving King, Sherman should be permitted to proceed on all cylinders with discovery into the claims against it. Where some, but not all, claims must be referred to arbitration, there are circumstances in which courts will allow litigation of the non-arbitrable claims to proceed. *See, e.g.*, *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 355 (S.D. Tex. 2008), *aff'd and remanded*, 583 F.3d 228 (5th Cir. 2009) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 20 (1983)). In such cases, the court looks at whether "allowing litigation to go forward would destroy the parties' right to meaningful arbitration." *Id.* at 356. That analysis typically includes consideration of whether the arbitrated and litigated disputes involve the same operative facts, whether the claims asserted in the arbitration and litigation are inherently inseparable, and whether the litigation has a critical impact on the arbitration. *Id.* (citing *Waste Mgmt., Inc. v. Residuos*

Industriales Multiquim, S.A. de C.V., 372 F.3d 339, 343 (5th Cir. 2004)); *see also Mut. Ben. Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 876 (D.N.J.), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (courts examine "whether the arbitrable claims dominate the issues in the non-arbitrable claims"). Where it is likely that the arbitration will resolve many if not all of the factual questions that will dominate the remaining claims in litigation, the court will generally stay the litigation until the arbitration is concluded. *See, e.g., Jaffe v. Zamora*, 57 F. Supp. 3d 1244, 1248 (C.D. Cal. 2014) (staying the federal court action against all parties where arbitration with the employer would likely resolve significant factual questions common to the claims against the parties not bound by the arbitration agreement); *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863, 873 (E.D. Va. 2009) (staying entire litigation in sex discrimination case against all parties even though arbitration was limited to plaintiff employee's claims against her employer, where the arbitration was likely to resolve factual questions coextensive with all parties).

In this case, Defendants do not dispute that the claims against King dominate this case, or that arbitration of those claims, if arbitration is ordered, would significantly simplify, if not resolve altogether, the claims against Sherman. Moreover, the Court is not persuaded that a stay until the decision on the motion to compel arbitration will unduly prejudice Defendants or present a clear tactical advantage to WFIS. On the one hand, if arbitration is ordered, determination of the proper scope of discovery will be up to the arbitrator, and both parties agree it is likely to be more limited than would otherwise be permitted in federal court litigation. Thus, to permit broader discovery on all issues to proceed before that decision would deprive WFIS of one of the significant benefits of

arbitration. On the other hand, if arbitration is denied, discovery can then immediately proceed at full speed under the Federal Rules.

Defendants complain that either way, there is an unfair and damaging delay in perfecting their anticipated motion for summary judgment and in getting certainty about the impact of the restrictive covenant on their business strategy. That argument is unpersuasive here. If arbitration is ordered, the decision on the enforceability of the restrictive covenant is for the arbitrator, not for the court, and Defendants have not even attempted to identify a specific area of discovery unique to the claims against Sherman that could not be pursued just as efficiently, if not more so, once the arbitration has concluded. If arbitration is denied, the Court can work with the parties to develop a new scheduling order that moves discovery forward expeditiously, including, if feasible and appropriate, prioritizing discovery directed to possible dispositive motion practice. Finally, the Court notes that even though the arbitration agreement provides for a sixty-day track to final decision – almost certainly faster than could be accomplished in litigation – it was Defendants who asked WFIS to defer serving the formal demand for arbitration that would have started that clock, and Defendants who have made it clear King would oppose any attempt to go down that path before a court order compelling him to do so. The Court therefore concludes that WFIS has shown good cause to stay broad-based discovery until Judge Schiltz rules on its motion to compel arbitration.

B. Whether Limited Discovery Should be Permitted

Defendants argue that even if this Court stays discovery generally between now and the decision on whether to compel arbitration, they should be permitted to pursue discovery

in the interim in two areas: (1) discovery relating to their grounds for opposing arbitration, so they can fully litigate their claims that WFIS does not have standing and that it has waived its right to arbitrate, and (2) discovery as to the "metes and bounds" of the covenant not to compete, which Defendants allege is vague and extraordinarily broad, so they can make informed decisions about their business pursuits in the interim.

1. Discovery Related to Whether Wells Fargo Has Standing to Enforce the Restrictive Covenant

Even where courts have stayed litigation pending a decision on a motion to compel arbitration, many have held that limited pre-arbitration discovery may be appropriate to explore the enforceability of the arbitration clause itself. Two cases from sister districts are instructive. In *Advocat*, a party requested discovery related to the enforceability of the arbitration agreement, including depositions of the affiants whose affidavits were attached to the motion to compel arbitration and discovery related to the negotiation, execution, and enforcement of the arbitration agreement. *Id.* at *5. The Eastern District of Missouri noted that other courts have allowed "limited pre-arbitration discovery . . . into 'issues relating to the making and performance of the agreement to arbitrate' where 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.'" *Id.* (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999)). The court ultimately denied even limited discovery in the case before it, however, because the requesting party had personal knowledge of the facts he sought to pursue in deposition, and could not offer a reasonably specific description of the information he hoped to elicit through written discovery to undermine the validity of the arbitration agreement. *Id.* at *6.

And in *Perras v. H & R Block, Inc.*, No. 12-00450-CV-W-BP, 2012 WL 4328196, at *1 (W.D. Mo. Sept. 14, 2012), the court allowed limited preliminary discovery on the enforceability of the arbitration clause and on choice of law issues in order to "facilitate" the motion to compel arbitration, finding that the requesting party had adequately identified the need for that discovery.

WFIS, citing *Dominium Austin Partners L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir.2001), urges that even discovery into the issues relating to its ability to enforce the arbitration clause against King would not be appropriate because it will be for the arbitrator, not the Court, to decide whether the agreement is enforceable. The Court disagrees. While *Dominium* held that it is for the arbitrator to determine whether particular procedural prerequisites for arbitration have been met (such as time limits for submitting matters to arbitration, submission of a formal demand, or compliance with a required grievance procedure), it is for the *court* to decide whether a party has waived its right to arbitrate by initiating and pursuing federal court litigation. In *Parler v. KFC Corp.*, 529 F. Supp. 2d 1009, 1012 (D. Minn. 2008), Judge Schiltz, quoting the Eighth Circuit's opinion in *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 728 (8th Cir. 1976), observed that

> [C]ourts generally decide whether a party has waived its right to arbitrate by 'actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with the right to arbitration,' [whereas] arbitrators generally decide claims of waiver that rest on the argument that arbitration 'would be inequitable to one party because relevant evidence has been lost due to the delay of the other.'

Another court in this district has come to the same conclusion. *Webster Grading, Inc. v. Granite Re, Inc.*, 879 F. Supp. 2d 1013, 1019 (D. Minn. 2012) (distinguishing *Dominium* on the same grounds).

Judge Schiltz, in his decision on the motion for preliminary injunction, noted the sparse record then before the Court on the issue of whether WFIS had standing to enforce the employment agreement. Although WFIS counsel provided additional documentation as exhibits to its reply memorandum on the motion before this Court [Doc. No. 64], and represented at the hearing that more documents had subsequently been produced to Defendants, the Court concludes that limited discovery directed specifically to facts underlying WFIS's standing, or lack thereof, to enforce the arbitration clause would be appropriate. Previewing this ruling at the hearing, the Court instructed counsel for Defendants to identify the specific requests in their written discovery related to this issue. It further instructed counsel for WFIS to provide objections to those specific requests within one week, to meet and confer in good faith with Defendants' counsel on those objections, and to produce documents, to the extent not already produced, by August 10, 2016. Finally, while the Court is skeptical of whether depositions on this subject are necessary, it instructed counsel to meet and confer after review of the documents if Defendants believed in good faith that additional facts could be elicited in depositions that would materially affect their arguments as to standing, and to promptly bring any disputes to the Court for resolution.

2. Discovery Related to the Scope of the Restrictive Covenant

Defendants argue that they need discovery to determine the metes and bounds of the restrictive covenant so that King does not violate its terms if it is ultimately enforced. They argue the restrictive covenant would appear to prohibit King from brokering insurance accounts for any customer or prospective customer to whom he sold or attempted to sell

insurance while at Wells Fargo. King asserts that he does not remember all of these individuals or entities. They also argue the agreement would appear to prohibit King from brokering insurance for any customer who has purchased insurance from another employee of Wells Fargo during the twenty-four months preceding his termination. King asserts that he does not know all of these individuals or entities. Thus, Defendants argue, even if they agreed the covenant was enforceable against King, he would not have the information he needs to avoid violating it. They also argue they need this discovery to pursue their argument that the covenant is impermissibly broad and vague, and therefore unenforceable.

Taking the latter point first, in light of the Court's ruling in Section II.A. above, the Court concludes discovery on the "metes and bounds" of the restrictive covenant for the purpose of challenging its breadth or vagueness should be stayed pending the decision on the motion to arbitrate. But the Court is persuaded that even if arbitration is ultimately ordered, requiring WFIS in the interim to identify the customers and prospective customers with whom WFIS contends the agreement prohibits King from doing business is not unduly burdensome, will not undermine its right to arbitrate, and will in any event have to be produced at some point in the proceedings, whether arbitrated or litigated. Moreover, that information will assist King in determining how, if at all, to modify his business activities to comply with the terms of the agreement, at least as WFIS sees those terms. Therefore, WFIS is to produce that information no later than August 10, 2016.

Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Stay Discovery [Doc. No. 45] is **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. Defendants may conduct reasonable discovery specifically directed to their claim that WFIS does not have standing to enforce the arbitration clause against King.

2. Plaintiff will identify the customers and prospective customers with whom it claims King is precluded from doing business by operation of the restrictive covenant.

3. In all other respects, discovery in this case will be stayed until Judge Schiltz rules on Plaintiff's motion to compel arbitration and stay litigation.

4. The Court incorporates by reference the deadlines set forth in the hearing of July 11, 2016, and Doc. No. 68.

Dated: July 29, 2016

s/ Hildy Bowbeer
HILDY BOWBEER
United States Magistrate Judge