IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WELLS FARGO BANK, NATIONAL ASSOCATION,	)	
Plaintiff,	)	**No. 17 C 4723**
v.	)	**Jeffrey T. Gilbert Magistrate Judge**
WORLDWIDE SHRIMP COMPANY; WILLIAM J. APPELBAUM,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

In this lawsuit, Plaintiff Wells Fargo Bank, National Association ("Plaintiff") asserts claims against Defendant Worldwide Shrimp Company ("WWS") and Defendant William J. Appelbaum ("Appelbaum") (collectively, "Defendants") arising out of an alleged breach of a loan agreement by WWS and Appelbaum's failure to honor a related guaranty. The matter has been referred to this Magistrate Judge for a report and recommendation on four pending motions: Plaintiff's Voluntary Motion to Dismiss [ECF No. 77]; Defendants' Motion to Amend Answer to Add a Counterclaim and New Parties ("Defendants' Motion to Amend") [ECF No. 83]; Defendants' Supplemental Motion to Amend Answer to Add a Counterclaim and New Parties ("Defendants' Supplemental Motion to Amend") [ECF No. 87]; and Defendants' Motion for Sanctions [ECF No. 81]. For the reasons discussed below, I recommend that Plaintiff's Voluntary Motion to Dismiss [ECF No. 77] be denied; that Defendants' Motion to Amend [ECF No. 83] be granted; that Defendants' Supplemental Motion to Amend [ECF No. 87] be granted; and that Defendants' Motion for Sanctions [ECF No. 81] be denied without prejudice.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Background Facts

A few years ago, Plaintiff made a loan to WWS by granting it a line of credit in the maximum principal amount of $15,000,000. Appelbaum, WWS's principal, guaranteed WWS's payment obligations to Plaintiff under the loan. Complaint, [ECF No. 1], ¶¶ 6, 16–34; Answer to Complaint, [ECF No. 19], at 2–6. In December 2016, WWS wrote down the value of its inventory. Complaint, [ECF No. 1], ¶ 37; Answer to Complaint, [ECF No. 19], at 7. Plaintiff alleges this write-down caused WWS to breach certain financial covenants when it ended 2016 with a net worth of less than $2,000,000 and a net income of less than $0.00. Complaint, [ECF No. 1], ¶¶ 35–36; Answer to Complaint, [ECF No. 19], at 6–7. Plaintiff also alleges WWS defaulted on December 31, 2016 by failing to repay timely certain amounts it had borrowed. Complaint, [ECF No. 1], ¶ 35; Answer to Complaint, [ECF No. 19], at 6. In May 2017, Plaintiff sent Defendants an acceleration letter, demanding immediate payment of the loan by WWS and by Appelbaum as the guarantor. Complaint, [ECF No. 1], ¶¶ 66–69; Answer to Complaint, [ECF No. 19], at 13. During the ensuing month, Defendants paid down some but not all of the outstanding balance and, on June 23, 2017, Plaintiff filed this lawsuit. *See* Complaint, [ECF No. 1], ¶ 74.

Plaintiff's Complaint contains three counts. Count I asserts a claim against WWS for breaching the various written agreements governing the loan from Plaintiff. *Id.* ¶¶ 75–82. Count II asserts a claim against Appelbaum for breaching his personal guaranty of WWS's indebtedness. *Id.* ¶¶ 83–91. Count III asserts a claim against WWS for failing to provide information requested in connection with Plaintiff's collateral examination and notice letters, and against Appelbaum for failing to provide copies of his financial statements. *Id.* ¶¶ 92–97. In the

prayer for relief, Plaintiff seeks (1) a monetary judgment, (2) an accounting by each Defendant, (3) delivery of Appelbaum's financial statements, and (4) other just and appropriate relief. *Id.* at p. 16–17.

2. Plaintiff's Motion to Appoint a Receiver

On July 17, 2017, Plaintiff moved to appoint a receiver over WWS. Plaintiff's Motion for the Appointment of a Receiver over the Assets of Defendant Worldwide Shrimp Company ("Plaintiff's Motion to Appoint a Receiver"), [ECF No. 8]. The parties finished briefing the motion on August 18, 2017, and a ruling date was set for September 1, 2017. Minute Entry Dated August 21, 2017, [ECF No. 24].[1] On September 1, the then-presiding District Judge referred the Motion to Appoint a Receiver to this Magistrate Judge. Minute Entry Dated September 1, 2017, [ECF No. 31]. Roughly two weeks later, Defendants requested an evidentiary hearing. Request for Evidentiary Hearing, [ECF No. 36]. The Court granted this request and set a hearing for October 20, 2017. Minute Entry Dated September 19, 2017, [ECF No. 49].

The parties exchanged discovery, prepared exhibit lists for the hearing on the appointment of a receiver, and met and conferred concerning objections to the exhibits. *See* Minute Entry Dated October 5, 2017, [ECF No. 59]. On October 19, 2017, the day before the hearing, Plaintiff requested a conference call with the Court and Defendants' counsel to discuss the hearing and the possibility of settlement. Minute Entry Dated October 19, 2017, [ECF No. 65]; Transcript of Proceedings on October 20, 2017 ("October 20 Transcript"), [ECF No. 104], at 4. During the telephone conference, Plaintiff asked that the hearing be converted into a settlement conference. October 20 Transcript, [ECF No. 104], at 4–7. Defendants objected and

[1] There was a spat of motion practice concerning whether Defendants' response to Plaintiff's Motion to Appoint a Receiver was timely. *See* Minute Entry Dated September 1, 2017, [ECF No. 31].

the Court, therefore, said the hearing would proceed as scheduled. *Id.* The next morning, however, Defendants changed their minds, and all parties agreed to convert the hearing into a settlement conference and to defer the Motion to Appoint a Receiver. *Id.* at 7–14; Minute Entry Dated October 20, 2017, [ECF No. 66]. Ultimately, the parties did not resolve the case. Plaintiff asked for time to consider how it wanted to proceed with respect to the appointment of a receiver. A status hearing was set for October 26, 2017. Minute Entry Dated October 20, 2017, [ECF No. 66].

At the status hearing held on October 26, Plaintiff said it did not yet know whether it wanted to proceed with its Motion to Appoint a Receiver. Minute Entry Dated October 26, 2017, [ECF No. 71]. At the next status hearing, held on November 7, 2017, Plaintiff withdrew that Motion. Minute Entry Dated November 7, 2017, [ECF No. 76]. During the next two weeks, the parties filed the four motions that are now before the Court. On November 22, 2017, Defendants also filed an Emergency Motion for a Temporary Restraining Order ("Defendants' Motion for a Temporary Restraining Order") [ECF No. 92], which was denied by the District Judge after a hearing on November 27, 2017. Minute Entry Dated November 27, 2017, [ECF No. 100]; Order Dated November 27, 2017, [ECF No. 101]; Minute Entry Dated November 29, 2017, [ECF No. 103].[2]

3. The Pending Motions

On November 14, 2017, Plaintiff served Defendants with an arbitration demand and moved to voluntarily dismiss this lawsuit without prejudice. Plaintiff's Voluntary Motion to Dismiss, [ECF No. 77]. Two days later, Defendants responded to that Motion arguing the case should not be dismissed. Defendants' Opposition to Plaintiff's Motion to Dismiss ("Defendants'

[2] The Court adopts the District Judge's convention of characterizing Defendants' motion as one seeking a temporary restraining order.

Response to Motion to Dismiss"), [ECF No. 79]. On the same day, Defendants filed a motion for sanctions and a motion for leave to amend their Answer to add counterclaims and new parties. Defendants' Motion for Sanctions, [ECF No. 81]; Defendants' Motion to Amend, [ECF No. 83]. A few days later, Defendants filed a supplemental motion to amend seeking leave to add affirmative defenses. Defendants' Supplemental Motion to Amend, [ECF No. 87]. All of these motions have been referred to this Magistrate Judge for a report and recommendation. Minute Entry Dated November 11, 2017, [ECF No. 85]; Minute Entry Dated November 21, 2017, [ECF No. 91].

4. Discovery

This case is part of the Mandatory Initial Discovery Pilot Project ("MIDPP") adopted by the United States District Court for the Northern District of Illinois. *See* Notice to the Parties, [ECF No. 4]. On September 22, 2017, the Court entered an agreed confidentiality order. Agreed Confidentiality Order, [ECF No. 52]. On October 11, 2017, the parties served their responses to the Mandatory Initial Discovery Requests, as required by the MIDPP. Notice of Filing and Certificate of Service, [ECF No. 62]; Notice of Service of Plaintiff's Responses to Mandatory Initial Discovery Requests, [ECF No. 63]. On October 24, 2017, the parties held a meeting pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and filed a report of that meeting that included dueling proposed schedules for fact and expert discovery, the filing of dispositive motions, a pretrial order, and a three- to five-day trial to begin approximately eight to twelve months later. Rule 26(f) Report for Mandatory Initial Discovery Pilot ("Rule 26(f) Report"), [ECF No. 69]. On October 26, 2017, the then-presiding District Judge entered a scheduling order that set deadlines for fact and expert discovery and for the filing of dispositive motions. Scheduling Order Dated October 26, 2017 ("Scheduling Order"), [ECF No. 70]. Among other

things, the Scheduling Order gave the parties until November 10, 2017 to make the disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure. *Id.* The Court assumes the parties complied with the November 10 deadline.[3]

II. DISCUSSION

This matter is now before me for a report and recommendation on the four motions described above. I first will discuss Plaintiff's Voluntary Motion to Dismiss. Next, I will address Defendants' Motion to Amend and their Supplemental Motion to Amend. Finally, I will turn to Defendants' Motion for Sanctions.

1. Plaintiff's Voluntary Motion to Dismiss

Plaintiff has moved to voluntarily dismiss this case pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiff's Voluntary Motion to Dismiss, [ECF No. 77], at p. 1. Rule 41(a)(2) permits a court to order that an action be dismissed "on terms that the court considers proper." FED. R. CIV. P. 41(a)(2). The plaintiff bears the burden of proving voluntary dismissal is warranted. *Jack Gray Transp., Inc. v. AT & T Corp*, 2017 WL 633848, at *1 (N.D. Ind. Feb. 16, 2017); *Kirschner v. Aerco Int'l, Inc.*, 2014 WL 51860, at *1 (S.D. Ill. Jan. 6, 2014); *Finch v. Ford Motor Co.*, 327 F. Supp. 2d 942, 945 (N.D. Ill. 2004). The court has "broad discretion" to determine whether an action should be dismissed under Rule 41(a)(2). *Nwatulegwu v. Boehringer Ingelheim Pharm., Inc.*, 668 F. App'x 173, 175 (7th Cir. 2016).

Plaintiff argues dismissal under Rule 41(a)(2) is warranted because it has decided to switch forums and pursue its claims in arbitration. Plaintiff's Voluntary Motion to Dismiss, [ECF No. 77], ¶ 7; Notice of Arbitration Demand, [ECF No. 77-1]; *see also* Plaintiff's Omnibus Brief to Respond to Defendants' Motion for Sanctions, Defendants' Motion to Amend Answer to

[3] This case was reassigned to a new district judge on November 21, 2017. Executive Committee Order, [ECF No. 90].

Add a Counterclaim and New Parties, and Defendants' Supplemental Motion to Amend Answer to Add a Counterclaim and New Parties and to Reply to Defendants' Opposition to Plaintiff's Voluntary Motion to Dismiss ("Plaintiff's Omnibus Response and Reply"), [ECF No. 114], at 7 ("[T]his Court should now dismiss this action in favor of arbitration[.]"); at 9 (Plaintiff "decided to [] move to voluntarily dismiss this action to pursue judgment through arbitration[.]"); at 15 ("[Plaintiff] should now be permitted to dismiss this case and pursue its claims in arbitration."). It is undisputed that the Credit Agreement, Security Agreement, and Guaranty (collectively, "the Loan Documents") contain arbitration provisions that grant Plaintiff the right to arbitrate if it chooses to do so.[4] The parties also agree that Plaintiff served Defendants with an arbitration demand on November 14, 2017. Defendants, however, argue dismissal under Rule 41(a)(2) is inappropriate now because: (1) Plaintiff waived its right to arbitrate and (2) dismissal on the terms proposed by Plaintiff would prejudice Defendants. The Court will take each argument in turn.

A. Waiver of Plaintiff's Right to Arbitrate

Defendants argue Plaintiff has impliedly waived its right to arbitrate by filing and litigating this lawsuit. According to Defendants, Plaintiff voluntarily and knowingly chose to proceed in federal court and engaged in extensive litigation activity here. Defendants claim

[4] Specifically, § 7.11 of the Credit Agreement provide as follows: "Arbitration. The parties hereto agree, upon demand by any party, to submit to binding arbitration all claims, disputes and controversies between or among them (and their respective employees, officers, directors, attorneys, and other agents), whether in tort, contract or otherwise in any way arising out of or relating to (i) any credit subject hereto, or any of the Loan Documents, and their negotiation, execution, collateralization, administration, repayment, modification, extension, substitution, formation, inducement, enforcement, default or termination; or (ii) requests for additional credit. Any party who fails or refuses to submit to arbitration following a demand by any other party shall bear all costs and expenses incurred by such other party in compelling arbitration of any dispute. Nothing contained herein shall be deemed to be a waiver by any party that is a bank of the protections afforded to it under 12 U.S.C. §91 (sic) or any similar applicable state law." Credit Agreement, [ECF No. 114-1], § 7.11(a) at 13. Section 16(a) of the Continuing Guaranty Agreement is an arbitration agreement for claims, disputes, and controversies arising out of or relating to the Guaranty. Continuing Guaranty, [ECF No. 114-3], at § 16(a) at 4–5. There is no difference between the various arbitration provisions that is material to the motions now before the Court.

Plaintiff has delayed too long and proceeded too far down the path of litigation in this court to switch forums now. Defendants also say Plaintiff has not offered an adequate explanation for demanding arbitration at this late date.

In response, Plaintiff concedes the right to arbitrate may be impliedly waived when a party to an arbitration agreement chooses instead to litigate a claim in court. *See, e.g.*, Plaintiff's Omnibus Response and Reply, [ECF No. 114], at 14 ("[P]laintiff acknowledges that, in certain circumstances, the filing of a complaint can amount to waiver of a right to arbitrate.") Plaintiff, however, argues that the District Judge already has held it did not waive its right to arbitrate in this case and that this holding constitutes the law-of-the-case. Plaintiff also says that, even if the District Judge has not already decided the issue, the Court now should find no waiver occurred because the terms of the Loan Documents allowed Plaintiff to seek the appointment of a receiver without waiving its right to arbitrate. In addition, Plaintiff contends there are special circumstances in this case that militate against a finding of waiver. Finally, Plaintiff maintains Defendants would not be prejudiced if the Court were to find Plaintiff has not waived the right to arbitrate.

"Like any other contractual right, the right to arbitrate a claim may be waived." *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 637 (7th Cir. 2002). This waiver can be implied. *Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 650 (7th Cir. 2000). To determine if there is an implied waiver, courts "must determine whether 'based on all the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate.'" *Id.* at 650–51 (quoting *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co.*, 969 F.2d 585, 588 (7th Cir. 1992)). "On more than one occasion, the Seventh Circuit has explained that '[l]litigating a claim is clearly inconsistent with any perceived right to arbitration.'" *Linda*

Constr., Inc. v. Republic Servs. Procurement, Inc., 2017 WL 2619140, at *5 (N.D. Ill. June 16, 2017) (quoting *Welborn*, 301 F.3d at 637). In fact, "a court must presume that a party implicitly waived its right to arbitrate when it chooses a judicial forum for the resolution of a dispute." *Grumhaus*, 223 F.3d at 650; *see also Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) ("[A]n election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate[.]"). This presumption can be rebutted when the supposedly waiving party has not acted inconsistently with the right to arbitrate. *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prod., Inc.*, 660 F.3d 988, 995 (7th Cir. 2011); *Lillegard v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 2017 WL 1954545, at *2 (N.D. Ill. May 11, 2017). "Except in extraordinary circumstances," though, parties "should be bound by their election." *Cabinetree*, 50 F.3d at 391.

To determine whether a party implicitly waived its right to arbitrate, the court must consider the totality of the circumstances. *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002). Relevant factors include whether the supposedly waiving party participated in litigation, substantially delayed its request for arbitration, or participated in discovery, and whether the other party would be prejudiced. *Lillegard*, 2017 WL 1954545, at *2. Heavy weight should be given to the diligence of the supposedly waiving party, and the court should ask whether that party did "all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration[.]" *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004). When deciding whether the right to arbitrate has been waived, "the court is not to place its thumb on the scales" either in favor of or against arbitration. *Cabinetree*, 50 F.3d at 390.

In *Grumhaus v. Comerica Securities, Incorporated*, the plaintiffs ("the Grumhaus children") sued Comerica Securities ("Comerica") and seven other entities in state court, asserting claims arising out of an allegedly unauthorized sale of stock. 223 F.3d at 649; *Grumhaus v. Comerica Sec., Inc.*, 1999 WL 1080593, at *1 (N.D. Ill. Nov. 23, 1999), *vacated*, 223 F.3d 648 (7th Cir. 2000). Several of the defendant entities, not including Comerica, filed a motion to dismiss. *Grumhaus*, 223 F.3d at 649; *Grumhaus*, 1999 WL 1080593, at *1. About five months into the litigation, the state court granted the motion to dismiss, with leave to replead, and said in its order that "nothing contained herein shall waive any party's right . . . to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal." *Grumhaus*, 223 F.3d at 649, 651; *Grumhaus*, 1999 WL 1080593, at *1. The Grumhaus children later filed an amended complaint against one of the entities, and, in the same month, voluntarily dismissed their claims against Comerica (and several other entities) so that they could arbitrate those claims. *Grumhaus*, 223 F.3d at 649, 651; *Grumhaus*, 1999 WL 1080593, at *1. Prior to this dismissal, Plaintiffs engaged in only "brief," "minimal," and "skeletal" litigation against Comerica and did not conduct any discovery with respect to Comerica. *Grumhaus*, 1999 WL 1080593, at *4. Although the Grumhaus children expressed their intent to arbitrate when they dismissed their claims against Comerica, they waited another six months before serving a formal demand to arbitrate. *Grumhaus*, 223 F.3d at 649. At that time, Comerica objected to arbitration, contending the Grumhaus children waived their right to arbitrate. *Id.* That led the Grumhaus children to file a lawsuit in federal court and move to compel arbitration. *Id.* The district court found there was no waiver and order Comerica to submit to arbitration. *Id.*

On appeal, the Seventh Circuit reversed the district court's ruling. *Id.* at 653. Among other things, the Grumhaus children argued on appeal that a waiver did not occur because "they never submitted their state court action for judgment." *Id.* at 651 (internal quotation marks omitted). The court of appeals rejected this argument, explaining that the Grumhaus children expressed their "intent to submit to a judicial forum by filing a complaint" that included a prayer for relief requesting entry of a judgment. *Id.* The court of appeals found the Grumhaus children's "knowing selection of one forum over another and willing participation in the ensuing litigation" was "plainly inconsistent with a desire to arbitrate." *Id.* The Seventh Circuit determined that, although Comerica was not unduly prejudiced by the Grumhaus children's lack of diligence in demanding arbitration, there were no special circumstances that overcame the presumption of waiver that arose because the Grumhaus children filed and litigated the state court action for several months. *Id.* at 653.

In this case, Plaintiff elected to pursue its claims in federal court by filing this lawsuit. Plaintiff knew the Loan Documents gave it the right to arbitrate those claims. Yet, after months of trying to resolve issues with Defendants, during which Plaintiff presumably was considering what to do if a consensual resolution was not reached, Plaintiff decided to proceed in federal court. *See* Complaint, [ECF No. 1], ¶¶ 38–71. In its Complaint, Plaintiff asserts claims for breach of contract and under the Appelbaum guaranty (and for an accounting), and requests in its prayer for relief "that the Court enter judgment in [Plaintiff's] favor against Defendants, in the amount of no less than $3,457,344.73, together with interest accruing at a daily rate of $691.49 until the date of judgment, costs, charges, and fees, including but not limited to attorneys' fees, . . . and other just and appropriate relief." Complaint, [ECF No. 1], at p. 16–17.

Defendants answered the Complaint. Answer to Complaint, [ECF No. 19]. Plaintiff and Defendants made their MIDPP and Rule 26(a)(1) disclosures. Plaintiff requested that this Magistrate Judge mediate its dispute with Defendants on the day it was set to argue its Motion to Appoint a Receiver. Minute Entry Dated October 20, 2017, [ECF No. 66]; October 20 Transcript, [ECF No. 104]. As the parties continued to discuss settlement, Defendants threatened to file counterclaims against Plaintiff arising from its alleged misconduct in calling the loan. On November 10, 2017, Defendants wrote to Plaintiff and said they would assert counterclaims against Plaintiff and two of its employees individually if Plaintiff did not forgive the outstanding balance of the loan and repay all the attorneys' fees and other monies it had deducted from WWS's operating account during the course of this dispute. Letter from Alan J. Farkus to Colby Anne Kingsbury Dated November 10, 2017, [ECF No. 79-2], at 5–6.[5] Four days later, Plaintiff filed its Voluntary Motion to Dismiss this case. Until Plaintiff filed that Motion on November 14, 2017, Plaintiff proceeded as if it intended to pursue its claims to resolution in this court (through litigation or settlement) and not submit any of those claims to arbitration.

Plaintiff offers several reasons why it has not waived the right to arbitrate, but I find none to be convincing. Plaintiff first contends the District Judge already held Plaintiff did not waive its right to arbitrate in the order denying Defendants' Motion for a Temporary Restraining Order ("TRO Order") and that this holding constitutes the law-of-the-case. *See* TRO Order, [ECF No. 101], at 2–3. Plaintiff focuses on the District Judge's statements that he "likely would find that

[5] The fact that Defendants might file counterclaims was not a surprise. In the parties' Rule 26(f) Report, filed on October 24, 2017, Defendants proposed that the case would be ready for trial by November 1, 2018 and that the five-day trial would be "inclusive of Defendants' contemplated counterclaims." Rule 26(f) Report, [ECF No. 69], at 3.

filing this lawsuit was not a waiver of arbitration" and "defendants' claims should be heard by an arbitrator." *Id.* at 2.

There is a threshold problem with Plaintiff's argument. Courts refuse to apply the law-of-the-case doctrine to a ruling at the preliminary injunction stage unless the ruling was based on a pure issue of law. *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012); *see also Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008); *Highway J Citizens Grp., U.A. v. U.S. Dep't of Transp.*, 656 F. Supp. 2d 868, 881 (E.D. Wis. 2009). There is no self-evident reason why the same should not be true of rulings at the temporary restraining order stage because "[t]he standards for issuing a temporary restraining order are the same as for a preliminary injunction." TRO Order, [ECF No. 101], at 1.

Moreover, the law-of-the-case doctrine "only applies where a court actually decided the issue in question." *Universal Guar. Life Ins. Co. v. Coughlin*, 481 F.3d 458, 462 (7th Cir. 2007); *see also Sherley*, 689 F.3d at 782 (discussing how a decision at the preliminary injunction stage may not satisfy this element). No party's brief in support of or opposition to Defendants' Motion for a Temporary Restraining Order squarely addressed the merits of whether Plaintiff waived its right to arbitrate. Plaintiff only touched on the issue in a footnote, saying "[t]he arbitrability issue is already teed up before Magistrate [Judge] Gilbert" and any ruling on the Motion for a Temporary Restraining Order "should not be used against [Plaintiff] on the issue of arbitrability." Wells Fargo Bank, National Association's Opposition to Defendants' Emergency Motion for Temporary Restraining Order & Preliminary Injunction, [ECF No. 97], at 1 n.2. In the "Factual Background: Current Procedural Posture" section of their brief, Defendants said in one sentence that Plaintiff waived its right to arbitrate, but they did not return to the issue later in

that filing. Defendants' Memorandum in Support of Their Emergency Motion for Temporary Restraining Order & Preliminary Injunction ("Defendants' TRO Brief"), [ECF No. 93], at 9. (Defendants also cited their response to Plaintiff's Voluntary Motion to Dismiss in which they addressed the waiver issue, but the Motion to Dismiss was not before the District Judge at that time.)

The TRO Order only discusses waiver in the context of whether Defendants have a likelihood of success on the merits of their counterclaims. In this specific context, the District Judge indicated what he "likely . . . would" do if the waiver issue were presented to him but he did not actually decide the issue, cite any cases, or conduct any substantive analysis of the matter. TRO Order, [ECF No. 101], at 2. The District Judge's observation about whether he might find that Plaintiff did not waive its arbitration option by filing this suit only mentioned Plaintiff's claims for "injunctive relief, attachment, or [the appointment of] a receiver," not the other claims in Plaintiff's Complaint or Plaintiff's pursuit of a judgment on all of those claims. *Id.* at 3. He did not review the course the litigation had taken until that juncture; the parties' Rule 26(f) Report in which they laid out the road maps they proposed to follow in this case through expert discovery, the filing of dispositive motions, and trial; the Scheduling Order previously entered in the case; or Plaintiff's on-again off-again approach to the appointment of a receiver. For these reasons, I reject Plaintiff's argument that the District Judge already decided the waiver issue in this case.

Next, Plaintiff contends filing and litigating this lawsuit did not constitute an implicit waiver because the Loan Documents explicitly provide that seeking the appointment of a receiver is not a waiver of the right to arbitrate. The relevant language is as follows:

> *The arbitration requirement does not limit the right of any party to* (i) foreclose against real or personal property collateral; (ii) exercise self-help remedies

> relating to collateral or proceeds of collateral such as setoff or repossession; or (iii) *obtain provisional or ancillary remedies such as* replevin, injunctive relief, attachment or *the appointment of a receiver, before,* during or after *the pendency of any arbitration proceeding. This exclusion does not constitute a waiver of the right* or obligation *of any party to submit any dispute to arbitration* or reference hereunder, including those arising from the exercise of the actions detailed in sections (i), (ii) and (iii) of this paragraph.

Credit Agreement, [ECF No. 114-1], § 7.11(c) at 14; *see also* Continuing Guaranty, [ECF No. 114-3], § 16(c) at 5. According to this provision, a party does not waive its right to arbitrate by seeking to foreclose, to exercise self-help remedies, or to obtain "provisional or ancillary remedies," such as the appointment of a receiver. To shoehorn the present lawsuit into this contractual language, Plaintiff says it filed this lawsuit for the purpose of having a receiver appointed.

The problem with this argument is that it rewrites history. Nothing in the Complaint indicates Plaintiff filed this lawsuit for the limited purpose of seeking appointment of a receiver. In fact, the word "receiver" does not appear in the Complaint. Instead, the Complaint requests entry of a monetary judgment in Plaintiff's favor, an accounting, and delivery of Appelbaum's financial statements. Complaint, [ECF No. 1], at p. 16–17. After filing the Complaint, Plaintiff waited more than three weeks to file its Motion to Appoint a Receiver and did not ask to expedite the process of briefing and resolving that Motion. Then, the day before and the day of the hearing, Plaintiff asked to have a settlement conference instead of proceeding to a hearing on the issue of a receiver. Ultimately, Plaintiff withdrew its Motion and decided not to seek the appointment of a receiver. I recite these events not to cast doubt on whether Plaintiff's Motion was meritorious or whether it was serious it wanted to have a receiver appointed. Instead, the purpose of this summary is to show that Plaintiff's conduct in this litigation, including its approach to the Motion to Appoint a Receiver, is not at all consistent with the proposition that

Plaintiff filed this lawsuit solely because it wanted to have a receiver appointed to protect its interests from immediate harm.

There is no question that as filed and litigated until now this case was a vehicle by which Plaintiff sought to resolve all of its contractual claims against Defendants and to obtain complete relief on those claims including entry of a monetary judgment. In fact, in their Rule 26(f) Report, which was filed on October 24, 2017, days after Plaintiff walked away from its motion seeking appointment of a receiver, the parties proposed complete discovery, pretrial, and trial schedules. The parties' description of the "Nature of the Claims" in that Report leads off by saying, "Plaintiff has brought this action for amounts owed to it pursuant to a Credit Agreement, Note, and Guaranty in connection with a commercial loan granted by Plaintiff to Defendants in 2014." Rule 26(f) Report, [ECF No. 69], at 1. The only mention of a receiver in that Report is by reference to Plaintiff's still technically pending, but as of then deferred, "Motion for Appointment of a Receiver" in the "Pending Motions" section of the Report. The parties proposed to take discovery on topics including the "a) History of the relationship between Plaintiff and Defendants; b) Communications preceding the alleged breach; c) Compliance with contractual terms. . . [; and] d) damages alleged by both Plaintiff *and Defendants*." *Id.* at 2 (emphasis added). The parties set forth their differing positions on when the case would be ready for trial on all claims asserted in this case arising from the lending relationship, with Plaintiff proposing July 2, 2018 and Defendants saying the case would be ready for trial on November 1, 2018. *Id.* at 3. Defendants' proposal in the Rule 26(f) Report made clear the claims that would be tried included "Defendants' contemplated counterclaims." *Id.* Clearly, the case as filed and litigated until November 14, 2017, was not limited to the issue of the appointment of a receiver.

Plaintiff next asserts that "a variety of circumstances may make [a] case abnormal" and thereby justify finding Plaintiff's election to proceed in a judicial forum does not result in waiver. Plaintiff's Omnibus Response and Reply, [ECF No. 114], at 15 (quoting *Cabinetree*, 50 F.3d at 390). Plaintiff relies on one Seventh Circuit case in which the court of appeals noted "that while normally the decision to proceed in a judicial forum is a waiver of arbitration, a variety of circumstances may make the case abnormal, and then the district court should find no waiver or should permit a previous waiver to be rescinded." *Cabinetree*, 50 F.3d at 391. The Seventh Circuit provided a non-exhaustive list of "abnormal cases," including those where: (1) "[t]here might be doubts about arbitrability, and fear that should the doubts be resolved adversely the statute of limitations might have run;" (2) "[s]ome issues might be arbitrable, and others not;" or (3) "[t]he shape of the case might so alter as a result of unexpected developments during discovery or otherwise that it might become obvious that the party should be relieved from its waiver and arbitration allowed to proceed." *Id.* None of these exceptions applies to this case, and Plaintiff does not identify any similar special circumstance.

Finally, Plaintiff argues Defendants would not be prejudiced by a finding that Plaintiff has not waived its right to arbitrate. Prejudice (or the lack thereof) is a factor in the totality of the circumstances analysis. *Physicians Healthsource, Inc. v. Allscripts Health Sols., Inc.*, 140 F. Supp. 3d 690, 693–94 (N.D. Ill. 2015). A showing or prejudice, however, is not "a prerequisite to a finding of waiver." *Id.*; *see also Grumhaus*, 223 F.3d at 653 ("The central question is whether the party against whom the waiver is to be found intended its selection and not whether either party would be prejudiced by the forum change."). As noted above, the Seventh Circuit in *Grumhaus* found Comerica was not prejudiced by the Grumhaus children's delay in demanding arbitration but still held the right to arbitrate had been waived. In this case, even if there were no

or only slight prejudice to Defendants from moving this case to arbitration now, I still would conclude Plaintiff has acted in a manner that is fundamentally inconsistent with the right to arbitrate for the reasons discussed above. Moreover, as explained below, Defendants also have established that they will be harmed if this case is dismissed without prejudice in the manner proposed by Plaintiff.

For all of these reasons, I recommend that the District Judge find Plaintiff has waived its right to arbitrate. Because Plaintiff's arbitration demand is its only justification for dismissal under Rule 41(a)(2), Plaintiff has not carried its burden to show dismissal is warranted. This alone is a sufficient basis to deny Plaintiff's Voluntary Motion to Dismiss.

B. Prejudice to Defendants within the Meaning of Rule 41(a)(2)

Plaintiff is seeking to have this action dismissed without prejudice and without any additional conditions. Defendants, though, argue they will be prejudiced unless a voluntary dismissal either is with prejudice or is conditioned on Plaintiff paying Defendants' attorneys' fees and costs. Plaintiff does not address Defendants' proposed conditions of dismissal. Rule 41(a)(2) permits a court to order that an action be dismissed "on terms that the court considers proper." FED. R. CIV. P. 41(a)(2). When deciding whether a case should be dismissed and, if so, on what terms or conditions, the court must consider whether a defendant will be unduly prejudiced. *Hernandez v. Chipotle Mexican Grill*, 2016 WL 7031571, at *1 (E.D. Wis. Dec. 2, 2016); *Wells Fargo Bank, N.A. v. Younan Properties, Inc.*, 2013 WL 251203, at *1 (N.D. Ill. Jan. 23, 2013), *aff'd*, 737 F.3d 465 (7th Cir. 2013). The court must ensure that a defendant will not suffer "plain legal prejudice" as a result of the dismissal. *Wojtas v. Capital Guardian Tr. Co.*, 477 F.3d 924, 927 (7th Cir. 2007). The court can "impose conditions on dismissal that are necessary to offset possible prejudice the defendant may suffer." *Hernandez*, 2016 WL

7031571, at *1.[6] Some of the factors that may be relevant when "determining whether the defendant has suffered 'plain legal prejudice'" are "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant." *Kovalic v. DEC Int'l, Inc.*, 855 F.2d 471, 473–74 (7th Cir. 1988) (quoting *Pace v. S. Exp. Co.*, 409 F.2d 331, 333 (7th Cir. 1969)).

Defendants argue they will suffer significant harm if Plaintiff's Voluntary Motion to Dismiss is granted without prejudice and without any additional conditions, as Plaintiff proposes. Throughout this litigation, Defendants have been required under the terms of the Loan Documents to pay not only their own but also Plaintiff's attorneys' fees and costs. As of November 16, 2017, Defendants say Plaintiff has charged them a total of $243,238.77 in attorneys' fees and costs that Plaintiff incurred in prosecuting this case from its inception. Defendants' Response to Motion to Dismiss, [ECF No. 79], at 3. Defendants contend it would be harmful to have to start over in a new forum after exerting significant effort and incurring significant expenses in this case.

Plaintiff does not address this issue beyond noting that some of the work done in this case, such as preparing the Complaint and the Answer, likely would be helpful in arbitration. In essence, Plaintiff's position is that it should not suffer any consequence for filing a lawsuit supposedly for the limited purpose of seeking the appointment of a receiver, never pressing for a decision on that motion, engaging in court-sponsored mediation, withdrawing its motion to

[6] "If a court imposes terms and conditions in accordance with Rule 41(a)(2), a plaintiff seeking dismissal without prejudice is not required to accept those conditions and instead has 'the option of withdrawing his motion . . . and proceeding instead to trial on the merits.'" *Uhrlaub v. Abbott Labs.*, 2017 WL 2130028, at *2 (S.D. Ill. May 17, 2017) (quoting *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994)).

appoint a receiver, filing a comprehensive litigation plan through trial, and then deciding to change forums and start over again, all while forcing Defendants to pay hundreds of thousands of dollars in their own and Plaintiff's attorneys' fees and costs. Plaintiff also does not say why, after months litigating in this Court, it now has decided to switch forums and move the case to arbitration. I conclude granting the dismissal without prejudice requested by Plaintiff in this context would be prejudicial to Defendants and not "proper" within the meaning of Rule 41(a)(2).

As noted above, Defendants propose two alternatives to remedy the prejudice to them from a voluntary dismissal: the Court either should dismiss the action with prejudice or require Plaintiff to pay the attorneys' fees and costs incurred by Defendants to date. I believe requiring Plaintiff to reimburse some, most, or all of the attorneys' fees and costs paid by Defendants in this case to date could mitigate the prejudice to Defendants of a dismissal without prejudice. Under Rule 41(a)(2), the court has discretion to include as a term of dismissal without prejudice that the plaintiff pay the defendants' attorneys' fees and costs. *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). In fact, "dismissals *without* prejudice are usually granted only if the plaintiff pays expenses incurred by the defendant in defending the suit up to that point." *Babcock v. McDaniel*, 148 F.3d 797, 799 (7th Cir. 1998); *see also 2010-1 SFG Venture LLC v. EP Milwaukee, LLC*, 2011 WL 4431745, at *4 (E.D. Wis. Sept. 22, 2011); *Wisconsin Cent. Transp. Corp. v. Miller Compressing Co.*, 2007 WL 4143220, at *1 (E.D. Wis. Nov. 19, 2007); 9 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 2366 (3d ed. 2001) ("[U]sually the district judge at least should require that the plaintiff pay the costs of the litigation and that practice has become commonplace[.]"). The plaintiff should not be required to reimburse expenses incurred in preparing work product that will be useful in subsequent litigation of the

same claim. *Wells Fargo Bank, N.A. v. Younan Properties, Inc.*, 737 F.3d 465, 468 (7th Cir. 2013); *see also Sacchi v. Levy*, 2015 WL 12765637, at *9 (C.D. Cal. Oct. 30, 2015) (distinguishing between expenses that likely would and would not be useful in subsequent litigation). The plaintiff also should not have to pay for expenses that were unnecessary and of the defendant's own making. *Heavy Duty Ramps LLC v. Advanced Aluminum Structures, Inc.*, 2014 WL 12656905, at *3 (E.D. Wis. July 21, 2014); *Gonzalez ex rel. A.R.Z. v. Tyrell*, 2006 WL 1706167, at *4 (W.D. Wash. June 16, 2006).[7]

The record now before me is not sufficient to determine what amount Plaintiff should be required to pay if it wants to dismiss this action without prejudice. The parties have not devoted much attention to this issue. Plaintiff entirely ignores the possibility that the Court may require repayment of attorneys' fees and costs as a condition of a voluntary dismissal without prejudice. Defendants broadly seek reimbursement of all their expenses without offering much justification for that approach. In this case, it is possible some of the parties' work product—such as Plaintiff's Complaint, Defendants' Answer, and some discovery—may prove useful in a subsequent arbitration. Other expenses perhaps may have been unnecessary and of Defendants' own making, such as those related to Defendants' Motion for Sanctions [ECF No. 81] discussed below. It would not be productive for me to prospect in this area without meaningful help from the parties. The parties would have to develop the record more fully for the Court to decide what

[7] Repayment of attorneys' fees and expenses can be conditioned on refiling (rather than on dismissal). *See Salazar v. Milton Ruben Chevrolet, Inc.*, 2007 WL 1185425, at *2 (S.D. Ga. Apr. 18, 2007). Because Plaintiff in this case seeks dismissal for the purpose of arbitrating its claims, I believe conditioning repayment on dismissal would be the more appropriate course.

amount of attorneys' fees and costs should be paid or repaid by Plaintiff as a condition of being permitted to dismiss this case without prejudice and refile it in another forum.[8]

Finally, Defendants already have suffered serious dislocation to their business as a result of the months-long limbo occasioned by Plaintiff's filing of this action, its on-again off-again request for the appointment of a receiver, and the ramping up and ramping down of preparations for a hearing on that issue. If Plaintiff no longer seeks the appointment of a receiver, then the parties need to resolve, by litigation or otherwise, the issues that brought them into court in the first place. Further delay in a resolution of the parties' dispute is not in anybody's interest. If the Court now were to grant Plaintiff's request for voluntary dismissal without any conditions so that Plaintiff can pursue its claims in arbitration, that most certainly would have the effect of delaying any resolution of the parties' dispute.

A summary of the above discussion may be helpful before moving on to the next motion. I recommend that the District Judge find that Plaintiff's election to proceed before a non-arbitral tribunal creates a presumption that Plaintiff has implicitly waived its right to arbitrate. Plaintiff has not rebutted that presumption and, considering the totality of the circumstances, Plaintiff has acted in a manner that is fundamentally inconsistent with the right to arbitrate by filing and litigating this case in the way it has done to date. Plaintiff's waiver of the right to arbitrate justifies denying its Voluntary Motion to Dismiss. Even if Plaintiff had not waived its right to arbitrate, I recommend that Plaintiff's Motion be denied for another reason. Dismissing the case without prejudice and with no additional conditions, as Plaintiff requests, would harm Defendants and would not be proper under Rule 41(a)(2). If the case were to be dismissed

[8] Again, Plaintiff does not address whether a different, more appropriate condition would suffice to make dismissal without prejudice proper. Plaintiff also does not say whether it would prefer to withdraw its Voluntary Motion to Dismiss and continue to litigate in this forum if the Court were to impose upon it the monetary terms of dismissal discussed above.

without prejudice, then Plaintiff should be required to pay some, most, or all of Defendants' attorneys' fees and costs in defending this case to date and, quite possibly, to reimburse WWS and/or Appelbaum for some portion of the attorneys' fees and expenses that it or they have had to pay under the Loan Documents, which it or they would not have had to pay if Plaintiff had not filed this case. The record, though, is inadequate to determine how much Plaintiff should pay in this regard and I do not recommend the District Judge go down that path. For all of these reasons, I recommend Plaintiff's Voluntary Motion to Dismiss [ECF No. 77] be denied.

2. Defendants' Motions to Amend

Defendants have filed two motions seeking leave to amend their Answer to add new affirmative defenses, counterclaims, and parties under Rule 15(a)(2) of the Federal Rules of Civil Procedure. Defendants' Motion to Amend, [ECF No. 83]; Defendants' Supplemental Motion to Amend, [ECF No. 87]. Defendants, however, did not attach to their Motion to Amend or to their Supplemental Motion to Amend the amended answer with additional affirmative defenses or the counterclaim that they propose to file. Rather, they said in their Motion to Amend that they "have not completed drafting their anticipated counterclaim." Motion to Amend, [ECF No. 83], at 2. Defendants did attach to their TRO Brief, filed about a week later, a document titled "Defendants' [Proposed] Amended Answer, Affirmative Defenses, and Counterclaim," [ECF No. 93-4]. In that document, Defendants purport to assert affirmative defenses based on the covenants of good faith and fair dealing (First Affirmative Defense), the doctrine of equitable estoppel (Second Affirmative Defense), and laches (Third Affirmative Defense). Defendants also include counterclaims for promissory estoppel (Count I), violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count II), intentional infliction of emotional

distress (Count III), abuse of process (Count IV), breach of fiduciary duty (Count V), and tortious interference with business expectancy (Count VI).

Plaintiff assumes the document attached to Defendants' TRO papers is the new pleading that Defendants plan to file. It argues the Court should not permit Defendants to file that pleading under Rule 15 because the new affirmative defenses and counterclaims are not viable as a matter of law, so any such amended filing would be futile. Defendants summarize the affirmative defenses and counterclaims that they want to file, argue that leave to amend is freely granted under Rule 15, and assume Plaintiffs will file a motion to dismiss the new pleading, which would be the time to test the viability of Defendants' new defenses and claims.

Under Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave." FED. R. CIV. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.*; *see also Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 520 (7th Cir. 2015) (emphasizing the importance of "the liberal standard for amending under Rule 15(a)(2)"). The court may deny leave to amend "in the case of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.'" *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (quoting *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007)). A proposed amendment is futile when it cannot survive a motion under Rule 12 of the Federal Rules of Civil Procedure. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014); *Waters Indus., Inc. v. JJI Int'l, Inc.*, 2012 WL 5966534, at *1 (N.D. Ill. Nov. 28, 2012); *Israel v. Israel*, 2014 WL 6685517, at *5 n.6 (N.D. Ill. Nov. 25, 2014).

Defendants point out a flaw with Plaintiff's position that the Court should deny Defendants leave to file an amended answer with additional affirmative defenses and counterclaims. They note that, in the Scheduling Order entered by the then-presiding District Judge in this case in accordance with the parties' Rule 26(f) Report, Defendants were "given to and including 3/1/2018 to amend all pleadings and to add any additional parties." Scheduling Order, [ECF No. 70]. In their Rule 26(f) Report, the parties agreed Plaintiff would have until February 1, 2018, and Defendants would have until March 1, 2018, to amend their respective pleadings. Rule 26(f) Report, [ECF No. 69], at 2. Therefore, Defendants say "[a]rguably . . . [they] do not even require leave under Rule 15, since [Plaintiff] consented in writing that Defendants had until March 1, 2018 to file counterclaims and add parties." Motion to Amend, [ECF No. 83], at 4.

Defendants arguably are correct that they do not need leave of court to file an amended answer with additional affirmative defenses and counterclaims in light of the earlier Scheduling Order. An order like the one entered in this case, though, usually means that a party cannot claim, and the court will not find, that another party waited too long to move to file an amended pleading if it does so within the time period provided by the scheduling order. It does not mean that a party has free license to add any defenses or claims regardless of whether they pass legal muster. The Scheduling Order, for example, would not prevent Plaintiff from moving to dismiss whatever new pleading Defendants filed of record for any reason other than that it was not timely filed.

The problem here, of course, is that Defendants have not presented the Court or Plaintiff with the actual amended pleading they wish to file. Both parties, however, largely ignore this technical legal nicety. Plaintiff presumes the draft document that Defendants attached to their

TRO Brief is the operative document Defendants intend to file if they are given leave to do so. Plaintiff may be correct in this assumption. Although Defendants say in their original Motion to Amend that they have not yet finished drafting their proposed counterclaim [ECF No. 83 at 2], seven days later Defendants filed their TRO Brief and attached to it a proposed amended answer that included six counterclaims (and three affirmative defenses) [ECF No. 93-4]. Two weeks after that, having successfully defended against Defendants' Motion for a Temporary Restraining Order, Plaintiff filed its Omnibus Response and Reply to the motions now pending before this Court. In that filing, Plaintiff adopted and re-asserted many of the arguments it made in opposition to Defendants' Motion for a Temporary Restraining Order and attacked the proposed affirmative defenses and counterclaims in the amended answer attached to Defendants' TRO Brief. Defendants, though, still have not filed the proposed amended answer as an exhibit to their pending motions to amend nor do they say definitively that the proposed amended answer attached to their TRO Brief is the final document they intend to file if they are given leave to amend. Defendants also do not engage with Plaintiff's legal arguments as to the viability of their new affirmative defenses or counterclaims. They just assume they either already have leave to file their amended pleading, since it is timely under the Scheduling Order, or that, since leave to amend is freely given under Rule 15, they should be allowed to file whatever pleading they want to file and Plaintiff's legal arguments should be addressed only if Plaintiff chooses to file a motion to dismiss that pleading.

Although Plaintiff spends much time in its Omnibus Response and Reply attacking the legal sufficiency of the defenses and claims it assumes Defendants want to file, it is premature for the Court to delve deeply into a hypothetical pleading before it actually is filed or presented for filing. That is particularly true here since many of the allegations laid out in Defendants'

proposed pleading submitted with its TRO Brief are conclusory in nature. Plaintiff attacks that "pleading," in part, on that basis but it is possible that Defendants will flesh out some of those allegations before they actually file their amended answer. In addition, because Defendants do not really respond to any of Plaintiff's arguments as to the legal sufficiency of their additional affirmative defenses or counterclaims, in light of their reliance on the Scheduling Order as authorizing the filing of an amended answer and counterclaims, the Court would have to try to divine the arguments Defendants would make on the merits if they had responded to Plaintiff's futility arguments under Rule 15. The document attached as an exhibit to Defendants' TRO Brief also does not allege counterclaims against any individuals even though Defendants say they may add such individual defendants with their counterclaims. Defendants' Motion to Amend Answer to Add a Counterclaim *and New Parties*, [ECF No. 83] (emphasis added); Defendants' Supplemental Motion to Amend Answer to Add a Counterclaim *and New Parties*, [ECF No. 87] (emphasis added). So, preliminary analysis conducted at this stage without an actual pleading on file or responsive briefing from Defendants could be largely a wasted effort. Although Plaintiff is correct that the Court can deny a motion for leave to amend if the proposed defenses or claims are futile, *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997), Defendants' position that such an analysis is premature now given the Scheduling Order and the lack of a definitive proposed pleading on file is not unreasonable.

The bottom line is that it is impossible to determine whether the affirmative defenses or counterclaims Defendants wish to file are viable or futile without reviewing the actual pleading Defendants propose to file. I am not willing to assume that the document attached to Defendants' TRO Brief is the final document they intend to file if given leave to do so. A filing is not final until it is filed or at least attached to a motion seeking leave to file it. Under these

circumstances, the Court agrees with Defendants either that the Scheduling Order provides them with leave to file their amended pleading or that leave should be granted now for them to file that pleading. In either case, Plaintiff is not prevented from challenging the legal sufficiency of Defendants' defenses or claims by motion. I considered whether to require Defendants to submit their actual amended pleading before ruling on their motions to amend but that would not obviate the need for another round of briefing and it would just delay a decision on Defendants' pending motions to amend. In my view, the better way to present the issue to the District Judge for decision is for Defendants to file their amended answer and for Plaintiff to file whatever it wants to file to challenge the actual defenses and claims made by Defendants. Accordingly, I recommend that Defendants' Motion to Amend [ECF No. 83] and Supplemental Motion to Amend [ECF No. 87] be granted.

Plaintiff also argues, however, that the District Judge now presiding in this case already decided in the TRO Order that certain of Defendants' proposed affirmative defenses and counterclaims are not viable. That issue is ripe now because it can be determined as a matter of law. In essence, Plaintiff again is invoking the law-of-the-case doctrine. As already noted, though, that doctrine does not apply to rulings at the preliminary injunction stage (unless the rulings are based on pure issues of law). *Howe*, 801 F.3d at 740; *Sherley*, 689 F.3d at 782; *Am. Civil Liberties Union*, 534 F.3d at 187; *Highway J Citizens*, 656 F. Supp. 2d at 881. Once again, there is no self-evident reason why the same should not be true of rulings at the temporary restraining order stage because "[t]he standards for issuing a temporary restraining order are the same as for a preliminary injunction." TRO Order, [ECF No. 101], at 1. There is another problem with Plaintiff's argument. The District Judge explicitly stated in the TRO Order that, "This ruling is based on the limited evidentiary record supplied in connection with the motion

and is without prejudice." *Id.* at 4. Therefore, I recommend that the District Judge find the TRO Order does not definitively resolve whether Defendants' proposed affirmative defenses and counterclaims are proper under Rule 15(a)(2).

3. Defendants' Motion for Sanctions

Defendants have moved for sanctions under 28 U.S.C. § 1927. Defendants' Motion for Sanctions, [ECF No. 81]. Section 1927 provides that "[a]ny attorney . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. "The purpose of § 1927 'is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them.'" *Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832, 835 (7th Cir. 2005) (quoting *Kapco Mfg. Co. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989)). Sanctions under § 1927 are appropriate only when an attorney has acted with subjective or objective bad faith. *Tate v. Ancell*, 551 F. App'x 877, 891 (7th Cir. 2014).[9] As the Seventh Circuit has put it, "[A] lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law." *Id.* (quoting *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985)). It is "highly unusual" for courts to award sanctions under § 1927. *Boldischar v. Reliastar Life Ins. Co.*, 2017 WL 4046350, at *3 (N.D. Ill. Sept. 12, 2017).

Defendants argue Plaintiff's attorneys have acted unreasonably and vexatiously in this case. According to Defendants, Plaintiff's attorneys have engaged in harassing, punitive, and needlessly expensive litigation by seeking the appointment of a receiver without sufficient basis in law or fact and pursuing this case for months in this court before changing horses and

[9] When an attorney's conduct "had an objectively colorable basis," subjective bad faith must be shown to justify sanctions. *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006).

demanding arbitration instead. Defendants' Motion for Sanctions, [ECF No. 81], at 1. As Defendants point out, they are paying their own and Plaintiff's attorneys' fees and costs in this litigation. Defendants make both of these arguments at a 30,000-foot level without much effort to show Plaintiff's positions in this case have been objectively meritless or pursued subjectively in bad faith. In response, Plaintiff claims Defendants defaulted under various provisions of the Loan Documents and, thus, Plaintiff was entitled to take any of a variety of steps, including filing a lawsuit to collect the amounts Defendants are legally obligated to pay. Plaintiff also defends the soundness of its Motion to Appoint a Receiver and justifies its withdrawal of the motion as a change in tactics.

In my view, this is not an "unusual" case where § 1927 sanctions are appropriate, at least on the record developed to date. As an initial matter, the requested sanction does not fit the supposedly sanctionable conduct. Defendants are seeking repayment of all attorneys' fees and costs they have been required to pay, but they only attack the soundness of Plaintiff's Motion to Appoint a Receiver and Plaintiff's Voluntary Motion to Dismiss. If Plaintiff filed individual motions that were without merit, then the sanction should be tied to that supposed misconduct. Defendants do not argue Plaintiff filed this lawsuit for the sole purpose of pushing these two supposedly meritless motions. In fact, as discussed previously in this Report and Recommendation, Defendants take the position that Plaintiff has sought to fully litigate its claims in federal court (thereby waiving its right to arbitrate those claims).

In any event, Plaintiff filed this lawsuit to pursue claims that, regardless of which party ultimately prevails on the merits, may have some reasonable basis in fact and law. That Defendants disagree on the merits does not make Plaintiff's position legally untenable or bankrupt. Plaintiff sought the appointment of a receiver after it called a default under the Loan

Documents and because of what it perceived to be the material deterioration of WWS's business which increased the risk that Defendants would not be able to satisfy their obligations under the Loan Documents. Regardless of whether Plaintiff would have prevailed on that motion if it were not withdrawn, the motion does not appear to have been completely baseless and there has not yet been a judicial finding to that effect. At the end of the day, Defendants are upset they are being saddled with Plaintiff's (and their own) attorneys' fees and that Plaintiff is aggressively enforcing its rights even though doing so potentially could make all parties worse off. *See generally* TRO Order, [ECF No. 101]. Defendants' frustration is understandable, but they agreed to pay Plaintiff's attorneys' fees and costs in the event of a default (which has been alleged), and the Loan Documents contemplate the self-help and other actions that Plaintiff has taken to date. *See generally id.* If it turns out that Plaintiff's claims are completely without merit and were so at the outset of this case, then it is possible that Defendants will not be without redress for the economic damage and loss they say they have suffered. At this juncture, however, Defendants' Motion for Sanctions is not well-founded. Therefore, I recommend Defendants' Motion for Sanctions [ECF No. 81] be denied without prejudice.

III. CONCLUSION

Accordingly, for all of the reasons stated above, I recommend that:

1) Plaintiff's Voluntary Motion to Dismiss [ECF No. 77] be denied;
2) Defendants' Motion to Amend Answer to Add a Counterclaim and New Parties [ECF No. 83] be granted;
3) Defendants' Supplemental Motion to Amend Answer to Add a Counterclaim and New Parties [ECF No. 87] be granted; and
4) Defendants' Motion for Sanctions [ECF No. 81] be denied without prejudice.

Specific written objections to this Report and Recommendation may be served and filed within 14 days from the date that this order is served. FED. R. CIV. P. 72. Failure to file objections with the district court within the specified time will result in a waiver of the right to appeal all findings, factual and legal, made in this Report and Recommendation. *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995).

Jeffrey T. Gilbert
United States Magistrate Judge

Dated: December 29, 2017