IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re TRUECAR, INC. SHAREHOLDER DERIVATIVE LITIGATION	Lead Case No. 1:19-cv-00617 (Consolidated with Case No. 1:19-cv-00625)
This Document Relates To: ALL ACTIONS	

PLAINTIFFS' OPPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING TRANSFER TO MDL NO. 2900

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Plaintiff Ara Afarian ("Plaintiff") respectfully submits this opposition to Defendants'[1] Motion to Stay Proceedings Pending Transfer to MDL No. 2900 (the "Motion").

INTRODUCTION

Defendants seek to stay the above captioned consolidated shareholder derivative action (the "Action") on the most illogical of grounds: the Action pending in this Court should be stayed, according to Defendants, so that the Action may ultimately proceed in this Court pursuant to the MDL proceedings. Conveniently for Defendants, the Action ***is already in the District of Delaware***. Defendants therefore cannot raise the specter of prejudice and seek to stay the litigation when the Action is already in the same forum of their choice.

Crucially, the entirety of the Motion forgets (or deliberately ignores) that as the party moving for a stay, Defendants have the heavy burden of demonstrating why such "extraordinary" relief is appropriate. Defendants have simply failed to articulate a clear case of hardship or inequity and on that basis, their Motion necessarily fails.

Indeed, this Action and the shareholder derivative action pending in federal court in California (the "California Derivative Action") are both in their relative stages of infancy. Neither case has progressed beyond the motion to dismiss stage. Accordingly, there is no risk of differing findings or conflicting rulings, as such rulings or findings will be made in the future. Instead, the only deadline in the Action is the deadline for Defendants' response to the Complaint – an event that will occur no matter where the derivative litigation proceeds.

At bottom, Defendants' Motion is simply a means to delay and hold up the litigation – which is not supported by the facts, nor justified by any economic considerations. It should be

[1] "Defendants" refers to Victor Perry, Michael Guthrie, John Pierantoni, Abhishek Agrawal, Robert Buce, Christopher Claus ("Claus"), Steven Dietz, John Krafcik, Erin Lantz, John Mendel, Wesley Nichols and Ion Yadigaroglu (collectively, the "Individual Defendants"), and nominal defendant TrueCar, Inc. ("TrueCar" or the "Company").

noted that several of the Individual Defendants are also named as defendants in the federal securities class action captioned *Milbeck v. True Car, Inc., et al*., Case No. 2:18-cv-02612-SVW-AGR (C.D. Cal.) (the "Securities Class Action"), in which, on February 5, 2019, the Honorable Stephen V. Wilson denied the defendants' motion to dismiss. The Action and the California Derivative Action are the only litigation, which seeks to hold the Individual Defendants responsible for the harm they inflicted upon the Company. For those reasons, and those stated herein, the Motion should be denied.

STATEMENT OF FACTS[2]

According to its public filings, TrueCar is an internet-based automobile marketplace for new and used cars that, according to its website, purports to give consumers the "TruePrice – the Actual Price You Will Pay at the Dealership." ¶1.

TrueCar's business model depends on its ability to attract consumers to its website, where users receive pricing information and are matched to TrueCar certified dealers. ¶3. According to the Company's filings with the U.S. Securities and Exchange Commission, a majority of the cars purchased by the users of TrueCar's website are directed to the site by TrueCar's "affinity group marketing partners." *Id*. These partners are financial institutions and member organizations that direct members to the TrueCar web platform, in exchange for marketing fees. *Id*.

The United States Automobile Association ("USAA") historically has been the most important partner for TrueCar, having generated nearly one-third of the Company's annual unit sales and revenues. ¶4. USAA was also TrueCar's largest shareholder, and TrueCar's Chairman of the Board during the Relevant Period was Claus, a former senior executive of USAA. ¶6.

[2] Citations to the Verified Stockholder Derivative Complaint (ECF No. 1) shall appear in the following format: "¶_."

From at least February 2017, the Individual Defendants caused the Company to issue false and misleading statements concerning the Company's business, operational, and compliance policies, and repeatedly assured investors that the Company's growth and revenues would continue throughout 2017 and beyond, based, in part, on TrueCar's partnership with USAA. ¶8.

Specifically, the Individual Defendants made or caused TrueCar to make false and/or misleading statements and/or failed to disclose that: (i) USAA, the Company's most important affinity partner, would be making significant changes to the co-branded websites used by TrueCar customers; (ii) these changes would have a material adverse effect on the volume of purchases generated by USAA; (iii) as a result, TrueCar's growth and revenues would be adversely affected; and (iv) as a result of the foregoing, TrueCar's public statements were materially false and misleading at all relevant times. *Id.* In reality, however, the Individual Defendants were aware that USAA would implement significant website changes in June 2017 and that these changes would cause the Company's website traffic, sales, and revenues to materially decline. ¶7.

But not everyone was harmed by the Individual Defendants' ongoing course of wrongdoing and acts of concealment. As TrueCar's stock rose to record highs based on the misrepresentations of the Individual Defendants, certain officers and directors of TrueCar sold their shares for tens of millions of dollars. ¶12.

In addition, on April 26, 2017, the Company closed a secondary offering of 10.35 million shares of common stock at a price of $16.50 per share (the "Secondary Offering"). ¶13. USAA and other shareholders, including several entities associated with members of TrueCar's Board of Directors, realized $151.8 million, or approximately 90%, of the proceeds from the Secondary Offering. *Id.*

As a result of this alleged misconduct, the Complaint alleges ten causes of action against

the Defendants. These allegations include: breaches of fiduciary duty against the Individual Defendants for disseminating false information (¶¶209-214), insider selling (¶¶229-233), abuse of control and gross mismanagement (¶¶234-242), unjust enrichment (¶¶248-252) and corporate waste. ¶¶243-247. The Complaint also alleges violations of the federal securities laws by the Individual Defendants, specifically §29(b), §10(b), §21D of the Securities Exchange Act of 1934. Finally, the Complaint alleges that USAA conspired to engage in the Individual Defendants insider selling and misappropriation of inside information. ¶¶253-259.

ARGUMENT

I. Legal Standard Governing Stay

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). However, federal courts have traditionally found that a stay of litigation is an "extraordinary remedy" to be imposed only in exceptional circumstances. *See, e.g., Cherokee Nation of Okla. v. U.S.*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (holding that a "pressing need" is required for a stay); *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation" of a federal court to exercise its jurisdiction); *Intel Corp. v. Advanced Micro Devices*, 12 F.3d 908, 912 (9th Cir. 1993) ("[o]nly exceptional circumstances justify . . . a stay").

Notably, "the burden is on the party seeking the stay to show that there is pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order." *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977); *accord Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Landis*, 299 U.S. at 256 ("the burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily on" those

seeking a stay). As held by the United States Supreme Court, "[a] stay of an action requires a balancing of the interests of the plaintiff, the interests of the defendant, all with an eye to the efficient and fair administration of the machinery of justice." *Carlton Invs. v. TLC Beatrice Int'l Holding*, No. Civ. A. 13950, 1996 WL 33167168, at *9 (Del. Ch. June 6, 1996). "Only in rare circumstances" should stays should be granted. *Landis*, 299 U.S. at 254-55.

As the party requesting the extraordinary remedy of a stay, Defendants bear the heavy burden of establishing their right to the requested stay. The Supreme Court explained this heavy burden in *Landis:*

> [T]he suppliant for a stay must make out a ***clear case*** of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.

299 U.S. at 255 (emphasis added). In exercising its discretion in considering a stay of litigation then, the Court must weigh the interests affected by the proposed stay, including possible damages that may result from the granting of a stay and the orderly course of justice measured in terms of simplifying or complicating of issues, proof and questions of law which could be expected to result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Here, Defendants have fallen far short of articulating a clear case in favor of a stay, and as such, the scales tip decidedly toward denial of the requested stay.

II. This Court Has Jurisdiction Over This Matter Until the MDL Panel Has Entered a Transfer Order

As a threshold matter, Defendants ignore the well-established rule that the filing of a motion for consolidation before the MDL Panel does not act as a stay of the litigation before this Court. The rules of procedure governing multidistrict litigation expressly state that "[t]he pendency of a motion . . . before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court

in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." J.P.M.L. Rule 1.5 (emphasis added); *see also Boudreaux v. Metropolitan Life Ins. Co.*, No. 95-138, 1995 U.S. Dist. LEXIS 2656, at *3 (E.D. La. Feb. 24, 1995) (quoting *In re Air Crash Disaster at Paris*, 376 F. Supp. 887 (J.P.M.L. 1974) ("The pendency of the transfer order does not in any way defeat or limit the authority of this Court to rule upon matters properly presented to it for decisions."); *Terkel v. AT&T, Inc.*, No. 06 C 2837, 2006 U.S. Dist. LEXIS 42906, at *3 (N.D. Ill. June 9, 2006) (citing a letter from MDL Panel which stated that the district court's "jurisdiction continues until any transfer ruling by the Panel becomes effective.")

The Manual for Complex Litigation (Fourth) confirms this Court's jurisdiction pending a ruling by the MDL Panel. *See* Manual for Complex Litigation (Fourth) ("Manual") § 20.131 ("During the pendency of a motion (or show cause order) for transfer . . . the court in which the action was filed retains jurisdiction over the case."). The Manual similarly encourages trial courts in matters such as these to address case management issues as early as possible. Manual at § 21.11.

III. The Action Is Already in Defendants' Preferred Forum

Defendants' assertion that the litigation should be stayed so that they may consolidate the derivative actions in the very same forum as their choosing is illogical to say the least. Defendants have already expressed an interest in litigating the Action in this Court, so the most reasonable and logical course of action is to allow the litigation to move forward here – as Defendants have articulated in their motion to transfer. Instead, Defendants seek to hold up the litigation and try to avoid having to answer for the harm they caused the Company under the guise of a stay. But delay is simply not an appropriate or justifiable rationale for staying the Action.

Contrary to their assertions, Defendants would not be faced with any hardship or inequity by allowing the case management issues to be decided and requiring them to answer Plaintiff's

complaint. While Defendants note the existence of other pending cases, to the extent that Defendants contend that such cases demonstrate hardship or inequity, that argument should fail. *Gallardo v. Aurora Dairy Corp.*, No. C07-05331 MJJ, 2008 U.S. Dist. LEXIS 7730, at *6 (N.D. Cal. Jan. 23, 2008) ("While it is true that there are other similar cases filed against Defendant in other jurisdictions, this alone does not show hardship and inequity."). Notably, this is not a case where hundreds of complaints have been filed in jurisdictions across the nation – there are only two pending actions, *total*, pending in just two forums.

Ultimately, should the MDL Panel decide to consolidate the derivative actions and rule that the actions should be litigated in this forum, Defendants will not be prejudiced by having a "head start" with respect to the proceedings here. But, even if the MDL Panel transfers this litigation elsewhere, there is no harm in having the cases pending before this Court efficiently organized and on schedule as they move to another District. Individual Defendants, Plaintiff, and, most notably, TrueCar, will benefit from an efficiently organized matter. Moreover, even if Defendants were required to file and brief a motion to dismiss, given the similarity of the claims asserted against Defendants in the respective derivative actions filed against them, such efforts would not be wasted and could be used by the parties before the transferee court.

IV. Judicial Economy Favors Denying a Stay

Here, judicial economy clearly favors denying a stay. A stay here would simply result in wasted time. While Defendants assert that any effort before this Court – such as drafting responses to the complaint – may be wasted upon transfer, courts recognize that efforts incurred by parties prior to transfer are not wasted. Any work Defendants perform, such as responding to the complaint or providing discovery, would have to be done anyway. *See Falk v. GMC*, No. C 07-01731 WHA, 2007 U.S. Dist. LEXIS 80864, at *7 (N.D. Cal. Oct. 22, 2007) (court denied motion for stay, stating inter alia, "[d]efendant[s] would have to turn over the same documents, and

plaintiffs would have to depose the same witnesses whether or not these actions are consolidated and transferred"); *see also In re H & R Block Mortg. Corp.*, No. 06-MD-230 (MDL 1767), 2007 U.S. Dist. LEXIS 68032, at *11 (N.D. Ind. Sept. 12, 2007) ("the risk of duplicating work performed by a single attorney, or single law firm, in two matters that involve the same standard and the same statute is not an appropriate justification to stay this case").

And, although Defendants recite the well-worn mantra of the risk of "inconsistent decisions," Defendants have not pointed to any specific pending motions or pretrial proceedings in any of the other courts which create this risk. *See Boudin v. ATM Holdings, Inc.*, No. 07-0018-WS-C, 2007 U.S. Dist. LEXIS 47067, at *3 (S.D. Al. June 27, 2007) ("A risk of inconsistent results arises only when different judges rule on similar motions. [Citation omitted.] Because the [movant] has not even alleged that the MDL Court is addressing similar issues under RESPA, no such risk has been shown" and the motion to stay was denied). That is because there is no immediate risk. Accordingly, a stay is not warranted.

V. TrueCar Will Be Prejudiced If a Stay Is Granted

It is not surprising that courts routinely reject proposals to delay proceedings while a motion before the MDL Panel is pending where the delay "may prejudice plaintiffs' rights to expeditious adjudication of their claims in the event that the matter is not transferred." *Grider v. Keystone Health Plan Cent., Inc.*, No. Civ.A.2001-CV-05641, 2004 WL 1047840, at *1, n.1 (E.D. Pa. May 5, 2004); *see also St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 613 (D. Del. 2011) (finding prejudice to nonmoving party because of delay); *Albert Fadem Trust v. Worldcom, Inc.*, No. 02-Civ-3288 (DLC), 2002 U.S. Dist. LEXIS 12572, at *7 (S.D.N.Y. July 12, 2002) (rejecting requested delay of proceedings pending decision by MDL Panel because delay "would be detrimental to the interests of the proposed class"). The real party

in interest in the Action is not Plaintiff, but TrueCar. And it is TrueCar that would be prejudiced by such a delay.

The Individual Defendants are self-interestedly seeking a stay in order to delay litigation that is targeting them – using speculative harm to the Company as a shield. In reality, a stay only would further harm TrueCar as it would be forced to wait to have its claims proceed, and permit those accused of mismanaging and damaging the Company to remain in their leadership positions.

CONCLUSION

For the reasons stated herein, the Motion should be denied.

Dated: May 22, 2019

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