IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEE NEUKRANZ, individually and as heir of the ESTATE OF LLOYD NEUKRANZ, and on behalf of a class of similarly situated persons,	§	
Plaintiffs,	§	
v.	§	**Case No. 3:19-cv-01681-L**
CONESTOGA SETTLEMENT SERVICES, LLC; CONESTOGA INTERNATIONAL, LLC; CONESTOGA TRUST SERVICES, LLC; L.L. BRADFORD AND COMPANY, LLC; PROVIDENT TRUST GROUP, LLC; STRATEGIX SOLUTIONS, LTD.; and MICHAEL MCDERMOTT,	§	
Defendants.	§	

DEFENDANTS CONESTOGA SETTLEMENT SERVICES, LLC; CONESTOGA INTERNATIONAL, LLC; CONESTOGA TRUST SERVICES, LLC; AND MICHAEL MCDERMOTT'S
MOTION TO STAY PENDING ARBITRATION AND SUPPORTING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

THE HONORABLE JUDGE OF SAID COURT:

Defendants Conestoga Settlement Services, LLC, Conestoga International, LLC, Conestoga Trust Services, LLC, and Michael McDermott (collectively "Conestoga Defendants") file this motion to stay pending arbitration and brief in support, and would show as follows:

BACKGROUND

Dee Neukranz, individually (Dee) and in her capacity as heir of the Estate of Lloyd Neukranz (Estate), brings this putative class action on behalf of a class of purported similarly situated persons (collectively "Plaintiffs") against the Conestoga Defendants; L.L. Bradford and Company, LLC (Bradford); Provident Trust Group, LLC (Provident); and Strategix Solutions, Ltd. (Strategix) (collectively Defendants). (docs. 1-4, 21.) All of Plaintiffs' claims concern the same investment in the same life settlement policies. (*See id.*) Dee and the Estate each assert the same claims to recover the same damages against the same Defendants based on the same operative facts for breach of fiduciary duty, conversion, civil conspiracy, and violations of the Texas Theft Liability Act (TTLA), and the Estate asserts separate claims against all Defendants based on the same operative facts for fraud and fraud by non-disclosure. (doc. 21 at 44-60.)

Provident moved to compel arbitration based on language in the Custodial Agreement between it and Dee. (doc. 9.) The Court has recommended that Provident's motion to compel arbitration be denied as to the Estate and granted as to Dee. (doc. 105.) The Court's April 14, 2020 Order provides that "[n]o later than April 29, 2020, the parties may file briefs containing citations to relevant authorities regarding whether this action should be stayed pending the outcome of arbitration or dismissed with prejudice." (doc. 121 at 2-3) For the reasons that follow, this action should be stayed pending the outcome of arbitration

ARGUMENT AND AUTHORITIES

A. Litigation involving even non-signatories to an arbitration agreement can be stayed pending arbitration of related claims pursuant to either FAA Section 3 (mandatory) or the Court's inherent power (discretionary).

1. Mandatory stay pursuant to Section 3.

Section 3 of the Federal Arbitration Act ("Section 3") provides that a district court must stay a lawsuit when a party demonstrates that any issue involved in the suit is "referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3; *Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 754 (5th Cir. 1993). The provision is mandatory and demands a stay of legal proceedings "whenever the issues in a case are within the reach of an arbitration agreement." *Id.* at 754 (quoting *Midwest Mech. Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748 (5th Cir. 1986)).

Though often applied to signatories to an arbitration agreement, Section 3 also "gives a non-signatory litigant standing to apply for a stay when the litigation involves 'any issue referable to arbitration.'" *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 342-43 (5th Cir. 2004) (emphasis added), quoting Section 3. Specifically, the Fifth Circuit has held that Section 3 "may be applied with respect to claims against non-signatories if (1) the arbitration and litigation involve the same operative facts, (2) the claims asserted are inherently inseparable, and (3) the litigation could have a critical impact on the arbitration." *Waste Mgmt*., 372 F.3d at 343-55. When these circumstances are present, the litigation involving non-signatories is stayed pending the arbitration between signatories to the arbitration agreement. *Id*.

2. Discretionary stay pursuant to Court's inherent power.

Even where a stay is not mandatory under Section 3, it is "within the district court's discretion to stay the claims between the nonarbitrating parties pending outcome of the arbitration

simply as a means of controlling its docket." *Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 755 (5th Cir. 1993), citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 at n. 23 (1983). Such power 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). Determining whether to issue a discretionary stay "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55.

"Thus, even if a mandatory stay is not warranted here, this Court may order a discretionary stay because the facts and claims underlying the arbitration and litigation proceedings significantly overlap." *Hallam v. Southaven R.V. Ctr., Inc.*, 3:18-CV-220-DMB-RP, 2019 WL 4675380, at *4 (N.D. Miss. Sept. 25, 2019); citing *Broussard v. First Tower Loan*, LLC, CV 15-1161, 2016 WL 879995, at *6 (E.D. La. Mar. 8, 2016) (concluding that while the *Waste Management* factors did not weigh in favor of a mandatory stay due to a failure of the second factor, they nonetheless weighed in favor of a discretionary stay); *see also, e.g., Suzlon Infrastructure, Ltd. v. Pulk*, CIV. A. H-09-2206, 2010 WL 3540951, at *11 (S.D. Tex. Sept. 10, 2010) ("In sum, even if the factors set out in *Waste Management* do not require a stay under section 3, those factors, on the present record, support a discretionary stay.").

B. Dee's claims against all Defendants should be stayed pending the outcome of the arbitration of Dee's claims against Provident as they are based on the same facts and transactions and seek the same damages.

Although the Conestoga Defendants are non-signatories to the arbitration agreement between Dee and Provident, Section 3 "gives a non-signatory litigant standing to apply for a stay when the litigation involves 'any issue referable to arbitration.'" *Waste Mgmt.*, 372 F.3d at 342–43. Section 3 "may be applied with respect to claims against non-signatories" when, as here: (1)

the arbitration and litigation involve the same operative facts, (2) the claims asserted are inherently inseparable, and (3) the litigation could have a critical impact on the arbitration." *Waste Mgmt.*, 372 F.3d at 343-45.

As noted above, "[e]ven if a mandatory stay is not warranted, a case may still be stayed 'in accordance with the court's inherent authority.'" *Qualls v. EOG Res., Inc*., CV H-18-666, 2018 WL 2317718, at *2 (S.D. Tex. May 22, 2018) (citation omitted). In the present case, "even if the factors set out in *Waste Management* do not require a stay under section 3, those factors, on the present record, support a discretionary stay." *Suzlon Infrastructure, Ltd*, 2010 WL 3540951, at *11; *see also, Broussard*, 2016 WL 879995, at *6 (collecting cases).

As will be shown, Dee's claims against the Conestoga Defendants should be stayed pending the outcome of the arbitration of Dee's claims against Provident. All three *Waste Mgmt*. factors weigh heavily in favor of a mandatory stay given that Dee's claims against the Conestoga Defendants are based on the very same facts and transactions and seek the very same damages as Dee's claims against Provident. Alternatively, and at the very least, a discretionary stay is warranted under the circumstances.

1. Operative facts: the Conestoga Lawsuit and Provident Arbitration arise out of the very same operative facts.

The first factor to consider is whether the litigation and arbitration involve the same operative facts. Dee is asserting identical claims against Provident and the Conestoga Defendants based on the very same transactions. Central to all of the Plaintiffs' claims is that Provident and the Conestoga Defendants allegedly made the same actionable misrepresentations regarding the very same investment transactions. The following chart highlights the overlapping (essentially identical) nature of Dee's claims to be arbitrated ("Provident Arbitration") and her remaining

claims to be litigated against the Conestoga Defendants ("Conestoga Litigation"). References below to Plainitffs' allegations are to paragraphs of the Amended Complaint, doc. 21.

CONESTOGA LITIGATION	**PROVIDENT ARBITRATION**
This is a fraud case relating to marketing and sale of certain life settlement contracts. ¶ 1. Misrepresentations by Conestoga Defendants caused Bill Neukranz to invest $770,000 for fractional interests in eleven life settlements. ¶ 152-53; *see also* ¶ 139.	This is a fraud case relating to marketing and sale of the very same life settlement contracts. ¶ 1. Misrepresentations by Provident caused Bill Neukranz to invest the same $770,000 for fractional interests in the same eleven life settlements. ¶ 152-53; *see also* ¶ 139.
Bill Neukranz (and beginning in mid 2019, Dee), have incurred thousands of dollars in additional costs to pay undisclosed, oversized, and untimely premium demands. ¶ 154.	Bill Neukranz (and beginning in mid 2019, Dee), have incurred the same thousands of dollars in additional costs to pay the same undisclosed, oversized, and untimely premium demands. ¶ 154.
Conestoga Defendants falsely represented and promised to investors six specific matters to investors, including matters regarding Provident's role. ¶ 4.	Conestoga Defendants falsely represented and promised to investors the same six specific matters to investors, including the same matters regarding Provident's role. ¶ 4.
Conestoga Defendants misled investors into believing premiums on each underlying life insurance policy was a known, fixed amount, and that Provident had established an escrow account associated with each policy, and that Provident would service those escrow accounts throughout life of investments. ¶ 33.	Provident misled investors into believing premiums on each of the same underlying life insurance policy was a known, fixed amount, and that Provident had established an escrow account associated with each policy, and that Provident would service escrow accounts throughout life of same investments. ¶ 33.
Conestoga Defendants misled investors into believing that funds in escrow reserve accounts were sufficient to pay future premiums owed on the policies over the life of the insureds, plus an additional grace period. ¶ 34.	Provident misled investors into believing funds in the same escrow reserve accounts were sufficient to pay future premiums owed on the same policies over the life of the insureds, plus an additional grace period. ¶ 34.
Provident misled investors into believing it was "independent" and had no "conflict of interest," with McDermott and the Conestoga Entities. ¶ 53. Many investors would never have invested if Provident had not been involved. ¶¶ 61, 62.	Provident misled investors into believing it was "independent" and had no "conflict of interest," with McDermott and the Conestoga Entities. ¶ 53. Many investors would never have invested if Provident had not been involved. ¶¶ 61, 62.
Conestoga Defendants worked with Provident to design and implement a marketing plan that	Conestoga Defendants worked with Provident to design and implement a marketing plan that

would target senior investors, including many using traditional IRA and 401k accounts. Provident made it possible for Conestoga Defendants to solicit funds from these retirement accounts. ¶¶ 64, 68	would target senior investors, including many using traditional IRA and 401k accounts. Provident made it possible for Conestoga Defendants to solicit funds from these retirement accounts. ¶¶ 64, 68.
The Written Sales Materials that Conestoga Defendants delivered to investors (including Plaintiffs) contained false and misleading statements that Defendants knew were false and misleading. ¶¶ 98-147.	The same Written Sales Materials that Provident delivered to investors (including Plaintiffs) contained the same false and misleading statements that Defendants knew were false and misleading. ¶¶ 97-147.
Conestoga Defendants, Provident and others engaged in an unlawful scheme to prevent investors, from discovering the fraud. ¶ 148.	Conestoga Defendants, Provident, and others engaged in the same unlawful scheme to prevent the same investors from discovering the same fraud. ¶ 148.
Dee learned the policies allowed the insurer to raise premiums in the Spring of 2019. ¶ 150.	Dee learned the policies allowed the insurer to raise premiums in the Spring of 2019. ¶ 150.
After her husband passed, Dee was required to pay tens of thousands of dollars toward life settlement polices and was told she owes tens of thousands of dollars more. ¶ 157. Dee was being made to make payments that exceeded the represented annual premiums on the policies by a total of $31,632. ¶ 158.	After her husband passed, Dee was required to pay the same tens of thousands of dollars toward life settlement polices and was told she owes tens of thousands of dollars more. ¶ 157. Dee was being made to make payments that exceeded the represented annual premiums on the policies by a total of the same $31,632. ¶ 158.
Dee has suffered severe emotional distress caused by the financial strain of being forced to meet multiple demands for premium payments, including several payments in excess of $10,000, shortly after the death of her husband. ¶ 162.	Dee has suffered severe emotional distress caused by the financial strain of being forced to meet multiple demands for premium payments, including the same several payments in excess of $10,000, shortly after the death of her husband. ¶ 162.
Conestoga Defendants committed acts in furtherance of a conspiracy, with Provident to defraud investors, including Plaintiffs. ¶ 211.	Provident committed overt acts in furtherance of the same conspiracy (with Conestoga Defendants) to defraud the same investors, including Plaintiffs. ¶ 211.
Provident and others assisted Conestoga Defendants after discovering the torts being perpetrated on investors, and hid the existence of the torts from investors, by serving as agents for the Conestoga Entities and engaging in other misconduct. ¶ 213.	Provident and others assisted Conestoga Defendants after discovering the torts being perpetrated on investors, and hid the existence of the torts from investors, by serving as agents for the Conestoga Entities and engaging in other misconduct. ¶ 213.

McDermott, the Conestoga Entities, Provident, Bradford, and Strategix conspired in and assisted in the breaches of fiduciary duty discussed in the Complaint. ¶ 214.	McDermott, the Conestoga Entities, Provident, Bradford, and Strategix conspired in and assisted in the breaches of fiduciary duty discussed in the Complaint. ¶ 214.
Plaintiffs suffered injuries as a proximate result of the conspiracy. ¶ 215.	Plaintiffs suffered the same injuries as a proximate result of the conspiracy. ¶ 215.
Dee has been harmed at least to the extent she has been required (and may be required in the future) to pay premium payments. ¶¶ 216, 232, 239, 243.	Dee has been harmed at least to the extent she has been required (and may be required in the future) to pay the same premium payments. ¶¶ 216, 232, 239, 243.
Conestoga Trust Services LLC breached fiduciary duties by participating in scheme to defraud Plaintiffs by making false representations and other misconduct. ¶ 230.	Provident breached fiduciary duties by participating in the same scheme to defraud Plaintiffs by making the same false representations and by the same other misconduct. ¶ 230.
Conestoga Defendants used the investment contrary to disclosures that had been made to Plaintiffs. ¶¶ 237, 241.	Provident used the same investment contrary to same disclosures that had been made to Plaintiffs. ¶¶ 237, 241.
Defendants should be compelled to fully account for all handling of Plaintiff's investment money and premium payments. ¶¶ 244-250	Defendants should be compelled to fully account for all handling of Plaintiff's same investment money and same premium payments. ¶¶ 244-250
Plaintiff is entitled to judicial declarations regarding six items. ¶ 253.	Plaintiff is entitled to the same declarations regarding the same six items. ¶ 253.

The operative facts in both cases are clearly the same. When, as here, the claims in the litigation and the arbitration concern the same underlying circumstances, courts have readily found the "operative facts" to be sufficiently similar to justify a stay of litigation as to non-signatories:

- *Waste Mgmt.*, 372 F.3d at 345 (5th Cir. 2004) ("[T]he same major operative facts—the details of the Letter and its negotiation—largely control the resolution of both the equitable claims being litigated and the contractual claims being arbitrated. Other operative facts, such as the circumstances surrounding the draw on the Letter, the propriety of Bethlehem's actions, and the scope of the Release, are also at issue in both disputes.").

- *BOKF, NA v. Wise*, 3:18-CV-794-N, 2019 WL 7902963, at *1 (N.D. Tex. Apr. 25, 2019) (claims in arbitration and litigation would "hinge on the same contracts, the same alleged conduct, and the same causes of action").

- *Deosaran v. Ace Cash Express, Inc.*, 4:16-CV-00919-O-BP, 2017 WL 1318568, at *1 (N.D. Tex. Mar. 23, 2017), report and recommendation adopted, 4:16-CV-00919-O-BP, 2017 WL 1296453 (N.D. Tex. Apr. 7, 2017) ("[b]oth proceedings concern the central question of whether Defendant had the right to make calls to the cell phone shared by Goodwin and Deosaran using an automated dialing system").

- *Hallam v. Southaven R.V. Ctr., Inc.*, No. 3:18-CV-220-DMB-RP, 2019 WL 4675380, at *3 (N.D. Miss. Sept. 25, 2019) ("[Although the Hallams' claims against the two defendants will require some different proof (breach of the warranty in the case of the claims against REV, and substantial impairment for the claim against Southaven RV), the claims generally rely on the same allegations of manufacturer defects in the vehicle. … Given this overlap, the Court concludes the claims involve the same operative facts.").

- *S. Indus. Contractors, LLC v. Neel-Schaffer, Inc.*, No. 1:17CV255-LG-JCG, 2018 WL 3130944, at *3 n. 1 (S.D. Miss. June 26, 2018) (claims in litigation and arbitration "arose out of the same facts and seek damages for problems caused by the same debris field and the same allegedly defective plans")

- *Qualls v. EOG Res., Inc.*, No. CV H-18-666, 2018 WL 2317718, at *2 (S.D. Tex. May 22, 2018) ("[T[he same facts will necessarily be relevant in both cases to determine which company" could be liable to the plaintiff).

- *Gupta v. Lynch*, No. CIV.A. 12-1787, 2014 WL 4063831, at *7–8 (E.D. La. Aug. 15, 2014) ("Plaintiffs assert identical causes of actions against each Defendant which share a common nucleus of underlying facts.")

- *Hope v. Debt Choice, Inc.*, 2:11-CV-189, 2012 WL 13005522, at *8 (E.D. Tex. Dec. 3, 2012) ("Given that Plaintiff's claims against Lexxiom and the Iniguez Defendants arise out of the same transaction for debt management services, all three *Waste Management* factors are satisfied.")

- *Galtney v. KPMG LLP*, No. CIV.A. H05583, 2005 WL 1214613, at *6–7 (S.D. Tex. May 19, 2005) ("Plaintiffs plead their claim of aiding and abetting a breach of fiduciary duty against both Presidio and the Deutsche Bank Defendants, and the claim against all is based on the same set of operative facts. Presidio's motion for a stay will therefore be granted pending the outcome of the arbitration of that issue between Flinders and the Deutsche Bank Defendants.")

Here, it is beyond dispute that the claims against Provident and Conestoga Defendants are based on "the same major operative facts" (*Waste Mgmt.*, 372 F.3d at 345), and "hinge on the same contracts, the same alleged conduct, and the same causes of action." *BOKF, NA*, 2019 WL 7902963, at *1. The claims clearly "share a common nucleus of underlying facts" (*Gupta*, 2014

WL 4063831, at *7–8) and "[t]he same facts will necessarily be relevant in both cases." *Qualls*, 2018 WL 2317718, at *2. The first *Waste Mgmt*. factor weighs heavily in favor of a stay.

2. Inherently inseparable: the lawsuit and arbitration involve the same fundamental dispute and the same alleged harm.

The next factor to consider is whether claims in the litigation and arbitration are "inherently inseparable." When the claims only involve one harm, the litigation and arbitration are inherently inseparable. *See, Waste Mgmt.*, 372 F.3d at 345 (plaintiff "trying to recover the same payment" from two defendants "only suffered one alleged harm, so the resulting litigation and the arbitration are 'inherently inseparable' from the instant litigation...."); *S. Indus. Contractors, LLC, ,* 2018 WL 3130944, at *3 ("A plaintiff's attempt to recover the same damages in arbitration and litigation warrants imposition of a stay of litigation against a non-signatory."); *Qualls*, 2018 WL 2317718, at *2 ("In both cases, Qualls only alleges one harm—not being paid overtime for the work he performed for EOG through Bedrock. Thus, Qualls's claims involve only one harm and are inherently inseparable."); *Hallam*, 2019 WL 4675380, at *4 ("Like Waste Management, the claims concern only one alleged harm—the sale and purchase of an allegedly defective product—for which the Hallams seek remedies in the form of reimbursement for repairs already performed on the product and the return of the product in exchange for return of the purchase price. Under these circumstances, the claim against Southaven RV is inherently inseparable from the claims against REV.").

No matter how many causes of action against how many defendants Dee has asserted, the claims are all based on the same alleged harm arising from the same investment in the same life settlements. Indeed, Dee expressly seeks the very same damages and relief from both Provident and the Conestoga Defendants, namely Dee "has been harmed at least to the extent she has been required (and may be required in the future) to pay premium payments" for the policies. (doc. 21

at ¶¶ 216, 232, 239, 243; *see also, id.* at ¶¶ 139, 152-53 (claims are based on the same $770,000 invested in the same eleven policies); ¶¶ 154-58 (claims based on the same premium payments); ¶ 162 (claims based the same "financial strain of being forced to meet multiple demands for [the same] premium payments").[1] Dee is trying to recover the same damages from Provident in arbitration and from Conestoga Defendants in litigation. Because Dee has only "suffered one alleged harm," the "resulting litigation and the arbitration are 'inherently inseparable.'" *Waste Mgmt.*, 372 F.3d at 345. The second *Waste Mgmt*. factor weighs heavily in favor of a stay.

3. <u>Critical impact: allowing litigation to proceed would risk inconsistent results and could have a critical impact on the arbitration.</u>

The final factor to consider is whether the litigation will have a critical impact on the arbitration. "When the claims in arbitration and the claims in litigation involve common questions of law or fact, the litigation would likely have a critical impact on the arbitration because the litigation could resolve issues subject to arbitration." *Hallam,* 2019 WL 4675380, at *4, citing *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agr. Implement Workers, UAW*, 97 F.3d 155, 159 (6th Cir. 1996) ("arbitrators are bound by prior federal court decisions under the doctrines of collateral estoppel and/or res judicata."); *Broussard v. First Tower Loan, LLC*, No. 15-1161 c/w 15-2500, 2016 WL 879995, at *6 (E.D. La. Mar. 8, 2016) ("Given the binding effect of a federal judgment, as well as the factual similarities in Broussard's and the EEOC's claims, the arbitrator would necessarily be strongly influenced to follow the Court's determination."); 18B FED. PRAC. & PROC. JURIS. § 4475.1 (2d ed.) ("[i]f an arbitrator refuses to recognize judicial disposition of an issue, a court may refuse to confirm the award.").

[1] Dee also seeks the same "accounting" and same declaratory relief against Provident and the Conestoga Defendants. (doc. 21 ¶¶ 244-254).

As demonstrated by the chart above (*supra*, pp. 5-7), Dee's litigation claims against the Conestoga Defendants and Dee's arbitration claims against Provident involve numerous common questions of fact and law. Here, as in *Waste Mgmt.*, "[a]llowing the instant litigation to proceed would risk inconsistent results, and 'substantially impact' the arbitration." 372 F.3d at 345; *see also, e.g., Suzlon Infrastructure, Ltd*, 2010 WL 3540951, at *8 ("The close relationship between the facts involved in the federal court claims and the arbitration claims counsels in favor of staying this litigation."); *Deosaran*, 2017 WL 1318568, at *4 ("[R]esolution of the litigation could have a 'critical impact' on the arbitration if these key issues of consent and revocation of consent were determined in the lawsuit before they could be addressed by the arbitrator. Under these circumstances, Judge O'Connor should stay further proceedings in the case pending resolution of the Goodwin arbitration."); *S. Indus. Contractors*, 2018 WL 3130944, at *3 ("[I]f a jury in the federal lawsuit found that the plans were defective, then such a determination would inevitably affect the arbitration against the Port Authority. As a result, the Port Authority's potential liability would be seriously affected by any judgment entered in this lawsuit. … The Consultant Defendants are therefore entitled to a stay of this litigation."); *Qualls*, 2018 WL 2317718, at *2–3 ("[G]iven that each case will involve the same and similar questions, proceeding with the instant litigation risks forfeiting Qualls's and Bedrock's rights to meaningful arbitration."); *Hope*, 2012 WL 13005522, at *8)"[P]roceeding with the action against Lexxiom would have a 'critical impact' on the arbitration by undermining the arbitrator's authority to resolve the dispute between Plaintiff and the Iniguez Defendants.").[2] The third *Waste Mgmt*. factor weighs heavily in favor of a stay.

[2] Further, allowing litigation to proceed in this Court could allow Dee to obtain discovery that she would not be able to under the arbitration rules and thus interfere with Provident's right to a meaningful arbitration. *See, BOKF, NA*, 2019 WL 7902963, at *1 ("[A]llowing the case to proceed in this Court could allow the Plaintiff to obtain discovery that it would not be able to under FINRA

4. That this is a putative class action does not change the result.

Although this is a putative class action,[3] no class has been certified and this case involves only the Plaintiffs' individual claims.[4] In any event, there is nothing about a putative class action that somehow overrides the "liberal federal policy favoring arbitration agreements." *See, gen., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (individual plaintiffs who asserted putative class action could not avoid arbitration agreement provision which waived their right to pursue claims on behalf of a class). With regard to the specific issue at hand, several courts have applied the Fifth Circuit's *Waste Mgmt*. factors to determine that a putative class action case involving non-signatories to an arbitration agreement should be stayed pending the outcome of an arbitration between signatories to the agreement. *See, e.g., Qualls.*, 2018 WL 2317718, at *1-3 (staying case, including putative class claims, against non-signatory defendant EOG pending outcome of arbitration of claims based on same operative facts by the plaintiff against the defendant Bedrock); *Jones v. Singing River Health Sys*., No. 1:14CV447-LG-RHW, 2016 WL 3351291, at *2 (S.D. Miss. June 15, 2016) (staying case, including putative class claims, filed by non-signatory plaintiff Lowe against KMPG pending resolution of arbitration of similar claims asserted by plaintiff Jones against KMPG); *Hope*, 2012 WL 13005522, at *8 (staying case,

---

[arbitration] rules. Accordingly, the Court holds that allowing this case to proceed could ultimately destroy Defendants' right to a meaningful arbitration.").

[3] It is the Estate and not Dee that seeks to represent a class. *See* Doc. 21 ¶ 164-70.

[4] *See gen., Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) ("[A] class lacks independent status until certified"); *Hohensee v. Divine Miracles, Inc.*, CV 18-1287, 2018 WL 6198370, at *3 (E.D. La. Nov. 14, 2018) ("No class has been certified. As a result, there are no 'absent class members.'"); *Malone v. TD Ameritrade, Inc.*, 4:16CV614, 2017 WL 2306412, at *1 n. 1 (E.D. Tex. Mar. 6, 2017) ("While Plaintiff styles his case as a putative class action, no class has been certified under Rule 23 and Plaintiff has not been found to be an adequate class representative. Thus, at this time, the case involves only Plaintiff's individual claims.").

including putative class claims, against non-signatory defendant Lexxiom pending outcome of arbitration of claims based on same operative facts by the plaintiff against the Iniguez Defendants); *Galtney*, 2005 WL 1214613, at *2 (staying case, including putative class claims, against non-signatory defendant Presidio pending outcome of arbitration of claims based on same operative facts by one of the plaintiffs against the defendant Deutsche Bank). Because the *Waste Mgmt.* factors weigh heavily in favor of a stay, the case against the Conestoga Defendants, including putative class claims, should be stayed pending the outcome of the arbitration with Provident.

5. A mandatory or, at the very least, discretionary, stay is warranted.

Dee is a signatory to the agreement to arbitrate with Provident, and this Court has found she is obligated to arbitrate her claims against Provident. Although the Conestoga Defendants are not signatories to that agreement, Section 3 nonetheless requires a mandatory stay of litigation against the Conestoga Defendants because (1) the arbitration and litigation involve the same operative facts, (2) the claims asserted are inherently inseparable, and (3) the litigation could have a critical impact on the arbitration. *Waste Mgmt*., 372 F.3d at 343-55. Alternatively, if for any reason the court finds a mandatory stay is not justified, a discretionary stay is clearly proper under the circumstances. Dee's claims against Conestoga Defendants should be stayed—whether mandatory under Section 3 or discretionary under the Court's inherent power—pending the outcome of the arbitration of Dee's claims against Provident that are based on the same facts and transactions and seeking the same damages.

C. The Estate's claims against all Defendants should be stayed pending the outcome of the arbitration of Dee's claims against Provident as they are based on the same facts and transactions and seek intertwined damages.

In her original complaint, Dee alleged identical claims on behalf of herself and the Estate. (doc. 1-4). This made sense because the claims of Dee and the Estate both concern the same

money used to pay for the same investments with the same defendants based on the same documents and same representations. (docs. 1-2, 21). After Provident moved to compel arbitration based on the arbitration agreement signed by Dee, Plaintiffs filed an amended complaint purporting to split the claims of Dee and the Estate. (doc. 21). This dodge does not change the underlying facts. Because (1) the arbitration and litigation involve the same operative facts, (2) the claims asserted are inherently inseparable, and (3) the litigation could have a critical impact on the arbitration, the Estate's claims against Provident and the Conestoga Defendants should be stayed pending the outcome of the arbitration of Dee's claims against Provident.

1. A court should stay claims asserted by a non-signatory plaintiff when, as here, the facts and claims forming the basis for the litigation proceedings significantly overlap with an arbitration.

If the Estate is not bound by the arbitration agreement, a *mandatory* stay under Section 3 may not be proper as to the Estate.[5] However, courts can and should issue *discretionary* stays to stay the claims of even a non-signatory plaintiff when those claims significantly overlap with claims to be arbitrated. Here, the Estate's claims and Dee's claims are not only based on the very same facts and transactions but seek inextricably intertwined damages. The Estate's claims should be stayed pending the arbitration of Dee's claims.

Two recent cases out of the Northern District of Texas provide examples of courts staying the claims of non-signatory plaintiffs pending arbitration of another plaintiff's claims. In *BOKF, NA*, both BOK, NA and BOKFS asserted claims against the defendants. 2019 WL 7902963, at *1 The plaintiff BOKFS was party to an arbitration agreement with the defendants. 2019 WL

[5] There are at least a couple reasons why a mandatory stay may be proper as to the Estate. First, the Estate itself may be bound by the arbitration agreement. (*See* doc. 106). Second, the intertwined nature of the claims by Dee and the Estate (discussed below in the next section) is such that Section 3 could and should apply. Regardless, as will be shown, a discretionary stay is clearly proper.

7902963, at *1. However, the plaintiff BOK, NA was not a party to any arbitration agreement with the defendants and was not obligated to arbitrate its claims. 2019 WL 7902963, at *1. Nonetheless, after considered the *Waste Mgmt.* factors, the court determined a stay of non-signatory BOK, NA's claims was proper pending arbitration between BOKFS and the defendants:

> Allowing BOKF, NA to proceed with this litigation could destroy Defendants' right to a meaningful arbitration. Primarily, the arbitration and litigation are based on the same operative facts and involve inherently inseparable claims. While BOK, NA and BOKFS may have different damages, both entities raise claims that hinge on the same contracts, the same alleged conduct, and the same causes of action. Indeed, "it is the violated right that matters, not the purported remedy." *Id.* at 345. Given how intertwined the claims are, a decision from this Court could influence the outcome of the arbitration. In addition, allowing the case to proceed in this Court could allow the Plaintiff to obtain discovery that it would not be able to under FINRA rules. Accordingly, the Court holds that allowing this case to proceed could ultimately destroy Defendants' right to a meaningful arbitration.

Id., citing *Waste Mgmt.*, 372 F.3d at 345.

Similarly, in *Deosaran*, both Lisa Deosaran and Raymond Goodwin asserted claims against the defendant for violations of the Telephone Consumer Protection Act. 2017 WL 1318568, at *1. Deosoran and Goodwin each claimed they were entitled to their own damages due to defendant making calls to a cellular phone the two plaintiffs shared after they had revoked their consent for defendant to call. 2017 WL 1318568, at *1. The calls concerned a loan agreement previously entered into by Goodwin. *Id.* As part of that transaction, Goodwin had entered into an arbitration agreement with the defendant. *Id.* at *2-3. However, Deosoran was not a party to any arbitration agreement with the defendant and was not obligated to arbitrate her claims. *Id*. at *3. Nonetheless, the court determined a stay of the non-signatory Deosoran's claims was proper pending arbitration between Goodwin and the defendant:

> Applying the three-part *Rainie*r [*i.e.*, *Waste Mgmt*.] test, the undersigned recommends that Judge O'Connor stay further proceedings in the case following dismissal of Goodwin's claims so that those claims may proceed to arbitration. The claims at issue in the arbitration and those remaining in the lawsuit involve the same

> operative facts. Both proceedings concern the central question of whether Defendant had the right to make calls to the cell phone shared by Goodwin and Deosaran using an automated dialing system. The claims in both proceedings are "inherently inseparable" and involve a shared cell phone, claims of consent to use an automated dialing system by listing the cell phone number in loan documents, and revocation of consent. Finally, resolution of the litigation could have a "critical impact" on the arbitration if these key issues of consent and revocation of consent were determined in the lawsuit before they could be addressed by the arbitrator. Under these circumstances, Judge O'Connor should stay further proceedings in the case pending resolution of the Goodwin arbitration.

Id., at *4. The Magistrate Judge's report and recommendation was adopted by the district court. 2017 WL 1296453.

Several other courts in this Circuit have also stayed the claims of non-signatory plaintiffs when their claims significantly overlap with claims of other plaintiffs that must arbitrate. For example, in *Jones*, two plaintiffs asserted putative class action lawsuits. 2016 WL 3351291, at *1. Both Thomas Jones and Martha Ezell Lowe filed putative class actions against KPMG as a result of the alleged underfunding of the Singing River Health System Employees' Retirement Plan and Trust. *Id.* Jones was party to an arbitration agreement with the defendant and the court granted the defendant's motion to compel arbitration of Jones's claims. *Id.* However, Lowe was not party to any arbitration agreement and the motion to compel arbitration of Lowe's claims was denied. *Id.* Nonetheless, the court determined a stay of non-signatory Lowe's claims, including Lowe's class action allegations, was proper pending the arbitration between Jones and the defendant KPMG:

> …. [T]he facts in the Lowe and Jones lawsuits are identical. The Jones plaintiffs have filed the following claims against KPMG: breach of fiduciary duty, Section 1983 conspiracy, negligence and professional malpractice, and fraud, fraudulent misrepresentation, and deceit. Lowe alleges that KPMG aided and abetted a breach of fiduciary duty. Thus, the claims filed in Jones and Lowe are not identical, nor are they inherently inseparable. Nevertheless, there is significant overlap among the claims asserted against KPMG in these lawsuits, because the same witnesses and evidence will likely be necessary to prove the claims asserted in Lowe and Jones. Finally, allowing Lowe to litigate her claims would pose a risk of inconsistent results and may undermine the arbitration of the Jones claims. *See Waste Mgmt., Inc.*, 372 F.3d at 345 (explaining that the binding effect

> of federal judgments would strongly influence an arbitrator to follow the court's decision, particularly where the claims asserted are similar). As a result, the Court finds that a discretionary stay of Lowe's claims against KPMG pending resolution of the Jones arbitration is warranted.

Id. at *2.

In *Galtney* there were four plaintiffs[6] asserting claims against four defendants.[7] 2005 WL 1214613, at *1. The court found that one of the plaintiffs, Flinders Ventures, was obligated to arbitrate its claims against some of the defendants. *Id.*, at *2-6. The other three plaintiffs were not bound by any arbitration agreement. *Id*. And, there was no arbitration agreement between any of the plaintiffs and the defendant Presidio. *Id*., at *7. Nonetheless, the court ordered "[a]ll further proceedings in this case are STAYED against all Defendants pending the outcome of an arbitration between Plaintiff Flinders Ventures" and the other three defendants. *Id.* The court explained:

> Defendant Presidio, which states that it is not a party to an arbitration agreement and does not consent to arbitration, nonetheless moves for a stay of Plaintiffs' action against it pending completion of the arbitration sought by the Deutsche Bank Defendants. Title 9 U.S.C. § 3 provides that where suit is brought "upon any issue referable to arbitration under an agreement in writing for such arbitration," the court, upon being satisfied that the issue involved is indeed referable to arbitration under the agreement, "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...." *Id.; Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 342 (5th Cir.2004). A non-signatory to the arbitration agreement, such as Presidio here, has "standing to apply for a stay when the litigation involves 'any issue referable to arbitration." ' Waste Mgmt., 372 F.3d at 342-43 (quoting 9 U.S.C. § 3). Plaintiffs plead their claim of aiding and abetting a breach of fiduciary duty against both Presidio and the Deutsche Bank Defendants, and the claim against all is based on the same set of operative facts. Presidio's motion for a stay will therefore be granted pending the outcome of the arbitration of that issue between Flinders and the Deutsche Bank Defendants.

---

[6] William F. Galtney, Jr., Susanne W. Galtney, Galtney Family Investors, Ltd., and Flinders Ventures LLC.

[7] Deutsche Bank AG's, Deutsche Bank Trust Company Americas, Deutsche Bank Securities, Inc, and Presidio Advisory Services LLC.

Id.

The *Gupta* case arose from the alleged mismanagement of a trust. 2014 WL 4063831, at *1. There were four plaintiffs: Narinder Gupta ("N. Gupta"), Suman Gupta ("S. Gupta"), and their two sons, Neel Gupta and Jagan Gupta (collectively the "Gupta Sons"). *Id.* The court held that the claims of N. Gupta and S. Gupta were covered by an arbitration agreement with defendants. *Id.* at *6. However, the court found that the Gupta Sons were not bound by any arbitration agreement. *Id.* at *7. Nonetheless, the court determined a stay of the non-signatory Gupta Sons' claims was proper pending arbitration by N. Gupta and S. Gupta:

> Having referred the claims of N. Gupta and S. Gupta against MLPFS and Chaturvedi to arbitration, the Court must now decide whether to stay the remaining claims pending arbitration. […] All of these factors weigh in favor of staying the remaining claims pending arbitration. First, Plaintiffs assert identical causes of actions against each Defendant which share a common nucleus of underlying facts. Resolving these common issues of law and fact in arbitration eliminates any possibility of conflicting decisions, conserves judicial resources, and is the most efficient way to adjudicate Plaintiffs' claims. Second, in addition to promoting judicial economy, a stay of all remaining claims is most convenient for all involved in the litigation. Requiring the parties themselves, their counsel, and the witnesses to participate in parallel proceedings—one in New York, the other in Louisiana—would impose undue hardship. Third, Plaintiffs have failed to demonstrate any prejudice that would result from a temporary stay. Finally, if Plaintiffs were forced to adjudicate their remaining claims in this forum, the arbitration proceedings would essentially be rendered meaningless and the federal policy in favor of arbitration thwarted.

Id., at *7–8.

Here, it is beyond dispute that the claims of the Estate and Dee "significantly overlap." *See* Doc. 21. As the table set forth above illustrates, the Estate and Dee are complaining about the same life settlement investments, the same alleged misconduct, and the same defendants. *See*, *supra*, pp. 5-7. The Estate's claims should be stayed pending the arbitration of Dee's claims.

2. <u>The Estate's claims are not only "significantly overlap" with Dee's claims, they are necessarily and inextricably intertwined with Dee's claims</u>.

This case presents a far stronger justification to stay the non-signatory's claims than even the cases just discussed (which all nonetheless did all stay the non-signatory's claims). Here, the claims of the non-signatory (the Estate) do not just involve significant overlap with the claims of the signatory (Dee). Rather, the claims of the Estate are inextricably intertwined with Dee's.

The investments at issue were made with the Neukranzes' community property and the alleged injury was to the Neukranzes' community estate.[8] Any right to recover damages regarding the investments was the Neukranzes' community property.[9] When a spouse dies in Texas, a surviving spouse's interest in the couple's community property becomes the surviving spouse's

[8] It is undisputed that Dee and Lloyd "used community property" to buy the investments at issue. *See* Doc. 1-4 at ¶ 20; *see also, gen.*, doc. 34-1 at ¶ 4 (Dee and Lloyd "met with the sales agent together and we discussed the investment before we made the decision to invest."). Of course, all property possessed by either spouse during or on the dissolution of marriage is presumed to be community property. *Evans v. Evans*, 14 S.W.3d 343, 346 (Tex. App.—Houston [14th Dist.] 2000, no pet.). This presumption applies to dissolution by death as well as divorce. *Id.*, citing *Smith v. Lanier*, 998 S.W.2d 324, 331–32 (Tex.App.—Austin 1999, pet. denied) (citing *George v. Reynolds*, 53 S.W.2d 490, 494 (Tex.Civ.App.—Eastland 1932, writ dism'd)). The presumption applies to all property—specifically including an IRA. *See Daigle v. Daigle*, 09-14-00399-CV, 2015 WL 5042145, at *4–6 (Tex. App.—Beaumont Aug. 27, 2015, pet. denied). "Any doubt as to the character of property should be resolved in favor of the community estate." *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex.App.—Fort Worth 2004, no pet.) (citing *Akin v. Akin*, 649 S.W.2d 700, 703 (Tex.App.—Fort Worth 1983, writ ref'd n.r.e.). Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the community presumption. *See McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex.App.—Houston [1st Dist.] 1995, writ denied).

[9] *See, e.g., Kite v. King*, 492 S.W.3d 468, 475 (Tex. App.—Amarillo 2016, no pet.) ("In seeking loss related to a community asset her causes of action against King must necessarily be community property. …. So, any purported cause of action against King belonged to the community[.]"); *Haase v. Herberger*, 44 S.W.3d 267, 268 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("Prior to their divorce proceeding, the Haases were Plaintiffs in a lawsuit which concerned construction defects on their community property homestead. […] The construction litigation was an asset of the community during the divorce proceedings."); *see also, gen., In re Bippert*, 311 B.R. 456, 467 (Bankr. W.D. Tex. 2004) ([D]amages which are attributable to an injury to the marital partnership are community property. … Thus, portions of a personal injury award may belong to the community estate, including damages for lost wages of the injured spouse, medical expenses incurred by the estate, and other expenses associated with injury to the community estate.").

separate property.[10] Accordingly, at Lloyd's death, one-half of the couple's community-owned cause of action regarding their investments became Dee's and only the other half that was remaining passed to Lloyd's Estate. Any claim asserted in this litigation by the Estate for damages regarding these investments is necessarily a claim for which Dee personally has a corresponding claim (for her one-half interest). Under these circumstances, it is clear that resolving common issues of law and fact in the arbitration is necessary to eliminate any possibility of conflicting decisions and is the most efficient way to adjudicate these overlapping and intertwined claims.

Even an argument by Plaintiffs that the above characterization of ownership of the Neukranzes' claims is inaccurate (it is not) would merely highlight an issue needing to be resolved in both the arbitration and the litigation; *i.e.*, both forums will face the same question as to which of the two Plaintiffs (Dee or the Estate) has authority to pursue which damages. Again, resolving in arbitration the common issues of law and fact raised in both proceedings is necessary to eliminate any possibility of conflicting decisions and is the most efficient way to adjudicate these overlapping and intertwined claims.

---

[10] "When a married resident of Texas dies, the marriage terminates and community property ceases to exist. Death generally works a legal partition of the community probate assets; the deceased spouse's undivided one-half interest therein passes to the heirs and/or devisees, and the surviving spouse retains an undivided one-half interest therein." 1 TEX. PRAC. GUIDE PROBATE § 3:1; *see, e.g., Carnes v. Meador*, 533 S.W.2d 365, 368 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (holding that surviving spouse did not "lack authority to bring suit [regarding community property] in her individual capacity because she was an heir"; "[s]ince [the surviving spouse] owned one-half of the community property in her own right and not as heir, she had a right to sue in her individual capacity for her one-half interest."); *Forrest v. Moreno*, 161 S.W.2d 364, 365 (Tex. Civ. App.—San Antonio 1942, writ ref'd) ("The property was a part of the community estate of plaintiff and her then husband. … [A]t her husband's death plaintiff owned, outright, a one-half of the property, not as an heir but as survivor in community, and the children owned the remaining one-half as heirs of their deceased father."); *Kreis v. Kreis, 36* S.W.2d 821, 827 (Tex. Civ. App.—Amarillo 1931, writ dism'd w.o.j.) ("Under the statutes of Texas defining community property, the surviving spouse has an undivided one-half interest in the entire estate, not as heir, but as owner. […] Where the husband's will disposed of "my estate," it was his interest alone which was disposed of.").

As the court said in *Suzlon Infrastructure, Ltd.*:

> Even if the operative facts are not identical and the claims are not "inherently inseparable," the facts and claims significantly overlap. […] The close relationship between the facts involved in the federal court claims and the arbitration claims counsels in favor of staying this litigation. *See Argus Media Ltd. v. Tradition Fin. Servs., Inc.*, 2009 WL 5125113, at *4 (S.D.N.Y. Dec.29, 2009) (finding that litigation should be stayed because the arbitration could cover the claims, over the plaintiff's objection that those claims covered a different period); *Citgo Petro. Corp. v. M/T Bow Fighter*, Civ. Act. No. H–07–2950, 2009 WL 960080, at *7 (S.D.Tex. Apr.7, 2009) (issuing a stay under the court's inherent authority because the claims in the litigation arose "from the same incident between two pairs of the same three parties" in the arbitration"); *Cobra North America, LLC v. Cold Cut Sys. Svenska AB*, 639 F.Supp.2d 1217, 1226 (D.Colo.2008) (staying litigation pending arbitration in Sweden because the arbitration's findings would aid the court in resolving the facts and the Swedish law relevant to the stayed litigation even though the plaintiff might not be a party to the Swedish arbitration); *Med–Im Dev., Inc. v. Gen. Elec. Capital Corp.*, 2008 WL 901489, at * 9 (S.D.Tex. Mar.31, 2008) (granting a discretionary stay because the litigation would "involve much the same evidence developed in arbitration").
>
> […]
>
> A discretionary stay of this litigation will also enable the court and the parties to benefit from the outcome of the arbitration. This effect does not weigh in favor of a mandatory stay under section 3, but does support a discretionary stay. *See Waste Mgmt.*, 372 F.3d at 343 ("The question is not ultimately one of weighing potential harm to the interests of the non-signatory, but of determining whether proceeding with litigation will destroy the signatories' right to a meaningful arbitration.").
>
> […]
>
> [E]ven if the factors set out in *Waste Management* do not require a stay under section 3, those factors, on the present record, support a discretionary stay.

2010 WL 3540951, at *8–9, 11. For all the reasons set forth in this motion and brief, the Estate's claims should be stayed pending the arbitration of Dee's claims.

CONCLUSION AND PRAYER

All further proceedings in this case should be stayed against all Defendants pending the outcome of an arbitration between Dee and Provident.

Dated: April 29, 2020.

Respectfully submitted,

HEYGOOD, ORR & PEARSON

/s/ James Craig Orr, Jr.
James Craig Orr, Jr.
State Bar No. 15313550
jim@hop-law.com
6363 North State Highway 161, Suite 450
Irving, Texas 75038
Tel: (214) 237-9001
Fax: (214) 237-9002

ATTORNEYS FOR DEFENDANTS CONESTOGA SETTLEMENT SERVICES LLC, CONESTOGA INTERNATIONAL LLC, CONESTOGA TRUST SERVICES, LLC, and MICHAEL MCDERMOTT

CERTIFICATE OF CONFERENCE

I certify on April 29,2020, that I conferred with counsel for the Plaintiffs and they are opposed to the relief sought by this motion, and I conferred with counsel for Defendant Provident Trust Group LLC and they are not opposed.

/s/ James Craig Orr, Jr.
James Craig Orr, Jr.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing was served on each counsel of record who has made an appearance in this case via the Court's automated e-filing system on this 29th day of April 2020.

/s/ James Craig Orr, Jr.
James Craig Orr, Jr.