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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary, Plaintiff, vs. **The Pennsylvania State University,** Defendant.	Docket No. 2012-1804 Type of Case: Whistleblower ____ Medical Professional Liability Action (check if applicable) Type of Pleading: Memorandum of Law in Support of Motion to Stay Proceedings Filed on Behalf of: Defendant, The Pennsylvania State University Counsel of Record for this Party: Nancy Conrad, Esquire White and Williams LLP 3701 Corporate Parkway, Suite 300 Center Valley, PA 18034 (610) 782-4909 conradn@whiteandwilliams.com PA I.D. Number 56157

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MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON
	:	PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S MOTION TO STAY PROCEEDINGS

Defendant, The Pennsylvania State University ("Penn State"), hereby submits this Memorandum of Law in support of its Motion to Stay this civil action pending resolution of the related criminal proceedings.

I. INTRODUCTION

The interests of the parties, the Court, and the public overwhelmingly favor a Stay. The related criminal proceedings are the well-publicized indictments that the Commonwealth of Pennsylvania has issued against three former Penn State administrators: Director of Intercollegiate Athletics, Timothy Curley ("Curley"); Senior Vice President, Gary Schultz ("Schultz"); and President, Graham B. Spanier ("Spanier"). All three indictments concern actions or inactions these three individuals took or failed to take with respect to alleged instances of sexual assault of minor male children perpetrated by the former Assistant Football Coach and Defensive Coordinator of Penn State, Gerald A. Sandusky ("Sandusky").

Critical factual events – Plaintiff, Michael J. McQueary's ("McQueary") witnessing Sandusky's improper conduct with a minor boy on February 9, 2001 in a Penn State locker room; McQueary's subsequent reporting of the incident to former Penn State Head Football Coach, Joseph Vincent Paterno ("Paterno"); and

Penn State's alleged response to the incident – lie at the heart of the indictments as well as the claims raised by McQueary in this litigation. McQueary is expected to be a key prosecution witness at the criminal trials of Curley, Schultz and Spanier.

To date, Penn State has not answered or otherwise responded to the instant Complaint, and cannot do so until the criminal proceedings are resolved. Penn State would need to contact Curley, Schultz and/or Spanier to obtain information, and these three individuals are highly likely to invoke their rights against self-incrimination under the Fifth Amendment of the United States Constitution, as well as Article I, Section 9 of the Pennsylvania Constitution, and not provide any information to Penn State. Therefore, this civil action must be stayed pending resolution of the criminal proceedings.

There are seven factors the Court should consider when deciding this Motion, which are discussed in detail below and all of which favor a stay. A brief discussion of these factors is warranted. First, this civil action and the criminal proceedings overlap greatly, as they all concern the Sandusky incident witnessed by McQueary, McQueary's subsequent reporting of the incident, and the conduct of Curley, Schultz and Spanier thereafter. Second, the status of these criminal proceedings favors a stay, as indictments have been issued against Curley, Schultz and Spanier, rendering it highly likely that these individuals will invoke their Constitutional rights and refuse to provide information or testify.

Third, McQueary will not be harmed by a stay of this matter, as there is no risk of evidence being destroyed and as McQueary will not suffer any economic harm. Fourth, Penn State would be greatly prejudiced if this litigation were not stayed, as it would be unable to obtain information from Curley, Schultz or Spanier, and most likely even McQueary; the prejudice to Penn State is evidenced by the fact that Penn State is unable to even answer or otherwise respond to the instant Complaint until the criminal proceedings are resolved.

Fifth, the interests and convenience of this Court favor a stay of this matter, as proceeding with discovery before Penn State responds to the instant Complaint, even if discovery is somehow limited by the Court, would be highly inefficient and a waste of the Court's valuable resources – it is simply not in the best interests of the Court for discovery to proceed in a piecemeal fashion. Sixth, the public interest favors a stay, as this will assure fair trials in the related criminal proceedings and a fair trial in the present case. Lastly, the interests of persons not parties to this litigation – the Commonwealth of Pennsylvania; Curley, Schultz and Spanier; other witnesses to the criminal proceedings; and the alleged victims of Sandusky – all favor a stay of this civil litigation. Therefore, Penn State respectfully requests that this Court stay the present matter until conclusion of the related criminal proceedings.

II. PROCEDURAL HISTORY OF THE CASE

McQueary commenced this action on or about May 8, 2012 by filing a Praecipe to Issue Writ of Summons against Penn State. On October 2, 2012, McQueary filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against Penn State (hereinafter "Complaint"). On October 22, 2012, Penn State filed this instant Motion to Stay Proceedings. McQueary's counsel has agreed to extend the deadline for Penn State to file an Answer or otherwise plead to the Complaint until after the Court's disposition of the instant Motion. Penn State is now submitting this Memorandum of Law in support of its Motion to Stay Proceedings.

III. STATEMENT OF FACTS

McQueary supports his Complaint with numerous allegations related to the actions or inactions of former Penn State employees whom are subject to parallel and well-publicized criminal proceedings, including Curley and Schultz, captioned as Commonwealth of Pennsylvania v. Timothy Mark Curley, Court of Common Pleas, Dauphin County, No. CP-22-CR-5165-2011; and Commonwealth of Pennsylvania v. Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-CR-5164-2011. See Complaint, ¶¶ 13-19, 21-23, 26-27, 39, 46-47, 60-64. Further, additional charges have recently been filed against Curley and Schultz on November 1, 2012 (see In Re: Timothy Mark Curley, Court of Common Pleas,

Dauphin County, No. CP-22-MD-1385-2012; and In Re: Gary Charles Schultz, Court of Common Pleas, Dauphin County, No. CP-22-MD-1386-2012), and Spanier has also recently been indicted (see In Re: Graham B. Spanier, Court of Common Pleas, Dauphin County, No. CP-22-MD-1387-2012).

McQueary alleges that Penn State violated the Pennsylvania Whistleblower Law when it discriminated against him for "his provision of truthful testimony to the Statewide Investigating Grand Jury, his truthful testimony at the criminal preliminary hearings for Athletics Director Curley and Senior Vice President Schultz and further because Plaintiff is expected to be a key prosecution witness at the criminal trials of the Athletics Director Curley and Senior Vice President Schultz." Complaint at ¶ 46. Now that Spanier has been indicted, McQueary will most like be a key prosecution witness in that case too.

McQueary's defamation claim stems from alleged oral and written statements made by Spanier, which purportedly suggested McQueary lied when reporting the aforementioned Sandusky incident. See Complaint at ¶¶ 50-54.

McQueary further alleges that "Athletics Director Curley and Senior Vice President Schultz intentionally misrepresented to the Plaintiff that they thought [the reported incident] was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." Id. at ¶ 60.

McQueary claims as a result of these intentional misrepresentations, he has suffered "irreparable harm to his ability to earn a living." Id. at ¶ 63.

The alleged conduct of Messers. Curley, Schultz and Spanier, individually and in connection with Penn State, will be addressed in the instant civil action. However, as discussed above, all of these individuals have been indicted and are not likely to communicate with Penn State or testify in this proceeding due to fear of self-incrimination. Thus, Penn State is moving to stay this litigation pending resolution of the related criminal proceedings. Applying the standard discussed herein to stay a civil matter pending resolution of related criminal proceedings, the Philadelphia Court of Common Pleas has already stayed multiple civil actions that involve Penn State, Curley, Schultz and Spanier. See Exhibit "A" to Penn State's Motion to Stay Proceedings.

IV. STATEMENT OF QUESTION INVOLVED

Question: Should the Court, after weighing the seven factors outlined above and discussed in detail below, stay the instant civil litigation pending resolution of the related criminal proceedings?

Suggested Answer: Yes.

V. ARGUMENT

This Court has broad discretion to stay civil proceedings, and, in doing so, the goal is to balance the various interests of the parties, the Court, and the public.

In Re Adelphia Communications Securities Litigation, No. 02-1781, 2003 WL22358819, at *2 (E.D. Pa. May 13, 2003) (citation omitted) attached hereto as Exhibit "A".[1] "[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 the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Adelphia Communications, 2003 WL22358819, at *2.

When deciding whether to stay a civil case pending the resolution of a related criminal case, a court can consider the following factors: "(1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest." Adelphia Communications, 2003 WL22358819, at *3 (citing Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd.,

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[1] Pennsylvania state courts routinely look to federal precedent in deciding analogous issues of federal procedure. See, e.g., Schacter v. Albert, 212 Pa. Super. 58, 62, 239 A.2d 841, 843 (1968) (looking to federal jurisprudence to interpret Pennsylvania's summary judgment rules); Janicik v. Prudential Ins. Co. of America, 305 Pa. Super. 120, 127 n.3, 451 A.2d 451, 454 n.3 (1982) (looking to federal jurisprudence to interpret Pennsylvania's class action rules).

7 F.Supp.2d 523 (D.N.J. 1998)). An additional factor to be considered is the interests of persons not parties to the civil litigation. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980) (listing factors similar to those in Adelphia Communications in addition to the interests of these non-parties).[2] Applying these factors to the present case, it is clear that the Court should stay this matter pending resolution of the related criminal proceedings.

A. The Issues in This Case and the Related Criminal Proceedings Overlap Substantially

The extent to which the issues in the civil and criminal cases overlap is the most important factor in determining whether or not to grant a stay. Adelphia

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[2] McQueary's attempt to distinguish Golden Quality Ice Cream (see Plaintiff's Answer to Defendant's Motion to Stay Proceedings, at 5-6) is of no avail. In Golden Quality Ice Cream, the only discovery that was allowed was the narrow request by the plaintiffs for copies of documents in the defendants' possession that were turned over to the grand jury investigating the alleged criminal violations, which had already completed its investigation. Golden Quality Ice Cream, 87 F.R.D. at 59. Further, the District Court held that "discovery of these documents poses no Fifth Amendment threat to the individual criminal defendants, and it is not otherwise significantly onerous as to them." Id. In the present case, Penn State believes that McQueary will not so limit his discovery requests. More importantly, as discussed above, Penn State cannot even Answer or otherwise respond to the Complaint because of the indictments against Curley, Schultz and Spanier, let alone engage in discovery. There was no allegation in Golden Quality Ice Cream that the defendants were incapable of responding to the complaint therein and thus could not even formulate their defense of the matter. In the present case, Penn State is faced with these issues, and therefore this case should be stayed pending resolution of the related criminal proceedings.

Communications, 2003 WL22358819, at *3 (citing Walsh Securities, 7 F.Supp.2d at 527). The issues and parties in the civil and criminal cases need not be identical, but rather merely "implicate similar facts or issues of law." Resco Products, Inc. v. Bosai Minerals Group Co., Ltd., Civ. A. No. 06-235, 2010 WL 2331069, at *4 (W.D. Pa. June 4, 2010), attached hereto as Exhibit "B" (finding that courts within the Third Circuit "have stayed proceedings in numerous cases where another pending action contained similar questions of fact or law").

In Adelphia Communications, the civil cases were private consolidated securities actions brought against Adelphia and its officers and directors; the criminal cases were brought by the federal government against former Adelphia officers, and included charges of wire fraud, securities fraud, and conspiracy. Adelphia Communications at *1. The District Court found that Count I of the 24-count indictment against these individuals contained issues and allegations similar to those in the private securities lawsuits, including allegations that these individuals improperly co-mingled funds, engaged in self-dealing, and failed to disclose co-borrowing arrangements that ultimately led to Adelphia's collapse. Id. The Adelphia Communications Court found that "these overlapping issues are integral to both the civil and criminal cases. Accordingly, this factor weighs heavily in favor of granting the stay." Id. at *3.

In the present case, there are overlapping issues that are integral to both this civil litigation and the related criminal proceedings. Both cases allege that McQueary observed improper conduct between Sandusky and a minor child in the Lasch Football Building; both cases allege that McQueary reported his observations to Paterno; both cases allege that McQueary met with Curley and Schultz about his observations; both cases allege that Curley and Schultz told McQueary that they would take further action; both cases allege that Curley and Schultz engaged in a course of conduct that attempted to avoid an investigation and keep McQueary's report of the underlying incident a secret; and McQueary avers that he was treated in a discriminatory fashion, defamed and that his employment was terminated because of his reporting of the Sandusky incident and his participation in the criminal proceedings. There can be no doubt that these overlapping issues are integral to both the present civil litigation and the related criminal proceedings. Therefore, the first factor weighs heavily in favor of granting a stay.

B. The Stage of the Related Criminal Proceedings Favors a Stay

When determining whether to grant a stay, "a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities." Adelphia Communications, 2003 WL22358819, at *3. If criminal proceedings have resulted in indictments being issued against

individuals accused of crimes, this factor strongly favors staying the civil proceedings. Id. (citations omitted).

> The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act.

Walsh Securities, 7 F.Supp.2d at 527 (quoting Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)). Further, "the indicted defendants risk exposing their criminal defense strategy during civil discovery." Adelphia Communications, 2003 WL22358819, at *3.

In Adelphia Communications, indictments were handed down, and the District Court held that this posed Fifth Amendment problems and also risked the defendants exposing their criminal defense strategies to the government and/or their co-defendants. Id. at *4. Thus, the District Court held that the stage of the related criminal proceedings weighed strongly in favor of staying the civil cases. In the present case, indictments have been handed down against Curley, Schultz and Spanier. There is a definite belief that these individuals will invoke their Federal and State constitutional rights against self-incrimination and refuse to discuss the civil case until the criminal proceedings are concluded. Staying this matter until that time will alleviate these constitutional concerns. Thus, this post-

indictment stage of the related criminal proceedings warrants staying the present civil litigation.

C. McQueary Will Not Be Harmed By a Stay of This Case

When considering the prejudice to the plaintiff caused by a stay, the plaintiff must establish "more prejudice than simply a delay in his right to expeditiously pursue his claim.... Instead, the plaintiff should demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay." Adelphia Communications, 2003 WL22358819, at *4 (citations omitted). McQueary has not demonstrated any such particularly unique injury. In Adelphia Communications, the District Court found that the plaintiffs did not demonstrate sufficient prejudice to warrant lifting the stay, as they had not shown "any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay." Id. at *4 (citing Walsh Securities, 7 F.Supp.2d at 528). This is the only alleged prejudice McQueary will suffer if the case is stayed. Further, there is no risk of loss or destruction of documents, as evidence has been properly preserved by Penn State. In addition, McQueary will not suffer any economic harm from the stay, as he is receiving severance (see Complaint at ¶ 40), and if he is successful on any of his claims, he may be able to recover interest as part of his judgment (see Walsh Securities, 7 F.Supp.2d at 528).

Not only will McQueary not be prejudiced, it is actually in his interest to have this case stayed. His claims relate to and require evidence from Curley, Schultz and Spanier, and until the respective criminal proceedings for these individuals are resolved, he will most assuredly not obtain evidence from them.[3] In addition, McQueary's claims relate to and require evidence from other Penn State current and former representatives, including Penn State's General Counsel, Cynthia Baldwin ("Baldwin"), who are subject to ongoing criminal investigations; McQueary will most likely not obtain evidence from these individuals either. Thus, McQueary will not be prejudiced by a stay, and it is actually in his interest to stay this civil action until the criminal proceedings are concluded and discovery can then proceed unimpeded by any invocation of the constitutional rights against self-incrimination or any motions for protective orders.

D. The Burden on Penn State if This Case is Not Stayed Would be Substantial

Penn State will clearly be prejudiced if this case is not stayed, as it needs information and testimony from Curley, Schultz and Spanier. McQueary's Complaint alleges factual and legal issues directly related to these individuals. His Whistleblower claim relates to the alleged reasons he was placed on leave in 2011.

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[3] On the advice of counsel, Curley and Schultz declined to be interviewed by the Freeh group and on that basis it is anticipated that counsel will seek a Protective Order if discovery is sought in this action.

McQueary's Defamation claim relates to the alleged statements and state of mind of Spanier in 2011. Finally, his Misrepresentation claim relates to the alleged conduct and state of mind of Curley and Schultz in 2001. He is seeking in excess of $4 million from Penn State. Penn State obviously needs information and testimony from Curley, Schultz and Spanier to defend against these substantial claims.

While concerns of self-incrimination do not necessarily require staying a civil litigation, courts certainly can consider these concerns when deciding whether to stay a civil case. Adelphia Communications, at *5. Because Curley, Schultz and Spanier have already been indicted, they face substantial self-incrimination concerns and are therefore almost certain to refuse to provide information to Penn State or to testify. Doing so could also force them to reveal their criminal defense strategies.

Further, McQueary's claims relate to and require evidence from other Penn State current and former representatives, including Baldwin. These individuals not only may also refuse to provide information or testify for fear of self-incrimination, but they also may be harmed if Curley, Schultz and/or Spanier refuse to provide information or testimony. Without information or testimony from these three indicted individuals, these other Penn State current and former representatives may

not provide information or testimony in this civil litigation, further prejudicing Penn State.

In addition, the Pennsylvania Office of Attorney General ("OAG") may prevent McQueary from testifying under oath in this action before he testifies in the criminal proceedings.[4] This would also greatly prejudice Penn State.

Without information from Curley, Schultz or Spanier, and possibly other Penn State representatives, Penn State will not be able to answer or otherwise respond to the Complaint. If it cannot Answer or otherwise respond to the Complaint, discovery should not be allowed to commence. It is a cardinal principle of law that a court "may properly defer or delay discovery while it awaits an answer to a complaint." Spotts v. United States, Civil Nos. 3:12-CV-0583, 3:12-CV-0743, 1:12-CV-0407, 2012 WL3994223, at *2 (M.D. Pa. Sept. 11, 2012), attached hereto as Exhibit "C" (citation omitted). The District Court in Spotts held that deferring discovery while awaiting a response to a complaint was warranted; this would allow the defendants to file dispositive motions in lieu of answering the complaint, which may present meritorious and complete legal defenses to the claims. The District Court further held that, until the defendants answered or otherwise responded to the complaint, they should not be put to the time, expense,

[4] At the request of the OAG, the Freeh group did not interview McQueary and on this basis it is anticipated that the OAG will intervene in this action if discovery is sought from McQueary.

and burden of factual discovery until any legal defenses raised by dispositive motions are addressed by the court.

In the present matter, Penn State is unable to adequately formulate its defense to the substantial claims asserted by McQueary, as it has not and is not likely to be able to communicate with Curley, Schultz or Spanier. Further, Penn State may not be able to obtain information from the other Penn State representatives for the same reasons. These are yet more reasons why this matter should be stayed.

E. The Interests of the Court Favor Staying This Case

This Court "has an interest in efficiently managing its caseload," and staying the matter promotes judicial efficiency. Adelphia Communications, at *5 (citation omitted). Without a stay, Curley, Schultz and Spanier, and possibly the other Penn State representatives, will likely intervene to stay this litigation or assert their constitutional rights against self-incrimination, and this will cause the Court to have to decide a number of issues during discovery. See id. If the matter is stayed until the conclusion of the related criminal proceedings, then these rulings will no longer be necessary. Id. (citing Walsh Securities, 7 F.Supp.2d at 528).

In addition, if this matter is stayed, there will be no need to engage in piecemeal discovery. In Plaintiff's Answer to Defendant's Motion to Stay Proceedings (at p. 7), McQueary argues that if any discovery invokes constitutional

issues – which it surely will – the appropriate response would be to wait until this occurs and then seek Court intervention. This solution is not only inefficient, it is likely to lead to the need to re-depose witnesses who have already had their deposition taken. However, this type of piecemeal discovery is not favored by courts, as it is inefficient and costly to all involved. See, e.g., McClendon v. Dougherty, No. 2:10-CV-1339, 2011 WL 4345901, at *1 (W.D. Pa. Sept. 15, 2011), attached hereto as Exhibit "D" (holding that "'discovery under the Federal Rules of Civil Procedure is intended to be obtained as expeditiously as possible.... Piecemeal discovery ... does not contribute to the expeditious completion of discovery.'"); Carpenter Technology Corp. v. Armco, Inc., Civ. A. No. 90-0740, 1990 WL 61180, at *4 (E.D. Pa. May 8, 1990), attached hereto as Exhibit "E" (requiring witnesses to be deposed twice, once before and once after production of documents, "would result in undesirable, piecemeal discovery").

Thus, staying this civil action will preserve judicial resources, promote judicial efficiency, save the parties unnecessary expense, and prevent the parties from engaging in piecemeal discovery.

F. The Public's Interest Favors a Stay

The public interest will not be harmed by staying this civil action. For example, there is no need to deny the stay to protect the public, such as in cases where allowing the civil case to proceed will protect the public by halting the

distribution of mislabeled drugs or preventing the dissemination of misleading information to the investing public. See Walsh Securities, 7 F.Supp.2d at 529. McQueary's suit only concerns claims that would benefit him, and have no bearing on the public. Further, the public would benefit from a stay by allowing the Commonwealth to complete, unimpeded, its criminal prosecution of the cases against Curley, Schultz and Spanier. See id.; Adelphia Communications, at *6. Thus, the public's interest weighs in favor of the stay.

G. The Interests of Non-Parties Favor a Stay

The last factor – the interests of persons not parties to the civil litigation – also favors a stay. As discussed above, non-parties, such as Curley, Schultz or Spanier, or the other former and current Penn State representatives, including Baldwin, could be burdened with self-incrimination issues and/or the need to seek a protective order from the Court. See, e.g., Golden Quality Ice Cream, 87 F.R.D. at 58 (holding that "the pressures of civil discovery are likely to weigh most heavily on certain key managerial officials in defendant companies;" these individuals, facing criminal charges, may be forced to invoke their constitutional rights against self-incrimination). "The dilemma for such persons is severe because they face serious penalties in the event of a criminal conviction, and because they are not themselves parties to th[e] civil action." Id.

Staying this matter would prevent the OAG from having to intervene to seek a stay or protective order. At the request of the OAG, the Freeh group did not interview McQuery and on this basis it is anticipated that the OAG does not want McQueary providing information or answering questions under oath before he testifies in the Curley, Schultz or Spanier criminal matters. Further, the alleged victims of Sandusky – the John Does in the various civil cases – may be negatively affected by development of the facts if this case were allow to proceed before the criminal proceedings conclude.

Thus, the interests of these non-parties weigh in favor of a stay.

VI. CONCLUSION

Balancing the factors discussed above, it is clear that they all favor granting a stay. Thus, Penn State respectfully requests that this Court stay this civil action pending resolution of the related criminal proceedings.

Respectfully submitted,

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY : : : CIVIL ACTION NO. 2012-1804 : : : :

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 16 day of November, 2012, a true and correct copy of the foregoing Memorandum of Law In Support of The Pennsylvania State University's Motion to Stay Proceedings was served upon the following persons via first class, United States mail, postage prepaid:

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EXHIBIT "A"

Not Reported in F.Supp.2d, 2003 WL 22358819 (E.D.Pa.)
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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
In re ADELPHIA COMMUNICATIONS SECURITIES LITIGATION

No. 02-1781.
May 13, 2003.

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MEMORANDUM AND ORDER

HUTTON, J.

*1 THIS DOCUMENT RELATES TO ALL ACTIONS

Presently before the Court are two Motions for Reconsideration of the Court's Order, dated September, 26, 2002, staying these securities class action cases. One motion (Docket No. 84) was filed on January 17, 2003, by a group of arbitrage funds ("Argent/Eminence Plaintiffs"). The other motion (Docket No. 88) was filed on January 29, 2003, by several public employee pension funds ("Pension Fund Plaintiffs"). In each of these motions, Plaintiffs ask the Court to (1) remove these cases from the civil suspense docket; (2) reconsider the stay order; and (3) rule on Plaintiffs' Motions for Appointment of Lead Plaintiff and Counsel. For the reasons discussed below, the motions are denied.

I. *BACKGROUND*

These cases arise from the financial collapse of Adelphia Communications Corporation, a company providing cable television and communications services to consumers. The first of these private securities actions against Adelphia and its officers and directors was filed on April 20, 2002. Since that date, approximately 40 similar actions have been filed. The cases were consolidated before this Court in an order dated April 30, 2002. Included among the Defendants in these actions are Adelphia, John Rigas, Timothy Rigas, and Michael Rigas ("Rigas Defendants").

Adelphia's collapse also spawned other litigation that is relevant to the instant case. First, on June 25, 2002, Adelphia filed a Chapter 11 Bankruptcy petition in the Southern District of New York. Presently, Adelphia's bankruptcy petition is still pending in that court.

Second, on July 24, 2002, the United States Securities and Exchange Commission ("SEC") filed a civil enforcement action in the Southern District of New York against Adelphia, the Rigas Defendants, and two other former Adelphia officers, James Brown and Michael Mulcahey. In its complaint, the SEC makes allegations similar to those contained in the various complaints filed in the private securities suits currently before this Court. Specifically, the SEC charges that Adelphia, as directed by the Rigas Defendants and others, fraudulently hid liabilities from Adelphia's consolidated financial statements, falsified company earnings, and concealed self-dealing by the Rigas Defendants. *See* Compl., *SEC v. Adelphia Comm. Corp,* No. Civ.A. 02-5776 (S.D.N.Y. July 24, 2002). On October 29, 2002, the

court stayed the SEC enforcement action pending resolution of the related criminal proceedings against the defendants, described below.

On September 23, 2002, the Rigas Defendants, James Brown, and Michael Mulcahey were indicted in the Southern District of New York on criminal charges related to their conduct at Adelphia, including charges of wire fraud, securities fraud, and conspiracy. While Mr. Brown pleaded guilty to several charges in November, 2002, the criminal proceedings are ongoing against the remaining defendants. Count I of the 24-count indictment contains issues and allegations similar to those in the instant private securities suits, including allegations that the Rigas Defendants improperly co-mingled funds, engaged in self-dealing, and failed to disclose co-borrowing arrangements that ultimately resulted in Adelphia understating its liabilities by approximately $3 billion. *See* Argent/Eminence Pls .' Compl. at ¶¶ 29-33, 44, 46; Indictment, *United States v. Rigas,* No.Crim.A. 02-1236, at ¶¶ 16-21, 73-91.

***2** On September 27, 2002, this Court issued an order (Docket No. 72) which: (1) stayed the consolidated action and placed it on the Civil Suspense Docket; and (2) denied all pending motions with leave to renew. Subsequent to this order, the Argent/Eminence Plaintiffs petitioned the United States Court of Appeals for the Third Circuit, requesting a writ of mandamus requiring this Court to lift the stay. On December 26, 2002, the Third Circuit denied the petition, stating that "the proper course is for plaintiffs to file a motion to reconsider the stay.... We are confident the District Court will review this matter and set forth its reasons for granting or denying the stay." *In Re Eminence Capital LLC,* No. 02-3889, at 1 (3d Cir. Dec. 26, 2002). As a result of this ruling, Plaintiffs filed the instant motions.

II. *LEGAL STANDARD*

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." *Vaidya v. Xerox Corp.,* No. Civ. A. 97-547, 1997 WL 732464, at *1 (E.D.Pa. Nov.25, 1997). The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Max's Seafood Café by Lou-Ann, Inc. v. Quinteros,* 176 F.3d 669, 677 (3d Cir.1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir.1995)). Therefore, a court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." *Drake v. Steamfitters Local Union No. 420,* No. Civ. A. 97-585, 1998 WL 564886, at *3 (E.D.Pa. Sept. 3, 1998) (citing *Smith v. City of Chester,* 155 F.R.D. 95, 96-97 (E.D.Pa.1994)).

III. *DISCUSSION*

"[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 the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.,* 299 U.S. 248, 254-55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936) (citing *Kansas City Southern R. Co. v. United States,* 282 U.S. 760, 763, 51 S.Ct. 304, 305-6, 75 L.Ed. 684 (1931)); *see also Texaco, Inc. v. Borda,* 383 F.2d 607, 608 (3d Cir.1967) (quoting same). Thus, the decision to stay civil proceedings calls for the trial court, in its discretion, to balance the various interests of the parties, the court, and the public. *Landis,* 299 U.S. at 254-56. In the instant motions, Plaintiffs argue that this Court abused its discretion by failing to give adequate weight to the Plaintiffs' interests. *See* Argent/Eminence Pls.' Mem. at 3-4; Pension Fund Pls.' Mem. at 3.

***3** In this case, the Court based its stay order on two parallel proceedings directly affecting the instant private securities suits: (1) the ongoing criminal case in the Southern District of New York;

and (2) Adelphia's pending bankruptcy petition. The impact of each action on the consolidated securities cases is discussed in turn below.

A. *Related Criminal Proceedings*

As noted above, the Rigas Defendants in this suit are currently under indictment in the Southern District of New York for engaging in allegedly fraudulent conduct that contributed to Adelphia's collapse. In deciding whether to stay a civil case pending the resolution of a related criminal case, courts consider many factors, including: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. *Walsh Securities, Inc. v. Cristo Prop. Mgmt. Ltd.*, 7 F.Supp.2d 523 (D.N.J.1998) (citing *Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.* ., 886 F.Supp. 1134, 1138 (S.D.N.Y.1995)); *see also Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa.1980) (listing similar factors). Each of these factors is discussed in turn below.

1. Similarity of Issues

The similarity of the issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay. *Walsh Securities,* 7 F.Supp.2d at 527 (quoting Milton Pollack, *Parallel Civil and Criminal Proceedings,* 129 F.R.D. 201, 203 (1989) (*"Parallel Proceedings"*)). The consolidated Adelphia securities actions have a significant overlap of issues with the Rigas Defendants' criminal case. For example, both cases allege that the Rigas Defendants made material omissions and misstatements regarding certain co-borrowing arrangements, which were used by the Rigas Defendants to purchase Adelphia stock. Moreover, both cases allege that the Rigas Defendants improperly commingled funds and used Adelphia assets for their own purposes. The Court finds that these overlapping issues are integral to both the civil and criminal cases. Accordingly, this factor weighs heavily in favor of granting the stay.

2. Stage of Related Criminal Proceedings

In determining whether to grant a stay, a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities. If criminal indictments are returned against the civil defendants, then a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved. *Parallel Proceedings,* 129 F.R.D. at 203 (citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C.Cir.1980)); *see also Walsh Securities,* 7 F.Supp.2d at 527-28. Civil defendants subject to criminal indictment face a significant risk of self-incrimination during the civil discovery process. *Walsh Securities,* 7 F.Supp.2d at 527 (citing *Parallel Proceedings,* 129 F.R.D. at 203). Moreover, the indicted defendants risk exposing their criminal defense strategy during civil discovery. *Id.* Additionally, the burden of delay on the civil litigants is minimal because the Speedy Trial Act requires prompt resolution of the related criminal proceedings. *Id.* In contrast, because there is less risk of self-incrimination and greater burdens imposed by the delay, stays are rarely granted at the pre-indictment stage. *See State Farm Mut. Auto. Ins. Co. v. Beckham-Easley,* No. Civ.A. 01-5530, 2002 WL 31111766, at *2 (E.D.Pa. Sept.18, 2002). *But see Walsh Securities,* 7 F.Supp.2d at 527-28 (granting temporary stay at pre-indictment stage).

**4 In this case, indictments were returned against several of the civil defendants on September 23, 2002. Because the civil and criminal issues are so closely intertwined, the Court finds that these defendants face a substantial risk of self-incrimination if the civil cases are allowed to proceed. In addition to the Fifth Amendment problems, the defendants risk exposing their criminal defense

strategies to the government and to their co-defendants. Thus, this factor weighs strongly in favor of staying the consolidated securities actions pending resolution of the related criminal proceedings.

3. Prejudice to the Plaintiff

In evaluating the plaintiff's burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim. *Golden Quality Ice Cream,* 87 F.R.D. at 56. Instead, the plaintiff should demonstrate a particularly unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay. *Beckham-Easley,* 2002 WL 31111766, at *3; *Walsh Securities,* 7 F.Supp.2d at 528.

In their filings, Plaintiffs primarily argue that they are prejudiced by the stay because a Lead Plaintiff and Lead Counsel have not yet been appointed to manage the consolidated actions. The Pension Fund Plaintiffs argue that, without Lead Counsel, Plaintiffs do not "have someone with authority to speak for them in this litigation." *See* Pension Fund Pls.' Mem. at 3. Similarly, the Argent/Eminence Plaintiffs assert that stay order deprives "tens of thousands of purchasers of Adelphia securities ... of representation" and prevents Plaintiffs from making important strategic decisions regarding the course of this litigation. *See* Argent/Eminence Pls.' Mem. at 2-3. Finally, both sets of Plaintiffs implicitly assert that the stay order is counter to Congressional intent in enacting the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA"). *See Id.;* Pension Fund Pls.' Mem. at 3. In their filings, Plaintiffs point out that Congress gave Lead Plaintiffs and Lead Counsel important roles in shaping the strategic direction of securities class action suits. *Id.* It follows, Plaintiffs argue, that staying the proceedings before making these appointments is counter to the scheme envisioned by Congress in the Act. *Id.*

The Court finds that Plaintiffs have failed to demonstrate sufficient prejudice to warrant reconsideration of the stay in this case. First, Plaintiffs have not shown any prejudice other than delay in pursuing their suits, which is insufficient to support vacating the stay. *See Walsh Securities,* 7 F.Supp.2d at 528. For example, Plaintiffs point to no evidence that Defendants are intentionally liquidating assets or otherwise trying to gain an advantage during the delay. *Contra Beckham-Easley,* 2002 WL 31111766, at *3 (finding the defendants' willful assets transfers militated against stay). Second, the lack of a Lead Plaintiff or Lead Counsel does not prevent the individual plaintiffs and their respective counsel from making the kinds of strategic decisions, such as intervention in other suits, described by Plaintiffs in their filings. Finally, nothing in the PSLRA indicates that Congress intended for private securities actions to proceed during related criminal proceedings. While the Court agrees that Congress gave Lead Plaintiffs and Lead Counsel important roles in shaping the strategic direction of securities class actions, the legislative record does not reveal an intent to limit a Court's inherent discretion to control its own docket. Accordingly, because the Court finds that Plaintiffs are not prejudiced by the delay resulting from the stay, this factor militates in favor of the stay.

4. Burden on the Defendants

***5** As noted above, civil defendants subject to a criminal indictment must often choose between waiving their Fifth Amendment rights during civil discovery or asserting the privilege and losing the civil case. *Walsh Securities,* 7 F.Supp.2d at 528. While it is not unconstitutional to place a defendant in this position, *see Baxter v. Palmigiano,* 425 U.S. 308, 318-19, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976), courts may consider these conflicts when deciding whether to stay a civil case. *Dresser Indus.,* 628 F.2d at 1375; *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.,* 175 F.Supp.2d 573, 577-78 (S.D.N.Y.2001).

In this case, the Court finds that Defendants potentially face a significant burden if the civil

cases are allowed to go forward. As noted above, because the Rigas Defendants are already under criminal indictment in a case concerning identical allegations and issues, they face substantial risks of self-incrimination. Moreover, Defendants also may be forced to reveal their criminal defense strategies if the case is allowed to proceed.

Finally, the unindicted civil defendants also face prejudice unless the civil proceedings are stayed. The Rigas Defendants are the key figures in both the civil and criminal cases. *See Volmar Distribs., Inc. v. New York Post Co., Inc.,* 152 F.R.D. 36, 41 (S.D.N.Y.1993). Because their actions lie at the center of the civil cases, their testimony and documents will be essential to resolving those cases. *Id.* Staying the civil cases pending resolution of the criminal proceedings will preclude the Rigas Defendants from invoking the Fifth Amendment privilege during the civil cases. *Id.* If a stay is not issued, then remaining Defendants, who are not protected by the Fifth Amendment, may not be able to adequately defend themselves. Accordingly, this factor weighs in favor of staying the civil proceedings.

5. Interest of the Court

The Court has an interest in efficiently managing its caseload. *Beckham-Easley,* 2002 WL 31111766, at *3. In this case, granting a stay promotes judicial efficiency. First, without a stay, the civil defendants will likely assert their Fifth Amendment rights, causing the court to decide a number of privilege issues during civil discovery. In contrast, if the civil actions are stayed until the conclusion of the criminal proceedings, then these rulings will no longer be necessary. *Walsh Securities,* 7 F.Supp.2d at 528. Moreover, if the indicted defendants assert the privilege throughout the litigation, then it will be "difficult or impossible to fairly apportion liability because of the differing factual record among the defendants." *Id.* at 528-29. Additionally, criminal convictions against any of the civil defendants will likely encourage them to settle the civil suits, thereby eliminating the need to litigate some issues in the civil cases. Thus, staying the civil actions preserves judicial resources and streamlines some of the complexities of the consolidated securities actions. As a result, this factor weighs in favor of staying the civil actions.

6. Public Interest

***6** The public interest is not harmed by staying the civil action. In their filings, Plaintiffs argue that the public interest in protecting the integrity of the securities markets militates in favor of letting the civil action proceed. *See* Pension Fund Pl.'s Mem. at 3. While the Court agrees that the public has a strong interest in protecting capital markets, the related criminal proceedings serve to advance those same interests. *Volmar Distribs. ., Inc. v. New York Post Co., Inc.,* 152 F.R.D. 36, 40 (S.D.N.Y.1993) (citing *Brock v. Tolkow,* 109 F.R.D. 116, 121 (E.D.N.Y.1985)). Accordingly, the public interest may be served by staying the civil cases pending resolution of the criminal proceedings. As a result, this factor militates in favor of staying the consolidated civil cases.

7. Balancing the Equities

On balance, the factors listed above support staying the consolidated civil cases pending resolution of the criminal proceedings. While the Court appreciates that the delay will cause some inconvenience to Plaintiffs, this prejudice is outweighed by the other factors supporting the stay.

B. *Related Bankruptcy Proceedings*

The Court also based its stay order on the pendency of Adelphia's bankruptcy proceedings. The stay is independent of the automatic stay provision of § 362(a) of the Bankruptcy Code, which applies only to the debtor-defendant in this case, Adelphia. Rather, the stay is based on the Court's inherent power to control its docket. *Landis,* 299 U.S. at 254-55. Under circumstances such as those present in this case, courts may stay civil proceedings against non-debtor defendants that are not subject to the Bankruptcy Code's automatic stay provision. *In re the Loewen Group, Inc. Sec. Litig.,* No. Civ.A. 98-6740, 2001 WL 530544, at *1-3 (E.D.Pa. May

16, 2001); *Smith v. Dominion Bridge Co.,* No. Civ.A. 96-7580, 1999 WL 111465 (E.D.Pa. March 2, 1999).

In *Loewen Group,* a series of securities class actions were filed against Loewen, alleging, *inter alia,* that the company inflated profits in its securities filings. 2001 WL 530533, at *1. While these class actions were pending, Loewen filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. *Id.* The court, *sua sponte,* placed the consolidated class actions in civil suspense pending the resolution of the bankruptcy proceedings. *Id.* In response, the plaintiffs filed motions to remove the cases from the suspense calendar and allow them to proceed against the non-debtor defendants. *Id.*

The court, applying four factors listed in *Dominion Bridge,* denied the motion to reconsider the stay. In denying the motion, the court considered the following factors: (1) plaintiff's interest in having a forum and whether a satisfactory alternative forum exists; (2) whether the defendant may wish to avoid multiple litigation or inconsistent relief for liability shared with third parties; (3) the extent to which judgment may impede the debtor-party's ability to protect its interest; and (4) the interest of the courts and the public in the consistent and efficient settlement of controversies. *Loewen Group,* 2001 WL 530544, at *1 (citing *Dominion Bridge,* 1999 WL 11465, at *4). Application of the factors to this case demonstrates that the consolidated civil actions should be stayed pending resolution of Adelphia's bankruptcy petition.

*7 Regarding the first factor, the consolidated securities actions have merely been placed in suspense. Thus, Plaintiffs retain this Court as the forum to adjudicate their securilies claims. Accordingly, this factor weighs in favor of staying the consolidated securities actions. *Accord Loewen Group,* 2001 WL 530544, at *1; *Dominion Bridge,* 1999 WL 11465, at *4.

Regarding the second and fourth factors, the Court, the public, and the parties all have an interest in the efficient resolution of both the civil and the bankruptcy claims. The Court finds that this interest is best served by staying the consolidated civil actions as to all defendants, not just Adelphia, pending resolution of Adelphia's bankruptcy petition. As in *Loewen,* the securities actions in this case will require significant and burdensome discovery on the part of the debtor-defendant, Adelphia. 2001 WL 530544, at *3. Thus, it will be difficult, if not impossible, to proceed against the non-debtor defendants without substantial involvement by Adelphia. *Id.* Accordingly, these factors militate towards staying the consolidated securities actions.

Finally, regarding the third factor, because many of the individual defendants were officers of Adelphia and the claims against them arise out of their conduct at the company, Adelphia cannot adequately protect its interests if the civil actions are allowed to proceed without Adelphia's involvement. In *Loewen,* the Court found that, because the claims against the individual defendants were based upon actions taken as officers of the debtor-defendant, the plaintiffs could not "meaningfully separate the actions of the company from the actions of its officers and directors." *Loewen Group,* 2001 WL 530544, at *3. *See also Dominion Bridge,* 2001 WL 530544, at *4 (extending stay to non-debtors where "there is such identity between the debtor and third-party that the debtor may be said to be the real party defendant"). As a result, an action solely against the non-debtor defendants risked unnecessary duplication of issue and inconsistent relief.

Similarly, in this case, proceeding against the individual defendants risks subjecting Adelphia to duplicative and inconsistent litigation. For example, if Plaintiffs are allowed to proceed against the individual defendants, Adelphia risks being collaterally estopped from relitigating issues decided in Plaintiffs' favor based on the Adelphia officers' actions. *Accord Loewen Group,* 2001 WL 530533, at *3. Thus, this factor also supports staying the civil actions until the conclusion of Adelphia's bankruptcy proceedings so that Adelphia may ad-

equately represent its interests. Therefore, all four factors discussed in *Loewen Group* and *Dominion Bridge* militate in favor of staying the civil cases as to all defendants.

IV. *CONCLUSION*

Based on the foregoing discussion, the Court finds that its stay order, dated September 6, 2002, is adequately supported by precedent. Accordingly, Plaintiffs fail to demonstrate that the Court committed a clear error of law by staying these civil cases. Plaintiffs' Motions for Reconsideration are denied.

*8 An appropriate Order follows.

ORDER

AND NOW, this 13th day of May, 2003, upon consideration of Plaintiffs' Motions for Reconsideration (Docket Nos. 84 & 88), IT IS HEREBY ORDERED that Plaintiffs' Motions are DENIED.

E.D.Pa.,2003.
In re Adelphia Communications Securities Litigation
Not Reported in F.Supp.2d, 2003 WL 22358819 (E.D.Pa.)

END OF DOCUMENT

EXHIBIT "B"

Not Reported in F.Supp.2d, 2010 WL 2331069 (W.D.Pa.), 2010-1 Trade Cases P 77,061
(Cite as: 2010 WL 2331069 (W.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
RESCO PRODUCTS, INC., Plaintiff,
v.
BOSAI MINERALS GROUP CO., LTD., and CMP Tianjin Co., Ltd., Defendants.

Civil Action No. 06–235.
June 4, 2010.

Austin P. Henry, Mills & Henry, Pittsburgh, PA, Jennifer Milici, William A. Isaacson, Boies, Schiller & Flexner LLP, Washington, DC, Richard E. Donovan, Kelley Drye & Warren LLP, Parsippany, NJ, for Plaintiff.

Benjamin J. Lambiotte, Paul S. Hoff, Richard D. Gluck, Garvey Schubert Barer, Washington, DC, Lizbeth R. Levinson, Kutak Rock LLP, Washington, DC, Frederick B. Goldsmith, Goldsmith & Ogrodowski, LLC, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION

CONTI, District Judge.

*1 An action was filed February 22, 2006 by Resco Products, Inc. ("plaintiff") alleging that defendants Bosai Minerals Group Co., Ltd. and CMP Tianjin Co., Ltd. ("defendants") entered into a conspiracy with the purpose and effect of fixing prices and controlling the supply of refractory grade bauxite, and committed other unlawful practices designed to inflate the prices of refractory grade bauxite sold to plaintiff and other purchasers in the United States and elsewhere. (Pl.'s First Am. Compl. (Docket No. 92) at 1.) Plaintiff submits these actions violated section 1 of the Sherman Act, 15 U.S.C. § 1.

Two motions to dismiss were filed on October 7, 2009. The first motion to dismiss was a joint motion filed by defendants pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). (Docket No. 98). The second motion to dismiss was filed by CMP Tianjin pursuant to Federal Rule of Civil Procedure 12(b)(2). (Docket No. 99). Plaintiff filed responses and defendants filed replies, and a hearing was held on January 21, 2010 regarding both motions to dismiss. The court requested additional briefing with respect to a pending World Trade Organization ("WTO") proceeding, and the implications of the WTO proceeding on the application of the act of state doctrine. (Mot. to Dismiss Hr'g Tr. (Docket No. 130) at 49.) CMP Tianjin later withdrew the motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(2). (*See* Docket Nos. 140, 142.)

After considering the parties' supplemental briefs (Docket Nos. 127 and 131) with respect to the joint motion to dismiss, the court will stay the proceedings until July 21, 2010, at which time the parties will inform the court about the status of the pending WTO proceeding and the stay will be re-evaluated.

A. WTO proceeding

The pending WTO proceeding was initiated by the United States Trade Representative ("USTR") in its Request for the Establishment of a Panel by the United States, *China—Measures Related to the Exportation of Raw Materials,* WT/DS394/7 (Nov. 9, 2009). (Defs.' Reply to Pl.'s Opp'n to Defs.' Joint Mot. to Dismiss (Docket No. 123), Ex. 4 ("Panel Request").) In response to the Panel Request, the Dispute Settlement Body ("DSB") of the WTO established a single panel on December 21, 2009 to examine complaints by the United States and others concerning China's export restrictions on various raw materials, including bauxite. (Pl.'s Reply to Defs.' Supplemental Br. (Docket No. 131), Ex. 4 at 1.)

The USTR's Panel Request, among other things, alleges the following:

> China ... imposes quantitative restrictions on the exportation of the materials [(including bauxite)] by requiring that prices for the materials meet or exceed a minimum price before they may be exported. Further, through its ministers and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.

*2 (Panel Request at 6.) The USTR's Panel Request asserts that the actions are inconsistent with specific provisions of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A--11, 55 U.N .T.S. 194 ("GATT"), and the Protocol on the Accession of the People's Republic of China (WT/L/432) ("Accession Protocol"), which incorporates certain commitments of China contained in the WTO's Working Party Report on the Accession of China (WT/MIN(01)/3) ("Working Party Report"). (*See generally* Panel Request.)

Normally, a panel must conduct its examination of the complaints and issue a final report to the parties within six months. (Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments– Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) ("DSU"), art. 12.8.) A panel's final report will "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." (DSU art. 12.7.) Parties to the dispute have a right under the DSU to appeal issues of law covered in the panel report and legal interpretations developed by the panel. (DSU art. 17.4, 6.) Parties may make written submissions to, and be given an opportunity to be heard by, an Appellate Body. (DSU art. 17.4.) Generally, "the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall ... not exceed nine months where the panel report is not appealed or 12 months where the report is appealed." (DSU art. 20.) Finally, the DSU states that "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement." (DSU art. 19.1.)

Discussion

B. Motion to stay

Defendants raised four major arguments in support of their joint motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b) (1) and (6):(A) the act of state doctrine prohibits the court from declaring defendants' restrictions on the trade of bauxite unlawful, (B) the foreign sovereign compulsion doctrine provides immunity for defendants' actions, (C) the court should decline jurisdiction for reasons of international comity, and (D) the first amended complaint fails to state a claim.

The court suggested at the hearing on January 21, 2010 that a stay of the action until the WTO proceeding concluded might be appropriate. (Mot. to Dismiss Hr'g Tr. (Docket No. 130) at 10.) The court requested supplemental briefing "with respect to the import of the proceeding before the [WTO] and the act of state doctrine and how that applies [to this case]." (*Id.* at 49.)

Defendants raised five arguments in their supplemental brief: (A) in dispute resolution cases, the WTO issues detailed decisions including findings of fact and conclusions of law, (B) moving forward with this case while the WTO proceeding is pending creates a substantial risk of interference with the conduct of foreign policy of the executive branch, (C) the act of state doctrine compels abstention, (D) comity factors weigh heavily in favor of abstention, and (E) a stay is within the court's discretion. (Defs.' Supplemental Br. (Docket No. 127).)

*3 Plaintiff raised four main arguments in its reply to defendants' supplemental brief: (A) the act of state and comity defenses are fact-based analyses

that do not justify abstention at this point, (B) there is no genuine risk of inconsistent findings or rulings until the court is ready to make them, which should occur after discovery has clarified whether defendants were acting pursuant to a governmental mandate, (C) no court has stayed an otherwise valid action pending the conclusion of WTO proceedings, and deference to the WTO is not required, and (D) a stay would prejudice plaintiff. The crux of issue concerning whether a stay should be ordered relates to the act of state doctrine, which will be addressed below.

a. Act of state doctrine

The act of state doctrine "is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs." *Environmental Tectonics v. W.S. Kirkpatrick, Inc.,* 847 F.2d 1052, 1057 (3d Cir.1998). American courts are to refrain from judging "the validity of a foreign state's governmental acts in regard to matters within that country's borders." *Id.* at 1057–58. The burden of proving dismissal on the grounds of the act of state doctrine is on the moving party. *Id.* at 1058.

When considering the act of state doctrine, a court must be mindful of the extent to which, in the context of a particular dispute, separation of powers concerns may be implicated. *Grupo Protexa, S.A. v. All Am. Marine Slip,* 20 F.3d 1224, 1237 (3d Cir.1994), *cert. denied,* 513 U.S. 986, 115 S.Ct. 481, 130 L.Ed.2d 395 (1994). The court in *Grupo Protexa* stated:

> [T]he court must determine whether there is evidence of a potential institutional conflict between the judicial and political branches such that a judicial inquiry into the validity of a foreign state's actions could embarrass the political branches in their conduct of foreign affairs. *See* [*Environmental Tectonics,* 847 F.2d at 1058]. This analysis is "must always be tempered by common sense." [*Allied Bank Int'l v. Banco Credito Agricola de Cartago,* 757 F.2d 516, 521 (2d Cir.1985)] (citations omitted). "The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." ' *Id.* (quoting [*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)]).

Id. The basis for this analysis is found in the underlying policy concerns of the act of state doctrine, which "focus on the preeminence of the political branches, and particularly the executive, in the conduct of foreign policy." *Allied Bank Int'l,* 757 F.2d at 520.

Defendants argue that price coordination and supply limits were mandated by China's export control regulations and policies. Under those circumstances, any alleged antitrust violation arguably was an act of state, and not a private conspiracy. Defendants claim that the Chinese organization responsible for the alleged antitrust violations is known as the China Chamber of Commerce of Chemical, Metals and Minerals Importers and Exporters ("CCCMC").

*4 Defendants rely on an amicus brief filed by the Ministry of Foreign Commerce of the People's Republic of China in *In re Vitamin C Antitrust Litigation,* 584 F.Supp.2d 546 (E.D.N.Y.2008), for the proposition that the CCCMC, which is one of the Chinese chambers of commerce, "is a Ministry-supervised entity authorized by the Ministry to regulate ... export prices and output levels, and the price coordination,' or so-called voluntary self-restraint,' it facilitated is a government-mandated price and output control regime." (Defs.' Mem. in Supp. of Joint Mot. to Dismiss (Docket No. 101), Ex. A at 3 ("Amicus brief").) Defendants allege that the CCCMC is under the direct supervision of the Chinese Ministry of Foreign Commerce, a government body with plenary authority to mandate export control policy, including supply and prices.

b. The court's power to stay

The United States Court of Appeals for the Third Circuit has held that a district court has broad

power to stay proceedings. *Bechtel Corp. v. Local 215, Laborers' Int'l Union,* 544 F.2d 1207, 1215 (3d Cir.1976) (affirming stay in deference to the trial court's discretionary power to grant a stay). The "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. North American Co.,* 299 U.S. 248, 299, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (Cardozo, J.). Central to this power is a court's ability to "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Bechtel Corp.,* 544 F.2d at 1215 . Of particular importance is that the issues and parties to the two causes need not be identical before one suit may be stayed to abide the proceedings in another suit. *See Landis,* 299 U.S. at 254. When two cases implicate similar facts or issues of law, the pending cause "may not settle every question of fact and law" in the current suit, but it may "in all likelihood ... settle many and simplify them all." *Id.* at 256. Before exercising the power to stay proceedings, a court must weigh competing interests and maintain an even balance. *Id.* at 255.

Courts within the Third Circuit have weighed the competing interests of the parties in deciding whether to exercise the power to stay proceedings. Tellingly, courts have stayed proceedings in numerous cases where another pending action contained similar questions of fact or law. *See, e.g., Cheyney State College Faculty v. Hufstedler,* 703 F.2d 732 (3d Cir.1983) (holding "that the district court did not clearly abuse its discretion in delaying the suit pending the potential resolution of some important issues in ongoing administrative proceedings"); *Chartener v. Provident Mut. Life Ins. Co.,* No. 02–8045, 2003 WL 22518526, at *4 (E.D.Pa. Oct.22, 2003) (granting stay for six months to abide the determination of a state court settlement agreement); *Schwarz v. Prudential–Bache Sec., Inc.,* No. 90–6074, 1991 WL 137157, at * 1 (E.D.Pa. July 19, 1991) (district court granted stay pending the settlement of a class action in which the plaintiff was a potential class member).[FN1]

FN1. Plaintiff cites several decisions for the proposition that the court does not have the authority to grant a stay in a case to await the resolution of a pending WTO proceeding. *See NSK Ltd., v. United States,* 416 F.Supp.2d 1334, 1337 (Ct. Int'l Trade 2006) (citing *Timken Co. v. United States,* 354 F.3d 1334, 1344 (Fed.Cir.2004) and *Corus Staal B.V. v. Dep't of Commerce,* 395 F.3d 1343, 1348 (Fed.Cir.2005)). The holdings in those decisions were based on the determination that the court was not required to treat the WTO's handling of a zeroing and antidumping policy as binding on its interpretation of United States statutory law. *See, e.g. Corus Staal,* 395 F.3d at 1346 ("[the Department of] Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law"); *Timken,* 354 F.3d at 1344 (refusing to overturn the Department of Commerce's zeroing practice based upon a WTO Appellate Body decision; holding that the Department of Commerce's "longstanding and consistent administrative interpretation is entitled to considerable weight").

Each decision relied upon by plaintiff is distinguishable from this case. *NSK Ltd.* is distinguishable because the United States was a party to the case and opposed the stay—here the United States is not a party and does not challenge the stay. In *Timken,* the United States Department of Commerce calculated a weighted average based upon the dumping margins of a producer of roller bearings, and the Department of Commerce used the weighted average to assess duties upon the producer. The producer argued that the WTO issued a report prohibiting this practice. *Timken,* 354 F.3d at 1338–39. The WTO proceeding at is-

> sue, however, concerned a trade dispute between European nations and India, and the WTO's decision was not binding on the United States. *Id.* at 1343–44. The plaintiff in *Corus Staal* argued the Department of Commerce was in violation of its international obligations in light of three WTO decisions, one in which the United States was not a party. *Corus Staal,* 395 F.3d at 1348. The court in *Corus Staal* reviewed the decisions cited by the plaintiff and held those decisions were not relevant to the interpretation of a United States statute. *Id.* at 1349. Of significance is that, unlike the situation in this case, all the WTO proceedings in *Corus Staal* had concluded and a stay was not an issue. Here the United States initiated the WTO proceeding and advanced a position potentially adverse to plaintiff in this case. For the reasons stated above, the decisions plaintiff relies upon do not constrain this court in exercising its power to stay the proceedings.

*5 Several courts have identified the competing interests as: (1) the length of the stay; (2) the balance of harm to the parties; and (3) whether a stay will simplify issues and promote judicial economy. *Gunduz v. U.S. Citizenship and Immigration Servs.*, No. 07–780, 2007 WL 4343246, at *1 (W.D.Pa. Dec.11, 2007); *see Smithkline Beecham Corp. v. Apotex Corp.*, No. 03–3365, 2004 WL 1615307, at *7 (E.D.Pa. July 16, 2004). Other courts have recognized five factors relevant to the balancing analysis:

> (1) The interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil ... litigation.

Morgenstern v. Fox Television Stations of Phila., No. 08–0562, 2010 WL 678113, at —— 1–2 (E.D.Pa. Feb.23, 2010) (holding case in abeyance pending the resolution of a bankruptcy proceeding to which the defendant was a party); *see Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa.1980) (granting limited pretrial discovery).[FN2]

> FN2. While the court is aware that decisions to stay cases usually involve pending lawsuits and not pending WTO proceedings, the same universal principles relevant to granting a stay (i.e., judicial autonomy, judicial economy, and resolving similar issues) should apply by analogy in this case. *See Landis* and *Bechtel* discussed *supra.*

Each balancing framework considers several overlapping factors, including the interests of and burdens on the parties, the length of the stay, and the interests of the court in promoting judicial efficiency. The court finds that the decision to stay these proceedings would not change regardless of which framework is applied to the facts of the case. For purposes of completeness, however, the court will weigh the interests of the parties under the five *Golden Quality* factors.

i. Plaintiff's interest and potential prejudice

District courts should operate in a manner that ensures a just, speedy, and inexpensive determination of every action and proceeding. *See* FED. R. CIV. P. 1. This goal is facilitated when plaintiffs and defendants use the discovery procedures to determine the merit, or lack thereof, of a case and to develop a strategy to guide them through litigation. *See Golden Quality,* 87 F.R.D. at 56. Plaintiff argues that it is not necessary to stay this case pending the issuance of the report of the WTO dis-

pute resolution panel because the court is not required to make any potential inconsistent findings of fact or conclusions of law until after discovery is completed. Plaintiff asserts that, consequently, discovery ought to continue and the court should deny the defendants' motion to dismiss as premature. Plaintiff submits that to stay the proceedings for six to twelve months would be prejudicial and would cause "more documents [to be] lost or discarded, witnesses [to] leave their companies, and memories [to] fade." (Pl.'s Reply to Defs.' Supplemental Br. (Docket No. 131) at 14.)

*6 It should be noted that the issues before the court and those pending in the WTO proceeding are similar. The USTR alleged in its Panel Request that the Chinese government, working through chambers of commerce, has been imposing restrictions on the exportation of bauxite by requiring that prices meet or exceed a minimum price before the material can be exported. Plaintiff argues alternatively that defendants have voluntarily entered into agreements to fix prices of bauxite before the material is exported, thereby controlling supply. The arguments of plaintiff and the USTR are similar in that they target a common method of price-fixing; where they differ is what entity is responsible for the price arrangements—the Chinese government or defendants.[FN3]

> FN3. Price-fixing is defined as "the artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market." BLACK'S LAW DICTIONARY 1227 (8th ed.2004). This definition appears to incorporate the alleged practices plaintiff complains about in this lawsuit and those which the USTR complains about in its Panel Request.

The difference in the position of plaintiff and the USTR focuses on factors that affect how the act of state doctrine should be applied in this case. Defendants argue that the act of state doctrine applies to this case because China is requiring the CCCMC to fix prices of bauxite before the material can be exported. If the panel determined that the United States is correct in its assertion that the Chinese government has been working through chambers of commerce to impose restrictions on the exportation of bauxite by requiring that prices meet or exceed a minimum price before the material can be exported, that finding may favor the defendants' arguments in this case. A contrary holding likewise could impact whether the act of state doctrine applies. While the court recognizes, and the parties do not dispute, that decisions adopted by the DSB are not binding, the findings of fact and conclusions of law made by the WTO panel may at the very least simplify the analysis of the act of state doctrine here.

Plaintiff's interest in pursuing discovery at this time does not outweigh other interests. To advance discovery now without a final determination in the pending WTO proceeding could lead the court to resolve the pending motion to dismiss or future dispositive motions in a manner that may be inconsistent with the position of the USTR and the eventual decision rendered by the WTO panel. While not dispositive, the WTO panel's report may implicate separation of powers concerns, which would be appropriate for this court to consider in determining whether a decision by this court would interfere with the executive branch's conduct of foreign policy. *See Grupo Protexa* discussed *supra*. The court determines it is prudent under those circumstances to await the resolution of WTO proceedings in order to minimize the delicate separation of powers concerns at this juncture.

Mindful that proceedings should be carried out in a manner that ensures a just, speedy, and inexpensive determination of the action, the court does not agree with plaintiff's position that staying the proceedings for six to twelve months would be substantially prejudicial. It should be noted that the WTO panel was formed on December 21, 2009. A final report by the panel is likely to be made six months from that date—about June 21, 2010. If an appeal is taken, a final appellate report should be adopted by the DSB by December 2010. From the

date of this order, the proceedings here will likely be stayed between two and seven months. If the court were to permit unfettered discovery, it is possible that a final report could be issued by the WTO before any significant progress is made in this case. Any prejudice to plaintiff caused by such a short delay is outweighed by the minimization of separation of powers concerns raised by the WTO proceedings.

ii. Burden on defendants

*7 Defendants argue that a stay in this case is warranted because a final report in the pending WTO proceeding could obviate further discovery, particularly concerning the act of state doctrine. Defendants submit that the court is within its power to abide the outcome of the WTO proceeding which may substantially affect this case or be dispositive of the issues. *See Bechtel* discussed *supra.* The court agrees with defendants' position that substantial time, effort, and resources may be saved by exercising the court's broad power to hold this case in abeyance until a final report is adopted by the DSB. It does not comport with fairness or economy to allow the parties further discovery at this stage in the case, when the court believes such efforts could soon be proven wasteful. *E.g., Golden Quality,* 87 F.R.D. at 57 ("The mere possibility that a substantial amount of the court's work, if undertaken now, may shortly prove to have been unnecessary, cautions against undue haste in proceeding with this civil action"). This factor weighs in favor of defendants.

iii. The burden on the court

The pretrial discovery phase is lengthy and complicated in private antitrust cases, especially in matters concerning international litigants. In weighing the interests of judicial economy in this case, the court considers the United States Court of Appeals for the Ninth Circuit's discussion in *Chronicle Publ'g Co. v. Nat'l Broad. Co., Inc.,* 294 F.2d 744, 747–48 (9th Cir.1961):

> We are ... confronted with the prospect of two tremendously complex proceedings simultaneously assembling the same factual data in painstaking detail for the purpose of considering these facts from different points of view. The situation is one which cries out for the elimination of wasteful duplication of effort. If the mechanics of justice are not to be wholly overwhelmed by the steadily increasing burden of complex antitrust litigation, means must be found for easing that burden.

Staying the proceedings in this case for a period between two and seven months may reduce the duplication of effort between the WTO panel and this court, as the two proceedings involve overlapping facts with regard to the Chinese government's alleged involvement in price-fixing of exported bauxite.

iv. Burden on nonparties

Neither party addresses in their briefing, and the court is not presently aware of, a burden on nonparties if this litigation were to advance at this time. This factor weighs in favor of granting the stay.

v. The public interest

The public has an "interest in having private antitrust actions proceed expeditiously." *Golden Quality,* 87 F.R.D. at 58; *see Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.,* 269 F.Supp. 540, 542 (E.D.Pa.1967) (stating that the strong incentive of treble damages "encourages private litigants to vigorously enforce the antitrust laws" and that "unwarranted stays of proceedings stymie and offset any incentive otherwise contained in the possibility of triple recovery"). The court cannot ignore, however, the United States' position taken before the WTO panel with regard to alleged price-fixing of bauxite in China. The United States, represented by the executive branch through the USTR, has an interest in making its case before the WTO panel.

*8 Were this court to rule on the pending motion to dismiss or proceed with discovery, there may be duplication of effort by the parties here and

the United States in the WTO proceedings, and there is a possibility for a conflict in decisions that may be avoided if a brief stay is issued. This potential conflict between the judicial and executive branches could implicate separation of powers concerns if decisions of this court were to embarrass the executive branch in the conduct of foreign affairs. *See Grupo Protexa* discussed *supra.* [FN4] The public interest in favor of advancing the USTR's position in the pending WTO proceeding supports a stay of this case until a final report is released by the WTO panel.

> FN4. The court does not rule on whether the act of state doctrine or any other theory of abstention defendants assert would act as a bar to plaintiff's suit. There are unresolved issues that remain before those defenses can be properly addressed. The resolution of the pending WTO proceeding will likely shed light on those issues—a factor deserving substantial weight in the court's analysis of staying this case.

Conclusion

After considering the five *Golden Quality* factors, the court holds that this case will be stayed until July 21, 2010, at which time the parties will inform the court about the status of the pending WTO proceeding and the stay will be re-evaluated. The pending joint motion to dismiss (Docket No. 98) will be denied without prejudice and may be renewed when the stay is lifted.

W.D.Pa.,2010.
Resco Products, Inc. v. Bosai Minerals Group Co., Ltd.
Not Reported in F.Supp.2d, 2010 WL 2331069 (W.D.Pa.), 2010-1 Trade Cases P 77,061

END OF DOCUMENT

EXHIBIT "C"

Slip Copy, 2012 WL 3994223 (M.D.Pa.)
(Cite as: 2012 WL 3994223 (M.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
Kelvin Andre SPOTTS, et al., Plaintiffs
v.
UNITED STATES of America, et al., Defendants.
John Legrand, et al., Plaintiffs
v.
Fenstermaker, et al., Defendants.
Antron Russell, et al., Plaintiffs
v.
United States of America, et al., Defendants.

Civil Nos. 3:12–CV–0583, 3:12–CV–0743,
1:12–CV–0407.
Sept. 11, 2012.

Kelvin Andre Spotts, Waymart, PA, pro se.

Broderick York, Waymart, PA, pro se.

Roderick Wheless, Waymart, PA, pro se.

Maurice Davis, Waymart, PA, pro se.

Justin Blewitt, U.S. Attorney's Office, Scranton, PA, for Defendants.

Roderick Wheless, Waymart, PA, pro se.Maurice Davis, Waymart, PA, pro se. Justin Blewitt, U.S. Attorney's Office, Scranton, PA. for Defendants.

MEMORANDUM ORDER

MARTIN C. CARLSON, United States Magistrate Judge.

I. *Statement of Facts and of the Case*

*1 In the above-captioned related actions, a number of federal inmates have sued the United States of America and certain individual Defendants, alleging injuries stemming from the consumption of salmonella-contaminated chicken that was served at the United States Penitentiary, Canaan, in June 2011. The Defendants have not yet filed an answer to the complaint or otherwise moved to dismiss this complaint, and the deadline for filing a responsive pleading in each of these cases has been enlarged until October 1, 2012. Nonetheless the *pro se* Plaintiffs have lodged discovery demands upon the Defendant, inspiring the Defendants to file motions for protective orders in each action, seeking a stay of discovery, or an extension of time in which to respond to the discovery propounded by Plaintiffs, until a case management schedule is issued after the Defendants have filed an initial pleading or otherwise responded to the complaints. [FN1]

FN1. The motions for protective orders are located at the following docket entries: *Kelvin Andre Spotts, et al., v. United States of America, et al.,* No. 3:12–CV–0583 (Doc. 67); *John Legrand, et al ., v. Fenstermaker, et al.,* No. 3:12–CV0743 (Doc. 76); and *Antron Russell, et al., v. United States of America,* No. 1:12–CV–0407 (Doc. 98).

For the reasons set forth below, the motions will be GRANTED.

II. *Discussion*

Several basic guiding principles inform our resolution of the instant discovery matter. Rulings regarding the proper scope of discovery, and the extent to which discovery may be compelled, are matters consigned to the court's discretion and judgment. Thus, it has long been held that decisions regarding Rule 37 motions are "committed to the sound discretion of the district court." *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 788 (3d Cir .1974). Similarly, issues relating to the scope of discovery permitted under Rule 26 also rest in the sound discretion of the court. *Wisniewski v. Johns–Manville Corp.*, 812 F.2d 81, 90 (3d Cir.1987). Thus, a court's decisions regarding the conduct of discovery, and whether to compel disclosure of certain information, will be disturbed

only upon a showing of an abuse of discretion. *Marroquin–Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir.1983). This far-reaching discretion extends to rulings by United States Magistrate Judges on discovery matters. In this regard:

> District courts provide magistrate judges with particularly broad discretion in resolving discovery disputes. See *Farmers & Merchs. Nat'l Bank v. San Clemente Fin. Group Sec., Inc.*, 174 F.R.D. 572, 585 (D.N.J.1997). When a magistrate judge's decision involves a discretionary [discovery] matter ..., "courts in this district have determined that the clearly erroneous standard implicitly becomes an abuse of discretion standard." *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 174 (E.D.Pa.2004) (citing *Scott Paper Co. v. United States*, 943 F.Supp. 501, 502 (E.D.Pa.1996)). Under that standard, a magistrate judge's discovery ruling "is entitled to great deference and is reversible only for abuse of discretion." *Kresefky v. Panasonic Commc'ns and Sys. Co.*, 169 F.R.D. 54, 64 (D.N.J.1996); *see also Hasbrouck v. BankAmerica Hous. Servs.*, 190 F.R.D. 42, 44–45 (N.D.N.Y.1999) (holding that discovery rulings are reviewed under abuse of discretion standard rather than de novo standard); *EEOC v. Mr. Gold, Inc.*, 223 F.R.D. 100, 102 (E.D.N.Y.2004) (holding that a magistrate judge's resolution of discovery disputes deserves substantial deference and should be reversed only if there is an abuse of discretion).

*2 *Halsey v. Pfeiffer*, No. 09–1138, 2010 WL 3735702, *1 (D.N.J. Sept.17, 2010).

We note that this broad discretion over discovery matters extends to decisions under Rule 26(c) relating to the issuance of protective orders limiting and regulating the timing of discovery. Indeed, it is undisputed that: " '[t]he grant and nature of [a protective order] is singularly within the discretion of the district court and may be reversed only on a clear showing of abuse of discretion.' *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir.1973) (citation omitted)." *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 19 (2d Cir.1992). This discretion is guided, however, by certain basic principles. Among these cardinal principles, governing the exercise of discretion in this field, is that the district court may properly defer or delay discovery while it awaits an answer to a complaint, *see United Sweetener USA, Inc. v. Nutrasweet Co.*, 766 F.Supp. 212 (D.Del.1991); or considers a potentially dispositive pretrial motion, provided the district court concludes that the pretrial motion does not, on its face, appear groundless. *See, e.g., James v. York County Police Dep't*, 160 F.App'x 126, 136 (3d Cir.2005); *Nolan v. U.S. Dep't of Justice*, 973 F.2d 843,849 (10th Cir.1992); *Johnson v. New York Univ. Sch. of Ed.*, 205 F.R.D. 433, 434 (S.D.N.Y.2002). Briefly deferring discovery in such a case, while the court awaits a response to the complaint and determines the threshold issue of whether a complaint has sufficient merit to go forward, recognizes a simple, fundamental truth: Parties who file motions which may present potentially meritorious and complete legal defenses to civil actions should not be put to the time, expense and burden of factual discovery until after these claimed legal defenses are addressed by the court. In such instances, it is clearly established that:

> "[A] stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion 'appear[s] to have substantial grounds' or, stated another way, 'do[es] not appear to be without foundation in law.' " *In re Currency Conversion Fee Antitrust Litigation*, 2002 WL 88278, at *1 (S.D.N.Y. Jan.22, 2002) (*quoting Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 209–10 (S.D.N.Y.1991)) (*citing Flores v. Southern Peru Copper Corp.*, 203 F.R.D. 92, 2001 WL 396422, at *2 (S.D.N.Y. Apr.19, 2001)); *Anti–Monopoly, Inc. v. Hasbro, Inc.*, 1996 WL 101277, at *2 (S.D.N.Y. March 7, 1996)).

Johnson v. New York Univ. School of Educ., 205 F.R.D. 433, 434 (S.D.N.Y.2002).

Guided by these legal tenets we conclude that

discovery should be briefly stayed in these cases at the present time. We note that the Defendants have not yet filed answers or any potentially dispositive motions in response to the complaints filed in these cases. Once the Defendants have responded to the complaints we will, by separate order, set a discovery schedule in this matter, at which time the parties may freely engage in discovery. However, until the merits of these claims are initially addressed by the Defendants and the Court, we conclude, consistent with settled case law, that a stay of discovery is appropriate in the exercise of our discretion. *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y.2002); *United Sweetener USA, Inc. v. Nutrasweet Co.*, 766 F.Supp. 212 (D.Del.1991).

*3 Furthermore, in this case, one other consideration calls for a stay of the discovery that has been propounded, and a more comprehensive and coherent approach to all related discovery being undertaken in this matter. There are currently more than 20 cases pending in the Middle District of Pennsylvania involving the same alleged food contamination incident: *Fuquan Anthony Spells, et al., v. United States of America, et al.*, Docket No. 3:12–CV–0455; *Kelvin Andre Spotts, et al. v. United States of America,* et al., Docket No. 1:12–CV–0583; *Antron Russell v. United States of America,* et al., Docket No. 1:12–CV–407; *John Legrand, et al., v. Fenstermaker,* et al., Docket No. 3:12–CV–0743; *Charron Butts v. United States of America,* Docket No. 1:12–CV–0785; *Reginald Barnett, et al., v. Fenstermaker,* et al., Docket No. 1:12–CV–0183; *Roddy McDowell v. United States of America,* et al., Docket No. 3:12–CV–01132; *Louis Rundolph v. United States of America,* et al ., Docket No. 1:12–CV–01177; *David A. Rogers v. Warden Ronnie Holt,* et al., Docket No. 1:12–CV–1041; *Austin Grupee v. Warden Ronnie Holt* et al., Docket No. 1:12–CV–1015; *Jorge Gonzales–Vasquez v. United States of America,* Docket No. 1:12–CV–1031; *Richard Randolph v. United States of America,* Docket No. 1:12–CV–0784; *Estac Love v. Holt,* et al., Docket No. 1:12–CV–1030; *Eugene Kenneth Brinson, et al., v. United States of America,* Docket No. 3:12–CV–1451; *Anthony Murphy v. United States of America,* Docket No. 3:12–CV–1415; *Nafis Woods v. United States of America,* Docket No. 1:12–CV–0900; *Tito Strong v. Ronnie Holt,* Docket No. 3:12–CV–1036; *Barabbas Brown v. United States of America,* Docket No. 3:12–CV–0956; Paul *Peraza v. United States of America,* Docket No. 3:12–CV–1356; *Christopher Ramos v. Holt,* et al., Docket No. 3:12–CV–01454; *Eric Connelly v. United States of America,* Docket No. 1:12–CV–1187; and *Joseph Bonilla v. United States,* et al., Docket No. 3:12–CV–1490.

These cases would all greatly benefit from a coordinated approach to discovery and litigation, and while we have declined to formally consolidate these cases because they entail different parties, multiple *pro se* plaintiffs, and disparate claims, we are committed to keeping these cases on consistent and coherent litigation tracks. Briefly deferring pre-answer discovery in this case, while we await the government's response to these complaints, will achieve this goal in a fashion which will ultimately benefit all parties to this litigation, in our view. Therefore, we will defer further discovery pending the filing of answer and further order of the Court. of the outstanding motion.

An appropriate order follows.

III. *Order*

Accordingly, for the foregoing reasons, the Defendant's motions for protective orders staying discovery in each of the above-captioned cases are GRANTED.

So ordered.

M.D.Pa.,2012.
Spotts v. U.S.
Slip Copy, 2012 WL 3994223 (M.D.Pa.)

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EXHIBIT "D"

Not Reported in F.Supp.2d, 2011 WL 4345901 (W.D.Pa.)
(Cite as: 2011 WL 4345901 (W.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
Kellen McCLENDON, Plaintiff,
v.
Charles J. DOUGHERTY, an individual; Ralph L. Pearson, an individual; and DUquesne Universtiy, a Pennsylvania Corporation, Defendants.

Civil Action No. 2:10–cv–1339.
Sept. 15, 2011.

Rachel M. Yantos, Millstein & Knupp, David J. Millstein, Youngwood, PA, for Plaintiff.

Kimberly A. Craver, Martha Hartle Munsch, Reed Smith, LLP, Pittsburgh, PA, for Defendants.

MEMORANDUM ORDER

NORA BARRY FISCHER, District Judge.

*1 AND NOW this 15th day of September, 2011, having considered the Plaintiffs Motion for Reconsideration [79] of my Memorandum Order, (Docket No. 78), denying his Second Motion to Compel Discovery, (Docket No. 73), the Defendant's response to Plaintiffs motion for reconsideration, (Docket No. 82), and the parties' arguments before this Court, made on August 29, 2011, (Docket No. 83), the Court DENIES the pending motion for reconsideration [79].

This motion for reconsideration comes in the wake of the Court's denial of Plaintiff's second motion to compel discovery. In that motion, Plaintiff sought to compel production of Dr. Judith Griggs for supplemental deposition, as well as certain of Dr. Griggs' files and the files of Defendant Pearson. (Docket No. 73 at 7). The Court denied this motion because Plaintiff delayed in requesting production of the documents, because Defendants had already agreed to produce Dr. Griggs for supplemental deposition, and because the Court did not find the requested documents relevant. (*See generally* Docket No. 78).

Motions for reconsideration are granted sparingly "[b]ecause federal courts have a strong interest in finality of judgments." *Jacobs v. Bayha,* Civ. A. No. 07–237, 2011 WL 1044638, at *2 (W.D.Pa. Mar.18, 2011) (quoting *Continental Cas. Co. v. Diversified Indus., Inc.,* 884 F.Supp. 938, 943 (E.D.Pa.1995)) (emphasis added). "Because of the interest in finality, at least at the district court level ... the parties are not free to relitigate issues the court has already decided." *Williams v. City of Pittsburgh,* 32 F.Supp.2d 236, 238 (W.D.Pa.1998) (citing *Rottmund v. Continental Assurance Co.,* 813 F.Supp. 1104, 1107 (E.D.Pa.1992)). The purpose of a motion for reconsideration is " 'to correct manifest errors of law or fact or to present newly discovered evidence.' " *Max's Seafood Café v. Quinteros,* 176 F.3d 669, 677 (3d Cir.1999) (quoting *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir.1985)). A Court may grant a motion for reconsideration if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Max's Seafood Café,* 176 F.3d at 677 (citing *North River Ins. Co. v. Cigna Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir.1995)). Plaintiff's motion clearly relies on the third rationale, as he claims that the Court committed clear error of law or fact in its disposition of his primary motion. (*See* Docket No. 79 at ¶ 2) (claiming that this Court's original order "constitutes an error of both law and fact and creates a manifest injustice."). The Court finds Plaintiff's argument to be without merit.

First, the Court reiterates its earlier point that "discovery under the Federal Rules of Civil Procedure is intended to be obtained as expeditiously as possible ... Piecemeal discovery, such as would arise if the Court were to grant this motion, does

not contribute to the expeditious completion of discovery." (*See* Docket No. 78 at 1) (internal citation omitted). Plaintiff's dilatory actions, which would result in *de facto* extension of the Court's discovery deadlines, do not contribute to the expeditious acquisition of discovery and disposition of the case.

*2 Second, the request to produce Dr. Griggs for deposition is moot because, as Plaintiff's Counsel has admitted, Dr. Griggs has already been produced for supplemental deposition. (Docket No. 89 at 59). In fact, at oral argument, Plaintiff's Counsel admitted to having prepared the primary motion before receiving a response from Defendant's Counsel, and then he clearly failed to make changes to his motion. In this Court's estimation, Plaintiff's Counsel should be aware of the content of his own filings, and avoid wasting the Court's time and that of opposing counsel with a request over which there is no dispute.

As to the files of Dr. Griggs and Defendant Pearson, the Court reiterates that Plaintiff had more than ample opportunity to request the documents at issue. The Court did not impose any requirements upon Plaintiff's Counsel to delay his request for production of files; that was done on his own accord, as he stated that "[i]t has always been [his] practice since [he has] been practicing law to have files produced right before a deposition so [he] could review them and use them in the deposition." (Docket No. 89 at 8). While this may be his practice,[FN1] seasoned counsel should modify his practice when he sees the end of discovery approaching and the window quickly closing on his opportunity to request production of documents. Despite Plaintiff's Counsel's assertions to the contrary, the end of discovery seems to this Court to be a "compelling reason" to request production. (*See id.* at 9) (counsel stating that he did not see "any compelling reason to [request production] at that time.").

FN1. For future reference in this case, to the extent that Counsel's practice does not conform to the Federal Rules of Civil Procedure, the local rules of this district, or this Court's Orders, the Court would recommend that Counsel modify his practices to match the rules that govern this case.

Indeed, as Plaintiff's Counsel could have discovered through a quick search on Westlaw, only a few months ago, on June 22, 2011, the Third Circuit upheld a discovery order denying a motion to compel under circumstances similar to those of the instant case. *See Nowell v. Reilly,* 2011 WL 2464645, *2 (3d Cir.2011) (upholding district court's denial of a motion to compel where documents were requested only nineteen days prior to close of discovery). As in *Nowell,* Plaintiff's Counsel has provided no "proof ... that more diligent discovery was impossible." *Id.* (citing *In re Fine Paper Antitrust Lit.,* 685 F.2d 810, 818 (3d Cir.1997)). Rather, as I discuss momentarily, he has provided proof to the contrary: that he easily could have requested the documents on April 27, 2011—more than 30 days prior to the close of discovery.

Plaintiff's Counsel strenuously argues that he "did not want to burden [Defendant Pearson] with the obligation of going through files and produce files and take care of all those issues while he was that sick." (Docket No. 89 at 28). While this is admirable, even if the Court was to accept this justification as the basis for his delay in requesting production, the Plaintiff's own exhibit, (Docket No. 83–2), entered during the hearing, shows that he could have requested the documents with no pangs of conscience as early as April 27, 2011, when he was informed that Defendant Pearson was healthy. April 27, the Court notes, is more than 30 days prior to the June 6, 2011 close of discovery. Still, Plaintiff's Counsel failed to make his request at this time. It seems to this Court that "more diligent discovery" was imminently possible.

*3 Turning next to Plaintiff's assertions that *Ansell v. Green Acres Contracting Company,* 347 F.3d 515 (3d Cir.2003), is justification for this Court to allow him discovery into claims of non-

racial discrimination at Duquesne University, the Court finds this argument unavailing. At argument, Plaintiff's Counsel quoted *Ansell,* stating: "[e]vidence of an employer's conduct toward other employees have long been held relevant and admissible to show that employer's proffered justification is pretext." (Docket No. 89 at 23). Plaintiff would probably have been better served citing a few lines later in that opinion, where the Court of Appeals for the Third Circuit stated that evidence can be brought to show "that the employer treated other, similarly situated persons out of [plaintiff's] protected class more favorably, or that the employer has discriminated against other members of his protected class *or other protected categories of persons." Ansell,* 347 F.3d at 521 (citing *Fuentes v. Perskie,* 32 F.3d 759, 765 (3d Cir.1994)) (emphasis added).

Even so, there is "no bright line rule for determining when evidence is too remote to be relevant." *Ansell,* 347 F.3d at 525 (citing *United States v. Pollock,* 926 F.2d 1044, 1048 (11th Cir.1991)). Instead, "such determination must be based on the potential the evidence has for giving rise to reasonable inferences of fact which are 'of consequence to the determination of the action.' " *Ansell,* 347 F.3d at 525 (citing FED.R.EVID. 401).

The Court does not see how any of the files of Dr. Griggs or Defendant Pearson are relevant, outside of the file of Valerie Harper, which has already been produced. 8/29/2011 *Transcript* at 34 (Plaintiff's Counsel admitting that Defense Counsel has produced the Harper file). As Plaintiff's Counsel clearly stated during his supplemental deposition of Dr. Griggs, cases involving a white complainant and white respondent are "of no interest to" him. *Transcript of Supplemental Deposition of Dr. Griggs,* at 102; *id.* at 100 ("If they're white on white, it's not something that I need to discuss with you.").[FN2] This limitation makes perfect sense, as any "white on white" cases cannot possibly teach anything about racial discrimination—obviously, a white person will win, but a white person will also lose. Such instances do not, in this case, give rise to any reasonable inference of consequence to the action. A non-white party is therefore necessary to show any kind of racial bias by Defendant. As Defendant's Counsel has already produced the sole relevant file, all other requests for production appear to this Court to be nothing more than a fishing expedition.

> FN2. Per her statement during the August 29 hearing, (Docket No. 89 at 18–19), Defense Counsel provided the Court with a copy of Dr. Griggs' supplemental deposition on August 29. The Court has reviewed the same.

Dr. Griggs' sworn testimony at her deposition corroborates Defense Counsel's statements, which this Court relied upon in its original Order, (*see* Docket No. 78 at 2), that the *only* file which might be shown to involve racial animus had already been provided to Plaintiff. *Transcript of Supplemental Deposition of Dr. Griggs,* at 99 ("Well, if it's a white complainant and a white respondent, that's the rest of these ..."). Plaintiffs Counsel admits that he is in possession of the of the Harper file, (Docket No. 89 at 32–33) ("They've [Defendants] given us the Valerie Harper case and said this is not a racial discrimination case but it's close and we are going to give it to you because we think it may be relevant."). Moreover, Dr. Griggs states in her supplemental deposition that she thought that her key recommendations in the Harper case were followed. *Transcript of Supplemental Deposition of Dr. Griggs,* at 93 ("I know that my recommendations—or at least I'm thinking that they may not have been fully accepted, but the thing that I focused on was that the complainant was satisfied."). Thus, in the only case where race *could* have been an issue, Dr. Griggs' key recommendations were followed *in favor of an African–American female* and against a white male.

*4 Finally, the files that were sent from Dr. Griggs to Defendant Pearson for review and action are irrelevant because Pearson could not have ob-

tained Plaintiffs file in this case for two reasons. First, Plaintiff had filed a complaint with PHRC, and it is the University's policy, in all cases, to terminate its investigations when complaints are filed with PHRC. (Docket No. 89 at 44). Second, Defendant Pearson was listed as a respondent in that complaint, so the file should not have gone to him anyway. (*Id.* at 61–62). The Plaintiff is, therefore, not similarly situated to those parties whose files would have gone to Defendant Pearson, because Plaintiffs file would have been reviewed and acted upon by a different party *if* the file had gone to Pearson, which it did not. *Cf. Goins v. EchoStar Commc'ns Corp.*, 148 Fed.App'x 96, 98 (3d Cir.2005) ("the operative employment decision made by a different independent manager asserting her discretion is sufficient to differentiate two otherwise similarly situated employees.").

Finally, the Court is of the opinion that production of Pearson's files would unduly complicate this case. The effect would likely be that the Court would be called to engage in mini-trials addressing each of the various claims in Pearson's files. In addition, the little benefit there seems to be in the requested discovery is far outweighed by inherent compromise to the privacy of individuals not party to this litigation. Finally, it would further delay the already protracted resolution of this rather straightforward case of alleged employment discrimination.

For these reasons, the Court sees no reason to overturn its previous Order. Plaintiffs Motion [79] is therefore DENIED.

W.D.Pa.,2011.
McClendon v. Dougherty
Not Reported in F.Supp.2d, 2011 WL 4345901 (W.D.Pa.)

END OF DOCUMENT

EXHIBIT "E"

Not Reported in F.Supp., 1990 WL 61180 (E.D.Pa.)
(Cite as: 1990 WL 61180 (E.D.Pa.))

H
Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
CARPENTER TECHNOLOGY CORP., Plaintiff,
v.
ARMCO, INC., Defendant.

CIV. A. No. 90–0740.
May 8, 1990.

Richard C. Rizzo, Dechert Price & Rhoads, Robert A. Limbacher, Philadelphia, Pa., for plaintiff.

Robert A. Nicholas, Reed Smith Shawl & McClay, Arland T. Stein, Philadelphia, Pa., for defendant.

MEMORANDUM AND ORDER

HUYETT, District Judge.

***1** Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, defendant Armco, Inc. ("Armco") has noticed the deposition of a corporate designee of plaintiff Carpenter Technology Corporation ("Carpenter").[FN1] In the instant motion for a protective order, Carpenter argues that certain portions of the deposition notice are irrelevant to the issue raised by its complaint. In addition, Carpenter objects to other portions of the deposition notice because it fails to identify the matters upon which testimony is sought with reasonable particularity. Finally, Carpenter asks this Court to postpone the taking of depositions until after document production is complete to avoid the need for costly, piecemeal depositions. For the reasons stated below, I will grant Carpenter's motion for a protective order, and order the parties to establish a comprehensive deposition schedule which shall commence after the initial exchange of documents.

I.

Resolution of this discovery dispute requires a detailed discussion of the factual background of this suit. In 1973, Carpenter entered into a patent license agreement with Armco regarding United States Patent No. 3,556,776 ("the '776 patent"). The agreement required Carpenter to pay a royalty of 5% of the net selling price of the products covered by the '776 patent. Carpenter has complied with this obligation.

A third party, Cyclops Corporation ("Cyclops"), began selling products covered by the '776 patent without a license in the early 1980's. As a result, Armco filed an infringement action against Cyclops in the Western District of Pennsylvania ("the *Cyclops* action"). As a defense, Cyclops maintained that the '776 patent was invalid because the invention was in public use and on sale for more than one year prior to the date of the patent application.

Subsequently, in October 1982, Carpenter initiated a declaratory judgment action in the Eastern District of Pennsylvania which alleged that the '776 patent was invalid and unenforceable. Carpenter and Armco settled this action on October 23, 1983.

Pursuant to the settlement agreement ("the 1983 Agreement"), Carpenter continued paying royalties to Armco pending the resolution of the *Cyclops* action. In the event the '776 patent was declared invalid in the *Cyclops* action, Armco agreed to reimburse Carpenter for all royalties paid from the date of the 1983 Agreement plus interest. The 1983 Agreement dealt with the possibility of settlement of the *Cyclops* action as follows:

6. In the event the *Armco v. Cyclops* case is terminated by settlement which has the effect of according Cyclops an effective royalty rate less than or more favorable to Cyclops than the royalty rate provided for in the Armco/Carpenter License Agreement of December 31, 1973, Armco shall promptly notify Carpenter of such lower or more favorable royalty rate (by furnishing Carpenter with a true copy of all portions of the Settlement Agreement bearing on the effective royalty rate, including all portions dealing with royalties and/or other pay-

ments), and Carpenter shall be entitled to recalculate royalties theretofore paid to Armco covering the period for which Cyclops is paying royalties as to have the benefit of such lower or more favorable royalty rate; Carpenter shall also have the benefit of such lower or more favorable royalty rate for royalty payments thereafter accruing under the December 31, 1973 agreement; in the event that such recalculation by Carpenter shall result in a sum due and owing to Carpenter, Armco shall pay the same to Carpenter within 15 days after written notice from Carpenter to Armco. In the event Carpenter shall be required to institute litigation to collect any such sum, Carpenter shall be entitled to recover in such litigation its reasonable attorney's fees for conducting the same.

*2 *See* Carpenter's Exhibit A, pp. 3–4.

In July 1985, the '776 patent was declared invalid in the *Cyclops* action on Cyclop's motion for summary judgment. The Federal Circuit reversed and remanded the case for resolution of certain factual disputes regarding the validity of the '776 patent.[FN2] *See Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147 (Fed.Cir.1986).

Nearly three years later, the *Cyclops* action was settled ("the *Cyclops* settlement agreement"). The *Cyclops* settlement agreement provided for a cash payment by Cyclops in the amount of $225,000 over the period of a year [FN3] and an exchange of services. Pertinent portions of the *Cyclops* settlement agreement provide for an exchange of services as follows:

4.1 CYCLOPS' Cytemp Division (hereinafter "CYTEMP"), shall make available to BALTIMORE the following conversion work at the prices per pound to BALTIMORE and maximum volume (tons/mo.) listed below, for a period of thirty (30) consecutive months from the date of execution of this Agreement:

5.1 CYCLOPS' CYTEMP Division or any successor to substantially all of the assets of the CYTEMP Division shall purchase conversion work from BALTIMORE an BALTIMORE's rotary forge for an aggregate 3,000 tons of material during a period of seven (7) years from the date of execution of this Agreement.

See Carpenter's Exhibit B, pp. 2–3, 7. Subsequent to the *Cyclops* settlement agreement, Armco, through its subsidiary, advised Carpenter that "[t]he royalty to Carpenter is 5% of sales, and the settlement with Cyclops is equivalent to an effective royalty of 5% of sales." *See* Carpenter's Exhibit C.

Carpenter disputed Armco's calculation of the effective royalty rate provided to Cyclops by virtue of the *Cyclops* settlement agreement at 5%, and has filed suit to recover under paragraph 6 of the 1983 settlement agreement. [FN4] The sole issue presented by this action is whether the *Cyclops* settlement agreement has the effect of according Cyclops an effective royalty rate more favorable than the 5% royalty rate paid by Carpenter pursuant to the 1973 patent license agreement with Armco. This is complicated by the fact that the *Cyclops* settlement agreement involves an exchange of services.

II.

The scope of permissible discovery is set forth in the Federal Rules of Civil Procedure. Rule 26(b)(1) states:

parties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible*

evidence.

*3 [emphasis supplied]. While the scope of discovery is generally broad, it is not without its bounds. *See McCalin v. Mack Trucks, Inc.*, 85 F.R.D. 53, 57 (E.D.Pa.1979). In defining the permissible scope of discovery, I may issue an order limiting discovery to certain matters.

Carpenter objects to the following areas of examination identified in Armco's notice of corporate deposition as irrelevant:

7. The making, using and selling by Carpenter of 13–8 Mo and other alloys in accordance with United States Patent No. 3,556,77[6], including but not limited to the amount of sales and usages of each alloy.

8. The costs and the profits to Carpenter with regard to sales and usages of 13–8 Mo and other alloys made in accordance with United States Patent 3,556,776, including but not limited to an identification of the items of costs and their amounts and the items of profit and their amounts.

10. The capacity of Carpenter to make 13–8 Mo and other alloys in accordance with United States Patent 3,556,776.

11. The services performed by Carpenter for Armco or Cyclops Corporation, including but not limited to the identification of each service, the capacity to perform each such service, sales price with regard to the performance of each such service, the cost to carpenter for performance of each such service, and the profits to Carpenter for performance of each such service.

12. The products sold by Carpenter to Armco or Cyclops Corporation, including but not limited to the identification of each such product, the sales price with regard to each such product, the costs to Carpenter for each such product, and the profits to Carpenter with regard to each such product.

13. The performance of annealing of billets by Carpenter for another company and by another company for Carpenter since January 1, 1981, including but not limited to the capacity to perform such annealing of billets, the identity of each such other company involved in each such annealing of billets, the costs of performing each such annealing of billets and the profits to Carpenter and to the other company in performing each such annealing of billets.

See Carpenter's Exhibit F, pp. 3–5. Carpenter claims that paragraphs 14 through 16, which are substantially similar to paragraph 13 except that they deal with pickling (¶ 14), VIM melting (¶ 15) and rotary forge conversion (¶ 16), also seek the production of irrelevant information.

Carpenter argues that "none of these subjects are remotely relevant to the fundamental issue of what is the effective royalty rate being paid by *Cyclops* to *Armco* under their 1989 Agreement." *See* Plaintiff's Brief in Support of Motion for a Protective Order, p. 14 (emphasis in original). In response, Armco argues that these matters relate directly "to valuation of the benefits received by Plaintiff under the terms of the 1973 License Agreement," and that it is necessary "to compare the relative value of the two effective royalty rates." *See* Defendant's Brief in Response to Plaintiff's Motion for a Protective Order, pp. 4–5. Armco incorrectly srgues that this case involves a comparison of the benefits accorded to Carpenter under the 1973 license agreement with the benefits accorded to Cyclops under the *Cyclops* settlement agreement.

*4 The language of the 1983 Agreement demonstrates that a valuation of the benefits received by Carpenter under the 1973 license agreement are not relevant to this suit. Paragraph 6 of the 1983 Agreement provides that in the event that the *Cyclops* action "is terminated by a settlement which has the effect of according to Cyclops an effective royalty rate less than or more favorable to Cyclops than the royalty rate provided for in the Armco–Carpenter License Agreement of 1973 ..."

The only question to be resolved by this suit is whether the *Cyclops* settlement agreement had the effect of according to Cyclops a royalty rate less than or more favorable than 5%—the rate negotiated by Armco and Carpenter as a part of the 1973 license agreement. The fact that Carpenter may have realized large sales or profits, by virtue of a high volume of sales of the subject matter of the '776 patent and 1973 license agreement, does not affect the ultimate issue to be resolved by this litigation. Therefore, the subject matter of paragraphs 7 and 8 are not relevant or reasonably calculated to lead to admissible evidence. Similarly, Carpenter's performance of annealing of billets, pickling, VIM melting, and rotary forge conversion for other companies or another companies' performance of same for Carpenter is *not* relevant to the narrow issue raised by Carpenter's complaint. Thus, the subject matter of the deposition notice contained in paragraphs 10 through 16 is also improper. Therefore, I will grant Carpenter's motion for a protective order, and strike these portions of Armco's notice of deposition.

III.

I will also grant Carpenter's request that I issue an order postponing the taking of depositions on the remaining areas of the deposition notice. I have "broad discretion" in controlling the timing of discovery. *Salter v. Upjohn Co.,* 593 F.2d 649, 651 (5th Cir.1979); *see also Marroquin–Manriquez v. Immigration and Naturalization Service,* 699 F.2d 129, 134 (3d Cir.1983), *cert. denied,* 467 U.S. 1259 (1984).

In addition to the deposition notice referred to above, Armco has filed a request for production of documents which duplicates all 16 subject areas contained in the deposition notice. Carpenter has not responded to this request. However, Armco proposes to conduct the depositions of various Carpenter corporate designees without the benefit of prior document production. This could lead to the need to reconvene the depositions of certain corporate officers for the purpose of a separate examination regarding the documents. I conclude that requiring Carpenter to produce the same witnesses on two separate occasions would result in undesirable, piecemeal discovery. This is both an inefficient and costly means of pursuing discovery. For this reason, I shall grant Carpenter's request.

Armco shall be prohibited from conducting any depositions of Carpenter's corporate designees until after all document production from its request for production of documents is completed and counsel have had an opportunity to negotiate a mutually convenient deposition schedule. During these negotiations, Armco may designate specific persons to be produced for deposition based upon its examination of the records produced or simply notice the deposition of an unspecified corporate designee with a description of the matters upon which examination will be taken. Fed.R.Civ.Proc. 30(b)(6); *see also GTE Products Corp. v. Gee,* 115 F.R.D. 67, 68 (D.Mass.1987).

IV.

***5** For the reasons stated above, Carpenter's motion for a protective order is granted and paragraphs 7, 8, and 10 through 16 of Armco's notice of deposition of Carpenter's corporate designee are stricken. In addition, all depositions of Carpenter's corporate designees are stayed pending production and review of all relevant corporate documents pursuant to outstanding requests for production of documents, and the negotiation by counsel of a mutually convenient and efficient deposition schedule for these corporate officers.

Counsel are reminded that the Court expects counsel to cooperate as much as possible in an effort to resolve discovery disputes without seeking judicial intervention. Counsel are further expected to proceed with discovery in an efficient and expeditious manner.

An appropriate order follows.

ORDER

Upon consideration of plaintiff's Motion for a

Protective Order Regarding the Rule 30(b)(6) Deposition Notice of defendant and supporting memorandum of law, the response of defendant, the reply of plaintiff, and for the reasons stated in the attached memorandum, it is ordered as follows:

(a) Plaintiff's motion is GRANTED;

(b) The subject matter of paragraphs 7, 8, and 10 through 16 of defendant's Rule 30(b)(6) deposition notice is not permissible discovery, and these paragraphs are hereby STRICKEN;

(c) The taking of the deposition of Carpenter's corporate officers or designees shall be STAYED until after: (1) the production and review of all documents produced by Carpenter pursuant to defendant's presently outstanding Request for Production of Documents, and (2) counsel for both parties agree upon a mutually convenient and efficient deposition schedule.

IT IS SO ORDERED.

FN1. The deposition was scheduled to take place on April 17, 1990. However, by agreement of counsel, it was postponed pending order of this Court on Carpenter's motion for a protective order.

FN2. The '776 patent disclosed stainless steel alloys of the general type of PH 13–8 MO fabricated by the air melt or double vacuum melt process. *Id.* at 148.

FN3. This amount was to be paid to Baltimore Specialty Steels Corporation ("Baltimore"), a subsidiary of Armco.

FN4. Carpenter seeks to recalculate royalties paid to Armco to obtain the benefit of the allegedly more favorable royalty rate accorded to Cyclops by virtue of the *Cyclops* settlement agreement. In addition, Carpenter seeks costs and attorney's fees.

E.D.Pa.,1990.
Carpenter Technology Corp. v. Armco, Inc.
Not Reported in F.Supp., 1990 WL 61180 (E.D.Pa.)

END OF DOCUMENT