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2016 JUN 30 AM 11:14

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

**REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S
RESPONSE TO SECOND MOTION TO STAY PROCEEDINGS**

Defendant, The Pennsylvania State University (hereinafter, "Defendant" or the "University"), by and through its attorneys, White and Williams LLP, respectfully submits this Reply Brief in response and opposition to Plaintiff's Response to The Pennsylvania State University's Second Motion to Stay Proceedings, which response was filed June 23, 2016 ("Plaintiff's Response").

Plaintiff's Response fails to comply with the applicable local rules¹ and the arguments advanced therein fail to demonstrate that a stay of this matter is unwarranted. For the reasons expressed below, and those set forth in the University's principal Brief in Support, the Court should grant the Second Motion to Stay Proceedings and stay this action at least until the completion of the criminal trials of Messrs. Curley and Schultz.

I. ARGUMENT

A. THE STATUS OF RELATED CRIMINAL PROCEEDINGS FAVORS A STAY.

Plaintiff's Response largely acknowledges that the most important factor for the Court to consider here supports the University's request for a stay.² That is,

¹ The Centre County Civil Local Rules require that "[t]he brief of the opposing party may contain a counter statement of the facts and of the questions involved and a counter history of the case. If counter statements of facts or questions involved are not filed, the statements of the moving party *will be* deemed adopted." Loc. R. 210(1) (emphasis added). Plaintiff's Response does not answer the factual and procedural averments in paragraphs 1 through 30 of the Second Motion to Stay Proceedings. Per the applicable Local Rule, those averments are deemed adopted.

² In considering the University's initial Motion to Stay, the Court stated that "there are no overlapping issues in the criminal and civil cases." Slip. Op. filed Dec. 20, 2012, at 7. The extent to which the issues in the civil and criminal case overlap is "the most important issue at the threshold in determining whether or not to grant a stay." Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F. Supp. 2d 523, 527 (D.N.J. 1998) (quoting Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)), and the Court here weighed that factor heavily against the initial Motion to Stay. See Slip. Op. dated Dec. 20, 2012, at 6-7. As demonstrated by the University and recognized by Plaintiff, there are overlapping issues between the criminal and civil cases. That factor weighs in favor of a stay, the Court's prior statement notwithstanding.

Plaintiff now acknowledges the existence of overlapping issues between the criminal cases against Curley and Schultz, and two (2) of Plaintiff's three (3) claims asserted against the University – namely, his claims of Defamation (Count II) and [Intentional] Misrepresentation (Count III). (Plf.s' Resp., at 6.) Although Plaintiff refuses to recognize the overlap between the factual issues in the criminal cases and Plaintiff's Whistleblower (Count III) claim, the University has nevertheless demonstrated such overlap. (See Def.'s Brf. in Support, at 17-20.)

In short, the issues in the criminal case overlap significantly with this civil case (as acknowledged by Plaintiff) and this most-important factor weighs heavily in favor of a stay.

B. THE STATUS OF THE CRIMINAL PROCEEDINGS SUPPORTS A STAY.

i. The Key Question Concerning the Status Issue Is Whether Criminal Charges Have Been Filed.

Plaintiff's argument regarding the status of the criminal proceedings focuses on the time elapsed since criminal charges were filed against Curley and Schultz. (Plf.'s Resp., at 6-7.) However, the key question is whether the criminal proceedings are at the pre- or post-indictment stage. Walsh Sec., supra. "The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned." Id. Here, criminal charges have been filed and remain pending against Curley and Schultz. Thus, and contrary to

Plaintiff's threadbare arguments, the status of the criminal proceedings strongly favors a stay.

ii. *Plaintiff Argues Two Extremes Regarding the Timeline for Resolution of the Criminal Cases.*

On one hand, Plaintiff argues the Second Motion to Stay Proceedings should be denied because "it's possible the criminal trials will be held before the October 17, 2016 scheduled trial date" in this case. (Plf.'s Resp., at 7.) On the other hand, Plaintiff raises the specter of a virtually-interminable criminal proceeding and a never-ending delay of this civil action. (*Id.*, at 6-7.) Plaintiff's assertions lack merit.

As to the latter assertion, the University does not seek an unspecified, never-ending stay of this case. Rather, the University seeks to stay this civil action at least until completion of the criminal trials of Curley and Schultz. (Def.'s Brief, at 24.) At the conclusion of the criminal trials, Curley and/or Schultz may be acquitted and/or may become available to provide critical and currently-unavailable information and testimony in this case. If a stay is granted until the conclusion of the criminal trials and Curley and/or Schultz are convicted and appeal, the question of whether to continue or to terminate the stay would then appropriately be addressed and resolved by weighing the applicable factors and balancing the equities as they exist at that time.

In short, the status of the criminal proceedings and uncertainty concerning the verdicts weighs strongly in favor of a stay until the completion of the criminal trials of Curley and Schultz.

C. THE UNIVERSITY’S MOTION ACCURATELY STATES THE PREJUDICE CAUSED BY THE UNAVAILABILITY OF CURLEY AND SCHULTZ.

The University’s Brief in Support accurately states and describes the prejudice it will continue to face if a stay is not granted. Plaintiff argues, in effect, that the University is not prejudiced in its ability to defend Plaintiff’s claims because its case would be no better off if Curley and Schultz were available. Specifically, he argues that the University is not harmed by their unavailability, because testimonial evidence from Plaintiff and other witnesses “substantially undermine[s] the credibility” of Curley and Schultz. (Plf.’s Resp., at 9.)

“The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness.” Commw. v. Seese, 512 Pa. 439, 443, 517 A.2d 920, 922 (1986).

Plaintiff’s argument demonstrates the important role that witness credibility will play in deciding Plaintiff’s claims, and illustrates the very prejudice the University continues to face because of the unavailability of Curley and Schultz. Because they remain unavailable, the University has only Plaintiff’s version of the

story regarding what, precisely, occurred and was said in February 2001 between Plaintiff and Curley and/or Schultz.

In short, the University would be significantly prejudiced if it were unable to obtain and present the other side of that story so that the jury in this case could assess the credibility of all key witnesses, not just those Plaintiff wishes to present.

D. THE UNIVERSITY DILIGENTLY PURSUED DISCOVERY IN THIS CASE.

- i. *There Has Been No Lack of Diligence Concerning Messrs. Curley and Schultz.*

Plaintiff's arguments regarding the University's purported lack of diligence in seeking information from Curley and Schultz are off the mark, at best, and misleading, at worst. Plaintiff asserts that "the University has avoided seeking to discover evidence that might further confirm [his] allegations." (Plf.'s Resp., at 4.) That is decidedly not the case.

It simply does not reflect a lack of diligence by the University that it did not regularly check in with Curley and Schultz – through their individual counsel – to confirm that they were continuing to assert their Fifth Amendment Rights and would continue refusing to discuss the substance of Plaintiff's allegations. As reflected by the very interrogatory answers attached to Plaintiff's Response, and as Plaintiff's counsel is well aware, Curley and Schultz have faced pending criminal charges and been represented by individual counsel since at least November 4, 2011 – nearly a year before Plaintiff commenced this action. Before Plaintiff filed

suit, Curley and Schultz declined to be interviewed by the Freeh Group on the advice of their respective individual counsel and, as discussed more fully in the University's Brief in Support of its Second Motion to Stay Proceedings, they have refused to answer any questions regarding the substance of Plaintiff's allegations in this action and the events and communications on which Plaintiff's claims are based.³

Circumstances have not changed since Plaintiff filed this suit in any way which might suggest that Curley and Schultz would alter their position with respect to their Fifth Amendment Rights, and indeed they have not – as demonstrated by the transcripts of their March and April 2016 depositions which the University excerpts in its Brief in Support. Contrary to Plaintiff's assertion, the University has diligently pursued discovery in this case – as to Curley and Schultz specifically, and otherwise. This further supports the requested stay.

- ii. *Plaintiff's Reference to Payment of Counsel Fees for Messrs. Curley and Schultz is Wholly Irrelevant and Inappropriate.*

Plaintiff makes repeated reference to the fact that the University is paying the legal fees of individual counsel for Curley and Schultz. (Plf.'s Resp., at 4, 7.)

³ Plaintiff also argues that the University did not exercise diligence because it did not seek information from other witnesses. (Plf.'s Resp., at 2-3, 8-9.) To the contrary, the Freeh Group sought to interview other witnesses in conducting its investigation commissioned by the University. Some of those witnesses, like Curley and Schultz, declined to speak with the Freeh Group on the advice of counsel. (Freeh Report, at 12.) Thus, Plaintiff's attempt to utilize other witnesses to demonstrate a lack of diligence by the University is also unavailing.

The thinly-veiled contention implicit from the context of those references is that the University could compel Curley, Schultz, and/or their individual counsel to provide information pertinent to this lawsuit because it is paying the legal bills related to the underlying criminal cases. (See id.)

Those references, and Plaintiff's contention intended thereby, are meritless, irrelevant, and inappropriate. As Plaintiff's counsel is aware, individual counsel for Curley and Schultz owe their professional duties of loyalty and competence to their individual clients (i.e., Curley and Schultz, personally) regardless of whether another individual or entity is paying counsel's fee. See Pa. R. Prof'l Cond. 1.8, Cmts. 11 and 12; and 5.4(c).

II. CONCLUSION

The University has diligently pursued and participated in discovery and has prepared and investigated its defense of this action to the extent possible in light of the continued unavailability of key individuals with information that goes to the heart of the claims and defenses in this case. However, with the date for trial of this case approaching and those key individuals still unavailable, the University seeks to stay these proceedings at least until the completion of the criminal trials of Curley and Schultz.

The University's Brief in Support demonstrates that the applicable equitable factors support a stay at this juncture and Plaintiff's Response fails to demonstrate

otherwise. For all the foregoing reasons, the University respectfully requests that the Court grant Defendant's Second Motion to Stay Proceedings.

Respectfully submitted,

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Dated: June 29, 2016

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CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 29th day of June, 2016, a true and correct copy of the foregoing Reply to Plaintiff's Response to Defendant's Second Motion to Stay Proceedings was served upon the following persons via First Class Mail, postage prepaid as follows:

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