IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:10cv14155-DPH-MKM Judge Denise Page Hood Magistrate Judge Mona K. Majzoub
BLUE CROSS BLUE SHIELD OF MICHIGAN,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S MOTION TO STAY DISCOVERY PENDING A RULING ON DEFENDANT'S MOTION TO DISMISS

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COUNTERSTATEMENT OF ISSUES

Whether Blue Cross's purported generalized interest in reducing the "burden" of discovery constitutes good cause to stay discovery during the pendency of its motion to dismiss in light of (a) Congress's express direction that courts resolve antitrust enforcement actions brought by the United States "as soon as may be," 15 U.S.C. § 4, and (b) the public's interest in halting Blue Cross's anticompetitive conduct, which continues to harm consumers in the State of Michigan, when the pending motion to dismiss is without merit?

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Motion to Stay Discovery (Docket No. 20) should be denied because Congress has directed that antitrust enforcement actions brought by the United States proceed expeditiously, and Blue Cross Blue Shield of Michigan ("Blue Cross") has failed to make the "particular and specific" showing needed for delaying this enforcement action.[1] The fact that Blue Cross has filed a motion to dismiss (Docket No. 12) is not sufficient to stay discovery, particularly where, as here, the motion rests on a false premise that the Complaint (Docket No. 1) seeks to preclude Blue Cross from obtaining lower rates, when in fact the Complaint challenges Blue Cross's use of contracts that impede competition and raise prices. Moreover, the State of Michigan has joined the United States in this action to enforce the federal antitrust laws, directly refuting Blue Cross's claims that this action somehow usurps the State's authority over health care policy and that this federal Court should refuse to exercise jurisdiction over a federal antitrust enforcement action.

Nor do Blue Cross's generalized claims of burden provide a basis to stay discovery. Blue Cross abruptly filed this motion with no discovery requests pending, and it has not identified any specific, undue discovery burden. If it had, the proper result would not be a stay, but a modification of the specific discovery request giving rise to the undue burden.

Rather than imposing any undue burden on Blue Cross, the Plaintiffs sought to negotiate a phased discovery plan intended to avoid unnecessary burden on any party and to narrow discovery at the outset. Blue Cross quit those negotiations in midstream, and its motion is therefore both premature and unfounded.

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[1] The State of Michigan joins this opposition. Although Parts II.A and III.C apply to only the United States, the State of Michigan endorses the arguments in those sections.

BACKGROUND

On October 18, 2010, Plaintiffs brought this action challenging Blue Cross's ongoing use of Most Favored Nation ("MFN") clauses in its hospital contracts in Michigan. The Complaint alleges that Blue Cross's MFN clauses have denied its competitors access to competitive hospital contracts, thereby (1) deterring or preventing competitive entry and expansion in health insurance markets in Michigan, and (2) likely increasing prices for health insurance sold by Blue Cross and its competitors and prices for hospital services paid by insureds and self-insured employers.

Shortly after Plaintiffs filed the Complaint, Blue Cross requested additional time to respond because it had recently retained new counsel. Plaintiffs consented and, after Blue Cross filed its pending Motion to Dismiss, Plaintiffs attempted during December and January to work with Blue Cross to develop a reasonable discovery schedule.

Blue Cross's motion includes an inappropriate, inaccurate, and irrelevant summary of the discovery negotiations. The issue before the Court is whether Blue Cross has shown good cause for a stay, and the alleged give-and-take of negotiations that ended in midstream are not relevant to this issue. We therefore limit our response to briefly noting only the following facts: During the course of negotiations, Plaintiffs offered to conduct phased discovery in an effort to focus discovery on potentially key facts while avoiding unnecessary burden. After Blue Cross raised consideration of a discovery stay, Plaintiffs' proposed discovery plans specifically provided for a two-phase discovery process that would begin with focused requests for easily produced materials. Blue Cross failed to provide its own proposed plan with a discovery schedule until January 24, the day the parties were required to file their Joint Rule 26(f) Report and Discovery Plan. The Plan was filed at approximately 9:00 pm on January 24 and, less than 30 minutes later, Blue Cross filed the instant Motion to Stay Discovery. The Motion was filed even though no discovery requests had even been served in this case at that time.

I. Blue Cross Must Demonstrate A Particular and Specific Factual Need to Stay Discovery.

Because a motion to stay discovery is "tantamount to a request for a protective order prohibiting or limiting discovery pursuant to Rule 26(c)," the movant must demonstrate "good cause" for the limitation on discovery. *Kron Med. Corp. v. Groth*, 119 F.R.D 636, 637 (M.D.N.C. 1988); *accord, Perry v. City of Pontiac*, 254 F.R.D. 309, 312 (E.D. Mich. 2008) ("court[s] may fashion a protective order to limit discovery" under Rule 26(c) "[u]pon good cause shown"). To establish "good cause" under Rule 26(c), "courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101–02 n.16 (1981).

Consequently, a party moving to stay discovery under Rule 26(c) "must show a particular and specific need for the protective order." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (applying same standard as *Gulf Oil* in denying motion to stay discovery during pendency of motion to dismiss). To determine good cause, courts perform "an individualized balancing of the many interests that may be present," *United States v. Microsoft Corp.*, 165 F.3d 952, 960 (D.C. Cir. 1999), but more weight should be given "to interests that have a distinctively social value than to purely private interests . . . ." *Marrese v. American Acad. of Orthopaedic Surgeons*, 726 F.2d 1150, 1159 (7th Cir. 1984) (*en banc*), *rev'd on other grounds*, 470 U.S. 373 (1985); *see also In re PE Corp. Sec. Litig.*, 221 F.R.D. 20, 27 (D. Conn. 2003) (same).

Simply filing a motion to dismiss does not excuse Blue Cross from its requirement to show particularized "good cause," because "a pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery." *Turner Broadcasting System,* *Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997). Indeed, courts in the Sixth Circuit have rejected motions to stay discovery pending resolution of motions to dismiss, recognizing that "the Federal Rules of Civil Procedure do not provide (and have never provided) for an automatic stay of discovery during the pendency of any type of case-dispositive motion, nor is the pendency of such a motion explicitly cited as a factor to be considered under those rules."[2] *Heartland Jockey Club Ltd. v. Penn Nat'l Gaming*, No. 2:09-cv-804, 2009 WL 5171829, at *4 (S.D. Ohio Dec. 21, 2009); *see also Hoxie v. Livingston County*, No. 09-CV-10725, 2010 WL 822401, at *1 (E.D. Mich. March 4, 2010) (Majzoub, M.J.) (denying motion to stay discovery pending motion to dismiss).

Contrary to Blue Cross's assertions, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny did not create a general rule staying discovery during the pendency of a motion to dismiss and certainly provide no basis to stay discovery in a government enforcement action. Blue Cross quotes snippets from *Twombly*, *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009) and *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007), conflating the analysis found in those cases — whether to grant *a motion to dismiss* — with the balancing test courts use to determine whether to grant a *stay of discovery* pending a motion to dismiss. Indeed, Blue Cross ignores the concern animating *Twombly* and its progeny — that *private plaintiffs* in an antitrust suit may file "a largely groundless claim" to obtain increased settlements

[2] By comparison, in rare instances, Congress has legislated that discovery be automatically stayed upon a motion to dismiss, such as under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B), where Congress was concerned about nuisance suits by *private plaintiffs* seeking damages. *See Miller v. Champion Enter., Inc.*, 346 F.3d 660, 691 (6th Cir. 2003) (automatic stay of discovery "was intended by Congress to protect innocent defendants from having to pay nuisance settlements in securities fraud actions in which a foundation for the suit cannot be pleaded"). The Sherman Act contains no such

"*in terrorem*." *Twombly*, 550 U.S. at 557–58. *This concern is simply not present when the United States brings an enforcement action and seeks only injunctive relief.*

In short, Blue Cross has not demonstrated good cause because it: (a) ignores Congress's statutory directive and express legislative intent that antitrust enforcement actions brought by the United States be adjudicated "as soon as may be;" (b) fails to consider the strong public interests that weigh against a stay here; and (c) fails to present any arguments that affirmatively demonstrate good cause for delaying discovery in this antitrust enforcement action.

II. Congress Intended that Antitrust Enforcement Actions Brought by the United States Proceed Expeditiously, and the Prompt Resolution of Such Actions is in the Public Interest.

A. Congressional intent is clear.

Rule 26(c)'s "good cause" standard must be "informed by and incorporate[]" the "many interests that may be present in a particular case," including Congressional intent, as expressed in relevant statutes. *Microsoft*, 165 F.3d at 959–60. Thus, courts regularly interpret Rule 26(c) and other rules of procedure that govern discovery in light of statutes and clearly expressed congressional policy. *See, e.g.*, *id.* at 960 (reading Rule 26(c) *in pari materia* with Publicity in Taking Evidence Act, 15 U.S.C. § 30); *Miller v. Champion Enter., Inc.*, 346 F.3d 660, 692 (6th Cir. 2003) (reading Rule 15(a) in light of the heightened pleading requirements for securities fraud actions found in the PSLRA).

Here, Rule 26(c) must be read in tandem with Congress's clearly expressed intent that antitrust enforcement actions brought by the United States should proceed expeditiously. That intent is expressed both in the plain language of the Sherman Act itself and in the rules

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provision, and such concerns are not present here where the United States and the State of Michigan have brought suit in equity to enjoin ongoing and future anticompetitive conduct.

governing the conduct of multi-district litigation. Congress directed in Section 4 of the Sherman Act that antitrust enforcement actions, when brought by the United States, "shall proceed, *as soon as may be*, to the hearing and determination of the case."[3] 15 U.S.C. § 4 (emphasis added). The plain meaning of this statute is clear — Congress intended antitrust enforcement actions brought by the United States to proceed as expeditiously as reasonably possible. *See David L. Skinner & Co. v. Hitchcock*, 67 F.2d 68, 69 (1st Cir. 1933) (interpreting "as soon as may be" command in the Bankruptcy Act to preclude an indefinite delay of at least three months); *Gen. Elec. Co. v. Beehive Telecasting Corp.*, 284 F.2d 507, 509–10 (10th Cir. 1960) (Bankruptcy Act's command of "as soon as may be" requires "prompt adjudication"). Indeed, the Sherman Act command to hear cases "as soon as may be," appearing in the jurisdictional statutes investing district courts with jurisdiction over antitrust enforcement actions brought by the United States, does not appear in the jurisdictional grant for private actions. *Compare* 15 U.S.C. §§ 4, 9, 25 *with* 15 U.S.C. §§ 15, 26 and 28 U.S.C. § 1337. Entry of a stay of discovery more than four

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[3] The full text of 15 U.S.C. § 4 provides:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition *the court shall proceed, as soon as may be, to the hearing and determination of the case*; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Id. (emphasis added).

months after Plaintiffs' complaint was filed would thus be at odds with a plain reading of Section 4 of the Sherman Act.

In the statute authorizing multi-district litigation, 28 U.S.C. § 1407, Congress exempted government antitrust injunctive actions from being "coordinated or consolidated [in] pretrial proceedings," 28 U.S.C. § 1407(a), with "tag-along" private damages cases. *See* 28 U.S.C. § 1407(g). Congress "in weighing the public interest in expedited resolution of government antitrust enforcement actions against the potential burdens of duplicative discovery on defendants . . . chose to strike the balance in favor of the public's interest in expedited relief." *United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 144 (D. Del. 1999). Accordingly, "Congress has made the decision that inefficiencies and inconvenience to antitrust defendants are trumped by an unwillingness to countenance delay in the prosecution of Government antitrust litigation." *Id.* at 146. Congress recognized "the primacy of antitrust enforcement actions brought by the United States, [because] they seek to enjoin ongoing anticompetitive conduct," while "private parties are primarily interested in recovering damages for injuries already suffered." [4] *Id.* at 145.

In short, Congress clearly intended that antitrust enforcement actions brought by the United States proceed expeditiously, unencumbered by the delays associated with private litigation. Blue Cross fails to identify any persuasive reason to ignore this instruction here. Indeed, its motion to stay discovery embodies precisely the delay tactic that Section 4 of the Sherman Act and 28 U.S.C. § 1407(g) are intended to avoid.

[4] Expediting federal actions "without being burdened by delays that consolidation [or coordination] may cause . . . also makes a judgment in favor of the Government available for use in a private suit[, which] promotes judicial efficiency by fostering settlement." *Dentsply*, 190 F.R.D. at 145 (citing 15 U.S.C. § 16(a)).

B. The strong public interest in swiftly ending anticompetitive conduct outweighs Blue Cross's interest in delaying discovery.

The need for expeditious resolution of this antitrust suit brought by the United States is concrete. As the Complaint alleges, Blue Cross's anticompetitive conduct has adversely "affected and will continue to [adversely] affect purchasers of both group and individual commercial health insurance." Complaint ¶ 24. While these anticompetitive practices continue, the public will continue to suffer from decreased competition in the vital health insurance market, which leads to higher prices and lower quality. The potential effects of this anticompetitive conduct are significant; Blue Cross had revenues in excess of $10 billion in 2009. The public's interest in ending Blue Cross's harmful conduct is a factor weighing heavily against the delay Blue Cross seeks. *See*, *e.g.*, *Williams v. New Day Farms, LLC*, No. 2:10-cv-0394, 2010 WL 3522397, at *1 (S.D. Ohio Sept. 7, 2010) ("the Court is required to take into account any societal interests which are implicated by either proceeding [with] or postponing discovery"); *FDIC v. Renda*, No. 85-2216, 1987 WL 348635, at *2 (D. Kan. Aug. 6, 1987) (listing "the public interest" as a factor "universally recognized" as "critical" to stay analysis).

Here, the United States (and the State of Michigan) are Plaintiffs, seeking "injunctive remedies on behalf of the general public." *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Thus, Blue Cross's reliance on cases where a private plaintiff was seeking damages is inapposite. Every case Blue Cross cites was brought by private plaintiffs under jurisdictional statutes that do not require disposition of the matter "as soon as may be," and no case involved the balancing of the important public interest, present here, in swiftly ending Blue Cross's anticompetitive conduct.[5]

III. Blue Cross Fails to Show a Particular and Specific Need for a Stay.

In addition to ignoring the strong public interest in prompt resolution of antitrust actions brought by the United States and the State of Michigan, Blue Cross also fails to identify any particular and specific need that would weigh in favor of staying discovery. First, Blue Cross's Motion to Dismiss is not well-founded and provides no basis for staying discovery. Second, Blue Cross has not demonstrated any particular burden arising from any particular discovery request. Third, Blue Cross's suggestion that a stay will permit coordination with "tag-along" private actions conflicts with Congress's clear intent that such actions not impede government enforcement actions.

A. Blue Cross's Motion to Dismiss is not "well-founded."

Blue Cross cannot demonstrate good cause to stay discovery because, contrary to Blue Cross's contention, its Motion to Dismiss is neither "well-founded in the law" nor likely to be dispositive. (Def.'s Mot. to Stay Disc. at 6.) As shown in the United States' Response in Opposition to the Motion to Dismiss (Docket Entry 16), Blue Cross initially ignored, and subsequently failed to distinguish, contradictory controlling authority on crucial elements of its state action and abstention claims, and its invocation of *Twombly* does not warrant dismissal.

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[5] Moreover, only three of the cases Blue Cross cites — *Dowdy & Dowdy P'ship v. Arbitron Inc.*, No. 2:09-cv-253, 2010 WL 3893915, at *2 (S.D. Miss. Sept. 20, 2010); *DSM Desotech Inc. v. 3d Sys. Corp.*, No. 08-cv-1531, 2008 WL 4812440, at *3 (N.D. Ill. Oct. 28, 2008); *In re Sulfuric Acid Litig.*, 231 F.R.D. 332, 339 (N.D. Ill. 2005) — even address stays of discovery pending a motion to dismiss. In contrast, *Hahn v. Star Bank*, 190 F.3d 708 (6th Cir. 1999), and *Gettings v. Buildings Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300 (6th Cir. 2003), do address motions to stay discovery, but in *Hahn* only after the court had already granted a motion for *summary judgment* and in *Gettings* where a motion for summary judgment was pending.

(1) The State Action Exemption is Not Applicable.

To qualify for the "state action" exemption Blue Cross must show *both* that the Michigan legislature has clearly articulated an affirmative policy, the foreseeable or logical result of which is the anticompetitive conduct in question, *and* that the State of Michigan actively supervises that conduct. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Blue Cross's state action argument fails to satisfy either test.

(a) *No clearly articulated state policy*. In its opening dismissal brief Blue Cross argued that "broad grants of authority" are sufficient to support a finding of clear articulation. (Def.'s Mot. to Dismiss at 10 ("the clear articulation test is satisfied by broad grants of authority").) That argument ignores this Circuit's controlling case, *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 445–58 (6th Cir. 2007). Blue Cross's reply brief now recognizes that "general grants of authority" are insufficient. (Def.'s Reply Mem. at 3.) The grants of authority Blue Cross attempts to rely on, however, are "broad" and "general," and do not logically or foreseeably result in hospital contracts containing MFN or MFN-plus clauses. For example, the fact that Blue Cross is "statutorily barred from dissolving" (Def.'s Reply Mem. at 3), does not logically or foreseeably imply that it is permitted to use MFN clauses that in effect raise the price of hospital services for its competitors throughout Michigan. Further, the State of Michigan has made clear its intent to foster, not displace, competition in the health insurance marketplace. (U.S. Mem. in Opp. at 26–29.)

(b) *No active supervision.* The State of Michigan has *not* actively supervised Blue Cross's challenged conduct. Blue Cross fails to show *as a matter of law* (as it must do on a motion to dismiss) that the State specifically reviewed or approved either its MFN or MFN-plus clauses. (Def.'s Reply Mem. at 10.) Indeed, Blue Cross admits that its MFN-plus clauses were never reviewed or approved at all and provides no basis to conclude the equal-to-MFN clauses were either specifically considered or approved by any state authority. (Def.'s Reply Mem. at 10; *see* U.S. Mem. in Opp. at 31–33.)

Silence is not sufficient to meet the active supervision test. The Supreme Court has squarely held that to satisfy the test, a party must show a state "ha[s] [ ] *exercise[d]* power to review particular anticompetitive acts," and that "the mere presence of some state involvement or monitoring does not suffice." *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added) (case quoted in Def.'s Reply Mem. at 2); *see also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). In other words, a state "must independently review and approve the anticompetitive behavior" to satisfy the active supervision prong.[6] *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 260 (3d Cir. 2001); *see AT&T v. IMR Capital Corp.*, 888 F. Supp. 221, 240 (D. Mass. 1995) (neither "mere failure to act against [ ] allegations" nor "theoretical power to regulate such behavior" is sufficient to immunize anticompetitive conduct from federal law) (citing *Ticor*, 504 U.S. at 633–34).

Blue Cross's referral to itself as "quasi-public" in an attempt to escape the "active supervision" requirement of the antitrust state action doctrine is unfounded. Its dismissal reply brief has no answer for its own admission in a prior case:[7] "[a]lthough BCBSM's regulation by

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[6] Blue Cross cites cases that in fact *require* the state to actually review and approve the conduct in question. *See, e.g., DFW Metro Line Servs. v. Sw Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir. 1993) ("potential for supervision does not satisfy [active supervision]. The [state] must actually fulfill the active role granted to it under the statute"); *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 435 (9th Cir. 1992) (state law "shows that state officials have the power to review [defendant's] actions . . . but fails to satisfy the requirement that they in fact exercise their power".)

[7] Blue Cross contends that there are differences between the state action exemption from the antitrust laws and whether a party is subject to liability under 42 U.S.C. § 1983. (Def.'s Reply Mem. at 8.) But it fails to recognize that the degree of public control is a salient factor in both the test for subjecting a party to "active supervision" under the state action doctrine and the test for identifying state actors under § 1983. *Compare Lebron v. Nat'l R.R. Passenger Corp.*,

the state may meet or even exceed that of some other insurance companies, BCBSM is a private corporation, which is *not* an agent of the state."[8] Instead, Blue Cross's reply brief attempts to obscure this admission with an extended, abstract legal discussion. (Def.'s Reply Mem. at 6–8.)

(2) There is No Basis for Abstention.

Blue Cross's *Burford* abstention argument is similarly without merit. Blue Cross fails to identify, as it now acknowledges it must (Def.'s Reply Mem. at 11–12), an adequate state court forum for the United States' antitrust claim. Federal courts have exclusive jurisdiction over Sherman Act claims. *See Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379–80 (1985). Blue Cross also ignores the import of the Sixth Circuit's recent, controlling decision in *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 562 (6th Cir. 2010), which makes clear that federal interests must be balanced against state interests in determining whether to abstain under *Burford*. Those federal interests are paramount where the United States is the plaintiff suing to enforce federal law. Indeed, Blue Cross still cannot point to any case where a federal court abstained under *Burford* where the United States sued to enforce federal law. (U.S. Mem. in Opp. at 35–38.)

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513 U.S. 374, 400 (1995) (for party to be state actor under section 1983 government must "retain permanent authority to appoint a majority of the directors of the corporation") *with Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 479–80 (6th Cir. 1990) (party must satisfy active supervision requirement where less than a majority of board of directors of corporation appointed by government).

[8] Blue Cross and Blue Shield of Michigan's Brief in Support of Motion for Summary Disposition, *Michigan Chiropractic Ass'n v. Office of Fin. and Ins. Servs.*, Mich. Cir. Ct. for the County of Ingham, Case No. 04-356-CK, 14 (filed Oct. 24, 2005) (emphasis in original) (attached as Appx. 7 to U.S. Mem. in Opp.).

(3) *Twombly* Provides No Basis for Dismissal.

Blue Cross's *Twombly* argument rests in part on a false description of the Complaint. Blue Cross claims that the Complaint seeks to preclude Blue Cross from obtaining lower rates, when in fact the Complaint challenges Blue Cross's use of contracts that impede competition and raise prices. A motion to dismiss must address the factual allegations of the complaint, and Blue Cross's argument against its own contrived allegations is improper. (U.S. Mem. in Opp. at 7.) As described at length in the United States' opposition to the motion to dismiss, the Complaint identifies the relevant provisions of the offending agreements, alleges how these provisions have caused the anticompetitive effects of raising prices and otherwise restricting competition, and defines and explains the relevant markets within Michigan where the MFNs have had these effects. The Complaint therefore goes well beyond the minimum pleading required to state a plausible violation of Section 1.

Blue Cross's contention in its reply that Plaintiffs "allege nothing" about harm to health insurance markets is baseless: the Complaint expressly alleges that Blue Cross's MFN clauses likely "increase[d] health insurance prices charged by Blue Cross and its competitors" (Complaint ¶ 44), and has resulted in other commercial health insurers "compet[ing] less effectively," than they otherwise would have.[9] (Complaint ¶ 48.) Other purported pleading deficiencies, such as Blue Cross's claim that health insurance markets might be "national" and that market shares cannot be approximated in a complaint, have been rejected by numerous courts. (U.S. Mem. in Opp. at 12–15.)

[9] These are just two of many examples of alleged harm to health insurance markets. (*See, e.g.*, Complaint ¶ ¶ 49–79.)

B. Blue Cross has not demonstrated that Plaintiffs' narrowly limited discovery creates an undue burden.

Blue Cross fails to offer any "particular and specific demonstration of fact" to describe the burden of Plaintiffs' discovery, and thus does not establish good cause. *See Gulf Oil*, 452 U.S. at 102 n.16. Indeed, Blue Cross itself previously characterized Plaintiffs' proposal to initially seek limited information as a "reasonable approach." (Def.'s Mot. to Stay Disc. at 11.) Blue Cross's characterization remains apt. The only currently pending discovery request is Plaintiffs' First Request for Production of Documents, which was served on February 4, 2011. This request is limited to a specific, discrete, and easily produced set of documents and was served with the intention to allow later discovery to "proceed more efficiently." *Id.*; *see also Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989) (courts "have insisted on a particular and specific demonstration of fact, as distinguished from conclusory statements in order to establish good cause"). In fact, even after Plaintiffs informed Blue Cross on January 14, and again on January 20, of the items they intended to seek in Plaintiffs' First Request for Production of Documents, Blue Cross did not identify any burden arising from the then forthcoming request. Instead, Blue Cross's stay brief speculates about what discovery may cost over the entire course of litigation. (Def.'s Mot. to Stay Disc. at 8.) Such conjectures are insufficient, because "[t]he wheels of justice would surely grind to a halt if discovery were stayed pending dispositive motions [ ] based on such generic allegations of undue burden and expens[e]."[10] *Hoxie*, 2010 WL 822401, at *1 (E.D. Mich. March 4, 2010) (Majzoub, M.J.).

Blue Cross asserts that Plaintiffs have conducted "vast" and "extensive" pre-filing discovery, and that Blue Cross has produced "nearly half-million" documents during the pre-complaint investigation. (Def.'s Mot. to Stay Disc. at 1, 11.) In reality, before filing the Complaint, Plaintiffs received only an incomplete production from Blue Cross — approximately one-seventh of the volume of documents Blue Cross claims it has produced from the files of eleven employees — in response to a Civil Investigative Demand issued in April 2010.

Blue Cross claims also that Plaintiffs "insist on a schedule that effectively requires the parties to launch into full-scale discovery immediately." (Def.'s Mot. to Stay Disc. at 2.) To the contrary, in negotiations Plaintiffs sought only limited, phased post-Complaint discovery from Blue Cross. But Blue Cross, rather than negotiating such a phased approach, abruptly filed this Motion, with no discovery pending. Though Blue Cross may have extensive, potentially burdensome discovery plans of its own, those plans provide no basis to stay *Plaintiffs'* discovery. The fact that Blue Cross intends to place "significant burdens on nonparties" (Def.'s Mot. to Stay Disc. at 8–9) does not show good cause for this Court to stay Plaintiffs' reasonable discovery efforts.

[10] Even if Blue Cross could demonstrate that the Plaintiffs' First Request for Production of Documents would cause it some expense, such a showing in and of itself would not establish good cause. *See Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 556 F. Supp. 316, 318 (W.D. Mich. 1983) (*citing Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979)) ("good cause is not established merely by showing that discovery may involve inconvenience and expense"); *Twin City*, 124 F.R.D. at 653 (same).

Indeed, rather than burdening the Court with this unfounded and premature motion, Blue Cross could have negotiated in good faith with Plaintiffs and, failing agreement, Blue Cross could have then sought tailored relief from specific demands that impose an undue burden.

C. Coordination with private actions provides no basis for a stay.

As described above, Congress "articulated a strong public policy" *against* the coordination of discovery in injunctive antitrust cases brought by the United States with private antitrust damages cases. *Dentsply*, 190 F.R.D. at 144–45. Indeed, in *Dentsply*, the only opinion to address this issue, the court denied the defendant's motion to consolidate two "tag-along" private antitrust damages actions based on Congressional concern that consolidation "would 'almost certainly' cause delay in resolution of the Government's cases."[11] *Id*. at 144. Because formal coordination with the suits of private plaintiffs is contrary to Congressional policy, the potential for coordination cannot be good cause for staying discovery.

CONCLUSION

Blue Cross has failed to show good cause in support of its motion to stay discovery. The motion should be denied.

[11] In *Dentsply*, as here, § 1407(g) was not strictly applicable because the "tag-along" private actions subject to proposed consolidation or coordination with the injunctive action brought by the United States were all pending in the same district. The *Dentsply* court, however, ruled that "[b]ecause the purpose of consolidating pretrial proceedings pending within one district under Rule 42(a) is analogous to the overarching purpose of 28 U.S.C. § 1407, the court concludes that the public policy underlying § 1407(g)'s exemption of Government antitrust cases from transfer and consolidation of pre-trial proceedings controls this case." *Dentsply*, 190 F.R.D. at 145.

Respectfully Submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Peter Caplan
Assistant United States Attorney
United States Attorney's Office
Eastern District of Michigan
211 W. Fort Street
Suite 2001
Detroit, Michigan 48226
(313) 226-9784
P-30643
peter.caplan@usdoj.gov

Barry J. Joyce
Ann Marie Blaylock
Ryan Danks
David Gringer
Steven Kramer
Richard Liebeskind
Trial Attorneys
Litigation I Section

By
/s/ Ann Marie Blaylock
Trial Attorney
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, D.C. 20530
(202) 616-5932
D.C. Bar # 976825
ann.blaylock@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

/s/ with the consent of M. Elizabeth Lippitt
M. Elizabeth Lippitt
Assistant Attorney General
G. Mennen Williams Building, 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933
(517) 373-1160
P-70373
LippittE@michigan.gov

February 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

/s/ Ann Marie Blaylock
Trial Attorney
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, D.C. 20530
(202) 616-5932
ann.blaylock@usdoj.gov

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Mississippi,
Hattiesburg Division.
DOWDY & DOWDY PARTNERSHIP, d/b/a WZKX (FM) Radio Station, Plaintiff
v.
ARBITRON INC., Adela Ware Corporation; Clear Channel Communications, Inc., a foreign corporation; CC License, LLC, and Chase Radio Properties, Inc.; Aloha Station Trust, LLC, each a foreign limited liability company and Capstar Tx Limited Partnership, a foreign partnership, Defendants.

Civil Action No. 2:09cv253 KS-MTP.
Sept. 30, 2010.

Wayne Dowdy, Dunbar D. Watt, Dowdy & Cockerham, Magnolia, MS, for Plaintiff.

Neville H. Boschert, Laura Limerick Gibbes, Watkins Ludlam Winter & Stennis, P.A., Robert L. Gibbs, Brunini, Shunda P. Baldwin, Grantham, Grower & Hewes, Jackson, MS, Lawrence C. Drucker, Peter Lambrianakos, Dickstein Shapiro, LLP, New York, NY, for Defendants.

ORDER

KEITH STARRETT, District Judge.

***1** This matter is before the court on Motions to Stay **[# 35]** and **[# 37],** filed on behalf of the defendants Arbitron, Inc., Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC. The court having reviewed the motions and being advised that no response has been filed and being otherwise fully advised in the premises finds that the motions are well taken and should be granted. The court specifically finds as follows:

Plaintiff Dowdy & Dowdy Partnership, d/b/a WZKX (FM) Radio Station ("Plaintiff'), filed this action in the Circuit Court of Jones County, Mississippi, Second Judicial District, on November 12, 2009, against Arbitron, Clear Channel Communications, Inc. ("Clear Channel") and four other defendants alleged to be wholly-owned subsidiaries of Clear Channel (together with Clear Channel, the "Clear Channel Defendants"). The Complaint alleges that the defendants have conspired with the intent to destroy competition in the radio broadcast industry: (1) by selling or offering Arbitron's services to the Clear Channel Defendants at a price lower than that charged to Plaintiff; (2) through Arbitron's enforcement of its license agreements against Plaintiff while waiving escalation clauses in the Clear Channel Defendants' contracts and performing "other acts" for the benefit of the Clear Channel Defendants; and (3) by otherwise conspiring for the purpose of injuring Plaintiffs business. Arbitron removed this action to this federal court and answered the Complaint on December 11, 2009.

On July 23, 2010, Arbitron filed a 12(c) Motion for Judgment on the Pleadings, asking this court to grant a judgment in Arbitron's favor alleging the plaintiff's Complaint does not allege any facts supporting its conclusory allegations that the defendants acted jointly and pursuant to an understanding, agreement or conspiracy to restrain trade, among other grounds. On September 10, 2010, defendants Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC filed a Motion for Judgment on the Pleadings as well.

The United States Court of Appeals for the Fifth Circuit has recognized that a stay of discovery is appropriate where a preliminary motion asking for dismissal of the case is pending because: (1) such motions are decided based on the content of the complaint only, without regard to facts obtained during discovery; and (2) the motion, if granted, would dispose of the case, thus avoiding the effort and expense of discovery. *Landry v. Air Line Pilots Ass 'n Int'l AFL-CIO,* 901 F.2d 404, 435-36 (5th Cir.1990), *cert. denied*, 111 S.Ct. 244 (1990); *see also Nankivil v. Lockheed Martin Corp.,* 216 F. RD. 689 (M.D.Fla.2003), *aff'd,* 87 Fed. Appx. 713 (11th Cir.2003) (good cause to stay discovery exists where "resolution of preliminary motion may dispose of entire action.").

This court has discretion to grant this type of stay based on Federal Rule of Civil Procedure 26(c) . Rule 26(c) provides that the court, "may, for good cause shown, issue an order to protect a party or person from ... undue burden or expense." Fed. R Civ. P. 26(c). "Good cause may be shown where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced." *Spencer Trask Software and In'l Servs., LLC v. Rpost Int'l Lim.,* 206 F.RD. 367, 368 (S.D.N.Y.2002).

***2** The court finds that good cause to grant a stay of discovery exists here. The defendants have filed dispositive motions seeking the dismissal of the Complaint with prejudice for failure to satisfy the pleading requirements under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). The defendants assert that the plaintiff's sole antitrust claim does not meet *Twombly's* plausibility standard because it lacks basic factual support for its conclusory allegations of a conspiracy among Arbitron and the Clear Channel defendants to restrain trade or harm the plaintiff's business through discriminatory pricing. The plausibility standard is intended to avoid the expense of far-reaching discovery in cases where the complaint is insufficient to support "a reasonably founded hope that the discovery process will reveal relevant evidence." *Twombly,* 550 U.S. at 559, 127 S.Ct. at 1967 (citations omitted). Proving an antitrust conspiracy of unspecified timing and scope is precisely the type of "sprawling, costly, and hugely time consuming undertaking" that should not be commenced on the strength of a complaint consisting entirely of conclusory allegations and vague generalities. *See id* . at n. 6.

The equities and potential harm to the defendants also weigh heavily in favor of granting a stay of discovery. Regardless of the defendants' contention that the vacuity of the plaintiff's Complaint makes it difficult to discern the scope of relevant discovery in this matter, it is possible that the plaintiff's discovery requests would require the defendants to image, search, and collect large amounts of electronic and paper documents. In light of the requirements regarding discovery of electronically stored information and depending on the scope of discovery the plaintiff intends to serve, the defendants' search for and production of documents could potentially be very expensive.

In comparison, an entity such as the plaintiff which is far smaller will likely only incur a fraction of the defendants' discovery costs. Since *Twombly* contemplates that unnecessary discovery costs should be averted where a complaint is insufficient, discovery in this case should be stayed until the court determines whether the pleading standard under *Twombly* has been met. Moreover, the requested stay should be granted because it will be effective for only a short period of time, while the court considers the pending 12(c) Motions for Judgment on the Pleadings.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motions to Stay **[# 35]** and **[# 37],** filed on behalf of the defendants Arbitron, Inc., Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC are granted and all discovery in this matter is stayed pending disposition of the pending motions to dismiss.

SO ORDERED AND ADJUDGED.

S.D.Miss.,2010.
Dowdy & Dowdy Partnership v. Arbitron Inc.
Slip Copy, 2010 WL 3893915 (S.D.Miss.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
DSM DESOTECH INC., Plaintiff,
v.
3D SYSTEMS CORPORATION, 3D Systems, Inc., Defendants.

No. 08 CV 1531.
Oct. 28, 2008.

Andrew Stanley Marovitz, Britt Marie Miller, Thomas Vangel Panoff, Mayer Brown LLP, Jeffrey Brandon Burgan, Bruce Michael Gagala, Lawrence Scott Beall, Leydig, Voit & Mayer, Ltd., Chicago, IL, for Plaintiff.

Michael Sennett, Niloy Ray, Paula W. Render, Jones Day, Chicago, IL, Jonathan A. David, Sidney David, Lerner David Littenberg Krumholz & Mentlik LLP, Westfield, NJ, for Defendants.

MEMORANDUM OPINION AND ORDER

JOAN HUMPHREY LEFKOW, District Judge.

***1** This case arises out of an eight-count complaint filed by plaintiff DSM Desotech, Inc. ("Desotech") against its competitors 3D Systems Corporation and 3D Systems, Inc. (collectively, "3DS" or "defendants") for violations of federal antitrust law, state antitrust law, state tort law, and federal patent law. Before the court are two motions brought by 3DS. First, 3DS moves to stay discovery on all antitrust and state law claims pending the outcome of its motion to dismiss such claims. Second, 3DS moves to bifurcate the patent liability and patent damages issues of the willful infringement claim filed against it and, additionally, to stay discovery of patent damages until liability has been determined. For the reasons set forth below, defendants' motion to stay discovery on the antitrust claims [# 46] will be granted, and defendants' motion to bifurcate trial and stay discovery on the patent claims [# 48] will be denied.

BACKGROUND

3DS is a manufacturer of large-frame stereolithography ("SL") machines. SL is a process by which a physical object, such as a model, is created layer by layer from liquid resin that is solidified into shape with a laser. Desotech is a leader in the SL resin market and the holder of two equipment patents allegedly covering the resin recoating technology used in eight of the SL machines produced and sold by 3DS. In addition to their claim of willful patent infringement (Count VIII), Desotech has alleged anticompetitive behavior on the part of 3DS in violation of sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, the Illinois Antitrust Act, and the Illinois Uniform Deceptive Trade Practices Act (Counts I-VII). Desotech further alleges that 3DS has tortiously interfered with its prospective economic advantages in violation of Illinois law (Count VII).

3DS has denied liability, raising several affirmative defenses to the patent infringement alleged in Count VIII. Also, in a separate motion, 3DS has moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss all antitrust and state law claims filed against it in Counts I-VII.

In the present two motions, 3DS seeks to alter the ordinary course of discovery on all eight counts by asking the court (1) to stay discovery on the antitrust and state law claims pending the outcome of its motion to dismiss, and (2) to bifurcate the patent claim, yielding separate trials on patent liability and patent damages and, additionally, to stay discovery of patent damages until such time as liability has been determined.

DISCUSSION

I. Motion to Stay Discovery of Antitrust and State Law Claims

District courts enjoy extremely broad discretion in controlling discovery. *Crawford-El v. Britton,* 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Patterson v. Avery Dennison Corp.,* 281 F.3d 676, 681 (7th Cir.2002). In accordance with Federal Rule of Civil Procedure 26(c), a court may limit the scope of discovery or control its sequence in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1); *Britton,* 523 U.S. at 598. Such a motion will only be granted, however, "for good cause" and after the moving party has certified to the court that it "has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute." Fed.R.Civ.P. 26(c)(1); N.D. Ill. L.R. 37.2.

***2** Accordingly, the mere filing of the motion does not automatically stay discovery. *SK Hand Tool Corp. v. Dresser Industries, Inc.,* 852 F.2d 936, 945 (7th Cir.1988). Nor does it mean that a court will automatically grant a stay pursuant to Rule 26(c) simply because a defendant asks for one. *In re Sulfuric Acid Antitrust Litigation,* 231 F.R.D. 331, 336 (N.D.III.2005). Nevertheless, stays are granted with some frequency. *Id.* Courts may limit discovery in myriad situations, including when a defendant files a motion to dismiss pursuant to Rule 12(b)(6), but in a majority of cases the existence of a dispositive motion is not the sole reason for granting the stay. *Syngenta Seeds, Inc. v. BTA Branded, Inc.,* No. 05 C 6673, 2007 WL 3256848, at *1 (N.D.Ill. Nov.1, 2007). Stays are often deemed appropriate where the motion to dismiss can resolve a threshold issue such as jurisdiction, standing, or qualified immunity or where, in cases such as this one, discovery may be especially burdensome and costly to the parties. *See id.* at * 1-2; *In re Graphics Processing Units Antitrust Litigation,* MDL No. 1826, 2007 WL 2127577, at *4 (N.D.Cal. July 24, 2007).

3DS has certified that it was unable to resolve this dispute with Desotech, which has submitted a motion to compel discovery on antitrust issues since the present motion to stay was first filed. The only issue remaining, therefore, is whether 3DS has shown good cause for the stay.[FN1] In its complaint, Desotech has alleged three separate theories of liability on which it might proceed with its federal antitrust claims: illegal tying under section 1 of the Sherman Act and section 3 of the Clayton Act, restraint of trade under section 1 of the Sherman Act, and attempted monopolization under section 2 of the Sherman Act. Desotech has also alleged two state law antitrust claims that may or may not ultimately overlap with the federal antitrust claims.

FN1. As Desotech points out, 3DS did not couch its motion in the language of "good cause." The motion does argue, however, that a stay should be granted because of the lopsided discovery burdens imposed by the antitrust portion of this case-in other words, good cause. To deny defendants' motion because it failed to invoke the "good cause" label in its opening motion would elevate form over substance, a position this court declines to take.

As the Supreme Court, the Seventh Circuit, and this court have all recognized, discovery in *any* antitrust case can quickly become enormously expensive and burdensome to defendants. *See Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 1967, 167 L.Ed.2d 929 (2007) ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (citations omitted); *Lupia v. Stella D'Oro Biscuit Co.,* 586 F.2d 1163, 1167 (7th Cir.1978) (acknowledging that "antitrust trials often encompass a great deal of expensive and time consuming discovery"); *Asahi Glass Co. v. Pentech Pharm., Inc.,* 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) (requiring that "some threshold of plausibility ... be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase"). Where, as here, not one, but multiple independent theories of antitrust liability have been presented, the potential burden on defendants will likely be even higher, as the scope of discovery must be further broadened to encompass each type of anticompetitive action alleged.

***3** Recognition by the courts of the hefty costs associated with antitrust discovery is not, as Desotech correctly points out, tantamount to an automatic prohibition on discovery in every antitrust case where defendants challenge the sufficiency of a complaint. Such recognition does, however, suggest that the court should be particularly mindful of the course of discovery it will authorize in antitrust cases.

Here, 3DS is facing potential liability on six separate antitrust claims. The business records 3DS has been asked to produce span a period of at least eight years of activity. *See* Defs.' Memo in Support of Mot. to Bifurcate (Dkt. No. 50), Ex. A, at 11.[FN2] More importantly, the information 3DS has been asked to disclose includes “every 3D Systems sales contract for four different 3D Systems stereolithography machines; every sales and marketing document for all 3D Systems stereolithography machines; large categories of third-party contracts; technical designs, manufacturing drawings and test results; complex financial records and reports; vast amounts of customer data, including every piece of communication with customers and potential customers,” as well as other internal communications-information that, in addition to being extensive, voluminous, and expensive to produce, is also highly sensitive subject matter to turn over to one's competitor.[FN3] Defs.' Memo. in Support of Mot. to Stay Certain Discovery (Dkt No. 47), at 5.

FN2. Although the interrogatories given to the court in the cited exhibit were offered in support of 3DS's motion to bifurcate trial on the patent claims, Desotech admits in its memorandum opposing that motion that many of its discovery requests go to both the antitrust counts and the patent counts. Pl.'s Memo Opp. to Mot. to Bifurcate (Dkt. No. 53), at 2.

FN3. Of course, these burdens on 3DS will not bar such discovery if Desotech's complaint survives, in whole or in part, the motion to dismiss that is currently pending. In that case, discovery would continue and the parties would generally have to rely on protective orders and other discovery tools to safeguard confidential information.

Absent circumstances presenting a compelling need for prompt discovery-as there might be if, for example, provisional relief were being sought or if testimony needed to be preserved due to the ill health of a witness-the court finds that the principles underlying *Twombly* counsel in favor of granting defendants' motion to stay. *See, e.g., In re Graphics Processing Units Antitrust Litigation,* 2007 WL 2127577, at *4-5 (“To be sure, to allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly,* at least when the discovery would be burdensome.”). Defendants' motion to temporarily stay certain discovery pending the outcome of their motion to dismiss is therefore granted.[FN4]

FN4. The court is mindful that 3DS has thus far taken it upon itself, without court approval, to withhold discovery on these claims and cautions 3DS to ensure that it complies with Desotech's legitimate discovery requests moving forward. The court also recognizes, however, that the purpose of the present motion almost certainly would have been frustrated had 3DS fully complied with all of Desotech's discovery requests up to this point.

II. Motion to Bifurcate Patent Claim and to Stay Discovery of Patent Damages

Rule 42(b) of the Federal Rules of Civil Procedure states that a court may order a separate trial of any claim or issue “[f]or convenience, to avoid prejudice, or to expedite and economize.” Fed.R.Civ.P. 42(b). The decision to bifurcate pursuant to Rule 42(b) is made on a case-by-case basis and is committed to the discretion of the district court. *Real v. Bunn-O-Matic Corp.,* 195 F.R.D. 618, 619 (N.D.Ill.2000); *see also McLaughlin v. State Farm Mut. Auto. Ins. Co.,* 30 F.3d 861, 870 (7th Cir.1994). The court, however, must be mindful of the factfinder's traditional role, which ordinarily is to make a determination on the basis of the case presented in its entirety. *Real,* 195 F.R.D. at 620. Consequently, bifurcation in patent cases, as in others, is the exception, not the rule. *Id.; Trading Techs. Int'l v. eSpeed, Inc.* ., 431 F.Supp.2d. 834, 836, 840 (N.D.Ill.2006). Separate trials should not be ordered "unless such a disposition is clearly necessary." *Real,* 195 F.R.D. at 619 (internal quotation marks and citations omitted).

***4** In those cases in which motions to bifurcate have been granted, the facts and circumstances were such that bifurcation lent itself to judicial economy while not unduly prejudicing any party. *William Reber, LLC v. Sony Ericsson Mobile,* No. 03 CV 4174, 2004 WL 2535074, at *2 (N.D.Ill. Sept. 27, 2004) (hereinafter "*Reber II*"). Such circumstances include but are not limited to "a) a need for voluminous documents to resolve damage issues; b) complex infringement issues; c) multiple patents, infringing products, claims, counterclaims or parties; or d) the probability that the defendant would prevail on the infringement issue, thereby eliminating the need to address the issue of damages." *Id.; Real,* 195 F.R.D. at 621. The party seeking bifurcation bears the burden of demonstrating that judicial economy would be served and that no party would be prejudiced by separate trials. *William Reber, LLC v. Samsung Elecs. Am., Inc.,* 220 F.R.D. 533, 536 (N.D.Ill.2004) (hereinafter "*Reber I*") (citing *Novopharm Ltd. v. Torpharm, Inc.,* 181 F.R.D. 308, 310 (E.D.N.C.1998)).

Desotech has asserted willful patent infringement of two of its U.S. Patents, Numbers 6,340,297 ("the '297 Patent") and 6,733,267 ("the '267 Patent"). Both patents are directed to a component of the SL machine called the "recoater," which adds and shapes a new layer of liquid resin to the object being created. Patent '297 has 12 patent claims and Patent '267 has 29 patent claims. According to 3DS, eight of its machines are implicated by the technology documented in these patents, and each might be at issue in the current litigation. As a result of the large number of potential claims involved, 3DS argues that this case will require hundreds of gigabytes of documents to prove financial damages and will involve many complicated questions of technology to be decided by the jury.

3DS has filed the current motion in an attempt to simplify the complicated nature of this case. First, 3DS asks the court to bifurcate the patent claim into two portions: (1) liability and (2) willfulness of infringement and damages. 3DS argues that bifurcation is required because of (a) the need for voluminous documents to resolve the damages issues; (b) the complexity of the infringement issues, (c) the need to avoid the risk of prejudice to the defendants due to the inadvertent disclosure of sensitive financial information, and (d) bifurcation will promote judicial economy. Second, 3DS asks the court to stay discovery of the damages potion until such time as liability has been assessed-or, in other words, only upon Desotech's success at the first trial. 3DS asserts that there is little overlap between patent liability and damages in this case-particularly if, as it urges, the issue of willfulness is tried with the damages portion of the bifurcation. Consequently, 3DS contends, proceeding in this fashion will assure substantial savings of judicial time and litigant resources. For the reasons discussed below, the court does not find 3DS's arguments to be persuasive.

A. Voluminous Documentation

***5** 3DS claims that the documents it has been asked to produce and the interrogatories it has been asked to answer in response to Desotech's discovery of patent damages will require sifting though hundreds of gigabytes of emails and documents. Desotech, on the other hand, has stated that it seeks to use a "reasonable royalty" calculation for the measure of its patent damages and that the most "basic financial information" will suffice in this regard. Pl.'s Memo in Opp. to Bifurcation at 1.

The gap between the parties' positions on this issue appears to stem from the seven antitrust and tort claims that are also pending in this case. Desotech acknowledges that it has sought information pertaining to 3DS's financial forecasts, market share information, and customer/supply agreements-requests that will undoubtedly require a large quantity of data to adequately answer. Desotech asserts, however, that such requests are meant to prove both patent damages *and* antitrust liability. Such evidence is, of course, often central to antitrust litigation. The likelihood of some degree of overlap in evidence regarding, on the one hand, antitrust liability (should those claims survive the pending motion to dismiss) and, on the other hand, patent damages, thus discourages the court from bifurcating the patent damages portion of this case.

Furthermore, other than requests for financial information, which may be considered ancillary to the issue, the court finds little indication that the damages aspects of plaintiff's patent claims will require any greater volume of documents than in a typical patent case that can be resolved in a single trial. *See Real,* 195 F.R.D. at 622-23 (holding bifurcation inappropriate despite the plaintiff's seeking to prove both reasonable royalties and lost profits as measures of damages).

B. Complexity and Multiplicity

As for the complexity of the case, it too appears to be no more intricate than a typical patent case. In *Reber II,* the court vacated a bifurcation order it had previously granted because the case had become significantly less complex than it had once been. 2004 WL 2535074, at *2. The original motion to bifurcate was granted when the claim was against six co-competitor defendants, discovery involved thousands of documents written in various languages other than English, witnesses spoke languages other than English, and many of the documents and witnesses needed to determine damages were located outside of the United States. *Reber I,* 220 F.R.D. at 535. Due to these extraordinary circumstances, bifurcation of damages served the interests of judicial economy, efficiency, and simplicity without unduly prejudicing the plaintiff's right to a jury trial. *See id.* As discovery progressed on the liability portion of the patent claim, however, the plaintiff settled with all but one defendant. *Reber II,* 2004 WL 2535074, at *1. Despite the fact that two patents, six claims, and fifteen of the defendant's products remained at issue, the court held that the extenuating circumstances justifying the original bifurcation no longer existed. *Id.* at *3.

***6** Clearly, the circumstances presented by this case do not amount to the global, multi-party litigation presented by *Reber I.* While there may be more potential claims at issue in the present case than there were in the streamlined *Reber II,* the mechanical engineering technology at issue here-involving the “recoater”-appears to be more digestible to the lay juror than does computer or electrical technology. Moreover, although eight of 3DS's products may be implicated by patents '297 and '267, there is little indication that differences between recoating components in each of the particular product will introduce significantly more complexity to the case. Rather, once the initial technology has been explained and understood by the jury, the damages allegedly suffered by Desotech from each newer model should be only marginally more difficult to prove or understand than the first.

C. Avoiding Prejudice

In *Reber I,* before granting the bifurcation order, the court “strongly considered” the potential “detrimental effects” that inadvertent disclosure of sensitive financial information could have on the defendants. *Reber II,* 2004 WL 2535074, at *3. Because each of the six defendants was in direct competition with one another, the potential detrimental effects of such disclosure outweighed any prejudice to the plaintiff. *Id.* In the present case, however, the two defendants are parent and subsidiary, and can hardly be said to be in direct competition with each other. While Desotech and 3DS do compete in the SL resin market, Desotech does not manufacture SL machines that compete with the machines at issue in this litigation. Moreover, patent issues often arise between two direct competitors; such a situation is generally handled by two-tiered protective orders of the type already being negotiated by the parties in this case. Although some sensitive information may inevitably be conveyed during trial, that is the nature of patent litigation.

D. Expedition and Economy

The final argument offered by 3DS in support of its motion is that it will save resources for both the court and the litigants, because the issues of patent liability and patent damages do not overlap. As an empirical matter, the court has regularly rejected this type of claim. It is precisely because the issues of willfulness, liability and damages generally overlap that bifurcation remains the exception in patent cases, rather than the rule. *See* *Trading Techs.,* 431 F.Supp.2d at 841 (noting that "courts in this district have repeatedly held that bifurcation ... was inappropriate because issues of liability and willfulness/damages do overlap"). The issue of willfulness in particular has been identified as a factor arguing against bifurcation because it is assessed according to the totality of the circumstances. *See id.* (recognizing that "where issues to be presented in the two trials sufficiently overlap, bifurcation should be denied" and noting that "evidence of liability and willfulness will likely overlap"); *Real,* 195 F.R.D. at 625-26.

***7** Because bifurcating this trial would prejudice Desotech by requiring it to duplicate its efforts and because 3DS has failed to show that such prejudice would be outweighed by other considerations, the court concludes that bifurcation is inappropriate in this case. Defendants' motion to bifurcate the patent infringement trial and to stay the discovery related thereto [# 48] is therefore denied.

CONCLUSION AND ORDER

Defendants' motion to stay discovery regarding the antitrust and state law claims pending the court's ruling on the motion to dismiss [# 46] is granted, and defendants' motion to bifurcate and stay certain discovery relating to the patent claims [# 48] is denied. In order to avoid unnecessary discovery disputes relating to sensitive financial and customer data, however, the court does hereby enter a temporary stay on the discovery of information relating to patent damages pending the outcome of 3DS's motion to dismiss the antitrust and state law claims. Once the antitrust claims in this case are determined, the appropriate scope of discovery on all claims should be better defined, thus lessening the likelihood of subsequent discovery disputes.

N.D.Ill.,2008.
DSM Desotech Inc. v. 3D Systems Corp.
Not Reported in F.Supp.2d, 2008 WL 4812440 (N.D.Ill.), 2008-2 Trade Cases P 76,423

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Only the Westlaw citation is currently available.

United States District Court, D. Kansas.
FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and Federal Deposit Insurance Corporation, in its capacity as Receiver of Indian Springs State Bank, Plaintiffs,
v.
Mario RENDA, et al., Defendants.

Civ. A. No. 85-2216-O.
Aug. 6, 1987.

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

***1** In this complex action, plaintiff Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity, and plaintiff Federal Deposit Insurance Corporation ("Receiver"), as receiver of Indian Springs State Bank ("ISSB"), allege that defendants have committed several violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Plaintiffs also claim violations of various securities laws and raise several state law claims. Pending before the court are the following motions: (1) Defendants' motion for a stay of further proceedings and for a protective order as to pending discovery matters; (2) defendants' motion for review of the magistrate's order denying their motion for a protective order; (3) plaintiffs' joint motion for leave to file a second amended complaint and for an order permitting the Federal Savings and Loan Insurance Corporation ("FSLIC") to intervene as a plaintiff; (4) defendants' motion to dismiss the first amended complaint or for a more definite statement; and (5) a motion filed by certain of the defendants for leave to amend their answers. We shall make the following rulings.

I. *Background.*

Plaintiffs FDIC and the Receiver originally filed this action on April 5, 1985. On September 4, 1985, plaintiffs filed their first amended complaint. In their first amended complaint, plaintiffs name as defendants several individuals and entities, including, among others: Mario Renda, Southbrook Homes, Inc., Nina Associates, Ltd., First United Realty Co., First United Fund, Ltd., First United Financial Corporation, and Joseph J. DeCarlo, Sr., ("the Renda defendants"); Sammy G. Daily and Sam Daily Realty, Inc., ("the Daily defendants"); Renate Winkler, as trustee for Barclay Trust; and V. Leslie Winkler.FN1

The essence of plaintiffs' multiple-count first amended complaint is that defendants devised an elaborate and complicated "linked financing" scheme to gain profit from the acquisition of fraudulent and illegal loans. Two of the targets of the scheme, plaintiffs allege in that complaint, were ISSB, a bank in Kansas City, Kansas, and Rexford State Bank ("Rexford"), a small rural bank in Kansas. Defendants effected the scheme, plaintiffs claim, through a pattern of regular and continuing criminal conduct, in violation of RICO. Plaintiffs also claim that defendants violated the federal securities laws. Finally, plaintiffs raise several state law claims, including common law fraud on the part of the defendants.

II. *Renda Defendants' Motion to Stay Further Proceedings.*

On June 29, 1987, the Renda defendants filed a motion to stay further proceedings and for a protective order as to pending discovery motions. They had twice earlier sought a stay and have filed other motions for protective orders. Indeed, as we noted above, defendants have asked the court to review the magistrate's denial of a protective order.

The Renda defendants' latest motion is prompted by the recent indictments handed down by a federal grand jury in Kansas on June 10, 1987, against Mario Renda and others involved in this civil action. An indictment is also pending in the Eastern District of New York. In their motion, the

Renda defendants seek a blanket stay of all further proceedings in this action until after resolution of the criminal charges.

***2** In considering defendants' motion, the court is mindful that "[t]here is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions." *Securities and Exchange Commission v. First Financial Group of Texas, Inc.,* 659 F.2d 660, 666-67 (5th Cir.1981). The Supreme Court has refused to create a per se rule prohibiting the simultaneous prosecution of civil and criminal actions because "prompt investigation and enforcement both civilly and criminally [are] sometimes necessary in order to protect the public interest...." *Id.* at 667 (citing *United States v. Kordel,* 397 U.S. 1, 11 (1970)).

It is well settled, however, that a trial court, in the exercise of its discretion, has the power to stay an action. As Justice Cardozo stated, in an oft-repeated phrase,

> 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. 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 (1936).

Five factors have been universally recognized as being critical to a proper balancing of the competing interests at stake. Those factors are: (1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *In Re Mid-Atlantic Toyota Antitrust Litigation,* 92 F.R.D. 358, 359 (D.Md.1981); *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers,* 87 F.R.D. 53, 56 (E.D.Pa.1980). A fair and careful analysis of these five factors, we conclude, indicates that the blanket stay sought by the Renda defendants is neither necessary nor appropriate.

A. *Plaintiffs' Interest.*

The Renda defendants' motion, if granted, would halt all further proceedings for a minimum of five to six months and perhaps much longer. Obviously, then, their motion threatens to seriously impinge on plaintiffs' "right to pursue [their] case and to vindicate [their] claim expeditiously." *Golden Quality,* 87 F.R.D. at 56.

Defendants argue that resolution of the criminal trial before continuation of this civil action would ultimately benefit plaintiffs by resolving many of the issues of civil liability. But, as plaintiffs note, most of the remaining discovery with respect to the Renda defendants concerns issues of causation and damages; those issues most certainly will not be resolved at the criminal trials.

Moreover, plaintiffs' interest in expediting its case weighs even more strongly than usual where, as here, plaintiffs are charged by Congress with acting quickly to protect the public interest. That charge, we believe, counsels caution in our contemplating the delay of this action.

B. *Burden on Defendants.*

***3** Defendants cite several burdens they would face should the court deny their motion. Some of these "burdens" reflect legitimate concerns. Others, however, are exaggerated.

First, Mario Renda maintains that continuation of discovery in this case would divert his energies and resources from his defense of the criminal actions. Certainly, that would be true during the actual trial. But that fact does not indicate that a blanket stay of all further proceedings and discovery as to all *other* defendants is warranted. Rather, we conclude that a more reasonable, fair, and balanced approach is to stay discovery, at least as it affects Renda, during the actual trial. Indeed, even plaintiffs recognize that a stay of discovery during trial would be appropriate. Hence, Renda's concern can be alleviated through a far less draconian solution than a blanket stay.

Second, the Renda defendants charge that plaintiffs have and will share information gained through the liberal civil discovery process with the criminal prosecutors; information to which those prosecutors might not otherwise be entitled. *Corbin v. F.D.I.C.,* 74 F.R.D. 147, 149-50 (E.D.N.Y.1977). This burden, we believe, is entirely illusory. Defendants have no real evidence that plaintiffs have improperly shared information in the past. Certainly, there is no evidence that plaintiffs are using civil discovery as a pretext for gathering information for use in the criminal cases. *Cf. Campbell v. Eastland,* 307 F.2d 478 (5th Cir.1962), *cert. denied,* 371 U.S. 955 (1963). And if there were any reason to believe that plaintiffs might share information with the prosecutors, the solution would be a limited protective order proscribing such conduct, not a blanket stay.

Finally, Mario Renda argues that continuation of this action will infringe his fifth amendment right against self-incrimination. To support his argument, he cites several potential threats to his fifth amendment right. First, he notes that if the court either denies the pending motion to dismiss the first amended complaint or grants plaintiffs leave to file a second amended complaint, he will be required to file an answer. If he has to answer, he insists, he would be forced to choose between defense of this action and his right against self-incrimination. The fact of the matter is that he faces no such potential dilemma.

In a series of opinions-known as the *Garrity-Lefkowitz* line of cases-the Supreme Court has held that the use of a threat of serious economic harm to compel a person to waive his fifth amendment right and testify is unconstitutional. *Mid-America's Process Service v. Ellison,* 767 F.2d 684, 686 (10th Cir.1985) (citing *Baxter v. Palmigiano,* 425 U.S. 308 (1976). Here, Renda faces a potential civil judgment of millions of dollars. Certainly he faces "serious economic harm." But that potential harm will not be used to force him to waive his fifth amendment right. Rather, should he be required to answer the second amended complaint, he may answer the allegations by invoking the privilege. *National Acceptance Co. of America v. Bathalter,* 705 F.2d 924 (7th Cir.1983). His assertion of the privilege will be treated as equivalent to a specific denial. *Id.* at 929. *See also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1280 at 360-61. Consequently, because Renda may assert his fifth amendment privilege without penalty, his privilege would not and will not be infringed.

***4** Second, Renda notes that, even though he may be able to invoke the privilege, the corporate defendants in this action have no such privilege. *See, e.g., Wilson v. United States,* 221 U.S. 361, 385 (1911). That fact, he argues, "creates a dilemma for [him] because a failure to answer by the corporate entities will expose them to a default judgment. [But] [i]f an answer is filed on their behalf, that answer may well be used against [him] in his capacity as president of those corporations." Renda Defendants' Motion to Stay, at 16. Thus, he argues, the court should stay further proceedings to relieve him of the "dilemma." In support of that position, he further notes that the Supreme Court, in *Kordel,* stated that if no individual could answer for the corporation without a risk of self-incrimination, "[f]or present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action." 397 U.S. at 9.

As Plaintiffs correctly observe, Renda does not suggest that, *in fact,* no other individual could answer interrogatories or other discovery matters on behalf of the corporate Renda defendants without risking self-incrimination. Indeed, an affidavit was prepared on behalf of First United Fund, Ltd., by Stuart Steinberg. No reason is given why he could not do so in the future. Hence, the *Kordel* dicta, even if accepted as the law, is apparently irrelevant to this action.

Moreover, the mere fact that the corporate defendants might provide information that would incriminate Mario Renda provides no reason to grant a stay. The fifth amendment only protects an individual from being forced to incriminate *himself;* it does not insulate him from damaging evidence provided by other individuals or entities. The United States District Court for the District of Utah aptly stated:

> The privilege is a personal privilege that protects against the testimonial compulsion of an accused to testify against himself. [Citation omitted.] The priceless and time honored shield provided by the privilege cannot be used as an insurmountable barrier to block the introduction of other damaging evidence through the mouths of others, that provides, as here, the measure of defendant's responsibility. The invocation of the Fifth Amendment privilege does not and cannot stop the mouths of all witnesses as evidence against the person claiming the privilege. *The Fifth Amendment protects an individual, not from the introduction of incriminating evidence, but from compelling him to produce it.* [Citations omitted.]

Hughes Tool Co. v. Meier, 489 F.Supp. 354, 374-75 (D.Utah 1977) (emphasis added).

Finally, we also note that, to the extent Renda complains about the potential prejudice he might suffer from having to assert his fifth amendment privilege, a stay would not be likely to improve his situation. He has already asserted the privilege at his deposition and the law permits a jury in a civil action to draw an adverse inference from such an assertion. *See Fidelity Bankers Life Insurance Co. v. Wedco, Inc.,* 586 F.Supp. 1123, 1126 (D.Nev.1984). Hence, any damage that may arise from invoking the privilege in this civil action has already been done. (In any event, plaintiffs represent that, with the possible exception of his answer, "it is unlikely that Mr. Renda will be asked to speak again prior to trial." Plaintiffs' Memorandum in Support, at 11.)

C. *Burden on the Court.*

***5** The Renda defendants argue that a stay will lessen the burden on the court because the outcome of the criminal trial may lessen the amount of court time in the civil action necessary to prove liability and because "continuation of civil discovery in the face of the pending indictment will require substantial supervisory judicial effort." We do not agree.

It is not at all clear that the plaintiffs and the court will be relieved of the burden inherent in plaintiffs' need to prove liability. Unlike the case cited by defendants-*Golden Quality*-the liability issues in the criminal and civil cases are far from identical. Moreover, even if the court denies the stay, the criminal case will undoubtedly be tried first. Hence, any potential lessening of the court's burden because of the criminal verdict will occur regardless of our decision here.

Finally, we are not convinced that the court will save itself a significant amount of effort-if any at all-by granting a stay. It is far more likely that a stay would only postpone the court's work, thereby frustrating the court's strong interest in moving its docket.

D. *The Interest of Non-Parties.*

In an effort to suggest a potential detriment to non-parties, the Renda defendants note that both the civil complaint and the indictment allege that named and unnamed individuals fraudulently obtained loans from ISSB. If subpoenaed to provide deposition testimony in the civil action, these non-parties would have to choose between asserting the privilege and incriminating themselves. Thus, defendants contend, a "[c]ontinuation of the civil action could jeopardize the Fifth Amendment rights of at least thirty individuals." Renda Defendants' Motion to Stay, at 18.

This suggested burden is of little weight. If non-parties are deposed and choose to invoke their privilege not to testify, their rights would be fully respected. Indeed, the court fails to perceive on what basis a party could assert that his constitutional right against self-incrimination had been impaired by the very exercise of that right.

Furthermore, the fact that a non-party, or a party for that matter, may not like some of the consequences of exercising his privilege is not a legitimate reason for depriving plaintiffs of their right to proceed with their case. As the court stated in *Controller of the Currency v. Lance,* 632 F.Supp. 437 (N.D.Ga.1986), “[t]he choice between testifying, or invoking the Fifth Amendment may be difficult, but it does not create a basis for a stay.” *Id.* at 442.

E. *The Public Interest.*

This factor, as do most of the others, weighs against the granting of the Renda defendants' motion. Plaintiffs, pursuant to a congressional mandate, are seeking to recover damages allegedly caused by defendants as the result of a scheme that purportedly caused the failure of at least three financial institutions in Kansas. Obviously, the public has a keen interest in the swift resolution of the issues involved in this action, as well as in the payment of damages if liability should be established. Those public interests are especially critical where, as here, plaintiffs are a public agency specially charged with the responsibility of enforcing federal law. As the Supreme Court stated in *Kordel:*

> ***6** It would stultify enforcement of a federal law to require a governmental agency ... invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, *or to defer civil proceedings pending the ultimate outcome of a criminal trial.*

397 U.S. at 11 (emphasis added).

F. *Conclusion.*

The above analysis demonstrates that a blanket stay, as sought by the Renda defendants, would be unnecessary, violative of plaintiffs' rights, and against the public interest. We recognize, however, that Mario Renda has a legitimate concern about the plaintiffs' pursuit of discovery from him during the actual criminal trial. Because his civil attorneys are also representing him in the criminal matters, his counsel will need to be free of distractions from this civil action during the criminal trial, if Renda is to receive adequate assistance of counsel. Therefore, we shall deny the Renda defendants' motion for a blanket stay. We shall, however, order a stay of discovery during the actual criminal trial itself. The Honorable Dale E. Saffels has scheduled the criminal trial to begin on October 19, 1987. *United States v. Renda,* No. 87-20049-01 (D.Kan., *unpublished,* July 23, 1987). We shall, thus, order that discovery be stayed as to those defendants named both in this action and in the criminal action pending before Judge Saffels from the date trial begins until the conclusion thereof. The court will, of course, consider modifying its order on a showing of good cause as the need may arise.

Concerning the Renda defendants' motion for review of the magistrate's order denying their request for a stay of discovery, we affirm the magistrate's order for all of the reasons stated above.

III. *Plaintiffs' Motion for Leave to Amend and the FSLIC's Motion to Intervene*

Plaintiffs have moved for leave to file a second amended complaint, which would add the following seven defendants: Antoinette Renda; Cindy Real Estate Partners, Inc.; MFS Partners, Inc.; Nevada Holdings Co., Inc.; Seaside Ventures, Ltd.; Waikiki Gateway Partners, Inc.; and Kansas City Associates, Inc. a/k/a Hawaiian Properties, Inc. (the “new Renda defendants”). Plaintiffs and the FSLIC have jointly moved for an order permitting the FSLIC to intervene and to file plaintiffs' second amended complaint. The second amended complaint would add new counts against the defendants based on their alleged participation in a scheme perpetrated upon Coronado Federal Savings & Loan Association (“Coronado”). Plaintiffs and the

FSLIC allege that the scheme involving Coronado was substantially identical to that perpetrated upon ISSB and, to a lesser extent, upon Rexford. The motion to amend and the joint motion to intervene are opposed by both the original and the new Renda defendants. The Daily defendants join in the Renda defendants' Memorandum in Opposition.

A. *Motion to Amend*

Motions to amend are governed by Federal Rule of Civil Procedure 15(a). Rule 15(a) clearly states that leave to amend "shall be freely given when justice so requires," and the Supreme Court has warned that "this mandate is to be heeded." *Foman v. Davis,* 371 U.S. 178, 182 (1962). A trial court has wide discretion in deciding whether to grant such a motion. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971).

***7** In the absence of a specific factor such as flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay, prejudice to the opposing party is the key factor to be evaluated in deciding a motion to amend. *Dunn v. Kaaz Holding Co.,* No. 83-2375 (D.Kan., *unpublished,* July 2, 1985). Prejudice under Rule 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Commissioners of Lewes,* 416 F.2d 290, 300 (3d Cir.1969). *See also LeaseAmerica Corp. v. Eckel,* 710 F.2d 1470, 1474 (10th Cir.1983) (no prejudice where the amended complaint referred to the "same chattels, the same consideration, and the same transaction which was the basis for the original complaint."). Such a change of theories would be prejudicial if, for example, the opposing party could show that it would be "disadvantaged or deprived of the opportunity to present facts or evidence which it would have [been able to] offer[ ] had the [movant's] amendments been timely." *Heyl & Patterson Inter'l v. F.D. Rich Housing,* 663 F.2d 419, 426 (3d Cir.1981). The party opposing the amendment of the pleadings has the burden of showing prejudice. *Beeck v. Aquaslide 'N' Dive Corp.,* 562 F.2d 537, 540 (8th Cir.1977).

Defendants first argue that plaintiffs have unduly delayed in seeking to name the seven new defendants. We disagree.

First, as to the six new corporate defendants, defendants offer no reason why plaintiffs should have been able to name them sooner. Moreover, we agree with plaintiffs that the extremely complex nature of the purported scheme itself caused the delay. Plaintiffs state that they have had to "digest hundreds of thousands of pages of documents, and to unravel complicated real estate transactions conducted through shell corporations and straw entities ..." to learn the relationship of the six new corporate defendants to the purported scheme.

Second, as to Antoinette Renda, defendants' sole argument is that plaintiffs should have discovered a reference to her activities in an article that appeared in the Kansas City Business Journal on December 10, 1984, more than three years before the motion to amend was filed. In that article, it was stated that Mario Renda had testified in a deposition that "Southbrook [one of the original Renda defendants] helped First United Fund broker deposits into Indian Springs." The deposition referred to in the article, defendants note, is attached to plaintiffs' proposed second amended complaint and identifies the connection between Mrs. Renda and Southbrook.

As plaintiffs correctly observe, however, Mrs. Renda is not even named in the article and the deposition itself was taken in a completely unrelated action, one in which the FDIC was not a party. Therefore, we find defendants' assertion that plaintiffs should have discovered Mrs. Renda's activities from the deposition and resulting article quite unpersuasive.

Defendants' second argument is that they would be prejudiced should the court grant plaintiffs leave to amend. Specifically, they note that over forty depositions have been taken and that, if the new Renda defendants choose to repeat the depositions, the original Renda defendants would have to attend them at a considerable cost.

***8** In our view, defendants' assertion of prejudice is, however, grossly overstated. As plaintiffs point out, many of the depositions were attended only by local counsel and often no questions were asked by any defense counsel. Moreover, at many of the depositions, no answers were given because the deponents invoked their fifth amendment privileges. It seems unlikely that the new defendants would want to reschedule any of those depositions. Indeed, plaintiffs maintain that "very little if any of the discovery taken to date would need to be retaken by the new Renda defendants, especially in light of the fact that the Renda defendants already intend to resume the depositions of a number of witnesses at a later date." Plaintiffs' Reply Memorandum, at 36.

We also note that, although we granted the Renda defendants leave to file a Sur-Reply, they did not use that opportunity to challenge the plaintiffs' detailed analysis of why the depositions already taken would not have to be repeated. They did point to "three weeks of depositions" taken after plaintiffs filed the instant motion and, as to those depositions, again baldly assert that they will have to be retaken. Although plaintiffs have not been able to respond to that allegation, we believe it likely that defendants' position is as exaggerated on that point as it has been on many of their other claims of prejudice. The court concludes that defendants will not be *unduly* prejudiced-if prejudiced at all-by the addition of the new defendants or by the filing of the second amended complaint.

Finally, defendants argue that leave to amend should be denied because the amendments would be futile; that is, the second amended complaint would be subject to immediate dismissal. To support their claim of futility, defendants argue that the court would lack personal jurisdiction over Antoinette Renda and the six new corporate defendants, that some of the counts fail to state a claim, and that many of the counts would be barred by the applicable statutes of limitations.

It is true that the court need not allow the amendment of the pleadings if the amendment would clearly prove futile. *See* *Dickerson v. City Bank & Trust Co.,* 575 F.Supp. 872, 876 (D.Kan.1983). Here, however, defendants have attempted to raise a number of issues that cannot and should not be decided on a motion to amend.

For example, one of defendants' main arguments is that many of the counts would be barred by the statutes of limitation as to the new defendants. In their original response to the motion to amend, defendants argued that, in Kansas, the period of limitation as to the RICO counts is two years. Subsequent to the filing of their response, however, the Supreme Court held that four years is the appropriate period nationwide. *Agency Holding Corp. v. Malley-Duff & Associate,* 55 U.S.L.W. 4952 (June 22, 1987). Although defendants have since filed their Sur-Reply, it is not clear what their new position is with respect to the effect of that decision. We are satisfied that there are still factual questions as to when the various causes of action arose. *See* Renda Defendants' Memorandum in Opposition, at 45-49. Hence, we simply cannot resolve the statutes of limitations issues at this juncture.

***9** Similarly, defendants' suggestion that the court could not exercise personal jurisdiction over the seven new defendants cannot properly be decided now. Defendants' position is that service of process is not authorized under the Kansas long-arm statute and that the new defendants have not had sufficient contacts with this state to meet the requirements of due process. Plaintiffs respond, in part, by noting that nationwide service of process is authorized under the RICO statute, 18 U.S.C. § 1965(b), and that due process under that statute requires only that a nonresident defendant have minimum contact with the United States. *F.T.C. v. Jim Walter Corp.,* 651 F.2d 251, 256 (5th Cir.1981); *Pioneer Properties, Inc. v. Martin,* 557 F.Supp. 1354, 1358 n. 6 (D.Kan.1983). *See also* *Butcher's Union*

Local No. 498 v. SDC Investment, Inc., 788 F.2d 535 (9th Cir.1986). In their Sur-Reply, defendants argue that the RICO statute's nationwide service of process provision cannot be used to obtain personal jurisdiction over Antoinette Renda because the second amended complaint fails to state a claim under RICO as to her.

Obviously, then, at least with respect to the RICO counts, the court would first have to determine whether those counts sufficiently plead causes of action as to Mrs. Renda before it could determine whether personal jurisdiction could be exercised. And even if those counts did not state a claim, the court would have to examine the non-RICO counts to determine whether the court could exercise personal jurisdiction over her under the Kansas long-arm statute and the traditional due process analysis.

In short, defendants' arguments do not clearly indicate that the proposed amendments would be futile. (Indeed, even if correct, many of defendants' points would only relate to certain counts, not the entire complaint.) We agree with plaintiffs that defendants have, "in essence, [asked the court] to grant summary judgment in favor of defendants on each issue raised by defendants." Plaintiffs' Reply Memorandum, at 39. That is, without observing the strict requirements wisely imposed on such motions (see, *e.g.,* Local Rule 15(c)), defendants ask the court to resolve numerous complex legal and factual issues in their favor in the context of a motion to amend. We obviously are not in a position to resolve those issues at this stage of the case. Defendants' suggestion that leave to amend should be denied on the ground of futility is thus not well taken and the court shall grant plaintiffs' motion for leave to file a second amended complaint.

Given the court's decision to allow plaintiffs to file a second amended complaint, defendants' motions to dismiss the first amended complaint and for leave to amend their answers are moot.

B. *Motion to Intervene*

The FSLIC, in a joint motion with plaintiffs, moves for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. That rule provides, in pertinent part:

> ***10** (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The decision whether to allow a party to intervene is left to the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Shump v. Balka,* 574 F.2d 1341, 1345 (10th Cir.1978); *Brown v. Board of Education,* 84 F.R.D. 383, 405 n. 16 (D.Kan.1979).

We first find, despite defendants' assertion to the contrary, that the FSLIC's claim has numerous questions of law and fact in common with plaintiffs' action. Factually, the alleged scheme that FSLIC claims defendants perpetrated upon Coronado is for all practical purposes identical to that allegedly aimed at ISSB and Rexford; both schemes involved the same defendants, the same hired borrowers, and defendants allegedly used the same alter ego entities to hide transfers of funds. In fact, plaintiffs allege that defendants used proceeds of the scheme against Coronado to maintain its scheme against ISSB.

Similarly, both actions have nearly identical issues of law. Plaintiffs and the FSLIC allege that defendants conducted a scheme in violation of RICO. To prove their various RICO claims, they will have to prove that defendants conducted their affairs through a "pattern" of racketeering (18 U.S.C. §§ 1961(5) and 1962(c)), that defendants conducted the affairs of an "enterprise" through such a pattern (*id.* at §§ 1961(5) and 1962(c)), and that defendants invested income received from a pattern of racketeering in the operation of an enterprise.

In addition, we agree with the FSLIC and plaintiffs that "requiring FSLIC to proceed in a parallel action rather than allowing FSLIC to intervene in this action would result in two nearly identical trials." Joint Memorandum in Support, at 5. Proof of defendants' racketeering activity directed at Coronado would be relevant and introduced in plaintiffs' action to show the requisite "continuity plus relationship" of defendants' pattern of racketeering activity" and vice versa. *See Sedima, S.P.R.L. v. Imrex Co.,* 105 S.Ct. 3275, 3285 n. 14 (1985). Obviously, then, the interests of justice and the efficient use of the court's resources strongly weigh in favor of granting the motion to intervene.

Defendants, however, urge that the motion should be denied for three reasons: (1) that they will be unduly prejudiced; (2) that the FSLIC's motion is not timely; and (3) the FSLIC's complaint would be subject to immediate dismissal. Turning to their first reason, we are simply not convinced that defendants would be unduly prejudiced. Defendants' professed concern for jury confusion is unwarranted. Certainly, this is an extremely complex case. But we see very little, if any, danger of making this case any more complicated by the intervention of the FSLIC. As we indicated above, the jury will hear a great deal of evidence about the defendants' alleged activities at Coronado whether the FSLIC is added as a plaintiff or not.

***11** Moreover, defendants' plea that intervention would cause too much additional discovery has little merit. As plaintiffs point out, "none of these defendants had conducted a single deposition in the discovery phase of this litigation until March 2, 1987, [and] [p]rior to that date counsel for defendants had been advised that FSLIC's entry into the case was imminent." Joint Memorandum in Support, at 6. Further, defendants have long been on notice that their activity at Coronado was considered relevant by plaintiffs to establishing a pattern of racketeering activity. In fact, defendants apparently have already scheduled depositions of Coronado witnesses, including its officers. Hence, the addition of the FSLIC will not significantly increase the need for discovery. We might also add that defendants would face at least as great a discovery burden should the FSLIC be denied permission to intervene and be forced to file a separate action.

Second, we find unpersuasive defendants' assertion that the FSLIC's motion is untimely. Defendants rely on an article that appeared in the Kansas City Business Journal on December 24, 1984, to argue that the FSLIC has had notice of its claims against defendants for more than three years. The article in question merely mentions that the FSLIC had entered a cease and desist order *directed against Coronado itself* because Coronado had "violated the loans-to-one-borrower regulation and engaged in unsafe or unsound practices by granting large loans without prior approval of the board of directors and accepting excessive deposits from a savings broker." The article does not state that the FSLIC was aware that the named defendants were committing acts for which they are potentially liable under RICO.

Perhaps even more significantly, intervention by the FSLIC will not "unduly delay" this action. As we noted above, defendants have long known that plaintiffs considered defendants activity at Coronado to be relevant to this action. In addition, defendants' assertion that they are anxious to proceed to trial is belied by the fact that they themselves have sought to delay this action, as evidenced by their motion to stay further proceedings.

As to defendants' third reason to deny intervention-that the FSLIC's complaint would be subject to immediate dismissal-we adopt and incorporate the conclusions we reached in rejecting an identical argument made by defendants in opposition to plaintiffs' motion to amend. To resolve the arguments made by defendants, the court would have to decide disputed questions of fact and law. A motion to intervene is simply not the proper vehicle for the resolution of such issues.

In sum, we conclude that allowing the FSLIC to intervene will not unduly delay the case or prejudice defendants. Because the FSLIC's claims present so many common questions of law and fact, the court and the parties will be spared the time and expense of conducting two complex, parallel actions. Therefore, we shall grant the motion.

***12** IT IS THEREFORE ORDERED that the Renda defendants' motion for a stay of further proceedings and for a protective order is denied, except that the court shall stay discovery as to those defendants who are named in both this civil action and in the criminal action pending before the Honorable Dale E. Saffels from the date the criminal trial actually begins until the conclusion thereof.

IT IS FURTHER ORDERED that defendants' motion for review of the magistrate's order denying defendants' motion for a protective order is denied.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to file a second amended complaint is granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss the first amended complaint and defendants' motion to amend their answer are denied as moot.

IT IS FURTHER ORDERED that the joint motion of plaintiffs and the Federal Savings & Loan Insurance Corporation ?? an order permitting the FSLIC to intervene is granted.

FN1. Other defendants, against whom default judgment has already been entered, included Franklin A. Winkler, F & I Real Estate Holding Co., First United Management Co., and First United Investment Co.

D.Kan.,1987.
F.D.I.C. v. Renda
Not Reported in F.Supp., 1987 WL 348635 (D.Kan.)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Ohio,
Eastern Division.
HEARTLAND JOCKEY CLUB LTD., et al., Plaintiffs,
v.
PENN NATIONAL GAMING, INC., Defendant.

No. 2:09-cv-804.
Dec. 21, 2009.

Thomas Walter Hill, Robert G. Cohen, Robert G. Schuler, Columbus, OH, for Plaintiffs.

John Cooper McDonald, Alan G. Starkoff, Columbus, OH, David L. Elsberg, H. Gregory Baker, Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York, NY, John Patrick Gilligan, Schottenstein Zox & Dunn Co., L.P.A., Columbus, OH, for Defendant.

OPINION AND ORDER

TERENCE P. KEMP, United States Magistrate Judge.

I. *Introduction*

***1** This breach of contract case is before the Court to consider whether discovery should be phased or whether each party should be free to conduct discovery to the extent permitted by F.R.Civ.P. 26(b). The concept of phasing discovery was raised by the defendant in the Rule 26(f) Report filed by the parties, was argued extensively at the initial Rule 16 conference, and has been briefed by the parties. For the following reasons, the Court rejects the proposal to phase discovery.

II. *The Proposal to Phase Discovery*

A brief explanation of the nature of the case will be helpful. Plaintiffs Heartland Jockey Club Ltd. and Charles J. Ruma (the Court will refer to them collectively as Heartland) own and operate the Beulah Park horse racing track which is located in Grove City, Ohio. In 2006, Heartland signed an option agreement with defendant Penn National Gaming for the sale of Beulah Park under certain conditions. Briefly stated, those conditions relate to whether Heartland would become legally authorized to install and operate a specified number of slot machines or similar devices at the race track. The agreement was effective for a period of six years. In the amended complaint, Heartland asserts that Penn National has breached the agreement and, as a result, the parties are no longer bound by it. Among other relief, Heartland has asked for a declaration that the agreement is void-relief which would then free Heartland to seek other purchasers for the property.

The parties' disagreement about the proper course of discovery is very much related to the conduct which, in Heartland's view, constitutes Penn National's breach of contract. As Heartland reads the contract, it imposes a duty on Penn National to support any constitutional or legislative changes necessary to allow for slot machines to be operated at Beulah Park. Heartland also asserts that Penn National was under a contractual duty not to do anything which would either delay or materially affect the consummation of the agreement or impair the value of the option. It is safe to say that the parties do not agree on their interpretation of the agreement, and especially on this latter point.

As those who have followed Ohio's most recent general election are aware, the Ohio Constitution has been amended to allow for the construction and operation of four casinos in Ohio, including one in Franklin County. It is common knowledge that Penn National was a supporter and beneficiary of these constitutional changes. As those who have followed the developments concerning the legalization of slot machines in Ohio also know, although

Governor Strickland directed the Ohio Lottery Commission to do whatever was necessary to allow for the placement of such devices (also called Video Lottery Terminals) at a number of racetracks around Ohio, and the Ohio General Assembly enacted legislation which would permit that operation, the Ohio Supreme Court has held that the issue is properly the subject of a referendum vote. *State ex rel. LetOhioVote.org v. Brunner,* 123 Ohio St.3d 322, 916 N.E.2d 462 (2009). Heartland believes that Penn National supported the organization, LetOhioVote.org, which litigated this issue. According to Heartland, both of these activities violated Penn National's duties under the option agreement because they made it less likely that the option would be exercised, they impaired the value of the option, or both.

***2** Heartland proposes that, now that the parties have met and conferred as required by Rule 26(f), full discovery should commence. That discovery would necessarily include inquiries about Penn National's lobbying efforts concerning the casino issue as well as whether it directly or indirectly lent support to the effort to block implementation of the video lottery terminal legislation by insisting that such a proposal could take effect only after a statewide referendum was conducted. Penn National has countered with a proposal that the discovery be phased, and that certain discovery should be prohibited altogether until either certain rulings have been made by the Court or certain dates have come and gone without a ruling.

In requesting that discovery be phased, and phased in a very particular way, Penn National relies on two related arguments. First, it contends that the Court can rather quickly dispose of the issue of whether any of the activities which the complaint identifies as contractual breaches-assuming that these activities actually occurred-constituted a breach of contract. In its view, either the contract clearly speaks to what types of actions would violate the provisions of the agreement which Heartland contends were breached, or the Court can take a relatively small amount of extrinsic evidence into account and can make the necessary decision through summary judgment proceedings. The extrinsic evidence to be discovered and presented on this issue would not include any evidence about the conduct which Penn National may have engaged in, because that would not be relevant to the Court's construction of the contract. This would not only preserve the Court's and the parties' resources by creating a scenario where, should the Court decide this issue in Penn National's favor, the case can be resolved quickly and without extensive discovery, but it would also prevent Heartland from achieving what, in Penn National's view, is the true objective of this litigation-to pry into, and then make public, Penn National's lobbying activities, as well the actions taken by others, including legislators and members of Governor Strickland's office, to promote the actions of LetOhioVote.org. This is of particular concern to Penn National, and, in its view, to the integrity of Ohio's legislative process, both because of the intrusiveness of such discovery into the details of that process, and because the process is still ongoing.

Penn National advanced a specific proposal in the Rule 26(f) report which it has modified slightly in its post-conference brief. Under its proposal, the parties would complete Phase I discovery and file summary judgment motions on the issues of contract interpretation by March 31, 2010. The scope of that discovery would be limited to “evidence of contract negotiation between the parties .” In all likelihood, no more than six witnesses would be deposed on that issue. Initially, Penn National had proposed that no additional discovery would be permitted until the Court had made its ruling on the contract interpretation issue. As Penn National expressed this concept in the Rule 26(f) report, “in the unlikely event that Phase II is necessary after the resolution of Phase I, the remaining issues [i.e. did Penn National actually breach the contract, and, if so, what relief Heartland is entitled to] would be part of Phase II.” In response to concerns voiced at the Rule 16 conference about the fact that there is no way to predict how much time it might take the Court to issue its Phase I ruling, Penn National has now suggested that the Court use what it describes as a "preliminary peek" procedure in which the Court would conduct a preliminary evaluation of the Phase I motion to determine how likely it is that the motion will dispose of the case. If that is not very likely, the Court could then order the Phase II discovery to proceed immediately. That way, Penn National would not be able to delay the ultimate resolution of the case unduly simply by filing a dispositive motion which stands little or no chance of being granted.

***3** In opposing the proposal to stay discovery, Heartland focuses on the question of how its economic interests would be impacted by delay in deciding this case. Right now, due to the existence of the option agreement, Heartland may not attempt to sell Beulah Park to anyone but Penn National. Because of the possibility that slot machines may be installed at Beulah Park, there may well be other parties interested in paying a substantial sum of money for the property. Under Penn National's discovery proposal, at least as it was initially made, it may well be years before the Court decides whether or not Heartland was entitled to treat the option agreement as having been properly terminated on August 24, 2009 (the date on which Heartland sent a letter to Penn National asserting that due to Penn National's material breaches, the agreement terminated). Heartland believes it likely that the Phase I proceedings could stretch out for six months to a year after Penn National moves for summary judgment. After that decision is made, the parties would have to do extensive discovery on the Phase II issues, after which there would be more motions practice and, ultimately, a trial (and then an appeal). Consequently, it might well be the case that the agreement would expire on its own terms before Heartland found out if it had the right to terminate it three years before. In that event, Rule 57's provision that the Court may order a speedy hearing on a declaratory judgment action would be thwarted and Heartland's economic interests would be severely and adversely affected. These factors, according to Heartland, when coupled with the courts' typical reluctance to stay discovery until the resolution of a case-dispositive motion, counsel strongly against the phasing of discovery that Penn National has proposed.

III. *Analysis of the Issue*

Penn National relies heavily upon Judge Posner's decision in *Marrese v. American Academy of Orthopaedic Surgeons,* 706 F.2d 1488 (7th Cir.1983), *vacated* 726 F.2d 1150 (7th Cir.1984) (en banc), *rev'd on other grounds* 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), in support of two propositions-first, that the Court must balance (and weigh more heavily) societal interests against purely private interests in determining whether certain discovery should be allowed, and, second, that the Court has substantially more discretion to order a postponement of discovery than a complete stay of all discovery. As the Court of Appeals (again speaking through Judge Posner) stated in the panel opinion found at 726 F.2d 1150,

> A motion under Rule 26(c) to limit discovery requires the district judge to compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. [The judge] must consider the nature of the hardship as well as its magnitude and thus give more weight to interests that have a distinctively social value than to purely private interests; and [the judge] must consider the possibility of reconciling the competing interests through a carefully crafted protective order. [The judge] must go through the same analysis under Rule 26(d) except that an order merely postponing a particular discovery request obviously should be granted more freely than one denying the request altogether.

***4** *Marrese,* 726 F.2d at 1159. The court also observed that phasing discovery in order to allow the parties to conduct non-sensitive discovery first, if that discovery would be pertinent to a casedispositive motion, might be a way to safeguard whatever societal interests were implicated by otherwise allowing discovery to proceed apace. Citing *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583, 597 (1st Cir.1980), the court stated that this was one way to insure that the filing of the action was not just a pretense for engaging in sensitive or burdensome discovery when the action itself bordered on the frivolous.

This Court takes seriously its obligation to manage discovery and recognizes that there are cases where the plaintiff's claim is so tenuous, and the potential injury to either private or societal interests from unfettered discovery is so great, that the Court must limit or preclude discovery in order to strike the proper balance between the competing interests involved. The Court also recognizes, however, and has consistently held in the past, that the Federal Rules of Civil Procedure do not provide (and have never provided) for an automatic stay of discovery during the pendency of any type of case-dispositive motion, nor is the pendency of such a motion explicitly cited as a factor to be considered under those rules which mandate the performance of a cost-benefit analysis when one party objects to discovery as being unduly burdensome or disproportionate to the matters at stake in the litigation. *See, e.g.,* Fed.R.Civ.P. 26(b)(2)(C) (listing as factors to be considered in such an analysis whether “the discovery sought is unreasonably cumulative or duplicative” and whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”). The Court also notes that when the interests of non-parties to the litigation are implicated by discovery, it has broad discretion to protect them from incurring undue burden and expense, *see* Fed.R.Civ.P. 45(c), and it also must respect and protect societal interests by recognizing and enforcing privileges or other doctrines that shield various types of information from disclosure, or from disclosure to persons other than those directly involved in the litigation. *See, e.g.,* Fed.R.Civ.P. 26(c). Taking these various factors into account here, Penn National's request that discovery be separated into that which relates to interpretation of the contract and that which relates to all other issues in the case, and that only the former discovery be permitted in the near term, raises the following questions:

(1) Is this a case where the proposed “sneak peek” at the summary judgment motion which Penn National intends to file would be of some help to the Court in determining if it is, in this Court's words, *see DiYanni v. Walnut Tp. Bd. of Ed.,* 2006 WL 2861018, *2 (S.D.Ohio October 4, 2006), “patent that the case lacks merit and will almost certainly be dismissed ...”?

***5** (2) If the various societal and private interests are given appropriate weight, do the societal interests identified by Penn National so strongly favor a stay of discovery that, coupled with the parties' and the Court's usual interests in avoiding unnecessary expense and delay, the Court should phase discovery as proposed by Penn National?

(3) And, finally, what might be the consequences of the Court's decision on the Phase I issue from precluding any discovery about exactly what Penn National may have done, particularly with respect to its alleged support of LetOhioVote.org?

A. *The First Issue: Sneak Peek?*

Parties moving for a stay or postponement of discovery pending resolution of a dispositive motion have sometimes filed that motion when the stay is requested, and sometimes have not. It is generally easier to determine if the motion is almost certainly going to be granted by looking at the motion itself, but in many cases there is enough information in the pleadings and, in a contract case, the contract itself to determine whether the plaintiff has little or no chance of prevailing. Certainly, the Court does not have the benefit of whatever evidence will be adduced concerning the parties' contract negotiations, but that is never the starting point for contractual interpretation, and often does little or nothing to aid the Court in determining the meaning of the disputed contractual terms. The Court has a good understanding of where the dispute lies here and what each party will argue, and has little difficulty determining that this case does not represent any type of fishing expedition or sham litigation designed solely or primarily to permit Heartland to delve into Penn National's private matters or to use the prospect of expensive discovery in order to force Penn National into an unfavorable settlement. Heartland has a substantial economic incentive for pursuing its claim for termination of the contract which is unrelated to any potential embarrassment its discovery requests may cause to Penn National.

The Court further concludes that Heartland also has, at the very least, a good faith argument that, if Penn National is truly involved in backing LetOhioVote.org, contractual duties were breached. Further, the summary judgment motion which Penn National would file after Phase I discovery is completed would not be asking the Court to decide if any specific conduct about the referendum initiative breached the contract. Unlike its backing of the casino issue (Issue 3), Penn National does not admit to any activities relating to the referendum initiative, and under its proposal Heartland would be prohibited from discovering whether Penn National engaged in any such activities. Its argument on this issue would have to be limited to asserting that the contractual provisions at issue cannot be construed to create any duty at all on its part not to engage in activity which had the ultimate effect of delaying the implementation of the Governor's slot machine proposal. It seems, other things being equal, that it is less likely to prevail on such a sweeping argument than on some more specific argument that even though it may have done something to support the referendum initiative, that specific activity either was not prohibited by the contract or did not cause whatever delays have occurred, thus making any breach immaterial. Given the type and scope of argument Penn National would necessarily be presenting as part of its proposed Phase I proceedings, the Court cannot conclude that it is patently obvious that Heartland's position on this issue will be summarily rejected. Thus, this aspect of the issue can fairly be evaluated without the need to wait an additional three months for the summary judgment motion to be filed. This factor weighs against Penn National's request.

B. *The Second Issue: Weighing the Interests*

***6** Answering the second question requires the Court to identify what interests are furthered or threatened by allowing Heartland to pursue its discovery now rather than later. The Court will take into account, in this analysis, the fact that there is a fair likelihood that the objected-to discovery will take place in the future based on the fact that it is not a foregone conclusion that the case will be resolved by way of an early summary judgment motion. Further, as explained above, dividing up the discovery as Penn National has proposed may actually prevent the Court from making a ruling, in the context of an early summary judgment motion, as to whether any support Penn National may have lent to the referendum issue actually breached the parties' agreement.

The private interests are easy to identify. Penn National asserts the typical defendant's interest in avoiding the time and expense of engaging in discovery that may prove to be unnecessary to the resolution of the case. Heartland would certainly benefit to some extent if it were not required to conduct that discovery, but its interest clearly lies in having the entirety of the case resolved sooner rather than later. That is particularly true where, as here, its ability to sell or otherwise dispose of a piece of real property and a fairly unique business, which finds itself, by virtue of the slot machine proposal, in fairly unique circumstances, is impeded by the uncertainty about whether the option agreement is still in effect. It is difficult to say that either parties' interest is more significant, and if these interests essentially offset each other, there would seem to be no reason to deviate from the usual course of allowing discovery to proceed in accordance with the Federal Rules of Civil Procedure.

The public or societal interests are somewhat more difficult to evaluate. Penn National asserts that because one of the alleged contractual breaches relates to the activities of LetOhioVote.org and the referendum issue, allowing Heartland to conduct discovery in this area would "taint the political process." Penn National also argues that the discovery will be very burdensome and that there is a public interest in not saddling public officials or other non-parties with the effort it will take to respond to that discovery. Some of the same concerns may be present with respect to discovery directed to Penn National's support of Issue 3, but because that support is not likely to be in dispute, there is less of a potential for extensive or intrusive discovery directed toward that conduct, and the Court will focus its analysis on the referendum issue.

The *Marrese* court considered a somewhat similar issue because the defendant in that case asserted a First Amendment interest in maintaining the confidentiality of its membership list. The court observed that disclosure of that list might inhibit the free flow of information among the members of the organization and could affect the members' willingness to express candid opinions about other applications for membership. Because the membership list was kept confidential and the exchange of ideas among those members was not expected to take place in a public forum, there were First Amendment interests implicated if the plaintiffs were allowed to conduct discovery on those issues. It was also important to the court's decision that plaintiffs would suffer no prejudice from being denied that information at the early stages of the case because the information appeared unlikely to help plaintiffs establish the foundational elements of their antitrust claim.

***7** The Court is not persuaded that the public interest would be served by keeping private the relationship, if any, between Penn National and LetOhioVote.org. First, there have been public filings in the Ohio Supreme Court alleging a relationship, there have been newspaper articles printed about it, and both Penn National and LetOhioVote.org have issued public statements about allegations that Penn National indirectly supported the referendum issue. *See, e.g .,* "Pa. gaming firm financing Ohio anti-slots group, document says," *The Charleston Gazette*, September 1, 2009 (available on the internet at http:// www.wvgazette.com/News/Business/200909010877). In its public statement, Penn National has threatened litigation against those who have suggested it supported LetOhioVote.org, a course of action which would certainly implicate many of the same interests Penn National is attempting to protect in this case. Additionally, although there are some First Amendment concerns raised by the disclosure of information relating to persons who, through organizations, attempt to influence elections or issues, the Supreme Court has recognized the constitutionality of legislation that requires significant disclosures of the names of contributors to such organizations. At the same time, it has downplayed the potential infringement of those contributors' First Amendment rights from fear of government reprisal. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Those decisions also recognize that important public interests are served by disclosing that information, such as reducing the opportunities for corruption to seep into the electoral process. Thus, it is by no means clear that the public interest in this case is served only by keeping information about LetOhioVote.org and its potential relationship with Penn National out of the public arena. Quite the opposite may be true. In short, the Court is not convinced that by allowing Heartland to discover some information about how LetOhioVote.org was created and funded, the public's interest in the integrity of the legislative process will somehow be undermined.

The Court recognizes that, apart from any First Amendment concerns, some of the proposed discovery may either require nonparties to participate in the discovery process, or may impinge upon interests that are protected by various privileges. Those things are true in many cases. Again, the Federal Rules of Civil Procedure, and particularly Rules 26 and 45, give the Court tools to address any undue burdens created by discovery directed to non-parties and to recognize and enforce any privileges. Those factors, by themselves, are not the type of public or societal interests that weigh heavily in favor of a stay or postponement of discovery.

C. *The Third Issue: Consequences of Phasing Discovery*

One of the major untoward consequences which would almost certainly result from phasing discovery in the way that Penn National has proposed would be to delay both the Court's ability to resolve Heartland's request for declaratory relief and to resolve the entire case. A case that involves fairly discrete issues about whether one party breached a contract, if the breach was material, and if the other party is entitled either to treat the contract as a nullity or to damages, should not take an inordinately long time to resolve. Fed.R.Civ.P. 1 encourages the Court to strive to resolve cases in a just, speedy and inexpensive manner. It has been the Court's experience that delay leads to expense, even in a case where the delay occurs as a result of efforts to avoid unnecessary expense. Again, since it is not a foregone conclusion that the case would end after the Phase I proceedings were completed, the stay of discovery proposed by Penn National does create a very real possibility of not only increased time to resolve the case, but increased expense to both parties.

IV. *Conclusion*

***8** For the foregoing reasons, the Court denies Penn National's request to phase discovery in this case. The Court sets the following schedule in this case:

1. Any motion to amend the pleadings or add parties shall be filed by January 8, 2010;

2. Any party who will use an expert witness in support of an issue on which that party has the burden of proof shall identify the expert, and provide all materials required by Fed.R.Civ.P. 26(a) (2), by April 30, 2010. Responsive experts shall be identified in the same fashion by May 31, 2010.

3. All discovery shall be completed by June 30, 2010.

4. Any summary judgment motions shall be filed no later than July 31, 2010. This does not preclude the earlier filing of a dispositive motion on any issue about which discovery has been completed.

5. The parties shall make a good faith effort to settle this case, and shall advise the Court if its participation in the settlement process would be productive.

S.D.Ohio,2009.
Heartland Jockey Club Ltd. v. Penn National Gaming, Inc.
Not Reported in F.Supp.2d, 2009 WL 5171829 (S.D.Ohio)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. Michigan,
Southern Division.
Gregory HOXIE, Plaintiffs,
v.
LIVINGSTON COUNTY, et al., Defendants.

Civil Action No. 09-CV-10725.
March 4, 2010.

Grant W. Parsons, Jennifer R. Berry, Parsons Ringsmuth PLC, Traverse City, MI, for Plaintiffs.

Anne M. Mclaughlin, T. Joseph Seward, Cummings, McClorey, Livonia, MI, for Defendants.

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DISPOSITIVE MOTIONS OF DEFENDANTS (DOCKET NO. 54)

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on Defendants' Motion For Protective Order Staying Discovery Pending Dispositive Motions Of Defendants FN1 filed on December 15, 2009. (Docket no. 54). Defendant Sheryl Simpson, D.O., filed a Concurrence In Co-Defendants' Motion For Protective Order on December 17, 2009. (Docket no. 56). Plaintiff filed a Response And Brief In Support on January 4, 2010. (Docket no. 59). Defendants filed a Reply To Plaintiff's Response To Defendants' Motion on January 12, 2010. (Docket no. 66). All discovery motions have been referred to the undersigned for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 41). The Court dispenses with oral argument on this matter pursuant to E.D. Mich. Local Rule 7.1(e). (Docket no. 67). The matters being fully briefed the motion is now ready for ruling.

> FN1. Defendants Livingston County, Robert Bezotte, Michael Murphy, Thomas Cremonte, Matthew Hoffman, Matthew Young, Cheryl Miks, Nicole Otten, Kasey Howe, Gerard Boyer, Deputy Sgt. York and Deputy Barry. (Docket no. 54).

Defendants move to stay discovery until the Court decides on their pending motions to dismiss and for judgment on the pleadings. On October 28, 2009 Defendant Simpson filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and on December 1, 2009 the LC Defendants filed a Renewed Motion for Judgment On the Pleadings pursuant to Fed.R.Civ.P. 12(c). (Docket nos. 38, 49). Defendants point out that one of their dispositive motions relies on a statute of limitations issue. Defendants ask for a protective order pursuant to Fed.R.Civ.P. 26(c) to prevent them from the undue burden of engaging in discovery pending the resolution of their motions.

Plaintiff argues that Defendants did not seek concurrence in their motion to stay discovery. The Court agrees. Defendants' Motion does not contain a certification that they have in good faith concurred or attempted to confer with the other parties "in an effort to resolve the dispute without court action." Fed.R.Civ.P. 26(c)(1). Defendants failed to comply with E.D. Mich. Local Rule 7.1(a) for the same reason. On the contrary, on December 14, 2009 the parties stipulated to a six month extension of discovery. (Docket no. 52, 57). The day after stipulating, Defendants sought to stay discovery. (Docket no. 54). The Court has also reviewed the underlying dispositive motions and is not convinced that justice is served by staying discovery, some of which is already more than several months past due FN2. (Docket no. 57).

FN2. Defendants admit in their Reply that their responses to discovery remain outstanding. (Docket no. 66).

With respect to the need for a protective order, Defendants make only general allegations that they will have to retrieve "voluminous information that will occupy other county employees in addition to the individually named defendants, as that task may prove unnecessary." (Docket no. 66). The general allegations are unsupported by affidavit or otherwise. The wheels of justice would surely grind to a halt if discovery were stayed pending dispositive motions and based on such generic allegations of undue burden and expensive. Defendants have failed to show good cause for the Court to issue a protective order staying discovery. Fed.R.Civ.P. 26(c)(1). For these reasons, Defendants' Motion For Protective Order Staying Discovery will be denied.

***2 IT IS THEREFORE ORDERED** that Defendants' Motion For Protective Order Staying Discovery Pending Dispositive Motions Of Defendants (docket no. 54) is **DENIED.**

NOTICE TO THE PARTIES

Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. 636(b)(1).

E.D.Mich.,2010.
Hoxie v. Livingston County
Slip Copy, 2010 WL 822401 (E.D.Mich.)

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This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Ohio,
Eastern Division.
Pamela D. WILLIAMS, et al., Plaintiffs,
v.
NEW DAY FARMS, LLC, et al., Defendants.

No. 2:10-cv-0394.
Sept. 7, 2010.

Shawn J. Organ, Jonathan Kent Stock, Organ Stock LLP, Columbus, OH, for Plaintiffs.

Kevin Patrick Braig, Dayton, OH, Thomas Patrick Whelley, II, Dayton, OH, Lawrence Scott Helkowski, Ohio Attorney General's Office, Columbus, OH, Aaron Scott Farmer, Columbus, OH, for Defendants.

ORDER

TERENCE P. KEMP, United States Magistrate Judge.

***1** This case is before the Court to consider the motion to stay discovery filed by defendants New Day Farms, LLC and Daybreak Foods, Inc. The motion has been fully briefed. For the following reasons, the motion to stay (# 17) will be denied.

I. *Background*

This case arises out of another action filed in this Court, *New Day Farms, LLC v. Board of Trustees of York Township,* Case No. 2:08-cv-1107, in which Pamela Williams and Northwest Neighborhood Alliance, the plaintiffs here, were named as defendants. The facts of that case, relevant for purposes of the current motion, include the following. In June 2007, New Day, a Minnesota limited liability company, purchased a poultry farm in York Township, Union County, Ohio. According to the allegations of the complaint in Case No. 2:08-cv-1107, Ms. Williams and NNA opposed the development of poultry farms by out of state corporations and discriminated against such poultry farms and their Hispanic employees. New Day contended that the alleged discrimination was demonstrated by the actions of Ms. Williams and NNA in motivating the Board of Trustees of York Township to enact a fire code as a pretext for impermissibly regulating New Day's operations. Ms. Williams and NNA filed a motion to dismiss relying, in part, on the *Noerr-Pennington* doctrine. This Court granted the motion to dismiss filed by Ms. Williams and NNA and dismissed all claims against them by order dated November 17, 2009. New Day and Daybreak have appealed to the Sixth Circuit Court of Appeals.

In the current case, Ms. Williams and NNA contend that the previous case was a “SLAPP Suit” or Strategic Litigation Against Public Participation action designed to silence their efforts as critics of New Day and Daybreak. Ms. Williams and NNA assert claims of malicious civil prosecution, abuse of process, and claims for violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. They also assert claims for attorneys' fees pursuant to 43 U.S.C. § 1988 and injunctive relief.

II. *Legal Standard*

A stay of discovery for any reason is a matter ordinarily committed to the sound discretion of the trial court. *Chrysler Corp. v. Fedders Corp.* 643 F.2d 1229 (6th Cir.1981). In ruling upon a motion for stay, the Court is required to weigh the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery. Additionally, the Court is required to take into account any societal interests which are implicated by either proceeding or postponing discovery. *Marrese v. American Academy of Orthopedic Surgeons,* 706 F.2d 1488, 1493 (7th Cir.1983). When a stay, rather than a prohibition, of discovery is sought, the burden upon the party requesting the stay is less than if he were requesting a total freedom from discovery. *Id.*

However, one argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has already filed, a motion to dismiss for failure to state a claim under Rule 12(b)(6). As one court has observed,

> ***2** The intention of a party to move for judgment on the pleadings is not ordinarily sufficient to justify a stay of discovery. 4 J. Moore, *Federal Practice* § 26.70[2], at 461. Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation.... Since motions to dismiss are a frequent part of federal practice, this provision only makes sense if discovery is not to be stayed pending resolution of such motions. Furthermore, a stay of the type requested by defendants, where a party asserts that dismissal is likely, would require the court to make a preliminary finding of the likelihood of success on the motion to dismiss. This would circumvent the procedures for resolution of such a motion. Although it is conceivable that a stay might be appropriate where the complaint was utterly frivolous, or filed merely in order to conduct a "fishing expedition" or for settlement value, *cf. Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 741, 95 S.Ct. 1917, 1928, 44 L.Ed.2d 539 (1975), this is not such a case.

Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D.Cal.1990). *See also Turner Broadcasting System, Inc. v. Tracinda Corp.,* 175 F.R.D. 554, 556 (D.Nev.1997) ("a pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery...."). Thus, unless the motion raises an issue such as immunity from suit, which would be substantially vitiated absent a stay, or unless it is patent that the case lacks merit and will almost certainly be dismissed, a stay should not ordinarily be granted to a party who has filed a garden-variety Rule 12(b)(6) motion.

III. *Analysis*

New Day and Daybreak assert the following arguments in support of their motion to stay discovery. First, they contend that significant discovery was undertaken in Case No. 2:08-cv-1107 such that a stay of discovery will not result in any prejudice to plaintiffs in this action. On the other hand, they argue, permitting additional discovery may result in duplication of efforts and unnecessary expense. Additionally, they assert that the goals of judicial economy and preservation of the parties' resources will be met by a stay. In support of this argument they note that the Court has already recognized the importance of these goals in entering a stay during the appeal of their attorneys' fees motion in Case No. 2:08-cv-1107. Further, New Day and Daybreak assert that additional discovery is unnecessary to address the legal issues raised in their dispositive motion including the issue of *Noerr-Pennington* immunity.

To the contrary, Ms. Williams and NNA argue that the discovery undertaken in the other lawsuit is addressed to completely different issues with limited relevance to this action. Plaintiffs contend that discovery is necessary directed to issues including the motive for suing Ms. Williams and NNA, the identification of Does 1-5 named as defendants in Case No. 2:08-cv-1107, and the financial background of New Day and Daybreak. Further, they contend that, to the extent discovery was undertaken in the other action, it was "incomplete and deficient" and a stay may increase the risk that information will not be recovered. Additionally, plaintiffs contend that a pending dispositive motion is not grounds for staying discovery. Plaintiffs note that New Day and Daybreak have moved not only to dismiss but, in the alternative, for summary judgment. This circumstance, according to plaintiffs, weighs even further against a stay of discovery.

***3** In reply, New Day and Daybreak assert that the ability of Ms. Williams and NNA to fully respond to the motion to dismiss proves that additional discovery is not required here. According to defendants, Ms. Williams and NNA cite to various discovery materials from the other action "no less than 40 times" in the response to the motion to dismiss. Further, New Day and Daybreak argue that, to the extent spoliation of evidence based on the conduct of discovery in the other case is a concern to plaintiffs, this is the first time plaintiffs have raised it. Moreover, New Day and Daybreak contend that such a concern is unfounded because preservation efforts were undertaken in Case No. 2:08-cv-1107 in accordance with the parties' agreed upon discovery plan. Finally, New Day and Daybreak reiterate that a stay of discovery will not prejudice plaintiffs but will prevent duplicative and harassing discovery.

While, as all parties acknowledge, significant discovery was undertaken in Case No. 2:08-cv-1107, Ms. Williams and NNA have identified additional discovery they wish to pursue for purposes of their claims in this case. In light of this, none of the arguments advanced by New Day and Daybreak persuade the Court that a stay of discovery is warranted here. To the extent that New Day and Daybreak are concerned about potentially duplicative discovery or expense, should any issues arise, the Federal Rules of Civil Procedure provide other options for addressing such situations short of a complete stay. However, the primary basis for the requested stay, the pendency of a potentially dispositive motion as to which the parties have presented substantial arguments on both sides, is simply not sufficient to warrant a complete stay of discovery. The potential prejudice to plaintiffs and the delay of the case outweigh the defendants' arguments in favor of a stay.

IV. *Disposition*

Based on the foregoing, the motion to stay discovery (# 17) is denied.

V. *Appeal Procedure*

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. § 636(b)(1)(A), Rule 72(a), Fed.R.Civ.P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

S.D.Ohio,2010.
Williams v. New Day Farms, LLC
Slip Copy, 2010 WL 3522397 (S.D.Ohio)

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