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SUPERIOR COURT OF NJ
MERCER COUNTY
CIVIL DIVISION

TMWB

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February 23, 2017

Via Hand Delivery
Hon. Mary C. Jacobson, A.J.S.C.
New Criminal Courthouse
400 S. Warren Street, 4th Floor
Trenton, NJ 08650

RE: H.G., et al. v. Harrington, et al.
Docket No. MER-L-2170-16

Dear Judge Jacobson:

We, along with Arnold & Porter Kaye Scholer LLP, represent the Plaintiffs in the above-referenced action. Please accept this letter on behalf of Plaintiffs in opposition to (1) Intervenor-Defendant American Federation of Teachers, AFL-CIO ("AFT")'s Motion to Stay Discovery and, in the alternative, Motion for Protective Order in response to Plaintiffs' Motion to Compel Discovery and (2) Intervenor-Defendant New Jersey Education Association ("NJEA")'s Opposition to Plaintiffs' Motion to Compel Discovery from Defendant Newark Public School District, submitted on February 8, 2017.

Effectively, through their motions, Intervenor-Defendants seek to stay *all discovery* pending disposition of their Motions to Dismiss despite the fact that Plaintiffs' discovery requests (the "Requests") do not seek documents from the Intervenor-Defendants, and the party

from whom the discovery is sought (Defendant Newark Public Schools District ("NPS" or the "District") has not made one objection to the timing of the Requests. Moreover, AFT's confidentiality concerns are limited only to certain categories of data and documents sought by the Requests, namely, only seeking to protect information relating to teachers and not information relating to their students.[1] In their Opening Brief, Plaintiffs already expressed a willingness to enter into a Protective Order. Therefore, Plaintiffs only object to AFT's Motion for a Protective Order to the extent that it does not address the concerns of *all* parties and non-parties to this action who may be called upon to produce documents.

More than two months ago, Plaintiffs served their Requests on the District. Thereafter, Plaintiffs and NPS engaged in a series of meet and confers, plagued by long delays from the District, during which no substantive objections to the Requests were raised, other than concerns about confidentiality. During those conversations, Plaintiffs repeatedly agreed to take steps to ensure confidentiality of any information produced. Despite Plaintiffs' assurances, NPS still has not produced a single document, objected to the Requests, or even provided a draft protective order in response. Delay seems to be the tactic taken by all defendant parties thus far, and it should not be countenanced. Intervenor-Defendants' request to stay all discovery will only further delay this case as the District ever-dangerously approaches finalization of its budget for its next academic year.

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[1] As stated in Plaintiffs' Opening Brief on the Motion to Compel, Plaintiffs are willing to enter into a Protective Order to govern the discovery requested from the District. Plaintiffs and the District have been engaged in a meet and confer process since December 20, 2016. In that time, the District expressed a general concern that some of the information sought in Plaintiffs' Document Requests might include personally identifiable information ("PII"). Plaintiffs assured NPS that the Requests did not intend to seek PII. With this assurance in hand, the District advised that they would get back to Plaintiffs with respect to a potential confidentiality stipulation or protective order. Given the District's confidentiality concerns, on February 22, 2017, Plaintiffs sent the District proposed edits to the proposed Protective Order attached to Intervenor-Defendants' Motion to Stay Discovery ("Protective Order") and requested that that the District revise the Order to reflect its confidentiality concerns.

I. Intervenor-Defendants' Motion to Stay Discovery Pending the Disposition of the Motions to Dismiss Should be Denied

Discovery should not be stayed pending the disposition of Intervenor-Defendants' Motions to Dismiss. A pending motion to dismiss does not automatically stay discovery. Moreover, New Jersey law does not preclude pre-answer discovery. *See Lee v. Telson Electronics U.S.A., Inc.*, No. BER-C-69-06, 2006 WL 3720308, at *3 (N.J. Super. Ct. Ch. Div. Dec. 15, 2006) (setting forth that parties have right to conduct discovery from inception of matter) (Trousdale Cert., Exhibit B).

Defendant-Intervenors rely on Third Circuit federal case law in the absence of New Jersey case law on this point. Intervenor-Defendants, however, ignore the fact that *DEG, LLC v. Township of Fairfield*, 198 N.J. 242 (2009) states that it is appropriate to consider federal jurisprudence when ascertaining the meaning of Rule 4:50-1 because of the similarities between said rule and Federal Rule of Civil Procedure 60(b). Rule 4:50-1 and FRCP 60(b) both "provide[] for relief from judgment where 'the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application.'" *Id.* at 265. The case at hand differs from *DEG, LLC*, because the question here is whether Plaintiffs may seek discovery during the pendency of a motion to dismiss and request that the Court compel discovery from Defendant NPS during such time. In short, the scenario in *DEJ, LLC* relates to federal law on a different point -- a different New Jersey Court Rule and analogue Federal Rule of Civil Procedure. It should not be interpreted to mean that this Court is

required to consider federal jurisprudence in interpreting the meaning of all New Jersey Court Rules with a federal analogue.

Notably, even though New Jersey case law provides that the Court may rely on federal jurisprudence when interpreting certain New Jersey Court Rules, when there are similarities in language with the analogue Federal Rule of Civil Procedure, there is no unequivocal requirement to do so when it comes to pre-answer discovery. Rule 4:10-3, cited by Intervenor-Defendants, generally governs protective orders. The comments to Rule 4:10-3 provide that the rule follows the text of FRCP 26(a), and, as a result, some New Jersey jurisprudence permits courts looking to applicable federal decisions and rules in interpreting this particular rule. However, assuming *arguendo*, federal case law governs here, the balancing test set forth in federal cases, such as *Actelion Pharms. Ltd. v. Apotex Inc.*, No. 12-5743, 2013 WL 5524078, at *1 (D.N.J. Sept. 6, 2013) (Trousdale Cert., Exhibit C), strongly leans in favor of denying Intervenor-Defendants' Motions for a Stay. Assuming *arguendo* that federal case law applies, this Court would be permitted to generally weigh the following factors: (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to Plaintiffs; (2) whether denial of the stay would create a clear case of hardship or inequity for Intervenor-Defendants; (3) whether a stay would simplify the issues and the trial of the case; and (4) whether discovery is complete and/or a trial date has been set. *Id.* at *11. None of these factors balance in favor of Intervenor-Defendants here.

First, the stay would unduly prejudice Plaintiffs, and prevent them from moving expeditiously forward towards any injunctive relief. As we approach the budget cut-off for yet another academic year, the granting of a stay now could (i) result in the District committing its limited resources to the retention of ineffective teachers to the detriment of students to avoid a

reduction-in-force ("RIF"), or (ii) result in the District executing drastic teacher layoffs -- without being able to consider a teacher's effectiveness -- in the event of a RIF. Both options would not only cause further harm to the Plaintiffs and students in other similarly situated circumstances, it would also prolong the negative impact that N.J.S.A. 18A:28-10 and 18A:28-12 (the "LIFO Statute") has on the Plaintiffs and children in similarly situated circumstances for at least another full academic year. The recent data shows that there are higher concentrations of ineffective teachers in Newark than other districts within the state; meanwhile, students in Newark, including students in the schools that Plaintiffs attend, are not meeting basic educational requirements. *See, e.g.*, Trousdale Cert., Ex. A at ¶¶ 31, 33, 35, 37, 105, 106. Allowing the budget cut-off for another academic year to pass without providing Plaintiffs with the requested data and documents could cause irreparable harm, as it would prevent Plaintiffs from determining whether to move for a preliminary injunction before budgetary decisions are finalized. Therefore, a stay of discovery during the pendency of motions to dismiss ultimately harms Plaintiffs and other students in the schools Plaintiffs attend at least for the duration of the 2017-2018 academic year, the impact of which would be long-term and permanent.

Second, denial of the stay would not create any hardship or inequity upon Intervenor-Defendants, who do not bear the burden of producing documents responsive to the Requests. The District bears the *entire* burden of producing documents, and the District has not once articulated any objection to the Requests on grounds other than confidentiality. Moreover, the purported hardship of maintaining confidentiality over certain documents is easily remedied through a Protective Order, which Plaintiffs have expressed a willingness to enter in their Opening Brief, yet have heard no response -- except in papers filed in this court -- from AFT.

Third, granting a stay would not simplify the issues and the trial of the case. Rather, it would do the exact opposite. The discovery sought by the Requests are limited to the issues in the case: teacher quality, student performance, and the impact of engaging in or avoiding RIFs. Moreover, Plaintiffs anticipate that there may be information produced in discovery that would permit them to seek injunctive relief quickly, which would further help simplify the issues and move quickly towards the trial of the case. Plaintiffs want to move this case forward -- getting this discovery now, *from a party that has uttered no objection to the timing of the Requests*, would assist in that progress.

Finally, although discovery is not complete and a trial date has not been set, given the weight of the time sensitivities involved and the other factors discussed above, the Court should deny Intervenor-Defendants' Motion for a Stay. As Intervenor-Defendants failed to mention, "[m]otions to stay discovery are not favored because when discovery is delayed or prolonged it can create case management problems which impede the court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Actelion*, 2013 WL 5524078, at *3. In the case at hand, Intervenor-Defendants' Motion to Stay will drastically impact the direction of the case and the prolonged injury to Plaintiffs.

Ultimately, one thing is certain: under New Jersey law, a trial judge has broad discretion in determining appropriate relief when it comes to discovery. *State v. Woods*, No. A-1790-04T4, 2006 WL 695799, at *2 (N.J. Super. Ct. App. Div. Mar. 21, 2006) (citations omitted) (Trousdale Cert., Exhibit D). The rules of discovery are to be liberally construed, favoring litigants' rights to "broad pretrial discovery." *Berkeley Heights Twp. v. Connell Corp. Ctr. I, LLC*, No. 003168-2014, 2016 WL 5377910, at *4 (N.J. Tax Ct. Sept. 23, 2016) (Trousdale Cert., Exhibit E);

Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (citing *Jenkins v. Rainner*, 69 N.J. 50, 56 (1976); *Huie v. Newcomb Hosp.*, 112 N.J. Super. 429, 432 (App. Div. 1970) (citations omitted).

Simply put, the Court should use its broad discretion with respect to discovery to compel the District to produce documents despite the Intervenor-Defendants' anticipated motions to dismiss. The District's failure to comply with its basic discovery obligations, coupled with the Intervenor-Defendants' attempt to further delay pre-answer discovery, severely impairs Plaintiffs' ability to conduct meaningful discovery and the overall objective of moving this case forward to resolution before budgetary decisions are finalized for the next school year.

In using its broad discretion with respect to discovery, the Court should take into consideration the timing restraints at issue here. Plaintiffs filed their Complaint nearly four months ago and served the Requests on the District over two months ago. The District has not objected to producing documents responsive to the Requests, nor has the District objected to the timing of the Requests and productions in response to the Requests.

II. The Confidentiality Concerns Should be Dealt with Separately, through Meet and Confers Among the Parties in this Action

The primary concerns of the Intervenor-Defendants, and the proposed Protective Order filed by AFT, appear to be related to the confidentiality of teachers and sensitive personnel records, such as teacher evaluation ratings and observations.

Plaintiffs are willing to enter into a Protective Order to govern the discovery requested from the District. Plaintiffs agree with Defendants-Intervenors that the Protective Order should address both party and non-party discovery, but oppose Defendants-Intervenors' proposed

Protective Order because it does not address all potential confidentiality considerations and was not proposed first to the parties in this action before being submitted to the Court. In an effort to utilize the proposed Protective Order drafted by AFT to address the confidentiality concerns of the District, which would be the *only* party producing documents in response to the Requests, on February 22, 2017, Plaintiffs sent proposed revisions to the Protective Order to the District. When the District determines that the proposed Protective Order addresses all of its confidentiality concerns, Plaintiffs plan to circulate the proposed revisions to the other parties in this action. Plaintiffs respectfully request that the Court hold off on issuing any Protective Order until the parties have had an opportunity to meet and confer on its contents.

With the confidentiality issues resolved by the parties, whether the District is compelled to produce documents responsive to the Requests, to which they have never substantively objected, simply does not concern Intervenor-Defendants. Intervenor-Defendants do not bear the burden of producing documents responsive to the requests, the District does, and the District has not once articulated any objection to the Requests on grounds other than confidentiality.[2]

III. The Motions Should Be Denied, But, In the Alternative, Any Relief Granted Should Be Limited

Given the above considerations, the Court should not stay discovery pending Intervenor-Defendants' motions to dismiss because (1) there is no New Jersey caselaw that prohibits pre-answer discovery, and (2) the District, the party on which the Requests were served and upon

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[2] The District has also not served any responses or objections to the Requests. The Requests were originally due more than a month ago on January 9, 2017. R. 4:18-1(b)(2). The time for compliance has now come and gone without Plaintiffs receiving anything from the District. The District also failed to respond to Plaintiffs' Motion to Compel, originally due on February 9, 2017.

whom the burden of production rests, has effectively waived any such consideration by engaging in the discovery meet and confer process with Plaintiffs prior to filing an answer or any motions.

Alternatively, in the event that the Court grants Defendant-Intervenors' Motion to Stay Discovery Pending the Disposition of the Motions to Dismiss, any such motion should be limited to certain categories of documents relating to teacher performance (which is really the only basis for Defendant-Intervenors' motions) as opposed to *all* discovery sought by the Requests. *See* AFT's February 8, 2017 Letter Brief at 2 ("Plaintiffs seek information about every teacher in the Newark Public School District . . . . Similarly comprehensive information is sought for every student in the District."); NJEA's February 8, 2017 Letter Brief at 2 ("The document request seeks a variety of highly sensitive and confidential data on both Newark students and Newark teachers . . . . [and] even applicants for employment in the Newark schools") (referring to Requests Nos. 1, 3, 4, and 9). Therefore, to the extent the Court orders any stay (and it should not), it should be limited to only those categories of data of concern to the teachers' unions.

Moreover, the Court should permit the parties to engage in meet and confers and conversations about the proposed Protective Order during the pendency of the stay so as not to further delay discovery following the resolution of any motion to dismiss.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order (i) denying Intervenor-Defendants' Motion for a Stay Discovery; (2) compelling the District to comply with and produce responsive documents to Plaintiffs' Requests pursuant to Rule 4:18-1(b)(4) and Rule 4:23-l(c); and (iii) granting such other relief as this court deems just and proper.

Respectfully Submitted,

WHT

William H. Trousdale
Tompkins, McGuire, Wachenfeld & Barry LLP

CC: Beth Shore
Charlotte Hitchcock
Flavio L. Komuves
Steven P. Weissman
Ken Nowak
Donna Arons
Natalie Watson
Matthew Tharney
Daniel Dryzga
(via email)

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SUPERIOR COURT OF NJ
MERCER COUNTY
CIVIL DIVISION

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Attorneys for Plaintiffs

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through his guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants,

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AFT NEW JERSEY, AFL-CIO; NEWARK TEACHERS UNION, AFT, AFL-CIO;

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

CERTIFICAION OF COUNSEL WITH EXHIBITS

I, William H. Trousdale, Esq., of full age, hereby certify:

1. I am a partner in the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, with offices at 3 Becker Farm Road, Suite 402, Roseland, New Jersey 07068.

2. This firm is local counsel to Arnold & Porter Kaye Scholer LLP; together, we represent Plaintiffs Tanisha Garner, on behalf of her children H.G. and F.G., et al.

3. Annexed hereto as Exhibit A is a true and correct copy of the Complaint filed November 1, 2016.

4. Annexed hereto as Exhibit B is a true and correct copy of *Lee v. Telson Electronics U.S.A., Inc., No, BER-C-69-06, 2006 WL 3720308, at *3 (N.J. Super. Ct. Ch. Div. Dec. 15, 2006).*

5. Annexed hereto as Exhibit C is a true and correct copy of *Actelion Pharms. Ltd. v. Apotex Inc.*, No. 12-5743, 2013 WL 5524078, at *1 (D.N.J. Sept. 6, 2013).

6. Annexed hereto as Exhibit D is a true and correct copy of *State v. Woods, No. A-1790-04T4, 2006 WL 695799, at *2 (N.J. Super. Ct. App. Div. Mar. 21, 2006).*

7. Annexed hereto as Exhibit E is a true and correct copy of *Berkeley Heights Twp. v. Connell Corp. Ctr. I, LLC, No. 003168-2014, 2016 WL 5377910, at *4 (N.J. Tax Ct. Sept. 23, 2016).*

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 2-23-17

Wm Trousdale

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

EXHIBIT

A

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants.

Case No.: MER-L-2170-16

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, bring this civil action for declaratory judgment and injunctive relief against Defendants Kimberly Harrington, in her official capacity as Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; Newark Public School District; and Christopher Cerf, in his official capacity as Superintendent of the Newark Public School District, (collectively "Defendants") for injuries

caused by Defendants' unconstitutional enforcement of the State statute prohibiting school districts from considering teacher quality when they have to resort to teacher layoffs due to a budgetary deficit. N.J.S.A. 18A:28-10 and 18A:28-12. Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Education Clause of the New Jersey Constitution requires the Legislature to provide "for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." Art. VIII, Sect. IV, ¶ 1.

2. Teacher effectiveness is the most important in-school factor affecting the quality of students' education. Students with high-quality, effective teachers do not just learn better than those without effective teachers in the short run—in the long run, they are more likely to graduate from high school, more likely to attend college, more likely to have good jobs and higher lifetime earnings, and less likely to become teenage parents.

3. Yet, the Legislature has passed a law that forces school districts faced with the possibility or reality of a reduction-in-force to follow quality-blind teacher layoff and reemployment statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (the "quality-blind layoff statute" or "LIFO statute"), which mandate that school districts, when executing a reduction-in-force, lay off teachers based on seniority alone, ignoring any other factor, including the teacher's effectiveness. If there is a later need to hire teachers, the district must prioritize the re-hiring of these laid off teachers in order of their seniority, not their assessed quality.

4. The children affected by the LIFO statute are primarily located in low-income districts such as the Newark Public School District ("Newark"). Parents in those districts continuously need to fight to ensure that their children receive the high-quality education and opportunities they deserve.

5. Given declining student enrollment in Newark and the corresponding decrease in state funding, the reality of LIFO in Newark forces Newark and similar districts to wrestle with two untenable options that damage every child in the district: either (i) lay off effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain ineffective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget.

6. Thus far, Newark has opted not to fire effective classroom teachers; instead, it has created a pool of ineffective teachers that it will not place in full-time teaching positions in order to avoid reducing the number of effective teachers instructing students within the district. This pool of ineffective teachers, which is known as the Educators Without Placement Sites ("EWPS") pool, is unsustainable. It drains millions of dollars per year from Newark's budget that could be used to hire new, effective teachers and provide other beneficial programs. This detrimental budgetary impact is especially harmful in light of the State's misguided efforts to cut education funding to the Schools Development Authority ("SDA") districts, including Newark, which would further inhibit the district's ability to provide a thorough and efficient education to these students.

7. Other school districts similarly situated to Newark are faced with this same dilemma and have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO.

8. Because of its harmful effects on the students in struggling school districts, the LIFO statute violates the rights of Plaintiffs guaranteed by the New Jersey Constitution,

including those guaranteed by the Education Clause, as applied to Newark and similarly situated districts because that statute operates, when a reduction-in-force is necessitated, to strip schools in these districts of effective teachers, and prevents these districts from instead laying off ineffective teachers that have greater seniority.

9. New Jersey courts have a long and admirable history of protecting the fundamental right to education in the state and ensuring that lower-income and struggling districts—known as *Abbott* or SDA districts—receive the additional funding needed to assist in meeting their constitutional mandate.

10. Ensuring adequate funding to these districts is essential, but funding alone is not sufficient to provide a thorough and efficient education to these students. They need effective teachers.

11. In these districts, of which Newark is one, this fundamental right to a thorough and efficient education requires the State to provide an education that "exceeds that needed by students in more affluent districts," according to the New Jersey Supreme Court. Yet, the LIFO statute has the perverse effect of mandating that these less affluent school districts fire junior (but effective) teachers and instead retain senior (but ineffective) teachers during reductions-in-force, violating the rights guaranteed by the Education Clause.

12. Additionally, these children are inequitably harmed in comparison to children attending other districts, given the impact of the LIFO statute in less affluent districts like Newark where recent data shows that there are higher concentrations of ineffective teachers than other districts within the state. Children in Newark and other similarly situated districts suffer greater harms from the LIFO statute than students in other districts, given that a reduction-in-force pursuant to the LIFO statute would result in the dismissal of effective teachers and the

retention of ineffective teachers. On this basis. the LIFO statute, as applied to these children, also violates their rights pursuant to the New Jersey Constitution's Equal Protection Clause.

13. Moreover, these children are being deprived of their fundamental right to a thorough and efficient education by virtue of the operation of the LIFO statute, thereby violating their rights pursuant to the Due Process Clause of the New Jersey Constitution.

14. For these reasons, Newark and other similarly situated districts need to be rid of the LIFO statute's requirements and permitted to keep effective teachers in the classroom. Laying off teachers without any consideration of their quality prohibits children from being educated in the constitutionally mandated manner.

15. By enforcing the quality-blind layoff statute, Defendants violate the constitutional and statutory rights of Plaintiffs and other students in Newark and similarly situated districts throughout the State.

16. Therefore, Plaintiffs seek a judgment declaring that the State's quality-blind layoff statute, as applied to Newark and other similarly situated districts, is unconstitutional.

17. Plaintiffs further seek injunctive relief to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness—regardless of seniority—when making decisions in relation to reductions-in-force.

PARTIES

18. Plaintiff Tanisha Garner is the mother of two daughters, H.G. and F.G., who currently attend Hawkins Street Elementary School ("Hawkins") in Newark. Ms. Garner sues on behalf of each of her children.

19. Plaintiff Noemí Vazquez is the mother of E.P., M.P., and F.D. E.P. currently attends East Side High School; M.P. currently attends the Fourteenth Avenue School; and F.D. currently attends Hawkins. All three schools are located in Newark. Ms. Vazquez sues on behalf of each of her children.

20. Plaintiff Fareeah Harris is the mother of W.H. and N.H., both current students at Luis Muñoz Marín Elementary School ("Marín") in Newark. Ms. Harris sues on behalf of each of her children.

21. Plaintiff Shonda Allen is the mother of J.H., a current student at the Eagle Academy for Young Men of Newark ("Eagle Academy"). Ms. Allen sues on behalf of her child.

22. Plaintiff Iris Smith is the mother of O.J. and M.R., both current students at Speedway Academies ("Speedway") in Newark. Ms. Smith sues on behalf of each of her children.

23. Plaintiff Wendy Soto is the mother of Z.S. and D.S., both current students at the First Avenue School in Newark. Ms. Soto sues on behalf of each of her children.

24. Defendant Kimberly Harrington is the Acting Commissioner of the New Jersey Department of Education ("Commissioner") and charged with enforcing the quality-blind layoff statute by creating the standards by which teachers may be laid off and ensuring that all children in New Jersey receive a constitutionally effective education.

25. Defendant New Jersey State Board of Education is charged with enforcing the quality-blind layoff statute by approving the standards set by the Commissioner, which dictate how teachers may be laid off.

26. Defendant Newark Public School District is charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district.

27. Defendant Christopher Cerf is the Superintendent of Newark and charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district and ensuring that all children within Newark receive a constitutionally effective education.

VENUE

28. Venue is proper in Mercer County because the cause of action arises here, where Defendants enforce the quality-blind layoff statute. R. 4:3-2(a)(2).

FACTS

THE NEWARK SCHOOL DISTRICT

29. Newark is a struggling school district, with almost one-third of Newark students failing to graduate from high school. Of those who do graduate, only approximately 10% will be ready for college and careers. The long-term harm suffered by these students as a result of their deficient in-school educational experiences is devastating.

30. Approximately 50% of Newark's eighth-graders have received an education that allows them to meet the state's minimum proficiency for literacy. Only 40% of these same eighth graders have received an education that allows them to meet the minimum proficiency standards for mathematics.

31. Newark's students are in the state's bottom 25% for literacy and bottom 10% for math.

32. For example, Plaintiffs H.G., F.G., and F.D. currently attend Hawkins.

33. In the 2014-2015 school year, 94.3% of the children attending Hawkins were considered economically disadvantaged students.[1] Only 18% of the children at Hawkins received an education that allowed them to meet or exceed the State's minimum proficiency

[1] *See* New Jersey Department of Education, *New Jersey School Performance Report: Hawkins Street School: 2014-2015 School Year*, 29, *available at* http://www.nj.gov/education/pr/1415/13/133570460.pdf.

benchmarks in language arts, and only 10% received such an education in math.[2] These results place Hawkins in the bottom 11% of elementary schools in the State.

34. Plaintiffs W.H. and N.H. currently attend Marín.

35. Similar to Hawkins, students at Marín are struggling. For the 2014-2015 school year, 12% and 10% of children at Marín received an education in language arts and math, respectively, that met or exceeded the State's grade level expectations.[3] These results place Marín in the bottom 5% of elementary schools in the State. Like Hawkins, Marín educates a large percentage of children considered to be economically disadvantaged.

36. Plaintiffs M.P., O.J., and M.R. also attend elementary schools in Newark.

37. For the 2014-2015 school year at the Fourteenth Avenue School, which M.P. attends, only 18% of students met or exceeded the grade level expectations in language arts and only 12% of students met or exceeded grade level expectations in math.[4] At Speedway, which O.J. and M.R. attend, only 11% of students met or exceeded the State's grade-level expectations in language arts, and only 8% of those students met or exceeded the State's grade-level expectations in math.[5] The majority of students at both schools are considered economically disadvantaged.

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[2] *Id.* at 3.

[3] *See* New Jersey Department of Education, *New Jersey School Performance Report: Luis Muñoz Marín Elementary School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570301.pdf.

[4] *See* New Jersey Department of Education, *New Jersey School Performance Report: Fourteenth Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570420.pdf.

[5] *See* New Jersey Department of Education, *New Jersey School Performance Report: Speedway Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570690.pdf.

38. Z.S. and D.S. both attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[6] However, Z.S. has been diagnosed with dyslexia, and her mother continues to struggle to have the school institute the appropriate educational plan to address this disability. At the First Avenue School, only 17.6% of children with a disability met the State standards.[7]

39. The issue is not limited to Newark's elementary schools, however. Plaintiff E.P. attends East Side High School. At this high school, only 13% of students met or exceeded the State's grade-level expectations in language arts during the last school year, and only 6% of them met or exceeded expectations in math.[8] This puts East Side High School in the bottom 10% of schools in the State. About one in three students failed to graduate from East Side High School on time.[9]

40. Likewise, Plaintiff J.H. attends the Eagle Academy. Ten percent of the students at Eagle Academy met or exceeded the State's expectations in language arts, and only 8% of the students met or exceeded the State's expectations in math.[10]

41. Despite these performance issues within Newark's schools, in 2016, Newark was forced to engage in a reduction-in-force of guidance counselors and librarians. This saved the

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6 *See* New Jersey Department of Education, *New Jersey Performance Report for First Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570410.pdf (indicating 41% of students met or exceeded grade-level expectations in language arts, and 44% met or exceeded grade-level expectations in math).

7 *Id.* at 4.

8 *See* New Jersey Department of Education, *New Jersey School Performance Report: East Side High School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570040.pdf.

9 *Id.* at 17 (70% of the students graduated in four years, which is below the State's target graduation rate of 78%).

10 *See* New Jersey Department of Education, *New Jersey School Performance Report: Eagle Academy for Young Men of Newark*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570307.pdf.

district $1.5 million, but, as it was based solely on seniority, the district was forced to terminate staff it would have retained but for the mandates of the LIFO statute. Although not the primary classroom teachers, this reduction-in-force deprived Newark students of professionals who could have positively impacted their educational experience.

NEWARK'S 2014 UNANSWERED EFFORT TO WAIVE THE REQUIREMENT FOR QUALITY-BLIND LAYOFFS

42. In February 2014, Newark submitted a request to the Commissioner seeking a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C. 6A:32-5.1 (the "Equivalency Request").[11] The request was driven by the declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[12] This forced a difficult choice upon the district about what to do with its limited resources.

43. The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting reductions-in-force. Either option results in harm to students within the district. They will either suffer the lifelong harms that can result from instruction by ineffective teachers or, alternatively, suffer from budget cuts in other areas that result in losses in important educational programming and resources. All of this stems from the impact of the LIFO statute.

EFFECTIVE TEACHERS ARE ESSENTIAL FOR CHILDREN TO RECEIVE THE RIGHTS CONFERRED BY THE EDUCATION CLAUSE

44. The effectiveness or ineffectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success.

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[11] *See* Newark Public Schools, *Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis* (2014), *available at* http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

[12] *See id.* at 1.

45. Recognizing this, New Jersey evaluates its teachers as "highly effective," "effective," "partially effective" or "ineffective." The final rating of a teacher is based on multiple factors generally evaluated based on student learning and teacher practice.[13] These considerations are designed to measure the quality of the teacher in the classroom, and are updated from time to time.

46. Ineffective or partially effective teachers are required to create a Corrective Action Plan with targeted professional development goals for the following year after the evaluation, and their progress is monitored.

47. In the last published Staff Evaluation report, the New Jersey Department of Education provided state- and district-level educator evaluation data.[14] In Newark, out of the 2775 teachers evaluated, 94 were rated "ineffective" and 314 were rated "partially effective." Statewide, there were only 205 teachers reported as being rated "ineffective," meaning that almost *half* of the ineffective teachers reported in the State worked in Newark at the time the evaluations were completed. Moreover, approximately 10% of the State's partially effective teachers were located in the district.

48. In comparison, of the 337 teachers evaluated in the Summit City School District ("Summit"), only a few miles from Newark, *not a single teacher* was reported as receiving a rating of ineffective or partially effective.

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[13] *See* http://www.nj.gov/education/AchieveNJ/teacher/ (setting forth explanations as to how teachers are evaluated in New Jersey).

[14] *See* N.J. Department of Education, *Staff Evaluation 2013-14, available at* www.state.nj.us/education/data/staff.

49. Therefore, even if Summit, a district with a median household income more than three times higher than Newark,[15] were forced to engage in a reduction-in-force, the students within the district would likely not be harmed in the same way as there were no teachers reported with ineffective or partially effective ratings that could be retained in place of effective teachers.

50. In essence, the effect of the LIFO statute in districts like Summit would not result in students being assigned to teachers reported as ineffective, given the nature of the district and the quality of the teaching staff. On the other hand, Newark has a disproportionately high concentration of teachers rated as less than effective. Therefore, when layoffs under the LIFO statute are based on an arbitrary standard of teacher seniority, not teacher effectiveness, while both districts can be injured, the data shows that Newark would retain less than effective teachers in place of effective teachers, while Summit, which reportedly has no ineffective teachers, would not suffer the same type of harm.

51. The importance to students of having effective teachers cannot be overstated. Study after study demonstrates that teacher quality is the most important in-school factor affecting student achievement.

52. One recent study found that replacing an ineffective teacher with simply an average teacher would increase the present value of students' lifetime income by over $250,000 per classroom—an amount reaching staggering proportions when aggregated over successive years of effective teaching.

53. Effective teachers can have an especially large effect on closing the achievement gap across class and racial lines.

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[15] Reported household median income for 2013 was $115,239 in Summit and $32,973 in Newark. *See* City-Data.com, *available at* www.city-data.com.

54. According to a recent national study, "[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority students."

55. Studies show that, consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities.

56. The New Jersey Department of Education found that using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated content knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers that did not possess even the minimum paper qualifications required by the federal No Child Left Behind Act.

57. Consequently, it is no surprise that one study found that the achievement gap narrows with each year a child of color is taught by an effective teacher.

58. Another study shows that, if this positive effect were to accumulate four consecutive years with a top-quartile teacher (a highly-effective teacher) rather than a bottom-quartile teacher (a highly-ineffective teacher), this would be sufficient alone to close the racial achievement gap between white students and their black counterparts.

59. Graduation rates in Newark are also low compared to other districts in New Jersey. According to 2015 graduation data published by the New Jersey Department of Education, the districtwide graduation rate from a four-year public high school in Newark was 69.59%. In comparison, the statewide graduation rate was 89.67%.[16]

[16] *See* N.J. Department of Education, *2015 Adjusted Cohort 4 Year Graduation Rates, available at* www.state.nj.us/education/data/grate/2015/.

60. Moreover, within Newark, only 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school. On a statewide basis, however, 81.51% of Black students and 82.81% of Hispanic students graduate high school, which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

61. The studies and metrics confirm what common sense and experience tell us—quality teaching is essential for quality education.

62. If, as the New Jersey Supreme Court has emphasized repeatedly, a thorough and efficient education is one that provides children the opportunity to achieve, enables them to perform their roles as citizens, and equips them with the skills needed to compete effectively in the contemporary labor market, then such an education is impossible without quality teachers.

TO THE DETRIMENT OF STUDENTS, QUALITY-BLIND LAYOFFS REQUIRE NEWARK TO EITHER (I) CONSISTENTLY LAY OFF EFFECTIVE TEACHERS AND RETAIN INEFFECTIVE TEACHERS OR (II) TAKE OTHER HARMFUL MEASURES TO AVOID LAYING OFF EFFECTIVE TEACHERS

63. The LIFO statute has two detrimental mandates dictating how districts must make certain personnel decisions.

64. First, when there is a reduction-in-force within a district, the district must dismiss teachers on the basis of seniority. Quality may not be considered. N.J.S.A. 18A:28-10.

65. Second, if a teacher is laid off due to such a reduction-in-force, the teacher must remain on a preferred eligibility list, which again is established on the basis of seniority alone. Quality may not be considered. N.J.S.A. 18A:28-12.

66. Seniority under the statute is not actually based on the individual's years of experience teaching, but, for the vast majority of teachers, on years teaching within the district where the reduction-in-force occurred. It is not truly teaching experience or teacher quality, but

tenure in the district that determines who gets preferential treatment in the event a district has the opportunity to fill vacancies following a reduction-in-force. This means that the ability of students to learn in an economically challenged district is dependent not on quality, and not even on actual years of experience, but on the arbitrary happenstance of teachers' years of service in a specific district.

67. Therefore, given the constraints of the reemployment provision of the LIFO statute, a district is (a) forced to ignore the quality of a teacher when able to re-hire previously laid off teachers and (b) prevented from bringing in new, effective teachers when a vacancy opens if there are qualified teachers on the eligibility list.

68. The primary persons who benefit from this mandate to consider *only* intra-district seniority are ineffective teachers who have held their jobs for many years despite their ineffectiveness. There is no empirical support for preferring this group of teachers. To the contrary, empirical studies show that seniority is weakly correlated with effective teaching. As a result, the length of employment is simply not a proxy for teacher effectiveness.

69. While layoffs based on effectiveness would cut the lowest performing and least effective teachers, LIFO undoubtedly cuts a number of higher performing teachers.

70. One study showed that 80% of those laid off on the basis of seniority alone are more effective than the lowest performing teachers. Put differently, the vast majority of teachers laid off during quality-blind layoffs are *not* ineffective teachers.

71. In response to a 2012 New Jersey Department of Education survey inquiring about the effects of quality-blind layoffs on student performance, school superintendents and administrators reported that such layoffs are a "tremendous handicap" because "the teacher with the most seniority is not always the best teacher."

72. The tremendous handicap suffered by superintendents and administrators that is inherent pursuant to the LIFO statute is especially felt in Newark, the state's largest school district.

73. In the Equivalency Request, Newark presented data from a simulation that used actual data from its teaching staff, and it showed the devastating impact of quality-blind layoffs on student achievement and the prospective benefits of performance-based layoffs.

74. Newark's data showed that, under the current quality-blind layoff system, if layoffs were implemented, 75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.* Pursuant to the LIFO statute, three hundred of Newark's effective or highly effective teachers would be laid off while *72% of Newark's lowest-rated teachers would remain.*

75. Given the number of students each of these effective or highly effective teachers would otherwise instruct, this means that as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

76. As previously described above, being taught by an ineffective teacher impacts these children not simply during that school year, but for the rest of their lives.

77. Unfortunately, Newark's experience is not unique. The same is true in other urban districts throughout the State that face layoffs this year and in the years ahead.

78. For example, the superintendent of the Camden School District ("Camden") has reported that quality-blind layoffs force Camden to lose some of the district's most-effective teachers, at a time when the district already struggles to educate its students competitively, and thus has no effective teachers to spare.

79. In an effort to avoid the necessity of quality-blind layoffs, these less affluent, urban districts take steps to avoid instituting reductions-in-force.

80. Consequently, Newark has resorted to the harmful and unsustainable tactic of keeping ineffective teachers on the district payroll.

81. When certain teaching positions become superfluous because of declining enrollment, Newark has refrained from imposing layoffs. Instead, it has created what is known as the EWPS pool for those teachers whom principals did not want to hire because of performance concerns.

82. Teachers in the EWPS pool do not have full-time classroom placements, but instead perform various support and teacher's aide functions. By definition, the teachers in this pool have been rated as ineffective or have other performance-related issues that made principals throughout the district decline to employ them.

83. During the 2013-2014 school year, there were 271 teachers in the EWPS pool, meaning there were 271 teachers that Newark had found to be so ineffective that they were not placed in a classroom, but still compensated as if these teachers were contributing full-time to student achievement.

84. This pool is largely composed of senior teachers. Approximately 70% of the teachers in this pool have ten or more years of experience.

85. Newark spent approximately $22.5 million dollars in the 2013-2014 school year keeping these ineffective teachers on its payroll and away from a permanent teaching placement within its district schools.

86. However, starting in 2015, Newark could not keep most of these EWPS teachers out of the districts' school.

87. Instead, the district had to force place these teachers as permanent teachers within district schools without the consent of the schools. For the 2016-2017 school year, this forced-teacher-placement represented more than $25 million in teacher salaries. Yet, $10 million in teachers' salaries remains in the EWPS pool.

88. In the event of any future quality-blind layoffs, teachers in this EWPS pool, rated partially effective or ineffective, and now serving as the principal teacher in classrooms in district schools, would largely avoid layoffs at the expense of less-senior, more-effective *and non-EWPS* teachers.

89. The largest component of any school district's budget is its personnel—almost 90% of any individual school's budget in Newark is tied to salaries. Spending the valuable resources of a district on ineffective teachers is not only nonsensical, but also inefficient and in direct contradiction with the mandate of the New Jersey Constitution. The EWPS pool would be wholly unnecessary were it not for the quality-blind layoff statute.

90. The EWPS pool is unsustainable, especially given the funding issues currently faced by Newark in light of continued declining enrollment and ongoing efforts by the State to cut the district's funding.

91. On September 15, 2016, the New Jersey Attorney General filed a Memorandum of Law in the State Supreme Court seeking to modify the Court's prior *Abbott* decisions and permit the State to institute a new funding scheme. Reports have stated that, if this funding scheme were to be enacted, Newark would lose almost 69% of its state aid, which is equivalent to a loss of $14,502.99 per pupil in the district.[17]

[17] *See* Stephen Stirling, *How Christie's Controversial School Aid Plan Could Impact You*, NJ.COM (Jun. 22, 2016), *available at* http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html.

EXHIBIT C

2013 WL 5524078
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United States District Court, D. New Jersey.

ACTELION PHARMACEUTICALS LTD. and Actelion Clinical Research, Inc., Plaintiffs,
v.
APOTEX INC., et al., Defendants.

Civil No. 12–5743(NLH/AMD).

Sept. 6, 2013.

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MEMORANDUM ORDER AND OPINION

ANN MARIE DONIO, United States Magistrate Judge.

*1 This matter comes before the Court by way of Plaintiffs' Actelion Pharmaceuticals Ltd. and Actelion Clinical Research, Inc. (hereinafter, "Plaintiffs" or "Actelion") motion to stay discovery pending a resolution of a dispositive motion. (*See* Plaintiffs' Motion to Stay Discovery Pending Ruling on Dispositive Motion (hereinafter, "Pls.' Mot.") [Doc. No. 45].) For the reasons set forth herein, the Court grants Plaintiffs' Motion.

Plaintiff Actelion Pharmaceuticals Ltd. is a "pharmaceutical company" and Plaintiff Actelion Clinical Research, Inc. is an "affiliate" of Actelion Pharmaceuticals Ltd. (*See* Complaint for Declaratory Judgment [Doc. No. 1], 3.) In this action, Plaintiffs seek a determination of whether Plaintiffs "have a legal duty to supply its patented pharmaceutical products" Tracleer and Zavesca "to potential rivals[.]" (*See* Memorandum of Law in Support of Plaintiffs' Motion to Stay Discovery Pending Ruling on Dispositive Motion (hereinafter, "Pls.' Br.") [Doc. No. 45–1], 1.) Defendants Apotex Inc. and Apotex Corp. (hereinafter, "Apotex"), Roxane Laboratories, Inc. (hereinafter, "Roxane"), Actavis Elizabeth LLC (hereinafter, "Actavis"), Johnson Matthey Inc. (hereinafter, "JM"), and Zydus Pharmaceuticals, Inc. and Cadila Healthcare Limited (hereinafter, "Zydus") (collectively, "Defendants") are generic drug manufacturers. [1] Each Defendant has sought to acquire samples of Tracleer, and Defendant Roxane has, in addition to Tracleer, sought samples of Zavesca. (*See* Defendants/Counterplaintiffs' Memorandum in Opposition to Plaintiffs/Counterdefendants' Motion to Stay Discovery at 2 (hereinafter, "Defs.' Opp'n") [Doc. No. 49], 2.) Defendants allege that such samples are needed "to conduct bioequivalence studies of their generic versions[,]" the results of which must be submitted to the United States Food and Drug Administration in order to obtain necessary approvals to market the generic versions. (*See* Defs.' Opp' n [Doc. No. 49], 2; *see also* Transcript of Proceeding Held on 3/12/2013 (hereinafter, "Transcript") [Doc. No. 71], 18.) There is no dispute that, despite Defendants' various requests, Plaintiffs have "refused" to provide Defendants with samples of these drugs. (*See* Pls.' Br. [Doc. No. 45–1], 1; *see also* Defs.' Opp'n [Doc. No. 49], 2.) Defendants assert that Plaintiffs' conduct in refusing to provide the samples purportedly prevented "approval of [Defendants'] generic products" and "thwart[ed] generic competition for these two products." (Defs.' Opp'n [Doc. No. 49], 2; *see also* Transcript [Doc. No. 71], 17.)

As set forth *supra,* Plaintiffs seek "a declaration that Actelion is under no duty or obligation to provide any quantity" of Tracleer or Zavesca to Defendants. (*See* Complaint for Declaratory Judgment [Doc. No. 1], 14; *see also* Pls.' Br. [Doc. No. 45–1], 3; *see also* Transcript [Doc. No. 71], 30.) Defendants each answered Plaintiffs' complaint, and asserted various affirmative defenses and counterclaims against Plaintiffs. [2] On January 16, 2013, Plaintiffs moved for judgment on the pleadings under FED. R. CIV. P. 12(c) and to dismiss counterclaims under FED. R. CIV. P. 12(b)(6). (*See* Motion for Judgment on the Pleadings (hereinafter, the "dispositive motion") [Doc. No. 44].) At that time, Plaintiffs also filed the present motion to stay discovery. (*See* Pls.' Mot. [Doc. No. 45].) Thereafter, on March 12, 2013, the Court conducted oral argument on the motion to stay discovery, but reserved decision. (*See* Minute Entry [Doc. No. 62], 1.) At this time, the dispositive motion remains pending, with oral

argument set for October 17, 2013. (*See* Text Order [Doc. No. 79].)

*2 Plaintiffs contend that the circumstances warrant the issuance of a stay pending resolution of the dispositive motion because the motion "seeks a determination of the law based on undisputed facts" "requir[ing] no factual development." (Pls.' Br. [Doc. No. 45–1], 2–3.) Plaintiffs further contend that discovery prior to resolution of the motion would constitute "an unnecessary waste of resources" because a ruling regarding the pending motion to dismiss may obviate the "need for discovery" or "narrow and streamline discovery." (*Id.* at 2–3.)

Defendants jointly contend that Plaintiffs' dispositive motion does not constitute good cause to stay discovery because Plaintiffs have not "demonstrate[d] a 'clear and unmistakable' likelihood of success on its potentially dispositive motion." (Defs.' Opp'n [Doc. No. 49], 6; *see also* Transcript [Doc. No. 71], 13–15.) Defendants further allege that Plaintiffs have "failed to demonstrate that the proposed discovery [would] be unduly burdensome or expensive[,]" in light of Defendants' "very reasonable discovery plan." (*Id.* at 8.) Moreover, Defendants assert that a stay would prejudice Defendants' ability to: " (1) complete bioequivalence studies[;]" "(2) obtain FDA approval[;]" and "(3) bring [Defendants'] generic versions of Tracleer and Zavesca to market." (*Id.* at 9.)

Plaintiffs dispute that the standard for a stay requires a finding that there is a "clear and unmistakable" likelihood of success on the motion, but also assert that Plaintiffs' dispositive motion "rests on long-standing antitrust and patent law principles[,]" which present no factual issues. (Reply Memorandum of Law in Support of Plaintiffs' Motion to Stay Discovery Pending Ruling on Dispositive Motion at 5 (hereinafter, "Pls.' Reply") [Doc. No. 51], 3–5.) Moreover, Plaintiffs contend that even pursuant to Defendants' proposed discovery plan, "[t]he burden, expense, and distraction to business that discovery ordinarily generates" may be entirely avoided if Plaintiffs' motion is granted. (*Id.* at 6; *see also* Transcript [Doc. No. 71], 10.) Plaintiffs dispute Defendants' assertion of prejudice because "Apotex first demanded samples of Tracleer in January 2011; Roxane demanded Tracleer in January 2012 and Zavesca as early as April 2010; and Actavis demanded samples of Tracleer in September 2011[,]" but no defendant sought relief from a court. (*Id.* at 5 .) Plaintiffs argue that Defendants' assertion that a stay of discovery will further delay production of generic versions of Tracleer and Zavesca purportedly "rings hollow." (*Id.*)

Pursuant to Federal Rule of Civil Procedure 26(c), the Court may stay discovery only on a showing of "good cause" by the party requesting the stay. *Gerald Chamales Corp. v. Oki Data Americas, Inc.*, 247 F.R.D. 453, 454 (D.N.J. Dec.11, 2007) ("A protective order pursuant to FED. R. CIV. P. 26(c) may only be issued if 'good cause' is shown."); FED. R. CIV. P. 26(c)(1) (establishing that the court may issue a protective order with respect to discovery only for "good cause"); *see also Perelman v. Perelman*, No. 10–5622, 2011 WL 3330376, at *1 (E.D.Pa. Aug.3, 2011) ("The burden is on the party seeking the stay [of discovery] to show 'good cause.' ") (citations omitted).

*3 "[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir.1982); *see also Coyle v. Hornell Brewing Co.*, No. 08–2797, 2009 WL 1652399, at *3 (D.N.J. June 9, 2009) ("In discovery disputes, the Magistrate Judge exercises broad discretion and is entitled to great deference.") (citations omitted); *Chamales*, 247 F.R.D. at 454 ("Magistrate Judges have broad discretion to manage their docket and to decide discovery issues, including whether to stay discovery pending a decision on a dispositive motion.") (citations omitted). However, "[m]otions to stay discovery are not favored because when discovery is delayed or prolonged it can create case management problems which impede the court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Coyle*, 2009 WL 1652399, at *3 (internal citations and quotation marks omitted).

In *Landis v. N. Am. Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), the Supreme Court set forth the standard for a stay of proceedings and found that, the movant "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay ... will work damage to [someone] else." *Id.* at 255. The power to stay proceedings "calls for the exercise of judgment, which must weigh competing interests" and "balance" the hardships with respect to the movant and non-movant. *Id.* at 254–55; *see Gold v. Johns–Manville Sales Corp.*, 723 F.2d 1068, 1076 (3d Cir.1983) (balancing the potential hardship with

respect to both parties). Thereafter, numerous courts further delineated the requisite showing with respect to "hardship or inequity[,]" *see, e.g., Cima Labs, Inc. v. Actavis Group HF,* Nos. 07–893, 06–1970, 06–1999, 2007 WL 1672229, at *8 (D.N.J. June 7, 2007), and further adapted the approach to reflect the additional considerations that arise where a stay is sought pending resolution of a dispositive motion. *See Mann v. Brenner,* 375 F. App'x 232, 239 (3d Cir.2010) (recognizing that "[i]n certain circumstances it may be appropriate to stay discovery while evaluating a motion to dismiss where" resolution of the motion would render discovery futile).

Consequently, courts generally weigh a number of factors in determining whether to grant a stay including: "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party[,]" *Cima Labs,* 2007 WL 1672229, at *8 (citing *Motson v. Franklin Covey Co.,* No. 03–1067, 2005 WL 3465664, at *1 (D.N.J. Dec.16, 2005)); (2) whether denial of the stay would create " 'a clear case of hardship or inequity' " for the moving party, *Hertz Corp. v. The Gator Corp.,* 250 F.Supp.2d 421, 424 (D.N.J.2003) (quoting *Gold,* 723 F.2d at 1075–76); (3) "whether a stay would simplify the issues and the trial of the case[,]" *Cima Labs,* 2007 WL 1672229, at *8 (citing *Motson,* 2005 WL 3465664, at *1); and (4) "whether discovery is complete and/or a trial date has been set." *Id.* In assessing prejudice, the Court notes that, "the party seeking [a] protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" do not suffice. *Cipollone v. Liggett Grp., Inc.,* 785 F.2d 1108, 1121 (3d Cir.1986). Moreover, if a dispositive motion is pending, courts further consider whether the pending dispositive motion "appear[s] to have substantial grounds or, stated another way, do[es] not appear to be without foundation in law[,]" *Victor v. Huber,* No. 12–282, 2012 WL 2564841, at *2 (M.D.Pa. July 2, 2012) (internal quotations and citations omitted), in assessing "whether a stay would simplify the issues and the trial of the case [.]" *Cima Labs,* 2007 WL 1672229, at *8 (citing *Motson,* 2005 WL 3465664, at *1). However, it is well settled that "the *mere filing* of a dispositive motion does not constitute 'good cause' for the issuance of a discovery stay." *Gerald Chamales,* 247 F.R.D. at 454 (internal citations omitted).

*4 With respect to the first factor, the Court must consider whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party. *See Cima Labs,* 2007 WL 1672229, at *8. In considering this factor, the Court notes that the hearing for Plaintiffs' dispositive motion has now been rescheduled for October 17, 2013. (*See* Text Order [Doc. No. 79], July 10, 2013.) At present, the Court finds that the delay in resolving the Plaintiffs' dispositive motion does not, without more, establish that undue prejudice will result from issuance of a stay. Defendants assert that staying discovery would offend the public's " 'particularly great' interest in 'vigorously enforcing national anti-trust laws through the expeditious resolution of private antitrust litigation' " and would prohibit Defendants from performing studies necessary for FDA approval. (Defs.' Opp' n [Doc. No. 49], 9; *see also* Transcript [Doc. No. 71], 19.) However, the Court finds that this claim of prejudice is contradicted by Defendants' failure to file claims against Plaintiffs, despite the knowledge that Plaintiffs refused to provide samples of their products. *See, infra.*

With respect to the alleged hardship to Plaintiffs if a stay is denied, Plaintiffs generally contend that, "[t]he burden, expense, and distraction to business that discovery ordinarily generates (and which is commonly recognized) may be entirely avoided." (Pls.' Reply [Doc. No. 51], 6.) Defendants, however, assert that, "Actelion's failure to identify any specific prejudice that it would suffer from proceeding with discovery is fatal to its request for a discovery stay." (Defs.' Sur-reply [Doc. No. 53], 7.) Defendants contend that their proposed phase discovery ameliorates any prejudice. (*See* Defs.' Opp'n [Doc. No. 49], 8.) However, Defendants state that "phase one" would include interrogatories and document requests concerning "core documents[,]" and acknowledge that disputes would exist regarding "what those core documents are." (*See* Transcript [Doc. No. 71], 20.) Plaintiffs generally retort that the proposed discovery would be voluminous, "quite costly[,] and expensive." (*Id.* at 10.) Moreover, Plaintiffs contend that although "phase discovery sounds on its face like it can save expenses, in some instances it can actually be more burdensome because it requires duplicative searching." (*Id.* at 9.)

As Plaintiffs assert, "[d]iscovery, particularly in antitrust cases, can be extremely expensive." (Pls.' Br. [Doc. No. 45–1], 2 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 558–59, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (recognizing the unusually high cost of discovery in antitrust cases)).) The Court concludes that the potential cost of discovery

establishes a specific and substantiated risk of harm. [3] *See Cipollone,* 785 F.2d at 1121 (requiring "specific examples or articulated reasoning" to demonstrate "harm" or "a particular need for protection"). Therefore, the Court concludes that, on balance, the equities favor issuance of a stay.

*5 With respect to the third factor, the Court must consider "whether a stay would simplify the issues and the trial of the case." *Cima Labs,* 2007 WL 1672229, at *8 (citing *Motson,* 2005 WL 3465664, at *1). In that regard, the movants bear the burden of establishing that issuance of a stay would simplify the issues for trial by "narrowing" or "outright eliminati[ng]" the need for discovery. *Weisman v. Mediq, Inc.,* No. 95–1831, 1995 WL 273678, at *2 (E.D.Pa. May 3, 1995) (generally noting that, "where a pending motion to dismiss" "may result in a narrowing or outright elimination of discovery [,]" "the balance [of competing interests] generally favors granting a motion to stay."). In this case, consideration of this factor further requires the Court to examine the impact of Plaintiffs' dispositive motion. In assessing such impact, the Court must first determine the appropriate standard under which to evaluate the dispositive motion. Defendants assert that the applicable standard requires the moving party "to demonstrate a 'clear and unmistakable' likelihood of success on its potentially dispositive motion." [4] (Defs.' Opp'n [Doc. No. 49], 5–6.) Plaintiffs assert, however, that the Court need not engage in a substantive review of the dispositive motion in determining whether to issue a stay. (*See* Pls.' Reply [Doc. No. 51], 3–5.) Both parties further contend that *Mann v. Brenner,* 375 F. App'x 232 (3d Cir.2010) endorses their respective articulations of the applicable standard. (*Compare* Transcript [Doc. No. 71], 32, *with* Transcript [Doc. No. 71], 33.)

The Court finds that the appropriate standard considers whether the pending dispositive motion "does not appear to be without foundation in law." *See Victor,* 2012 WL 2564841, at *2. If the dispositive motion is without foundation or otherwise frivolous, then the Court need not, in considering a stay request, engage in any inquiry regarding the filing impact of the dispositive motion. However, if there is no such showing, then the filing of a dispositive motion may favor the issuance of a stay where, as here, the Court finds that resolution of the dispositive motion may "narrow[ ]" or "outright eliminat[e]" the need for discovery. *Weisman,* 1995 WL 273678, at *2. A stay is provisional relief designed to maintain the status quo during the pendency of certain proceedings. *See, e.g., Valansi v. Ashcroft,* 278 F.3d 203, 207 (3d Cir.2002) (noting the court's issuance of a stay pending the court's decision "[t]o preserve the status quo"). Any showing of a "clear and unmistakable" likelihood of success is, quite simply, antithetical to that purpose. Consequently, the Court rejects Defendants' argument that the applicable standard requires the moving party "to demonstrate a 'clear and unmistakable' likelihood of success on its potentially dispositive motion." (Defs.' Opp'n [Doc. No. 49], 5–6; *see also* Transcript [Doc. No. 71], 22.) Nor does the Court find that the Third Circuit case of *Mann v. Brenner,* 375 F. App'x 232 (3d Cir.2010), requires such a showing. [5] Although in *Mann,* the court noted that "none of Mann's claims entitle him to relief[,]" *Mann,* 375 F. App'x at 239, the Third Circuit did not delineate a standard that conditions stays upon an analysis of the merits of the underlying motion. Indeed, requiring this Court to opine on the underlying merits of the Plaintiffs' dispositive motion, in addition to the District Court's consideration, would be unduly duplicative. While clearly the mere filing of a dispositive motion does not, without more, constitute good cause for issuance of a stay, this Court "need not 'form[ ] an opinion as to the merits' of the [pending dispositive] motion." *See Perelman,* 2011 WL 3330376, at *1 (E.D.Pa. Aug.3, 2011) (quoting *Weisman,* 1995 WL 273678, at *2). Therefore, the Court examines whether the pending dispositive motion "does not appear to be without foundation[,]" *Victor,* 2012 WL 2564841, at *2, or otherwise frivolous.

*6 Here, there is no contention that Plaintiffs' dispositive motion is without basis, frivolous, or filed solely for a dilatory purpose. Plaintiffs contend that the "dispositive motion rests on long-standing antitrust and patent law principles that respect the fundamental right of a firm like Actelion to deal-and refuse to deal-with whomever it chooses[.]" (Pls.' Reply [Doc. No. 51], 4.) Defendants have not filed an application with the Court seeking sanctions under Federal Rule of Civil Procedure 11 with respect to Plaintiffs' filing of the dispositive motion. Rather, Defendants dispute the dispositive motion on substantive grounds. (*See* Defs.' Opp'n [Doc. No. 49], 6; *see also* Defs.' Sur-reply [Doc. No. 53], 4.) Thus, it does not appear that Plaintiffs' dispositive motion is without foundation in law or otherwise frivolous. Therefore, the Court concludes that the filing of the motion may be considered, and examines how the motion's resolution

may impact the overall adjudication of this action. In certain circumstances, the nature of the dispositive motion may be such that any resultant resolution may have little impact on the ultimate scope of discovery. Thus, this factor requires an individual determination in light of the specific circumstances of a given case. Here, Plaintiffs contend that, "[i]f the Court grants Actelion's Motion for Judgment on the Pleadings and to Dismiss Counterclaims, then there will be no need for discovery." (Pls.' Br. [Doc. No. 45–1], 3; *see also* Transcript [Doc. No. 71], 29.) Defendants Apotex, Zydus, and JM concede that a resolution of the dispositive motion favorable to Plaintiffs would obviate the need for discovery. (*See* Transcript [Doc. No. 71], 23.) Only two Defendants, Roxane and Actavis, dispute Plaintiffs' assertion. (*See* Transcript [Doc. No. 71], 37, 40.) In light of Plaintiffs' assertion that a favorable resolution of Plaintiffs' dispositive motion would end this litigation, and certain Defendants' agreement with respect to such effect, the Court concludes that "a stay would simplify the issues and trial of the case[,]" *Cima Labs,* 2007 WL 1672229, at *8 (citing *Motson,* 2005 WL 3465664, at *1), and accordingly, that this factor, on balance, favors entry of a stay.

With respect to whether discovery is complete and whether a trial date has been set, the Court notes that the case remains in its initial stages and no trial date has been set. Moreover, Plaintiffs' complaint was filed on September 14, 2012 (*see* Complaint for Declaratory Judgment [Doc. No. 1]), with the present motion filed shortly thereafter on January 16, 2013. Such temporal proximity supports the issuance of a stay because no party has engaged in significant production or protracted motion practice. Therefore, the Court finds this factor likewise favors entry of a stay.

Consequently, the Court concludes that the factors as set forth herein warrant a stay of discovery. Therefore, for the reasons set forth above,

*7 IT IS on this 6th day of September 2013,

ORDERED that Plaintiffs' Motion to Stay Discovery [Doc. No. 45] shall be, and is hereby, ***GRANTED.***

All Citations

Not Reported in F.Supp.2d, 2013 WL 5524078

Footnotes

1 Plaintiffs' initial complaint named as Defendants only Apotex Inc., Apotex Corp., and Roxane Lab., Inc. By Order dated December 19, 2012, the Court granted Actavis' Motion to Intervene. (*See* Order [Doc. No. 39], Dec. 19, 2012.) By letter dated March 29, 2013, JM joined in Defendants' previouslysubmitted papers, and agreed "to be bound by the resulting decisions subject to any and all appeal rights." (*See* Letter [Doc. No. 66], 1.) By Order dated April 2, 2013, the Court granted JM's Motion to Intervene. (*See* Consent Order [Doc. No. 67], Apr. 2, 2013.) Thereafter, Zydus moved to intervene, joined in Defendants' previously-submitted papers, and agreed to "be bound by the decisions on the [m]otions subject to any and all appeal rights[.]" (*See* Text of Proposed Consent Order [Doc. No. 75–1], 1.) By Order dated July 9, 2013, the Court granted Zydus' motion. (See Consent Order [Doc. No. 78], 1, July 9, 2013.)

2 Each Defendant independently alleges that Plaintiffs have violated Section 2 of the Sherman Act, 15 U.S.C. § 2; violated the New Jersey Antitrust Act, N.J. STAT. ANN.. § 56:9–3 and § 56:9–4; New Jersey's common law tortious interference; and seeks mandatory injunctive and declaratory relief. (*See* Apotex's Answer and Countercl. [Doc. No. 24], ¶¶ 60–109; Roxane's Answer and Countercl. [Doc. No. 25], ¶¶ 99–244; Actavis' Answer and Countercl. [Doc. No. 40], ¶¶ 43–92; JM's Answer and Countercl. [Doc. No. 69], ¶¶ 46–93.)

3 In *Twombly,* the Supreme Court acknowledged that "proceeding to antitrust discovery can be expensive." 550 U.S. at 558. Though *Twombly,* as noted by Defendants, involved a putative class action, the Court concludes that the nature of the proposed discovery in this case supports a stay, particularly in light of the number of parties and the parties' various representations regarding the Defendants' proposed discovery plan. (*See, e.g.,* Transcript [Doc. No. 71], 9–10, 19–20.)

4 Defendants contend that *Gerald Chamales Corp. v. Oki Data Arms, Inc.,* 247 F.R.D. 453, 454 (D.N.J.2007), and *Ariano Castro, M.D., P.A. v. Sanofi Pasteur Inc.,* No. 11–7178, Order [Doc. No. 102] (D.N.J. July 18, 2012), articulate such a standard.

5 With respect to *Castro,* the Court notes that *Castro* relies upon *Gerald Chamales. Castro,* No. 11–7178, Order [Doc. No. 102], 2. The Court further notes that the rulings in *Gerald Chamales* and *Castro* were predicated upon the significant

discovery that had already been commenced. *Gerald Chamales,* 247 F.R.D. at 456; *Castro,* No. 11–7178, Order [Doc. No. 102], n. 2. Here, however, discovery remains in its preliminary stage.

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EXHIBIT D

2006 WL 695799
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Donta WOODS, Defendant-Appellant.

Submitted Jan. 31, 2006.
|
Decided March 21, 2006.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, 03-12-2420-I.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Arthur L. Marchand, Designated Counsel, of counsel and on the brief).

Luis A. Valentin, Monmouth County Prosecutor, attorney for respondent (Tara Wilson, Assistant Prosecutor, of counsel and on the brief).

Before Judges COBURN and COLLESTER.

Opinion

PER CURIAM.

*1 Tried to a jury, defendant Donta Woods was convicted of conspiring with co-defendant Robert Murphy to commit theft, contrary to *N.J.S.A.* 2C:5-2 (count one), and committing third-degree theft of movable property, contrary to *N.J.S.A.* 2C:20-3(a) (count three). The trial judge merged counts one and three and sentenced defendant to a five-year term of imprisonment with a two and one half-year period of parole ineligibility.

Co-defendant Robert Murphy entered a guilty plea to conspiracy to commit burglary as part of a plea bargain, which included testifying against defendant. Murphy testified that on July 31, 2003, he picked up defendant at a friend's house in Union Beach and they decided to go to the municipal public works building in search of scrap aluminum to sell to a scrap yard. When they arrived, Murphy parked his truck in front of the locked chain link gates. Defendant managed to slide through the gate and take some street signs. Defendant and Murphy were loading the signs into Murphy's truck when Detective Beacham arrived and saw them throwing something into the back of the truck. When the two men saw the officer, they jumped into the truck as if to pull away. Detective Beacham pulled in front of the truck in order to block the way. He approached and spoke to Murphy, who said the street signs were lying outside the fenced-in area and that he and defendant thought they were discarded as garbage. Defendant repeated the same story. However, Beacham's suspicions were aroused when he saw mud on defendant's back and shoulders and dirt on Murphy's hands and shoes.

Beacham then checked the gate and noticed that the gate could be moved to enable a person to slide through. He then placed both men under arrest. At the police station, Murphy confessed and said defendant entered the fenced-in area and took the signs.

Defendant appeals his conviction and sentence and alleges the following:

> *POINT I*-THE TRIAL JUDGE ERRED BY ALLOWING TESTIMONY FROM A WITNESS THAT WAS NOT ON THE STATE'S WITNESS LIST IN VIOLATION OF *R*. 3:13-3(c)(6).
>
> *POINT II*-THE SENTENCE IMPOSED BY THE TRIAL COURT JUDGE WAS MANIFESTLY EXCESSIVE AS THE JUDGE IMPROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS WHEN [DETERMINING] DEFENDANT'S SENTENCE.
>
> *POINT III*-IMPOSITION OF THE MAXIMUM TERM VIOLATES DEFENDANT'S CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS OF LAW. (Not Raised Below.)
>
> *POINT IV*-THIS CASE MUST BE REMANDED TO THE TRIAL COURT TO CORRECT THE JUDGMENT OF CONVICTION TO ACCURATELY REFLECT THE CRIMES THAT DEFENDANT WAS CONVICTED OF.

Thomas Luminoso, the Union Beach Public Works Director, was permitted to testify and identified the signs as municipal property in a public works truck parked

inside the locked gate at the time of the offense and gave an estimated value of the signs of approximately $1,500. Luminoso's name was not provided on the witness list submitted to defendant prior to trial, but his name appeared in the indictment and in the police reports which were provided in discovery.

***2** A trial judge has broad discretion in determining appropriate relief if a party fails to comply with discovery, and a ruling will be upheld absent a showing of an abuse of discretion. *State v. LaBrutto,* 114 *N.J.* 187, 205 (1989); *State v. Toro,* 229 *N.J.Super.* 215, 223 (App.Div.1988), *certif. denied,* 118 *N.J.* 216 (1989). There was no mistaken exercise of discretion in permitting Luminoso to testify, especially since there was notice of his potential testimony and the obvious error of omission by the State.

Defendant argues and the State concedes that defendant is entitled to re-sentencing under *State v. Natale,* 184 *N.J.* 458 (2005). Moreover, both the State and the defense agree that judgment of conviction should be amended to reflect the conviction of conspiracy to commit theft and theft of movable property in violation of *N.J.S.A.* 2C:5-2 and *N.J.S.A.* 2C:20-3(a).

Affirmed in part. Reversed and remanded in part.

All Citations

Not Reported in A.2d, 2006 WL 695799

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EXHIBIT
E

2016 WL 5377910 (N.J.Tax)
Only the Westlaw citation is currently available.

Tax Court of New Jersey.

Re: Berkeley Heights Township
v.
Connell Corporate Center I, LLC
and
Berkeley Heights Township
v.
The Connell Company

September 23, 2016

Attorneys and Law Firms

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Opinion

Joshua D. Novin, Judge

*1 This letter constitutes the court's opinion with respect to defendants', Connell Corporate Center I, LLC and The Connell Company (collectively referred to as "defendants"), motion for reconsideration of the court's April 18, 2016 opinion and Order denying defendants' motion for a protective order barring discovery of an Appraisal Report dated September 24, 2014 and quashing the duces tecum portion of plaintiff's Notice of Deposition (the "motion for reconsideration").

For the reasons set forth below, defendants' motion for reconsideration is denied, in part, and granted, in part.

I. Findings of Fact & Procedural History

For the purpose of providing context, the court will include a brief statement of facts. A full statement of facts can be found in the court's April 18, 2016 opinion.

The mutual exchange of trial-ready appraisal reports in these matters was initially scheduled for September 25, 2015, with trial commencing on January 14, 2016 and continuing on January 15, 2016. On September 18, 2015, defendants' counsel requested a thirty (30) day adjournment of the exchange date of the trial-ready appraisal reports and the trial dates. The court adjourned the exchange date for the trial-ready appraisal reports to October 30, 2015, and adjourned the trial to February 19, 23, and 24, 2016.

On February 2, 2016, the court conducted a telephone conference with counsel for plaintiff and defendants to address their mutual request to adjourn the February 2016 trial dates. During the telephone conference counsel advised the court that depositions must be conducted prior to commencement of trial. Accordingly, the court adjourned the February 2016 trial dates, assigned new trial dates of April 18, 20 and 21, 2016, and ordered depositions to be completed by March 24, 2016. On February 3, 2016, in furtherance of the court's instructions, plaintiff's counsel uploaded a letter to the case jackets in these matters confirming the details of the telephone conference call and the court's order to complete all depositions by March 24, 2016.

On or about February 25, 2016, pursuant to *R.* 4:14-7, plaintiff's counsel served a notice to take oral deposition of defendants' Chief Financial Officer or other person in charge of records and accounting. The deposition notice included a duces tecum demand for the production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties." The oral deposition and document production was to take place on March 14, 2016 in defendants' counsel's office.

By letter dated March 9, 2016 defendants' counsel advised plaintiff's counsel that defendants have "no documents responsive to the duces tecum in your notice. Please advise me as soon as possible if you still wish to proceed with a deposition of the Chief Financial Officer." The oral deposition was apparently postponed due to a scheduling conflict and no new date was assigned.

Thereafter, by letter dated March 30, 2016, defendants' counsel advised plaintiff's counsel that he was in possession of a "leased fee appraisal dated September 24, 2014, with a value date of September 4, 2014 that was

performed with respect to 200 Connell Drive in connection with refinancing and is addressed to the mortgagee" (the "2014 Appraisal Report"). The letter further stated that "the appraiser who did the report is neither" plaintiff's expert, nor defendants' expert, nor anyone from either of their respective appraisal firms and therefore, "[i]t is [defendants] position that the report is not discoverable."

*2 In response, on April 5, 2016 plaintiff's counsel submitted a letter to the court addressing defendants' production of the 2014 Appraisal Report. The court scheduled a telephone conference with counsel for plaintiff and defendants to address this matter. During the telephone conference call the court advised defendants' counsel that if he wished to seek relief from the duces tecum portion of plaintiff's deposition notice, he must file a motion, on short notice, for a protective order and to quash the duces tecum portion of the deposition notice. The court established a schedule for submission of the motion, briefs, reply briefs, and oral argument.

On April 8, 2016, defendants' counsel filed a motion, on short notice, seeking entry of a protective order, under *R.* 4:10-3, barring discovery of the 2014 Appraisal Report.

On April 18, 2016, the court heard oral argument on defendants' motion for entry of a protective order. Following oral argument, the court rendered an oral opinion pinpointing the reasons it was denying defendants' motion for entry of a protective order under *R.* 4:10-3 and entered an Order. In addition, the court adjourned the April 18, 20 and 21, 2016 trial dates to afford defendants' counsel the opportunity to submit this motion for reconsideration.

On May 9, 2016, defendants' counsel filed the motion for reconsideration of the court's April 18, 2016 opinion and Order.

On June 10, 2016, the court heard oral argument on the motion for reconsideration.

II. Conclusions of Law

A. Standard for Reconsideration

A motion for rehearing or reconsideration is governed by *R.* 4:49-2. *See also R.* 8:10. The rule provides, in part, that:

> a motion for rehearing or reconsideration seeking to alter or amend a judgment or order... shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred...
>
> [*R.* 4:49-2.]

A motion for reconsideration must be supported by "a statement 'of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.' The basis to such a motion, thus, focuses upon what was before the court in the first instance." *Lahue v. Pio Costa*, 263 *N.J. Super.* 575, 598 (App. Div. 1993) (citations omitted).

A motion for rehearing or reconsideration is granted sparingly. Nonetheless, reconsideration "is a matter within the sound discretion of the Court, to be exercised in the interest of justice." *Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). Reconsideration should not be used as a vehicle to reiterate the merits of or "reargue a motion." *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 398 *N.J. Super.* 299, 310 (App. Div.), *certif. denied*, 195 *N.J.* 521 (2008). A motion for reconsideration will be granted "only for those cases which fall into that narrow corridor in which either: (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence ..." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). *See also Fusco v. Bd. of Educ. of the City of Newark*, 349 *N.J. Super.* 455, 462 (App. Div.), *certif. denied*, 174 *N.J.* 544 (2002). A motion for reconsideration is not fitting because a litigant has expressed dissatisfaction with the court's decision, the appropriate setting for such arguments are on appeal. *D'Atria*, *supra*, 242 *N.J. Super.* at 401. Although a motion for reconsideration should be narrowly construed, a court may "in the interest of justice" consider any "evidence" that the litigant claims is "new or additional ... which it could not have provided" during the initial hearing. *Id.* at 401. However, consideration of such evidence is in the court's "sound discretion." *Ibid.* "[R]epetitive bites at the apple" should not be tolerated or "the core will swiftly sour." *Ibid.* Accordingly, a court must "be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." *Id.* at 402.

*3 In the motion for reconsideration defendants argue that the court "failed to take into account" two "key factors": (1) that the trial-ready appraisal reports prepared by plaintiff and defendants' experts were exchanged on January 29, 2016, approximately 27 days prior to plaintiff's deposition notice and duces tecum demand; and (2) Standard Tax Court Interrogatories were served upon defendants by plaintiff, and defendants provided certified answers to those interrogatories prior to the exchange of the trial-ready appraisal reports.

Additionally, defendants contend, for the first time in the motion for reconsideration, that the court should have permitted them to furnish the 2014 Appraisal Report in a redacted form, omitting the author's conclusions of value.

Conversely, plaintiff argues that defendants' counsel's motion is devoid of any new facts, evidence or law supporting the protective relief sought by defendants. Plaintiff asserts that the two "key factors" raised in the motion for reconsideration were carefully examined, and rejected by the court on their merits. Finally, plaintiff maintains that the third argument, first raised by defendants in the motion for reconsideration, must be rejected by the court because it was not addressed in the initial motion and does not amount to new evidence. Thus, plaintiff maintains that defendants have failed to meet the threshold standards for reconsideration under *R.* 4:49-2.

B. April 18, 2016 Opinion

Without restating in its entirety the court's April 18, 2016 opinion, the court will briefly address the substance of the arguments presented to the court and the court's conclusions.

Defendants' counsel presented five arguments to the court in support of their motion for a protective order, three of which focused upon relevancy. Defendants' counsel argued that: (1) the 2014 Appraisal Report was not relevant and amounted to nothing "more than a fishing expedition by plaintiff"; and (2) the 2014 Appraisal Report relates to a valuation date eleven months after the latest valuation date involved in the instant matter and therefore, was "irrelevant to the issue of value" before the court; and (3) the 2014 Appraisal Report employed a leased fee analysis, which is a valuation approach not endorsed for use in the Tax Court and therefore, "has absolutely no relevance... to the present appeal"; and (4) the production of appraisal reports is limited by Standard Tax Court Interrogatories absent a showing of special need or exceptional circumstances; and (5) the 2014 Appraisal Report would not be admissible at trial. Defendants' counsel asserted that because plaintiff "has already prepared and exchanged a trial ready appraisal report" plaintiff's counsel failed to make a showing of "special need" or "exceptional circumstances" warranting discovery of the 2014 Appraisal Report under *R.* 4:10-2; and because the 2014 Appraisal Report was not relied upon by plaintiff's expert and the report preparer is not being called to testify, it is inadmissible at trial.

The court observes that as construed by applicable case law, a presumption of validity attaches to original tax assessments and judgments of the county boards of taxation. *MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes*, 18 *N.J. Tax* 364, 373 (Tax 1998); *Riverview Gardens, Section One, Inc. v. North Arlingto*, 9 *N.J.* 167, 174-175 (1952); *Aetna Life Insurance Co. v. Newark City*, 10 *N.J.* 99, 105 (1952); *Pantasote Co. v. City of Passaic*, 100 *N.J.* 408, 413 (1985). Based on this presumption, the appealing party bears "the burden of proving that the assessment is erroneous." *Pantasote Co., supra*, 100 *N.J.* at 413 (citing *Riverview Gardens, supra*, 9 *N.J.* at 174). The presumption is not an evidentiary device functioning "as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." *Pantasote Co., supra*, 100 *N.J.* at 413 (quoting *Powder Mill, I Assocs. v. Hamilton Township*, 3 *N.J. Tax* 439 (Tax 1981)).

*4 A litigant can only surmount this presumption of validity by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." *Aetna Life Insurance Co., supra*, 10 *N.J.* 99, 105 (1952). Thus, the appealing party shoulders the burden of presenting the court with credible evidence "sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.' " *West Colonial Enters, LLC v. City of East Orange*, 20 *N.J. Tax* 576, 579 (Tax 2003) (quoting *Lenal Properties, Inc. v. City of Jersey City*, 18 *N.J. Tax* 405, 408 (Tax 1999), *aff'd*, 18 *N.J. Tax* 658 (App. Div. 2000), *certif. denied*, 165 *N.J.* 488 (2000)). To afford litigants the opportunity to meet this burden, our court

rules favor "broad pretrial discovery." *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524, 535 (1996) (citing *Jenkins v. Rainner* 69 *N.J.* 50, 56 (1976)). *See also Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 215-216 (App. Div. 1987).

In addressing defendants' arguments, the court acknowledged that a party may obtain information and material which "appears reasonably calculated to lead to the discovery of admissible evidence" pertaining to the cause of action. *In re: Liquidation of Integrity Ins. Co.*, 165 *N.J.* 75, 82 (2000). Our court rules afford litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." *R.* 4:10-2(a). Although not explicitly defined in the court rules, "relevant evidence" is defined as "evidence having any tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401. However, the relevancy of documents or other materials is not predicated upon its admissibility at trial, instead it is centered upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause of action or its defense." Pressler & Verniero, *Current New Jersey Rules Governing the Courts*, comment 1 on *R.* 4:10-2(a) (2016). Thus, disclosure of evidence which may be inadmissible at trial is required "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *R.* 4:10-2(a). *See also Irval Realty Inc. v. Board of Public Utility Commissioners*, 115 *N.J. Super.* 338, 346 (App. Div. 1971), *aff'd*, 61 *N.J.* 366 (1972); *Berrie v. Berrie*, 188 *N.J. Super.* 274, 278 (Ch. Div. 1983). Information which bears even a remote relevance to the subject matter of the cause of action is discoverable, but can be withheld by a demonstration of privilege. *Payton, supra*, 148 *N.J.* at 539.

The court concluded that although the 2014 Appraisal Report was completed on September 24, 2014, approximately 11 months after the October 1, 2013 valuation date, it nonetheless was prepared during a tax year at issue in this proceeding. Therefore, the factual information, property data and sources of data which were relied upon by the author of the 2014 Appraisal Report, including tenant and lease information and income and expense data were directly relevant to the subject matter of this action and were likely to lead to the discovery of admissible evidence. Moreover, because the 2014 tax year is at issue in this litigation and the report was completed in September 2014, it is likely that the 2014 Appraisal Report contains information about the subject property during a time period that is squarely relevant to this matter.

Moreover, the court found a lack of support for defendants' argument that plaintiff must make a showing of "special need" or "exceptional circumstances" in order to obtain the 2014 Appraisal Report. *R.* 4:10-2(d) limits the scope of discovery, which is otherwise discoverable to "facts known and opinions held by experts" that are "acquired or developed in anticipation of litigation or for trial." *R.* 4:10-2(d) (emphasis added). For example, through interrogatories, a litigant is entitled to know the name and address of each expert witness expected to be called at trial, including a treating physician expected to testify, and the name of an expert who has conducted a physical or mental examination of an injured party, whether or not expected to testify. *R.* 4:10-2(d)(1). *R.* 4:10-2(d)(3) permits a litigant to "discover facts known or opinions held by an expert...who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." *R.* 4:10-2(d)(3) (emphasis added).

*5 Here, the 2014 Appraisal Report was not prepared by an individual identified by defendants or plaintiff as an expert or consultant. Instead, the report was prepared by an appraiser commissioned by defendants' mortgage lender, a non-party to the litigation, to enable defendants to refinance a mortgage loan on one of the properties that is the subject matter of this action. Therefore, the court concluded that the provisions of *R.* 4:10-2(d)(3) were not directly applicable to defendants' motion for a protective order because the 2014 Appraisal Report was not prepared by a party's expert or consultant in anticipation of litigation or in preparation for trial. Stated differently, the 2014 Appraisal Report is not an expression of the opinions held by an expert for plaintiff or defendants that is not expected to be called to testify at trial. *R.* 4:10-2(d)(3).

Although the court determined that the provisions of *R.* 4:10-2(d)(3) were not directly applicable, the court concluded the general approach expressed by the Rule

should nonetheless be considered in the context of defendants' motion. That Rule suggests that, absent a showing of exceptional circumstances, discovery of an appraisal report prepared for a non-party to the litigation, employing facts, data and information that is markedly removed from the years at issue, should not be permitted. Here, the 2014 Appraisal Report was prepared for defendants' mortgage lender in September 2014 connection with a mortgage loan for one of the properties that is the subject matter of this tax appeal litigation. In this litigation, the court will be asked to determine the true market value of the subject property for the 2014 tax year. Therefore, the 2014 Appraisal Report likely contains records, data and information about the property for the 2013 and 2014 calendar years, which is not so far removed from the October 1, 2013 valuation date, that it may reasonably lead to the discovery of admissible evidence.

1. Exchange of trial-ready appraisal reports

In the motion for reconsideration, defendants' counsel asserts that the court failed to consider that trial-ready appraisal reports had been exchanged prior to service of plaintiff's deposition notice. However, defendants' counsel is mistaken. In the court's April 18, 2016 opinion, the court recognized not only that the 2014 Appraisal Report likely contains data and information about one of the properties that is the subject matter of these tax appeals during the 2013 and 2014 tax years, but also that the information contained in appraisal reports is routinely relied upon by this court in making a determination of the true market value of property. The court expressed that although the 2014 Appraisal Report "may not buttress the opinions of the experts in this matter, it may render factual information [upon which the experts opinions were premised inaccurate,] which is probative to issues which are to be tried in these appeals."

In rejecting defendants' motion for a protective order, the court observed that plaintiff and defendants remained very much engaged in the discovery process. On September 18, 2015, the court granted defendants' request to adjourn the trial date in these matters so that trial-ready appraisal reports could be completed, exchanged and discovery concluded. Thereafter, on February 2, 2016, the parties again contacted the court and advised that certain discovery remained open, more precisely, the depositions of key witnesses. Concluding that no prejudice would be suffered by the continued extension of discovery, on February 2, 2016, the court again adjourned the trial in this matter and ordered depositions be completed by March 24, 2016. Within the time parameters identified by the court for completion of discovery, plaintiff served defendants with a deposition notice, including a duces tecum demand for the production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties."

*6 Pretrial discovery is not limited to a single document or request, "parties may obtain discovery by one or more of the following methods: Depositions upon oral examination...; written interrogatories; production of documents or things...." *R.* 4:10-1 (emphasis added). It was therefore, inconsequential to the court that defendants had furnished plaintiff with answers to interrogatories and exchanged trial-ready appraisal reports. Despite having responded to and completed certain discovery requests and discovery assignments, the parties continued to engage in pretrial discovery. It is well-settled that parties to a litigation are under a continuing obligation to make disclosure of newly discovered information which renders a prior response incomplete or inaccurate. *R.* 4:17-7. Thus, as of the date when plaintiff's deposition notice and duces tecum demand for the 2014 Appraisal Report was served, the parties continued to engage in pretrial discovery.

2. Limitations of discovery

Defendants' counsel asserts in its motion for reconsideration that the court failed to address the "limit as to which appraisals are required to be produced in discovery" under questions 17 and 18 of the Tax Court Standard Interrogatories to be Served on Taxpayer. In his April 8, 2016 letter brief in support of the motion for a protective order, defendants' counsel argued that production of prior appraisal reports is confined to the Tax Court Standard Interrogatories to be Served on Taxpayer. Defendants' counsel argued that absent plaintiff showing "special need," defendant was not required to produce the 2014 Appraisal Report. In support of his position, defendants' counsel cited, quoted and attached four unreported Tax Court decisions.

It is well settled that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." *R.* 1:36-3. Thus, the opinions cited by defendants' counsel were not authority, binding the court in this matter. Nevertheless, the court reviewed and analyzed each of the opinions offered by defendants' counsel, and during oral argument raised salient features of each opinion which distinguished those cases from the instant matter. The court concluded that the material facts upon which each of those opinions were premised were disparate from the facts in the instant matter. Therefore, the court accorded those opinions no weight.

Importantly however, the court concluded that no showing of "exceptional circumstances" was required by plaintiff because the 2014 Appraisal Report did not constitute "facts known or opinions held by an expert...who has been retained or specially employed by another party in anticipation of litigation or preparation of trial and who is not expected to be called as a witness at trial..." *R.* 4:10-2(d)(3) (emphasis added). Here, the author of the 2014 Appraisal Report was not identified by plaintiff or defendant as an expert or consultant in this matter. Moreover, the 2014 Appraisal Report was commissioned and prepared for defendants' mortgage lender, a non-party to the litigation in contemplation of defendants' mortgage loan refinancing, and not for purposes of this, or any other anticipated litigation. Nonetheless, the court applied the general principles of *R.* 4:10-2(d) to the matter, concluding that when an appraisal report is prepared for a non-party to the litigation, utilizing data and information about the property which is markedly removed from the years at issue, disclosure should not be required. However, because here the court will be asked to determine the true market value of the subject property as of October 1, 2013, the 2014 Appraisal Report likely contains records, data and information about the property for the 2013 and 2014 calendar years, which may reasonably lead to the discovery of admissible evidence.

Moreover, it is important to note that although the Standard Interrogatories to be Served on Taxpayer are prescribed by the Tax Court under *R.* 8:6-1(a)(5), they do not express the limitations or boundaries of permissible pretrial discovery. Contrary to the provisions of *R.* 8:6-1(a)(4), which provides that discovery in matters assigned to the small claims track, "shall be limited to the property record card... inspection... a closing statement... [and] the costs of improvements," no such restrictions or limitations exist under *R.* 8:6-1(a)(5) (emphasis added). Even when our court rules have limited the form and scope of interrogatories for certain causes of action, additional discovery is still permitted. *See R.* 4:17-1(b)(1); *R.* 4:17-6. The Standard Interrogatories to be Served on Taxpayer are one, amongst many, discovery tools, designed to procure relevant and probative information from a taxpayer relative to a pending tax appeal matter. However, they are not the solitary mechanism for securing discovery and are certainly not intended as a barrier to additional discovery. Discovery may be obtained by "[d]epositions upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions." *R.* 4:10-1. Interrogatories are not intended to express the "outermost limit to which...discovery proceedings may extend..." *Kellam v. Feliciano*, 376 *N.J. Super.* 580, 588 (App. Div. 2005). When analyzing, interpreting and applying our court rules, as they impact and affect discovery matters, we must be conscious that:

> *7 Procedural rules should not in themselves be the source of any extensive litigation; they should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.
>
> [*Tumarkin v. Friedman*, 17 *N.J. Super.* 20, 26-27 (App. Div. 1951), *certif. denied*, 9 *N.J.* 287 (1952) (citing Vanderbilt, The New Rules of the Supreme Court on Appellate Procedure, 2 *Rutgers L. Rev.* 1, 18 (1948)).]

Here, the court observed during oral argument that three of the cases cited by defendants' counsel focused on Interrogatory question 18 of the Standard Interrogatories to be Served on Taxpayer. That Interrogatory question requires production of appraisal reports "covering the subject property or any portion thereof" if the report was authored by the "expert" identified in the answer to Interrogatory question 17 "during or with respect to the year of appeal or either of the preceding two years..." However, the court contrasted the narrow focus of the information under Interrogatory question 18 with the broad spectrum of information sought under Interrogatory question 20, which requires the taxpayer to:

> Attach a copy of or describe in detail each document of which you have knowledge and which relates to or bears upon the subject matter of this appeal... Include in such description the following: the date of the document; the nature of the document (e.g. letter, appraisal, memorandum, photograph, contract); the name and address of the person who prepared the document..." (emphasis added).

The court interpreted Interrogatory question 20 as a demand for documents which the parties have knowledge of and has bearing upon the subject matter of the litigation. More precisely, the court highlighted that Interrogatory question 20 seeks, in part, appraisal reports relating to or bearing upon the subject matter of the tax appeal. Thus, an obligation to furnish an appraisal report which may not arise under Interrogatory question 18 can nevertheless surface in response to Interrogatory 20.

Defendants' counsel and plaintiff's counsel agree that the 2014 Appraisal Report was not authored by an individual identified as an expert in Interrogatory question 17. Thus, defendants' obligation to furnish the 2014 Appraisal Report in response to Interrogatory question 18 was not triggered. However, defendants had a continuing obligation to furnish the 2014 Appraisal Report to plaintiff in response to Interrogatory question 20 when they became aware of it. *R.* 4:17-7.

Nonetheless, on February 25, 2016, plaintiff served a notice to take oral deposition of defendants' Chief Financial Officer, along with a duces tecum demand for the production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties." In reviewing that discovery demand, the court concluded the 2014 Appraisal Report was not an "opinion[ ] held by experts" that was "acquired or developed in anticipation of litigation or for trial" under *R.* 4:10-2(d) because the author of the 2014 Appraisal Report was not either party's expert, and the report was not prepared or developed in anticipation of litigation or for trial. Moreover, because the author of the 2014 Appraisal Report was not "retained or specially employed by another party in anticipation of litigation or preparation for trial" no showing of special or exceptional circumstances was required. *R.* 4:10-2(d)(3). However, because the court will be called upon to determine the true market value of the property as of October 1, 2013, for the 2014 tax year, the court concluded that the 2014 Appraisal Report likely contains records, data and information about the property which may reasonably lead to the discovery of admissible evidence.

3. Redaction of the 2014 Appraisal Report

*8 Defendants' counsel argues that if the court deems the financial and property data contained in the 2014 Appraisal Report as relevant, and reasonably likely to lead to the discovery of admissible evidence, the conclusions of value reached by the report's author are not relevant. Correspondingly, defendants' counsel contends that they are not reasonably likely to lead to the discovery of admissible evidence. Thus, defendants' counsel requests they be "allowed to redact" those portions of the 2014 Appraisal Report which relate to the "valuation of the subject property."

Plaintiff charges that defendants did not present this argument in support of the motion for a protective order and therefore, should be precluded from asserting it before the court in the motion for reconsideration. Moreover, plaintiff asserts that defendants have not demonstrated "annoyance, embarrassment, oppression, or undue burden or expense" associated with production of the 2014 Appraisal Report hence, plaintiff argues that application of a protective order under *R.* 4:10-3 is misplaced.

As the court highlighted in its April 18, 2016 opinion, the arguments raised by defendants in support of the motion for a protective order and to bar discovery of the 2014 Appraisal Report centered upon issues of relevancy and the admissibility of the report at trial. Defendants did not present any argument that production of the 2014 Appraisal Report would be burdensome, harassing, involved trade secrets or sought confidential materials. Thus, the focus of the court's opinion concentrated upon issues of privilege, relevancy, special need, exceptional circumstances and admissibility. In addressing the issue of relevancy, the court concluded that "the data and information about the subject property [included in the 2014 Appraisal Report], including its tenants and

rental revenues upon which the 'leased fee' analysis is predicated is directly relevant to the subject matter of this action." However, candidly, the court did not consider the relevancy of the author's conclusions or opinions of value for the property and whether those opinions are reasonably likely to lead to the discovery of admissible evidence.

This court is mindful that the rules of discovery are to be liberally construed, favoring litigants' rights to "broad pretrial discovery." *Payton, supra*, 148 *N.J.* at 535 (citing *Jenkins, supra*, 69 *N.J.* at 56). Discovery is permitted of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," *R.* 4:10-2(a), or which "appears reasonably calculated to lead to the discovery of admissible evidence." *In re: Liquidation of Integrity Ins. Co.*, 165 *N.J.* 75, 82 (2000). However, meandering expeditions which seek irrelevant, oppressive or burdensome discovery are not permitted. *See Cain v. Merck & Co., Inc.*, 415 *N.J. Super.* 319, 332 (App. Div. 2010); *Gensollen v. Pareja*, 416 *N.J. Super.* 585, 591 (App. Div. 2010).

The court's analysis begins with the principle that all property, in a taxing district, shall be assessed under uniform rules and according to the same standard of value. *N.J. Const. art. VIII, § 1, para. 1 (a)*. Moreover, a property's true or fair market value as of the assessment date, shall be the basis for the assessment of taxes. *N.J. Const. art. IV, § 7, para. 12. See also Kearny v. Div. of Tax Appeals*, 137 *N.J.L.* 634, 635 (Sup. Ct. 1948); *N.J.S.A.* 54:4-2.25; *N.J.S.A.* 54:4-23. The implementing legislation requires "[a]ll real property...be assessed according to the same standard of value, which shall be the true value of such real property..." *N.J.S.A.* 54:4-2.25. Stated succinctly, in New Jersey, "it is the fee simple interest which is assessed for property tax purposes." *Harclay House v. East Orange City*, 18 *N.J. Tax* 564, 569 (Tax 2000).

*9 A leased fee appraisal report values the "ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires." Appraisal Institute, The Appraisal of Real Estate 72 (14th ed 2013). However, because the leased fee approach is materially influenced by the leasehold interest and the stream of rental income, it is often not a reliable indicator of true or fair market value. A "leased fee... [valuation is] of dubious usefulness. The remaining term of a lease, the creditworthiness of the tenants, the influence of atypical lease clauses and stipulations, and other factors can affect the value... causing the sum to be less than or greater than the value of the fee simple estate." *Id.* at 505. Because a leased fee approach to value does not always represent the value of the fee simple interest, this court has rejected conclusions of value premised upon the leased fee interest in property. *Marina Dist. Development Co., LLC v. City of Atlantic City*, 27 *N.J. Tax* 469, 488 (Tax 2013), *aff'd* 28 *N.J. Tax* 568 (App. Div. 2015), *certif. denied*, 223 *N.J.* 354 (2015); *Pine Plaza Associates, L.L.C. v. Hanover Twp.*, 16 *N.J. Tax* 194, 199 (Tax 1996); *Harclay House, supra*, 18 *N.J. Tax* 564; *International Flavors & Fragrances, Inc. v. Union Beach Borough*, 21 *N.J. Tax* 403, 423 (Tax 2004). Here, the author of the 2014 Appraisal Report valued the leased fee interest of the property and not the fee simple interest. Thus, the conclusions of value stated in the 2014 Appraisal Report may not represent the true or fair market value of the property as of the assessment date, as required under *N.J.S.A.* 54:4-2.25.

Moreover, the 2014 Appraisal Report was prepared to facilitate defendants mortgage loan refinancing, not in anticipation of this tax appeal litigation. The author of the 2014 Appraisal Report was not retained, nor identified by plaintiff or defendant as an expert on the issue of property valuation in these matters.

Therefore, the court concludes that although the facts, data and information about the property contained in the 2014 Appraisal Report may be relevant to and probative of the issue of value of the property in this tax appeal proceeding, the author's conclusions of value using a lease fee approach are not. The author's opinions and conclusions of value are not likely to lead to the discovery of admissible evidence. Accordingly, the court grants defendants' motion for reconsideration, in part, permitting defendants to redact those portions of the 2014 Appraisal Report which relate to the author's opinions or conclusions of value of the property.

III. Conclusion

For the above stated reasons, the court denies, in part, defendants' motion for reconsideration for entry of a protective order, and grants, in part, defendants' motion for reconsideration to redact those portions of the 2014 Appraisal Report which relate to the author's opinions or conclusions of value of the property.

An Order reflecting this opinion will be simultaneously entered herewith.

All Citations

2016 WL 5377910

End of Document

92. However, the issues of funding and the LIFO statute should not be conflated. Newark, and other *Abbott* districts, need the money provided by the *Abbott* line of cases. Even with the court-mandated *Abbott* funding, Newark faces a crippling budget deficit, prompting the need to either conduct damaging reductions-in-force or place teachers from the EWPS pool within classrooms while the LIFO statute is in effect.

93. Put simply, between the quality-blind layoff statute and the EWPS program, Newark faces an impossible dilemma: the district must either lay off effective teachers and retain ineffective teachers, or it must bear the heavy burden of keeping ineffective teachers on staff (or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case by case basis) rather than lose the effective teachers they have.

94. The loss of effective teachers from the classroom due to a reduction-in-force, or the insertion of ineffective teachers from the EWPS pool in order to avoid a reduction-in-force, impacts the education offered to the Plaintiff children, who already attend schools that are unable to educate the majority of their students in order to meet the State's base-level expectations for each grade-level.

95. As a result of the impossible dilemma, in connection with other factors facing the district, Newark continues to struggle with poor student performance, growing achievement gaps, and ever-more difficult challenges in recruiting and retaining high-quality teachers. And the Plaintiff children suffer as a result.

QUALITY-BLIND LAYOFFS ALSO UNDERMINE THE ABILITY OF SCHOOL DISTRICTS, LIKE NEWARK, TO ATTRACT AND RETAIN EFFECTIVE TEACHERS

96. High-poverty districts, like Newark, also face extraordinary difficulties in recruiting, hiring, and retaining highly-qualified teachers.

97. Elementary schools in Newark have difficulty hiring new, highly-qualified teachers from outside the district. Instead, they are forced to first hire qualified teachers from the EWPS pool to fill any staffing needs, even if the pool is made up of teachers rated as less than effective. The devastating result for children within the district is that the district is limited in its ability to find and place qualified and effective teachers in open positions. Even if a school were successful in removing an ineffective teacher from the classroom during layoffs, if a vacancy for which the teacher is deemed to fall within the job parameters exists elsewhere in the district, the principal is forbidden from hiring the most qualified and effective applicant, and instead must settle for that teacher who was previously deemed to be so ineffective that they had been removed from full-time teaching positions. For example, Newark recently needed to hire Spanish teachers, but was forced to require its schools to take Spanish teachers from the EWPS pool instead.

98. Therefore, schools in Newark, already stripped of effective teachers due to the prior periods of engaging in quality-blind layoffs, must add to their concentration of ineffective classroom teachers every time they look to fill a vacancy, as high-quality teachers who may otherwise have been available to fill the position will find alternative employment opportunities.

99. Although other districts have been less transparent than Newark about their dealings with the quality-blind layoff statute, it is clear that, if the statute must be enforced, it will continue to rob districts of effective teachers that they cannot afford to lose.

100. Moreover, outside of the impact of the EWPS pool and the LIFO statute, published studies and reports indicate that qualified teachers are reluctant to work in poorer, urban districts like Newark, which further reduces Newark's pool of potential candidates when it can hire new teachers.

101. Nevertheless, the specter of quality-blind layoffs at the end of every school year serves to exacerbate qualified teachers' reluctance to apply to work in districts like Newark, where the likelihood of layoffs is higher for teachers new to the district—even teachers with many years of experience. Consequently, qualified candidates seek employment opportunities in other districts where funding and declining enrollment are not concerns and greater employment stability exists.

102. Likewise, effective teachers voluntarily may decide to take their talents elsewhere.

103. Because of the quality-blind layoff statutes and the other factors that make teachers reluctant to come to less affluent districts, Newark is prevented from replenishing its supply of effective teachers with new hires from outside the district.

QUALITY-BLIND LAYOFFS UNDERMINE NEWARK'S ABILITY TO EFFECTIVELY EDUCATE ITS STUDENTS AND VIOLATE THE CONSTITUTIONAL RIGHTS OF PLAINTIFFS

104. Defendants' enforcement of the quality-blind layoff statute in Newark will remove quality teachers, which leads to lower test scores, lower high school graduation rates. lower college attendance rates, and sharply reduced lifetime earnings for students in Newark like the Plaintiff children.

105. Almost half of the students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts. This means those students did not possess the basic skills needed for obtaining a high school diploma.

106. Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree.

107. Plaintiffs' struggles in obtaining an effective education at their schools in Newark mirror the struggles facing other students in districts like Newark throughout the State.

108. In particular, information about Camden is worrisome. Less than 1% of Camden graduates are ready for college and careers. This means more than 99% of the students who graduate from Camden high schools, which has a 63.57% graduation rate, are not ready for college or careers.

109. This reality cannot be reconciled with the mandate under the State Constitution that children in New Jersey, and especially Plaintiff children who attend schools in an *Abbott* district, receive a thorough and efficient education giving them the opportunity to achieve, fulfill their role as citizens, and compete effectively in the contemporary labor market.

110. Draining districts like Newark of quality teachers, an inevitable result of the LIFO statute's quality-blindness, removes those within the schools who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the New Jersey Constitution on numerous fronts.

111. In sum, the quality-blind layoff statute violates the rights of Plaintiffs and similarly situated children in Newark and similar districts throughout the State.

112. The LIFO statute necessarily leads to the devastating result of laying off effective teachers in school districts that cannot afford to lose any effective teachers, and the retention of ineffective teachers to the detriment of the students in those districts. Moreover, the statute undermines the ability of districts like Newark to attract and retain desperately needed qualified and effective teachers.

113. The LIFO statute's overall effect is to prevent school districts from effectively educating their students by removing the necessary in-school ingredient for a constitutional education -- quality teachers.

FIRST CAUSE OF ACTION
Education Clause Violation

114. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

115. The Education Clause requires that the State provide a "thorough and efficient" system of education to New Jersey's primary and secondary school students. In doing so, the Education Clause confers an individual right in those students to an effective education.

116. The quality-blind layoff statute, however, requires school districts conducting reductions-in-force to disregard teacher quality when deciding which teachers to lay off and, instead, requires districts to lay off teachers based upon seniority alone. Additionally, it mandates that subsequent vacancies in the district be filled in accordance with quality-blind, seniority-based eligibility. This policy has required, and will continue to require, Newark and other similarly situated districts to retain ineffective teachers while laying off effective teachers, with the effect of depriving students in those districts of a constitutionally guaranteed effective education.

117. Therefore, Defendants, by enforcing the quality-blind layoff statute in Newark and similarly situated districts, have violated the Education Clause and are not providing the mandated thorough and efficient public education to Plaintiffs and children similarly situated to them.

118. Enforcement of this statute must be enjoined in Newark and all similarly situated districts.

SECOND CAUSE OF ACTION
Equal Protection Violation

119. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

120. Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law.

121. The quality-blind layoff statute disproportionately affects students attending school districts like Newark, which primarily serves children of color who live in areas of concentrated poverty, like Plaintiffs, who have a fundamental right guaranteeing them to a thorough and efficient education set forth by the Constitution and the rulings of the New Jersey Supreme Court.

122. The LIFO statute impinges on the children's constitutional right to a thorough and efficient education as this constitutional right is inextricably linked to the retention of effective teachers.

123. It is arbitrary to deny these children their fundamental right to a thorough and efficient education by requiring districts to retain, terminate, and hire teachers based solely on intra-district seniority, and not their effectiveness or quality or even their actual years of teaching experience.

124. These layoffs will occur and continue to occur in poor, urban areas with high populations of children of color, such as Newark, and will be comparatively rare in wealthier, whiter, suburban districts, such as Summit.

125. Accordingly, Plaintiffs and similarly situated children attending districts such as Newark are disproportionately and adversely harmed by the quality-blind layoff mandate of N.J.S.A. 18A:28-10 and 18A:28-12.

126. The harm to Plaintiffs and children attending schools in districts like Newark results from the denial of an equal opportunity to receive a thorough and efficient education, which is a fundamental right, is profound, and outweighs any governmental interest that may support the quality-blind layoff statute.

127. Because the quality-blind layoff statute as applied disproportionately impacts Plaintiffs and similarly situated students, the statute violates the equal protection principles embodied in Article I, Paragraph 1 of the New Jersey Constitution.

128. The statute must therefore be declared unconstitutional and its enforcement enjoined as applied to Newark and all similarly situated school districts.

THIRD CAUSE OF ACTION
Due Process Violation

129. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

130. Article I, Paragraph 1 of the New Jersey Constitution grants individuals protection against government deprivation of their interests in life, liberty, or property.

131. The Education Clause grants every New Jersey child a right to and an interest in a thorough and efficient education. Art. VIII, Sect. IV. Moreover, New Jersey statutory law grants to all children the right to attend primary and secondary school. *See* N.J.S.A. 18A:38-25.

132. Accordingly, under the State Constitution, State statutes, and case law interpreting the New Jersey Constitution and State statutes, a thorough and efficient education is guaranteed to be provided by public school districts to such primary and secondary school students as Plaintiffs, and it is deemed to be a fundamental right.

133. By requiring school districts to reduce their teacher workforces on the basis of intra-district seniority alone, and without any regard to teacher performance, the quality-blind

layoff statute deprives Plaintiffs and similarly situated schoolchildren of their fundamental right to a thorough and efficient education.

134. No rational governmental interest justifies this deprivation.

135. Therefore, Defendants' enforcement of the quality-blind layoff statute is unconstitutional, as it violates the due process principles of Article I, Paragraph 1 of the New Jersey Constitution and must be enjoined in Newark and all similarly situated school districts throughout the State.

FOURTH CAUSE OF ACTION
Civil Rights Act Violation

136. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

137. The New Jersey Civil Rights Act grants individuals the right to be free of deprivations by public officials of substantive rights secured by the laws or Constitution of New Jersey. *See* N.J.S.A. 10:6-2, *et seq.*

138. The New Jersey Constitution grants Plaintiffs and similarly situated students the substantive rights to a thorough and efficient education, equal protection under the law, and substantive due process.

139. By enforcing the quality-blind layoff statute, Defendants, acting under color of law, have violated the New Jersey Civil Rights Act. Therefore, Defendants' enforcement of the quality-blind layoff statute in Newark and similarly situated districts must be enjoined.

FIFTH CAUSE OF ACTION
Declaratory Judgment

140. Plaintiffs re-allege and incorporate by reference the preceding allegations in the foregoing paragraphs as if fully set forth here.

141. Plaintiffs seek relief under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 *et seq*. This act allows parties to sue for a judicial declaration in order to declare and settle the rights and obligations of the parties.

142. As alleged in the preceding counts and the general allegations above, the Education Clause of the New Jersey Constitution requires that the State provide a "thorough and efficient" education; Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law; and Article I, Paragraph 1 of the New Jersey Constitution protects individuals from the unwarranted deprivation of certain fundamental rights, including the right to an effective education.

143. Each of these constitutional rights is being and will in the future again be violated by the application of the LIFO statute in Newark and other similarly situated districts. The quality-blind layoff statute requires school districts conducting reductions-in-force to disregard quality in laying off teachers, instead mandating that these districts implement reductions-in-force based upon seniority alone. This policy has required and will require Newark and other similarly situated districts to retain ineffective and less-effective teachers, to the profound detriment of the Plaintiffs and other schoolchildren in those districts.

144. The quality-blind layoff statute deprives Plaintiffs and other similarly situated children in Newark and other similarly situated districts of their fundamental right to a thorough and efficient education, equal protection of the law, and the fundamental right to an education. Plaintiffs therefore seek a declaratory judgment that the application of the LIFO statute is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE. Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants, as follows:

145. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Education Clause of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

146. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Equal Protection principles of Article I, Paragraph 1 of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

147. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates fundamental rights protected by the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State, and deprives children within those districts of their due process rights;

148. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, as applied to Newark and similarly situated school districts throughout the State, violates the New Jersey Civil Rights Act;

149. Permanently enjoining Defendants from enforcing the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, or any law or policy substantially similar to this statute in Newark and any similarly situated school district throughout the State;

150. Awarding Plaintiffs legal fees and costs of suit, under the New Jersey Civil Rights Act and otherwise; and

151. Awarding any and all such other relief as deemed just and warranted.

Dated: November 1, 2016

By: _____

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Of Counsel; Moving for Pro Hac Vice Admission

RULE 4:5-1 CERTIFICATION

I. William H. Trousdale, Esq., certify pursuant to Rule 4:5-1 that, to the best of my knowledge, information, and belief, the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, other than the Abbott v. Burke litigation (078257), and that no other parties should be joined in this action pursuant to Rule 4:28.

Dated: November 1, 2016

By: _____

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EXHIBIT
B

2006 WL 3720308
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Chancery Division,
Bergen County.

Woo Seung LEE,
v.
TELSON ELECTRONICS U.S.A., INC., Young Il Kim, Dong Yun Kim, Jae Hyun Kim, Jung Sung Kim, Keyung Soon Kim, John Does (fictitious names 1-50), and XYZ Companies (fictitious names 1-50), Defendant(s).

Argued Dec. 15, 2006.
|
Decided Dec. 15, 2006.

Attorneys and Law Firms

Arthur O'Leary, Esq., appearing on behalf of the Plaintiff, Woo Seung Lee. (Kim & Bae, P.C.).

Joseph M. Cerra, Esq., appearing on behalf of the Defendants, Telson Electronics U.S.A., Inc., and Young Il Kim, Responding Defendants. (Forman Holt & Eliades, LLC.).

PETER E. DOYNE, P.J.S.C.

Introduction

*1 Before the court are four separate applications. The defendant, Telson Electronics U.S.A., Inc. and other named individual defendants ("Telson U.S.A." when referenced individually, "defendants" when referenced collectively), have brought two motions; the first motion seeks to dismiss the complaint with prejudice, and the second motion seeks to quash a subpoena served upon H.T. Woo, C.P.A. ("Woo"), Telson U.S.A.'s accountant.

Plaintiff, Woo Seung Lee ("Lee" or "plaintiff"), by way of his counsel, has filed two cross motions; to compel the deposition of Woo, a non-party witness, and to disqualify Joseph M. Cerra, Esq. ("Cerra") and his law firm, Forman Holt & Eliades, LLC. ("the law firm"), from representing Woo and the defendants.

Counsel requested oral argument. Even though the matter addressed discovery concerns, the court honored counsels' requests. *R.* 1:6-2.

The court incorporates herewith as if set forth at length its prior written decision rendered on June 9, 2006 for procedural and factual background.

Unfortunately, the plaintiff's applications are not only procedurally and substantively defective, but have seen fit to unnecessarily and improperly accuse defendants' counsel of unethical conduct. Strikingly, the unethical conduct alleged is defendants' counsel's insistence plaintiff comply with prior court orders.

Procedural History

A verified complaint and a request for an order to show cause was filed on behalf of the plaintiff on February 16, 2006. Accompanying the complaint was a certification of Lee. The court met with counsel on or about May 11, 2006 for purposes of a case management conference. At that time counsel were advised the court would make every effort to bring the matter to conclusion within the one year anniversary of the filing of the complaint. After discussion with counsel a case management order was entered. The specifics of the discovery deadlines were constructed by counsel after the court established a discovery end date of December 1, 2007. Trial was then scheduled for February 26, 2007 so as to afford counsel the opportunity to timely file summary judgment motions in advance of the scheduled trial date. See amendment to *R.* 4:46-1. The case management order provided all depositions were to be completed by November 1, 2006. The court has addressed multiple motions prosecuted by the defendants to dismiss the case for various procedural and substantive reasons. All such requests were denied.

Under cover of November 2, 2006 plaintiff's counsel authored a letter to the court requesting a ninety (90) day discovery extension and an adjournment of the trial date due to outstanding discovery difficulties. On November 6, 2006 the court responded to that request and provided there would be no discovery extensions and the trial would remain as heretofore scheduled. At counsels' request the court conducted a telephone conference on November 6, 2006. The conference call was conducted

at the request of counsel to address various discovery difficulties. At that time it was agreed plaintiff's counsel would produce the plaintiff for his deposition within seven (7) days of the date of the conference call, and defendants' counsel graciously agreed if the same was accomplished, the defense would withdraw its objection to untimely discovery. This concession must be reviewed in light of the defendants' persistent and unsuccessful efforts to depose the plaintiff.

***2** On September 8, 2006 defendants' counsel issued a deposition notice scheduling the deposition of the plaintiff for September 25, 2006. Plaintiff's counsel requested an adjournment and requested Lee's deposition be conducted by telephone as the plaintiff resides, and is a practicing attorney, in Korea. Defendants' counsel agreed to the same and, thereafter, made repeated requests for a date acceptable to the plaintiff. Despite these repeated requests, plaintiff's counsel and/or the plaintiff remained intransigent and refused to provide a date leading to the conference call with the court heretofore referenced. Subsequent to that call, plaintiff's deposition was scheduled for November 13, 2006 to be conducted telephonically beginning at 7:00 p.m. Such is a reflection of the reasonable position adopted by defendants' counsel.

On November 13th plaintiff's counsel cancelled the plaintiff's deposition due to a purported emergency (for which there is no competent certification). Augmenting the difficulties, plaintiff refused to provide a re-scheduled date and offered, anomalously, another representative "in lieu of" Lee. Curiously, plaintiff wishes to assert the suit was brought by Lee in his representative capacity and, therefore, he has no special knowledge of the facts, and a Mr. Kim, the manager of the bankruptcy, should be an acceptable replacement for Lee. This somewhat remarkable position is offered even though Lee provided the verification in support of the complaint and the request for an order to show cause, and when Mr. Kim had not even been listed as a witness in conformity with the case management order, paragraph 2, heretofore referenced.

Analysis

It is beyond peradventure that the defendants have the right to depose the party plaintiff. It does not appear hyperbolic for the defendants to assert the plaintiff is a pivotal witness separate and apart from defendants' counsel's assertion the amended complaint and discovery adduced to date provide scant specificity in support of the plaintiff's alleged causes of action. Conversely, the plaintiff's suggestion the plaintiff has "no special vantage point" verges on the sublime.

Although the defendants implore the court to dismiss the matter with prejudice, and that application comes perilously close to success, the court is satisfied the most drastic remedy is not yet necessary. *See, Abtrax Pharmaceuticals, Inc. v. Elkin-Sinn,* Inc ., 139 N.J. 499, 514 (1995). Dismissal without prejudice, though, is clearly warranted. See *R.* 4:23-4; *R.* 4:23-2(b)(3); *Valez v. Williams,* 206 WL. 1410023*4 (App.Div.2006) ("[d]ismissal of a complaint "with" or "without prejudice" is specifically included as an available sanction" under *R.* 4:23-2(b)(3)).

The keys to the kingdom shall remain with the plaintiff. If he chooses to forthwith submit to his deposition, sought since September, the court shall expect defendants' counsel shall comply with its overture to waive strict compliance with the case management order.

***3** The second series of applications concerns the plaintiff's subpoena served upon Woo. In order to properly evaluate this application it is necessary to set forth, as has plaintiff's counsel, "[p]rior to September 2006, certain documents were produced by defendants, related to the matters in controversy in this law suit. These documents had been prepared by Mr. Hee Taek Woo, the defendant's [sic] Accountant." Defendants' brief dated December 6, 2006, pages 1 and 2. Somewhat remarkably, plaintiff's counsel then goes on to assert:

> After several in-depth reviews of the documents, it became apparent that Mr. Woo's deposition was necessary to interpret these documents.

Although the date of production is not set forth, there is no explanation offered as to why Woo's deposition was not sought from sometime prior to September 2006 until November 14, 2006 when the subpoena was issued. Further, the subpoena was issued after the court has indicated specifically it would not extend the discovery deadlines unless counsel could mutually agree to the same. The same is all the more anomalous in light of the plaintiff's contention Woo is a "critical witness." Of course, if Woo was as "critical" as suggested, one is

compelled to wonder why the subpoena was untimely issued.

As such, defendants' motion to quash the subpoena is granted and the plaintiff's cross motion to compel the deposition is denied.

The plaintiff's contention discovery was unnecessarily delayed due to defendants' repeated motions to dismiss fails to consider no stay of discovery was ever issued, nor were the parties' right to conduct discovery from the inception of the matter ever constrained or limited.

Lastly, is the plaintiff's request to disqualify Cerra and the law firm. Initially, the court is satisfied the motion is not in conformity with *R.* 1:6-3(b)(a cross motion may be filed and served only if it relates to the subject matter of the original motion). Particularly in a matter as sensitive as disqualification, it is neither in the interest of justice nor fair to the parties to permit such an application on a truncated schedule. This is so when it appears plaintiff is seeking the disqualification of Cerra and the law firm, not only from representing Woo, but also from representing the named defendants in a matter with a scheduled trial date looming.

The somewhat astounding allegation Cerra has wrongfully obstructed discovery in violation of RPC 3.4(a) premised upon the defendants' refusal to consent to extensions of deadlines set forth in the case management order is shocking. Suffice it to say, counsel's reliance upon an order appears to be a tenuous basis upon which to base accusations of ethical improprieties. The suggestion Cerra's representation of Woo violates the appearance of conflict rule is particularly curious as that rule was abandoned as of January 1, 2004.

In light of the above, the court need not determine whether Woo was in the litigation control group as defined by the case law in RPC 1.13.

Conclusion

***4** The defendants' notice of motion to dismiss the complaint with prejudice is denied, but the complaint shall be dismissed without prejudice subject to restoration if the plaintiff promptly is produced for his deposition.

Plaintiff's motion to compel the deposition of Woo is denied, and defendants' motion to quash the subpoena of Woo is granted.

Lastly, plaintiff's cross notice of motion to disqualify Cerra and his law firm is denied.

Trial shall remain as heretofore scheduled.

Defendants' counsel shall prepare and submit the appropriate order pursuant to the five day rule.

All Citations

Not Reported in A.2d, 2006 WL 3720308

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