UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JONATHAN N. WATERS	)	Case No. 14 CV 1704
	)	
Plaintiff,	)	Judge James L. Graham
	)	
v.	)	Magistrate Judge Terence P. Kemp
	)	
MICHAEL V. DRAKE, M.D. et al,	)	
	)	
Defendants.	)	

PLAINTIFF JONATHAN N. WATERS'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY

I. INTRODUCTION

The Defendants seek to stop this case in its tracks until resolution of their *Motion for Judgment on the Pleadings* (the "MJOP") (Doc. # 9). But this Court has repeatedly recognized that the filing of a potentially case-dispositive motion is an insufficient reason to stay discovery, with very limited exceptions that Defendants cannot meet. Defendants' subjective and self-interested belief that the case should be decided by their MJOP rather than on facts revealed by discovery, is insufficient reason to prejudge that motion. Nor does the anticipated burden of discovery insulate high-level OSU officials who regularly interacted with Mr. Waters, and who have discoverable knowledge of facts directly relevant to the case. And, any privacy concerns can be met through a protective order or similar means.

In short, Defendants fail to show grounds for the Court to ignore its general rule that the filing of a potentially case-dispositive motion is insufficient to stay discovery. The Court should deny a stay, and the case should proceed expeditiously, to restore Mr. Waters' reputation and career.

II. BACKGROUND

Plaintiff Jonathan N. Waters ("Waters") filed a complaint alleging various claims stemming from his termination as Director of The Ohio State Marching Band (the "Band"), which has resulted in the destruction of his reputation and career. *See Complaint* (Doc. #1), ¶12. Defendants responded with a 377-page Answer, brimming with factual distortions and material omissions. The deeply-flawed claims pled in the Answer form the basis of the MJOP. *See Answer* (Doc. # 8); MJOP (Doc. # 9). The parties completed their briefing on the MJOP on December 4, 2014. *See Defendants' Reply to Defendants' MJOP* (Doc. #13). Judge Graham has scheduled a hearing for March 5, 2015.[1] In the interim, Defendants seek to halt discovery until Judge Graham issues his ruling.

III. LAW AND ARGUMENT

A. <u>Discovery Stays Are Disfavored By This Court</u>

Staying discovery in this case would cause needless delay and require the Court to prejudge the merits of the MJOP. This Court has repeatedly recognized that simply filing a motion to dismiss or a motion for judgment on the pleadings is alone insufficient to stay discovery. *See*, *e.g.*, *Ohio Bell Telephone Co., Inc. v. Global NAPs Ohio, Inc.*, No. 2:06-cv-0549, 2008 WL 641252, *1 (S.D. Ohio Mar. 4, 2008) (Kemp, J.) ("[O]ne argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has

[1] Judge Graham's chambers has already been apprised that Mr. Waters will move to continue the hearing until April 6, 2014 to accommodate one of his attorneys' scheduling conflicts.

already filed, a case-dispositive motion"); *Nabi v. Biopharmaceuticals v. Roxane Laboratories, Inc*., No. 2:05-cv-0889, 2006 WL 3007430, *2 (S.D. Ohio Oct. 20, 2006) (Kemp, J.) (same); *Boddie v. PNC Bank, NA*, No. 2:12-cv-158, 2012 WL 4088683, *2 (S.D.Ohio Sept. 17, 2012) (Kemp, J.) (same); *Osman v. Mission Essential Personnel*, LLC, No. 2:11-cv-577, 2012 WL 1831706, *1 (S.D. Ohio May 18, 2012) (Kemp, J.) (same); *Williams v. New Day Farms, LLC,* No. 2:10-cv-0394, 2010 WL 3522297, *1 (S.D.Ohio Sept. 7, 2010) (Kemp, J.) (same).

The Court's reasoning is twofold. First, the Federal Rules of Civil Procedure are intended to promote the "expeditious resolution of litigation." *Boddie*, 2012 WL 4088683 at *2 (internal citations omitted). In light of the frequency with which Rule 12(b)(6) and 12(c) motions are filed, the idea that such motions should automatically stay discovery "is directly at odds with the need for expeditious resolution of litigation." *Id.*, 2012 WL 4088683 at *2 (internal citations omitted). Such a rule would encourage the filing of frivolous, supposedly dispositive motions, for the sole purpose of delaying discovery, in direct conflict with the goals of the rules.

Second, as noted before, to stay of discovery for these reasons would require a court to prejudge a claimed dispositive motion's likelihood for success. According to this Court,

> This…circumvent[s] the procedures for resolution of such a motion. Although it is conceivable that a stay might be appropriate when the complaint [is] utterly frivolous, or filed merely in order to conduct a fishing expedition or for settlement value…a stay should not ordinarily be granted to a party who has filed a garden-variety [dispositive] motion.

Boddie, 2012 WL 4088683, at *2 (internal citations omitted).

There are two primary exceptions to this rule: (1) when the dispositive motion "raises an issue such as immunity from suit, which would be substantially vitiated absent a stay" and, (2) when "it is patent that the case lacks merit and will almost certainly be dismissed." *Id*. *See also*,

Shanks v. Honda of America Mfg., No. 2:08-cv-1059, 2:08-cv-1060, 2009 WL 2132621, *1 (S.D. Ohio July 10, 2009) (Kemp, J.) (noting the two exceptions and concluding, "[o]therwise, discovery should proceed while the motion to dismiss is pending…"). Neither applies here.

Defendants do not argue immunity from suit. Instead, their motion rests entirely on the second exception, as they argue that "[t]his case can, and should, be resolved on the legal grounds set forth in defendants' pending Motion for Judgment on the Pleadings" (Defendants' Motion to Stay Discovery, Doc. #15, p. 3). But Defendants' subjective, self-serving belief in the MJOP's merits falls far short of their burden. It cannot be seriously argued – and Defendants make no serious effort to show – that it is "patent that the case lacks merit and will almost certainly be dismissed." Indeed, the length – 48 pages – and complexity of the MJOP vividly portray the seriousness and risk that Defendants attach to the *Complaint*. If anything, and for the reasons explained in *Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings* (Doc #11), the MJOP will likely be denied. Furthermore, as in *Boddie*, prejudging the MJOP in the context of a discovery dispute would "circumvent the procedures for resolution of [that] motion." *Boddie*, 2012 WL 4088683, at *2. For these reasons, discovery cannot be stayed simply because of Defendants' subjective, self-serving belief in the merits of their MJOP.

B. <u>The Burden Of The Contemplated Discovery Does Not Outweigh Its Benefits</u>

Defendants also argue for a stay because the burden of contemplated discovery supposedly outweighs its benefits. This, too, is insufficient reason to halt discovery.

In arguing that a stay will not prejudice Mr. Waters, Defendants make short shrift of his rights, while elevating their own interests to exalted status. Defendants ignore the damage they have inflicted on Mr. Waters' reputation and career. They also ignore the negative effect that

delay occasioned by the stay may have on the availability and reliability of important evidence. But whether Defendants like it or not, Mr. Waters has a right to an expeditious and just resolution of his claims.

Further, Defendants ignore that all discovery imposes some burden on all of the parties. But to justify staying discovery, Defendants must demonstrate an "undue burden," by identifying the burden they would face, and explaining how that burden differs from that inherent in all discoveries. *See City of Lancaster v. Flagstar Bank, FSB*, No. 2:10-cv-01041, 2011 WL 1326280, *5 (S.D. Ohio Apr. 5, 2011) (Kemp, J.) (emphasis added) (noting that a stay of discovery is inappropriate if the party seeking the stay "makes no effort to detail the specific burdens it will face from the discovery in this case…[or] explain how the prejudice it would face is different from any other party that files a potentially case-dispositive motion"). Here, Defendants fail to demonstrate that Mr. Waters' anticipated discovery requests – neither served nor discussed with Defendants – will be unduly burdensome or otherwise objectionable.

Additionally, Defendants' argument that discovery will be financially burdensome is unpersuasive – and, indeed, surprising – in light of media reports that OSU has already spent nearly $700,000 on its investigation of the OSU Marching Band, independent of this litigation.[2] Having already paid that sum to lawyers and consultants to conduct a one-sided investigation of the Band, it is disappointing to see Defendants now plead poverty. The files, notes, interview reports, emails and other information generated during the investigation already conducted should be readily available. If anything, a delay in discovery could create management challenges and add unnecessary costs as memories fade and documents get refiled. *See, e.g., Newsome v. City of Newark*, No. 13-6234, 2014 WL 1767562, *1 (D. N.J. May 2, 2104)

[2] *See* the January 23, 2015 Columbus Dispatch, *Ohio State Bills for Band Investigation and Defense Pushing $1 million,* http://www.dispatch.com/content/stories/local/2015/01/23/Ohio-State-legal-defense-of-band-pushing-$1-million.html

(prolonged or disrupted discovery "can create management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems").

Further, OSU cannot avoid discovery because potential witnesses are busy people. Mr. Waters occupied a high-profile position as the Director of The Ohio State University Marching Band, wherein he regularly interacted with high-level OSU officials, many of whom have direct, discoverable knowledge of facts relevant to the case. Indeed, counsel for Defendants acknowledged at the Case Management Conference on December 9, 2014 that the apex doctrine shields neither President Drake nor Provost Steinmetz from deposition. *See, e.g., Libertarian Party of Ohio v. Husted,* 302 F.R.D. 472, 475 (S.D. Ohio 2014) (Kemp, J.) ("The general rule which applies to these facts is that '[u]nder the liberal discovery principles of the Federal Rules' a party is 'required to carry a heavy burden' to show why a properly-noticed deposition should not go forward"). The operational responsibilities of *bona fide* witnesses, no matter how significant, does not insulate them from discovery.

Mr. Waters's counsel will be sensitive to the witnesses' busy schedules, but those schedules do not warrant stopping the case in its tracks, especially because Defendants cannot satisfy either of the exceptions to the general rule that discovery should proceed. In any case, depositions and other discovery directed to OSU officials can be conducted in ways that minimize interference with their schedules and OSU operations. If scheduling issues arise, Defendants may raise with the Court at the appropriate time. *See Boddie*, 2012 WL 4088683 at *3 (finding the fact that police officers were potential witnesses in the case was not a weighty favor in determining whether to stay discovery because the officers' schedules could be accommodated).

Finally, any Title IX privacy concerns can be alleviated through means which do not entail delay, such a protective order. Such privacy concerns do not warrant limiting Mr. Waters's right to discover information relevant to his case.

IV. CONCLUSION

For the foregoing reasons, Mr. Waters respectfully requests that Defendants' Motion to Stay Discovery be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on February 2, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Katherine S. Decker
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