

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO**

STACIE RAY,	)	
<i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Case No. 2:18-cv-00272
	)	
v.	)	
	)	
LANCE HIMES,	)	Judge: Michael Watson
<i>et al.</i> ,	)	
	)	Magistrate Judge: Chelsey Vascura
Defendants.	)	
	)	

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**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO STAY DISCOVERY**

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**INTRODUCTION**

A stay of discovery should not be granted simply because Defendants filed a motion to dismiss—and indeed, to grant such a stay would be a deviation from this Court’s normal practice. Defendants present this Court with no reason to make such an exception here, other than Defendants’ own desire to frustrate this case’s progress at every turn, and to avoid the routine costs and efforts of litigation.

Defendants’ delays in this action have already been considerable. The Complaint was filed on March 29, 2018. At Defendants’ request, Plaintiffs agreed to a twenty-one day extension (ECF No. 12), and then an additional seventeen-day extension (ECF No. 16), for Defendants to respond to the Complaint. At the pretrial conference call on July 18, Defendants demanded a year-long discovery period for a case that they now concede is “primarily legal in nature[.]” (ECF No. 21 at 1.) Plaintiffs served written discovery requests on July 17, 2018. Defendants have refused to even exchange initial disclosures. (ECF No. 19 at 2.)

The Motion to Stay Discovery (ECF No. 21, the “Motion”) relies heavily on the assumption that Defendants’ pending Motion to Dismiss (ECF No. 18) will be granted in whole or in part, rendering discovery unnecessary. Yet, as Magistrate Vascura already noted during the pretrial conference call, stays of discovery on that basis are disfavored and highly unusual. Neither Defendants’ own belief in the merits of their Motion to Dismiss, nor their generalized complaints about the costs that all defendants encounter, is a basis for a stay. In the meantime, Plaintiffs and other people born in Ohio are suffering tangible harms with each passing day as a result of the ongoing violation of their constitutional rights. Further delay would unquestionably result in prejudice to Plaintiffs and to the public.

Defendants have failed to meet their burden to show a legitimate need for the stay and that Plaintiffs will not be harmed by further delay. The Motion should be denied.

### **LAW AND ARGUMENT**

As with any pause in civil proceedings, stays of discovery are not to be granted lightly, “since a party has a right to a determination of its rights and liabilities without undue delay.” *Ferrell v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-cv-447, 2005 U.S. Dist. LEXIS 25358, at \*7 (S.D. Ohio Oct. 24, 2005) (quoting *Ohio Envtl. Council v. U.S. Dist. Ct.*, 565 F.2d 393, 396 (6th Cir. 1977)). To be entitled to a stay, a movant must demonstrate both (1) a need for delay and (2) a lack of prejudice to both the nonmoving party and the public. *See, e.g., Dummen Na, Inc. v. Proven Winners N. Am. LLC*, No. 2:16-cv-00709, 2017 U.S. Dist. LEXIS 217181, at \*5 (S.D. Ohio May 3, 2017). As discussed below, Defendants have shown neither.

#### **I. Defendants Have Failed To Demonstrate Any Need For A Stay.**

##### **A. Defendants’ Pending Motion to Dismiss Does Not Justify a Stay.**

Though presented in the Motion under the guise of “judicial economy,” Defendants’ core argument for a stay is that they hope their Motion to Dismiss will succeed in whole or in part,

rendering any discovery eventually unnecessary. (*See* Motion at 3.) Defendants cite no precedent in this district for such a proposition—nor can they, as precedent in this Court overwhelmingly rejects their precise argument: “one argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has already filed, a motion to dismiss for failure to state a claim under Rule 12(b)(6).” *Williams v. New Day Farms, LLC*, No. 2:10-cv-0394, 2010 U.S. Dist. LEXIS 98934, at \*3 (S.D. Ohio Sept. 7, 2010). As this Court has explained, to stay discovery on the basis of a pending motion to dismiss “would require the court to make a preliminary finding of the likelihood of success on the motion to dismiss. This would circumvent the procedures for resolution of such a motion.” *Boddie v. PNC Bank, NA*, No. 2:12-cv-158, 2012 U.S. Dist. LEXIS 132195, at \*4-5 (S.D. Ohio Sept. 17, 2012) (quoting *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990)). For that reason, “a stay should not ordinarily be granted to a party who has filed a garden-variety Rule 12(b)(6) motion.” *Williams*, 2010 U.S. Dist. LEXIS 98934, at \*5.

Though Defendants spend a significant portion of their Motion rehashing the arguments in their Motion to Dismiss (*see* Motion at 2), it is well-settled in this Court and elsewhere that a party’s perception of the strength of its own motion to dismiss is irrelevant to the question of whether to grant a stay. *See, e.g., Dummen*, 2017 U.S. Dist. LEXIS 217181, at \*4 (“it is unpersuasive for a party to rely on the strength of the motion to dismiss in moving for a motion to stay, unless the complaint is clearly frivolous”) (internal citations omitted); *Ashland Hosp. Corp. v. RLI Ins. Co.*, No. 0:13-143-DLB, 2014 U.S. Dist. LEXIS 168873, at \*8 (E.D. Ky. Dec. 5, 2014) (similar). Defendants have presented no extraordinary circumstance warranting an exception here.

**B. Defendants Have Raised No Preliminary Legal Issues to Warrant a Stay.**

Defendants repeatedly assert, without elaborating, that the Motion should be granted because their pending Motion to Dismiss involves purely legal issues. (*E.g.*, Motion at 4.) But pure legal issues in a pending dispositive motion—a feature common to all properly briefed Rule 12(b)(6) motions—do not merit a stay of discovery. The only circumstances in which a motion to stay may be granted based on a pending dispositive motion are where the Court’s jurisdiction or a defendant’s immunity from suit are at issue. *See, e.g., Victoria's Secret Stores Brand Mgmt., Inc. v. Bob's Stores LLC*, No. 2:13-cv-1261, 2014 U.S. Dist. LEXIS 34503, 2014 WL 1045994, at \*6 (S.D. Ohio Mar. 17, 2014) (granting stay of merits discovery until court could resolve whether it had personal jurisdiction over defendant); *Williamson v. Recovery L.P.*, No. 2:06-CV-0292, 2010 U.S. Dist. LEXIS 19873, at \*2 (S.D. Ohio Feb. 10, 2012) (“unless the motion raises an issue such as immunity from suit, which would be substantially vitiated absent a stay ... a stay should not ordinarily be granted”); *Baker v. Swift Pork Co.*, No. 3:15-CV-663-JHM, 2015 U.S. Dist. LEXIS 152235, at \*3-4 (W.D. Ky. Nov. 10, 2015) (refusing to stay discovery where pending dispositive motion did “not present a clear, discrete issue such as immunity from suit or the running of a statute of limitation that can be easily decided”).

This case does not involve any of the preliminary issues that might occasionally merit a stay of discovery. *See Di Yanni v. Walnut Twp. Bd. of Educ.*, No. 2:06-cv-0151, 2006 U.S. Dist. LEXIS 72363 (S.D. Ohio Oct. 4, 2006) (denying motion to stay based on pending motion for judgment on the pleadings). In *Di Yanni*, the Court refused to enter a stay despite a pending motion for judgment on the pleadings where both parties presented “legal arguments ... with respect to the viability of a § 1983 claim and the state law negligence claim.” *Id.* at \*5. The Court noted that the legal issues did not merit a stay because they were not of a threshold nature, like immunity, nor of the type easily evaluated, like a statute of limitation defense. *Id.* at \*5-6.

Defendants have not raised any such issue. As in *Di Yanni*, the parties here have presented legal arguments related to the claims (*see* ECF Nos. 19 and 23), and the parties' extensive briefing on the issues demonstrates those issues' complexity. In fact, Defendants concede that "it is possible that one or more claims survive the Motion." (Motion at 3.) A stay is inappropriate in this context. *See United States ex rel. Am. Sys. Consulting, Inc. v. Mantech Advanced Sys. Int'l*, No. 2:08-CV-733, 2011 U.S. Dist. LEXIS 47632, at \*11 (S.D. Ohio May 2, 2011) (rejecting movant's argument that its pending motion to dismiss involved only "discrete legal issues," where the alleged jurisdictional issues were not as clear-cut as the movant suggested).

**C. Defendants' Desire to Avoid Litigation Expenses Does Not Warrant a Stay.**

"[C]onclusory complaints about the cost of discovery, without more, do not warrant a stay of discovery in this case." *United States ex rel. Am. Sys. Consulting, Inc.*, 2011 U.S. Dist. LEXIS 47632, at \*11-12 (denying motion to stay). *See also W. Va.-Ohio Valley Area I.B.E.W. Welfare Fund v. Am. Tobacco Co.*, No. 2:97-0978, 1999 U.S. Dist. LEXIS 23226, at \*10 (S.D. W. Va. May 24, 1999) (denying motion to stay scheduling because "the desire to avoid customary litigation expenses neither amounts to good cause nor warrants a premature end to remaining discovery or other intervening deadlines").

Judicial economy and party resources are no more at stake here than in any other action. *See, e.g., Dummen*, 2017 U.S. Dist. LEXIS 217181, at \*2-4 (rejecting a stay requested on the basis of "judicial economy"). If routine costs of discovery alone could justify a stay, stays would be automatic upon the filing of a dispositive motion; obviously, they are not. *See Griffiths v. Ohio Farmers Ins. Co.*, No. 1:09-CV-1011, 2010 U.S. Dist. LEXIS 69249, at \*7 (N.D. Ohio July 12, 2010). Defendants have presented no authority to suggest that their own routine costs weigh more heavily than other litigants' costs, and so have provided no reason for a stay on that basis.

**II. The Delay Caused By A Stay Will Harm The Plaintiffs and the Public.**

On the issue of prejudice, the Motion relies on Defendants' conclusory assurance that Plaintiffs will not be prejudiced "because the legal issues in this case are unlikely to be altered by fact discovery." (Motion at 4.) That assertion is inadequate to meet Defendants' burden for two reasons. First, as noted above, the "pure legal issues" in this case are not of the simple, preliminary nature that might warrant a stay in discovery. (*Id.*) Second, the Plaintiffs and members of the public who are similarly situated are suffering very real and ongoing harm, harm that will continue until the day that relief in this case is granted. A stay of discovery will necessarily set back this date, prolonging their harm.

**A. Plaintiffs Are Entitled to Discovery on Relevant Factual Issues.**

Defendants argue that Plaintiffs will not be harmed by a stay because their Motion to Dismiss is "based on pure legal issues." (*Id.*) Again, Defendants are incorrect that the mere filing of a motion to dismiss based on legal issues warrants a stay. If that were true, granting a stay except in the most clear-cut and limited contexts would be tantamount to prematurely ruling on the motion to dismiss itself. *Supra.*

The cases on which Defendants rely are inapposite. In *MacConnell*, a stay was granted because the movant's motion to dismiss was premised on the movant's immunity under Ohio law. *MacConnell v. Plummer*, No. 3:13cv00034, 2013 U.S. Dist. LEXIS 96388, at \*4 (S.D. Ohio July 10, 2013). In *Brown*, a stay was granted because the defendants' motion to dismiss was premised on *res judicata* and was unrelated to the merits of the claims. *Brown v. Danson Inc.*, No. 1:11-cv-820, 2012 U.S. Dist. LEXIS 117631, at \*6 (S.D. Ohio Aug. 21, 2012). In *Muzquiz*, the Eastern District of Michigan granted a stay because the plaintiff's claims were barred by clear precedent, Michigan law, and the fact that the defendant was not a state actor.

*Muzquiz v. W.A. Foote Mem'l Hosp.*, 70 F.3d 422, 430 (6th Cir. 1995) (declining to find abuse of discretion).

In *Am. Sys. Consulting*, this Court rejected the argument that discovery is rendered unnecessary merely because the pending motion to dismiss supposedly only involved “discrete legal issues.” *United States ex rel. Am. Sys. Consulting, Inc.*, 2011 U.S. Dist. LEXIS 47632, at \*10. The Court reasoned that whether a public disclosure of alleged fraud occurred and whether a party qualified as an “original source” pursuant to a statute were not discrete legal issues and did not warrant a stay in discovery. Similarly, a brief review of the parties’ arguments shows that discovery is appropriate here, to explore the precise nature, underpinnings, and impact of Defendants’ birth certificate policy, as well as Plaintiffs’ factual allegations that support their constitutional claims. (*See, e.g.*, ECF No. 23 at 9-15 (discussing factual allegations that the Defendants’ birth certificate policy violates Plaintiffs’ privacy); 15 (characterization of birth certificates); and 18-19 (whether the birth certificate policy puts Plaintiffs at risk of bodily harm).) Delaying that discovery unnecessarily will prejudice Plaintiffs. *Ferrell*, 2005 U.S. Dist. LEXIS 25358, at \*7.

**B. Further Delay Will Cause Harm to Plaintiffs and the Public.**

By focusing on spoliation,<sup>1</sup> Defendants completely ignore that Plaintiffs and other members of the public who are similarly situated would suffer serious ongoing harm during any delay in adjudicating their rights. (*E.g.*, ECF No. 1 at ¶¶ 54 (workplace harassment), 55, 85-87, 98 (public humiliation and hostility), 74 (unnecessary expense).) Plaintiffs’ allegations suffice to show prejudice. *E.g.*, *Nationwide Recovery, Inc.*, 2017 U.S. Dist. LEXIS 200549, at \*6 (denying

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<sup>1</sup> Defendants assert, without evidence or authority, that any concern about spoliation should be “virtually non-existent” with a state entity. (Motion at 4.) Plaintiffs submit that spoliation is no less of a concern in this case than in any other.

interim stay pending a motion to stay, where plaintiffs would continue suffering reputational harm and lost profits); *Dummen*, 2017 U.S. Dist. LEXIS 217181, at \*5 (ongoing patent infringement sufficient to show prejudice from a stay).

The fact that Defendants are allegedly impairing Plaintiffs' constitutional rights amplifies the need for expedience. *See, e.g., Ohio State Conference of N.A.A.C.P. v. Husted*, 786 F.3d 524, 560 (6th Cir. 2014) (upholding preliminary relief because "when constitutional rights are threatened or impaired, irreparable injury is presumed"). And "the public is always served when an individual's injuries are remedied in a timely manner." *Lenoir v. Ohio Dep't of Rehab. and Corr.*, No. 1:17-cv-586, 2018 WL 3057720, at \*2 (S.D. Ohio June 20, 2018) (internal citation omitted) (denying state's motion to stay in civil rights claim). Defendants' requested stay in discovery will result in ongoing, tangible harm to Plaintiffs and to the public. Moreover, any delay in commencing discovery in this action increases the risk that Defendants may eventually seek an otherwise-unnecessary extension of discovery, in order to ensure the full year of fact discovery that they have demanded in this case. Such an outcome would only compound the resultant prejudice to Plaintiffs.

**C. Plaintiffs Have Already Served Relevant Discovery Requests and Are Entitled to Timely Responses.**

Defendants' argument that the timing of their Motion precludes prejudice against Plaintiffs is meritless. They rely on *Victoria's Secret* for that assertion, but that case is inapplicable because, unlike here, "the moving party filed its motion before any discovery had been served and prior to the preliminary pretrial conference." *DSM Desotech, Inc. v. Momentive Specialty Chems., Inc.*, No. 2:15-cv-70, 2015 U.S. Dist. LEXIS 158632, at \*34 (S.D. Ohio Nov. 24, 2015) (discussing *Victoria's Secret*, 2014 U.S. Dist. LEXIS 34503). *DSM Desotech* rejected the moving party's reliance on *Victoria's Secret* and denied the motion to stay because discovery

had already been served on the moving party. *Id.* The Court explained: “*Victoria’s Secret* simply illustrates that a trial court has broad discretion in deciding whether to stay discovery in a particular case.” *Id.* at \*34-35. Here, the Motion was filed after Defendants had already been served with Plaintiff’s first written discovery requests and after the initial conference with the Court, rendering *Victoria’s Secret* irrelevant. Defendants’ desire to stave off responses to those requests will indeed be unduly prejudicial to Plaintiffs. *See supra.*

### **CONCLUSION**

For the foregoing reasons, Defendants’ Motion to Stay Discovery should be denied.

Dated this 10th day of August, 2018.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2018, I electronically filed the foregoing with the Clerk of the Court for the for the U.S. District Court for the Southern District of Ohio using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

Respectfully submitted,

*/s/ Freda Levenson*

Freda Levenson (0045916)