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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN P. MORGAN,

Plaintiff,

v.

NO. CIV. S-09-2649 LKK/DAD

JANET NAPOLITANO, SECRETARY,  
U.S. DEPARTMENT OF HOMELAND  
SECURITY, IMMIGRATION AND  
CUSTOMS ENFORCEMENT, FEDERAL  
PROTECTIVE SERVICE,

Defendants.

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JOHN P. MORGAN,

Plaintiff,

v.

NO. CIV. S-12-1287 LKK/DAD

JANET NAPOLITANO, SECRETARY,  
U.S. DEPARTMENT OF HOMELAND  
SECURITY,

O R D E R

Defendants.

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This is an employment discrimination case against the Department of Homeland Security, with claims arising under Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"). Three motions came on

1 for hearing on October 1, 2012:

- 2 1. Defendant's motion to consolidate cases under Fed. R.
- 3 Civ. P. 42(a).<sup>1</sup>
- 4 2. Plaintiff's motion to amend the pretrial scheduling
- 5 order to extend the discovery deadline.
- 6 3. Defendant's motion to amend the pretrial scheduling
- 7 order to extend the discovery and law & motion
- 8 deadlines.

9 Having considered the matter, the Court hereby GRANTS  
10 defendant's motion to consolidate and DENIES both motions to amend  
11 the pretrial scheduling order as moot, for the reasons set forth  
12 below.

13 **I. BACKGROUND**

14 **A. Factual & Procedural Background re: Motion to Consolidate Cases**

15 On September 21, 2009, plaintiff filed Morgan v. Napolitano,  
16 case no. 2:09-cv-02649, an employment discrimination case against  
17 the Department of Homeland Security ("DHS") (Morgan I). On May 12,  
18 2012, plaintiff filed a second such case, Morgan v. Napolitano,  
19 case no. 2:12-cv-01287 (Morgan II). On May 15, 2012, the court  
20 entered a Related Case Order finding the cases related within the  
21 meaning of Local Rule 123(a). On July 30, 2012, the court ordered  
22 defendant to bring this motion to consolidate the cases.

23 The Fifth Amended Complaint in Morgan I (docket no. 56)  
24 alleges four causes of action: (1) retaliation for plaintiff's

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25 <sup>1</sup> Hereinafter, the term "Rule" refers to the applicable  
26 Federal Rule of Civil Procedure.

1 wife's role as an attorney representing DHS employees in  
2 discrimination claims against the agency; (2) retaliation for  
3 plaintiff's perceived aiding and abetting of his wife's  
4 representation of those employees; (3) retaliation for plaintiff's  
5 filing of discrimination claims on his own behalf, and his  
6 assistance to co-workers in also filing discrimination claims; and  
7 (4) age discrimination against plaintiff. Among the remedies  
8 plaintiff seeks in the Morgan I complaint are retroactive promotion  
9 to the position he was denied due to retaliation, back pay, and  
10 front pay.

11 The Morgan II complaint alleges the following facts not  
12 included in the Morgan I complaint:

- 13 • DHS allegedly removed plaintiff from federal service on  
14 January 6, 2009. Plaintiff's union invoked arbitration  
15 regarding the removal.
- 16 • By written decision dated July 31, 2009, the arbitrator  
17 denied the grievance and affirmed plaintiff's removal.
- 18 • Plaintiff then filed a request for review of the arbitrator's  
19 decision with the Merit Systems Protection Board ("MSPB").
- 20 • By final order dated April 13, 2012 ("MSPB Decision"), the  
21 MSPB affirmed two of the four charges against plaintiff and  
22 affirmed DHS's removal action.

23 (Morgan II docket no. 1 ¶¶ 7-11.)

24 In place of the fourth claim in the Morgan I complaint, for  
25 age discrimination, the Morgan II complaint seeks judicial review  
26 of the MSPB Decision. As an additional remedy, plaintiff seeks

1 retroactive restoration to his position with DHS. But in most  
2 substantive respects, the Morgan I and Morgan II complaints are  
3 identical.

4 **B. Factual & Procedural Background re: Motions to Extend Discovery**  
5 **and Law & Motion Deadlines**

6 On June 27, 2012, the court entered an order extending the  
7 discovery deadline in Morgan I from July 11, 2012 to September 11,  
8 2012. (Morgan I docket no. 90.) The court simultaneously extended  
9 the law & motion deadline to November 9, 2011, delayed the final  
10 pretrial conference to February 11, 2012, and postponed the  
11 commencement of trial to May 14, 2013. The parties jointly sought  
12 this extension due to an illness in counsel's family. (See Morgan  
13 I docket no. 89.)

14 Defendant now moves the court to further extend the discovery  
15 and law & motion deadlines, arguing good cause therefor. (Morgan  
16 I docket no. 108.) Plaintiff opposes this motion. (Morgan I docket  
17 no. 111.) Plaintiff separately moves to extend the discovery  
18 deadline, also arguing good cause. (Morgan I docket no. 109.)  
19 Plaintiff's motion is unopposed.

20 **II. STANDARD**

21 Rule 42(a) provides:

22 If actions before the court involve a common question of  
23 law or fact, the court may:

24 (1) join for hearing or trial any or all matters at  
issue in the actions;

25 (2) consolidate the actions; or

26 (3) issue any other orders to avoid unnecessary cost or

1 delay.

2 The court has broad power under this rule to consolidate  
3 cases. Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. of  
4 Cal., 877 F.2d. 777 (9th Cir. 1989). The moving party bears the  
5 burden of persuading the court that consolidation is warranted.  
6 Internet Law Library, Inc. v. Southridge Capital Management, LLC,  
7 208 F.R.D. 59, 61 (S.D.N.Y. 2002)

8 Under the most common standard adopted by federal courts in  
9 deciding motions to consolidate,

10 [t]he critical question [is] whether the specific risks  
11 of prejudice and possible confusion were overborne by  
12 the risk of inconsistent adjudications of common factual  
13 and legal issues, the burden on parties, witnesses and  
14 available judicial resources posed by multiple lawsuits,  
the length of time required to conclude multiple suits  
as against a single one, and the relative expense to all  
concerned of the single-trial, multiple-trial  
alternatives.

15 Arnold v. Eastern Airlines, 681 F.2d 186, 193 (4th Cir. 1982). See  
16 Charles Alan Wright & Arthur R. Miller, Federal Practice and  
17 Procedure § 2383 (3d. ed. 2012) (discussing this standard with  
18 approval). Ultimately, considerations of convenience and economy  
19 must yield to a paramount concern for a fair and impartial trial.  
20 Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990).

### 21 **III. ANALYSIS**

22 There is little question that nearly every factor weighs in  
23 favor of consolidating Morgan I and Morgan II. The facts alleged  
24 in the two complaints are virtually identical; Morgan II simply  
25 adds details about plaintiff's subsequent termination and his  
26 exhaustion of administrative remedies. The legal issues are also

1 nearly identical; Morgan II merely pleads additional remedies  
2 stemming from plaintiff's termination, adds a claim for review of  
3 the MSPB Decision, and includes a reference in the Third Claim for  
4 Relief to assisting one Michael Conrad in making a discrimination  
5 complaint. Two trials would therefore present a significant risk  
6 of inconsistent verdicts.<sup>2</sup>

7         Given the factual and legal identities between the matters,  
8 a second lawsuit would also mean a tremendously duplicative  
9 expenditure of effort and resources by the parties, the witnesses,  
10 and the court. This is especially true if, as defendant claims,  
11 "[m]ost of the witnesses are from outside the Sacramento area,  
12 including witnesses in Washington DC, Chicago, Denver, Oregon,  
13 southern California and San Francisco." (Reply, docket no. 112,  
14 p.4.) There seems little merit in requiring these far-flung  
15 individuals to testify at a second trial on the termination issues  
16 raised in Morgan II.

17         Plaintiff also argues that the court's review of the MSPB  
18 Decision in Morgan II would prejudice the jury as to his remaining  
19 claims. He appears concerned that the court may uphold the MSPB  
20 Decision, e.g., on a motion for summary judgment, and that this  
21 decision would then be communicated to the jury at trial. This  
22 concern can be properly addressed by bifurcating plaintiff's cause  
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24         <sup>2</sup> While it is possible, as plaintiff argues, that many of the  
25 issues in Morgan II could be disposed of through claim preclusion  
26 and issue preclusion, any such efficiency gains would undoubtedly  
be outweighed by the costs of maintaining a second nearly-identical  
action.

1 of action for review of the MSPB Decision, and postponing  
2 consideration of this cause of action until after the remaining  
3 issues in this case are decided.

4 Plaintiff's only meritorious argument is that allowing  
5 additional discovery to address the new factual and legal matter  
6 pleaded in Morgan II will further delay trial. Three years have  
7 passed since plaintiff filed Morgan I, and trial is not scheduled  
8 to begin until May 14, 2013. If the cases are consolidated, trial  
9 will be delayed even further. Still, a consolidated trial will take  
10 place sooner than a standalone Morgan II trial would. Given that  
11 plaintiff must be reinstated (a remedy he seeks in Morgan II)  
12 before he can be promoted (a remedy he seeks in Morgan I), it seems  
13 prudent to try the cases together despite the unfortunate delay.

14 The court therefore grants defendant's motion to consolidate  
15 Morgan I and Morgan II. Consolidating these cases will require a  
16 new status conference to set discovery and law & motion deadlines,  
17 and dates for the final pretrial conference and trial. Accordingly,  
18 the court will vacate the existing status (pretrial scheduling)  
19 order, and set a new status conference. The effect will be to  
20 vacate the current discovery and law & motion deadlines, rendering  
21 the parties' respective motions to amend the pretrial scheduling  
22 order moot. The court urges the parties to take advantage of this  
23 one-time "get out of jail free" card and complete discovery. It is  
24 exceedingly unlikely that the court will grant any further  
25 extensions.

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1 **IV. CONCLUSION**

2 The court hereby orders as follows:

3 [1] Morgan v. Napolitano, case no. 2:09-cv-02649, and  
4 Morgan v. Napolitano, case no. 2:12-cv-01287, are hereby  
5 CONSOLIDATED.

6 [2] The complaint currently filed in case  
7 no. 2:12-cv-01287 (docket no. 1) shall become the  
8 operative complaint in the consolidated action.

9 [3] Plaintiff is granted leave to file an amended  
10 complaint within seven (7) days of entry of this order  
11 solely to allege an additional cause of action under the  
12 Age Discrimination in Employment Act (currently pleaded  
13 in the Fifth Amended Complaint in case no. 2:09-cv-02649  
14 (docket no. 57), but not pleaded in the complaint in  
15 case no. 2:12-cv-01287 (docket no. 1)).

16 [4] Defendant shall file a response to the consolidated  
17 complaint (whether amended by plaintiff or not) within  
18 twenty-one (21) days of entry of this order. Any motion  
19 filed by defendant under Fed. R. Civ. P. 12(b)(6) in  
20 response to the consolidated complaint may only address  
21 new matter pleaded in the consolidated complaint and not  
22 pleaded in the Fifth Amended Complaint currently filed  
23 in case no. 2:09-cv-02649 (docket no. 57).

24 [5] Plaintiff's cause of action for judicial review of  
25 the Merit Systems Protection Board order dated April 13,  
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2012 shall be tried to the court separately following trial on all other causes of action herein. The parties may not refer to the proceedings that led to this order, or the order itself, in any proceedings before a jury herein.


[6] Plaintiff's and defendant's motions to amend the status (pretrial scheduling) order currently in effect in case no. 2:09-cv-02649 (docket no. 68) are DENIED as moot.

[7] The status (pretrial scheduling) order currently in effect in case no. 2:09-cv-02649 (docket no. 68) is VACATED.

[8] A status (pretrial scheduling) conference is set for November 13, 2013 at 11:00 a.m. The parties shall file status reports no later than 14 days before the status conference.

IT IS SO ORDERED.

DATED: October 3, 2012.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT