

EXHIBIT C



LEXSEE 2007 U.S. DIST. LEXIS 44341

**ASHTON R. O'DWYER, JR., on his own behalf and on behalf of all heirs survivors,
relatives and beneficiaries of Emma De Lesseps Richardson (widow of Rudolph T.
O'Dwyer, Sr.) and Lavenia Fayard (widow of George L. O'Dwyer, Sr.) versus
UNITED STATES OF AMERICA, ET AL**

CIVIL ACTION NO. 06-10811 SECTION "T"

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA**

2007 U.S. Dist. LEXIS 44341

June 19, 2007, Decided

June 19, 2007, Filed

SUBSEQUENT HISTORY: Objection sustained by, Motion granted by, Motion denied by, Motion to strike denied by, Objection overruled by, Stay granted by *O'Dwyer v. United States, 2007 U.S. Dist. LEXIS 65360 (E.D. La., Aug. 31, 2007)*

PRIOR HISTORY: *Abrams v. United States Dep't of Treasury, 2007 U.S. App. LEXIS 13695 (5th Cir. Tex., June 11, 2007)*

COUNSEL: [*1] For Ashton R. O'Dwyer, Jr. on his own behalf and on behalf of all heirs, survivors, relatives and beneficiaries of Emma De Lesseps Richardson (widow of Rudolph T. O'Dwyer, Sr.) and Lavenia Fayard (widow of George L. O'Dwyer, Sr.), Plaintiff: Ashton Robert O'Dwyer, Jr., LEAD ATTORNEY, Ashton R. O'Dwyer, Jr., Attorney at Law, New Orleans, LA; Joseph W. Hecker, Joseph W. Hecker, Baton Rouge, LA.

For United States of America, Defendant: Stevens E. Moore, LEAD ATTORNEY, Glenn Kenneth Schreiber, U. S. Attorney's Office, New Orleans, LA.

For The State of Louisiana, Louisiana Department of Natural Resources, Scott A Angelle, Secretary of the Department of Natural Resources, State of Louisiana, Louisiana Department of Transportation and Development, Johnny D. Bradberry, Secretary Louisiana Department of Transportation and Dev, Defendants:

Michael Courtney Keller, LEAD ATTORNEY, Louisiana Department of Justice, New Orleans, LA.

For Sewerage and Water Board of New Orleans, Defendant: Eric Oliver Person, LEAD ATTORNEY, Eric Oliver Person, Attorney at Law, New Orleans, LA.

For Kirk Bonner, Sigrid Bonner, Scott Campbell, Thomas Coleman, Robert Dupuy, Robert M Fry, Jamie Grue, [*2] John Koerner, Catherine Mitchell, Hope Sartorio, Miriam Schramm, Sidney Snow, Ian Grue, Defendants: Bruce Lane Brown, LEAD ATTORNEY, James Julian Coleman, Sr., Coleman, Johnson, Artigues & Jurisich, LLC, New Orleans, LA.

For Entergy Corporation, Entergy Louisiana Holding, Inc., formerly known as Entergy Louisiana, Inc., Defendants: Sean D. Moore, LEAD ATTORNEY, Entergy Services, Inc., New Orleans, LA.

JUDGES: DANIEL E. KNOWLES, III, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: DANIEL E. KNOWLES III,

OPINION

DISCOVERY ORDER

Before the Court is Defendants' **Motion for Protective Order and/or to Stay Discovery [Doc. No. 36]** pending the *Rule 26(f)* conference and/or pending a determination of their motion to dismiss. Plaintiff filed formal opposition [Doc. No. 48] and the matter is deemed submitted for a determination without oral hearing. For the following reasons, the Motion for Protective Order is GRANTED.

Plaintiff prematurely propounded discovery requests to the defendants in advance of the *Rule 26(f)* discovery scheduling conference. *Fed. R. Civ. P. 26 (d)* prescribes the timing of discovery, to wit: "Except in categories of proceedings [*3] exempted from initial disclosures under *Rule 26(a)(1)(E)*, or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred in accordance with *Rule 26(f)*." *Fed. R. Civ. P. 26(d)*. Specifically addressing interrogatories, *Fed. R. Civ. P. 33(a)* provides in pertinent part that: "Without leave of court or written stipulation, interrogatories may not be served before the time specified in *Rule 26(d)*." *Fed. R. Civ. P. 33(a)*. *Fed. R. Civ. P. 34(b)* sets forth the identical procedural caveat as to timing, to wit: "Without leave of court or written stipulation, a request may not be served before the time specified in *Rule 26(d)*." *Fed. R.*

Civ. P. 34(b).

This case does not fall within any of the categories of proceedings exempted from initial disclosures. There is no written stipulation or other agreement between the parties to proceed with discovery in advance of a *Rule 26(f)* conference. No scheduling conference [*4] has been set by the district judge, motions to dismiss and/or for more definite statement are pending and issue has not been joined. No motion for leave of court to proceed with discovery in advance of the preliminary conference was filed. Moreover, discovery in advance of issue being joined and a *Rule 26(f)* could prove to be counterintuitive. There is no good reason to deviate from the rule which prescribes the proper timing of discovery.

IT IS ORDERED that Defendants Motion for Protective Order # 36 is GRANTED and discovery is STAYED by *operation of law* in advance of the *Rule 26(f)* discovery scheduling conference.

New Orleans, Louisiana this 19th of June, 2007.

DANIEL E. KNOWLES, III

UNITED STATES MAGISTRATE JUDGE



LEXSEE 2008 U.S. DIST. LEXIS 55356

CHRISTOPHER DRESSER VERSUS MEBA MEDICAL & BENEFITS PLAN

CIVIL ACTION NO. 08-2662 SECTION "A" (3)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA**

2008 U.S. Dist. LEXIS 55356

July 10, 2008, Decided

July 10, 2008, Filed

COUNSEL: [*1] For Christopher J Dresser, Plaintiff: J. Mac Morgan, LEAD ATTORNEY, Law Office of J. Mac Morgan, Lake Charles, LA.

For MEBA Medical & Benefits Plan, Defendant: Phyllis Guin Cancienne, LEAD ATTORNEY, Baker Donelson Bearman Caldwell & Berkowitz (Baton Rouge), Baton Rouge, LA; Daniel C. Green, Neal I. Korval, Vedder, Price, Kaufman & Kammholz, P.C. (New York), New York, NY; Steven F. Griffith, Jr., Baker Donelson Bearman Caldwell & Berkowitz (New Orleans), New Orleans, LA.

JUDGES: DANIEL E. KNOWLES, III, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: DANIEL E. KNOWLES, III

OPINION

**ORDER GRANTING DEFENDANT'S MOTION
SEEKING A TEMPORARY STAY OF DISCOVERY**

Before the Court is Defendant's Motion # 15, seeking a stay of discovery until ten (10) days after the district judge rules on its pending Motion to Dismiss, which is fully briefed. Plaintiff filed formal opposition arguing that the defendant has not met its burden pursuant to *Rule 26(c)* and that the Court should deny defendant's motion. The defendant's motion essentially seeks an adjustment of the district judge's discovery schedule but was referred to

the undersigned Magistrate Judge for determination. For the following reasons, MEBA Medical & Benefit Plan's motion for [*2] protective order # 15 is GRANTED - that is, insofar as it seeks a brief stay of discovery pending the determination of its pending Motion to Dismiss.¹

1 This case is presently set for trial on March 23, 2009 and the discovery deadline is February 4, 2009. [Doc. # 20]. A temporary stay of discovery will not jeopardize the trial date in this matter.

Plaintiff in this case, Christopher Dresser ("Dresser"), seeks coverage of fees incurred in connection with a collateral attack lawsuit and a declaration that the defendant, MEBA Medical & Benefit Plan ("MEBA") should cover his legal expenses in any future proceedings, *inter alia*. MEBA, a multi-employer funded Taft-Hartley health and welfare benefit plan regulated by ERISA, filed a Motion to Dismiss (Doc. # 11) arguing that: (1) to the extent that Dresser seeks coverage of legal fees incurred in connection with his current Complaint for Judicial Review, the action is moot; (2) to the extent that Dresser seeks coverage of fees incurred in connection with his collateral attack lawsuit, the action should be dismissed because plaintiff cannot establish that the Plan administrator's denial of benefits was legally incorrect and constituted an abuse [*3] of discretion; and (3) to the extent that Dresser seeks a declaration that the Plan should cover legal expenses in any as yet undefined future proceedings, the action must be dismissed for lack of ripeness because there is no

present case or controversy and he has failed to exhaust his administrative remedies as required by the Employment Retirement Income Security Act ("ERISA"). [Doc. # 11].

Dresser filed formal opposition to the Motion to Dismiss and a Certificate pursuant to *Fed. Rule of Civ. P. 56(f)* noting that: (1) defendant was served Interrogatories, Requests for Production and Requests for Admissions and the Plan's discovery responses are not due until two days before the noticed hearing; and (2) defendant's *Rule 30(b)(6)* deposition was noticed for August 1, 2008 (thirty-five days after the hearing date). In his *Rule 56(f)* request discovery, plaintiff contends generally that he has good reason to believe that paper discovery and a *30(b)(6)* deposition of the Plan will yield evidence justifying his opposition and evidence that the Plan administrator's interpretation of the Plan was incorrect, was internally inconsistent and not in good faith. [Doc. # 14].

MEBA most recently filed [*4] its reply brief and the district judge has not yet ruled on either Dresser's request for a *Rule 56(f)* relief seeking to delay resolution of the motion to dismiss in advance of discovery or the motion to dismiss itself. The matter was only recently deemed submitted for determination. In the interim, MEBA filed its motion seeking a stay of discovery pending a determination of its dispositive motion to dismiss. As aforesaid, that motion for protective order seeking a brief stay of discovery was referred to the undersigned.

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown," a district court is authorized to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c)*. In its motion for protective order seeking to stay discovery pending disposition of the Motion to Dismiss and its Reply Brief addressed to the district judge, MEBA explained at length why the discovery sought was unnecessary; MEBA's position is that, if granted, its dispositive motion would preclude the need for the discovery altogether. Defendant correctly states that no discovery [*5] will be needed to resolve the motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. Such motions are decided on the face of the complaint. MEBA also argues that the summary judgment motion can be decided as a matter of law on the

basis of the undisputed facts already before the court and the administrative record.

The undersigned Magistrate Judge finds that MEBA has met its burden of showing, *prima facie*, why a protective order temporarily staying discovery is warranted. Indeed, in the event that it prevails on its pending Motion to Dismiss and the district judge agrees that *Rule 56(f)* discovery is not warranted,² deposition discovery commencing August 1, 2008, *inter alia*, would be unduly burdensome, expensive and for naught. Whether plaintiff's claims are dubious enough to be eliminated prior to discovery and whether plaintiff has identified any factual issues in need of *immediate* exploration are issues squarely addressed to the district judge in the context of the pending Motion to Dismiss, Plaintiff's Opposition/*Rule 56(f)* Affidavit and Defendant's Reply. This Court is not inclined to issue an advisory opinion on a dispositive motion addressed to the district judge.

2 See Defendant's [*6] Reply in further Support of its Motion to Dismiss [Doc. # 26].

Under the circumstances presented, there can be no abuse of discretion in ordering a brief temporary stay of discovery pending the determination of the defendant's dispositive motion. Indeed, a plaintiff's entitlement to discovery prior to a ruling on a motion to dismiss is not unlimited and may be terminated when the record shows that the requested discovery is not likely to produce facts necessary to withstand judgment as a matter of law.³ Defendant has advanced "good cause" under *Rule 26(c)* and the unique posture of this case⁴ makes a temporary stay practical. In balancing the harm produced by such a temporary stay at the outset of this case (which is nil) against the *possibility* that the motion to dismiss will be granted and entirely eliminate the need for such discovery, this Court has determined that a temporary stay is appropriate.

3 See *Landry v. Air Line Pilots Assn'n Intern. AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990) (finding in an ERISA case that there was no abuse of discretion in an order staying discovery pending the resolution of dispositive motions); *Enplanar Inc. v. Marsh*, 25 F.3d 1043, 1994 WL 261088 (5th Cir. 1994) [*7] (unpublished) (holding that the district court did not abuse its discretion in declining to grant additional discovery pending the determination of the

motion to dismiss); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1030 (5th Cir. 1983) (noting that a district judge may exercise his discretion to prevent the plaintiff from burdening defendant with a needless round of discovery); *Aguirre v. Nueces County, Texas*, 217 Fed.Appx. 348, 2007 WL 486854 (5th Cir. 2007) (unpublished) (noting that a party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts"); *Parish of Jefferson v. Louisiana Southern Recovery Management, Inc.*, 1996 U.S. Dist. LEXIS 3894, 1996 WL 144400 (E. D. La. Mar. 27, 1996) (Sear J.) (vacating the Magistrate Judge's order denying defendant's motion to stay discovery; citing *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987) for the proposition "it is appropriate to stay discovery until preliminary questions that may dispose of the case are determined").

4 This case is in its infancy and the motion to

dismiss has been fully briefed and is submitted for determination.

Accordingly and for all of the above and foregoing reasons,

IT IS [*8] ORDERED that the Defendant's Motion for Protective Order # 15 seeking a temporary stay of discovery pending the resolution of the motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that the July 16, 2008 hearing previously scheduled by the undersigned Magistrate Judge is hereby CANCELLED.

New Orleans, Louisiana, this 10th day of July, 2008.

/s/ Daniel E. Knowles, III

DANIEL E. KNOWLES, III

UNITED STATES MAGISTRATE JUDGE