UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE Plaintiff, v. WALTER K. OLSON, THEODORE H. FRANK, ESQUIRE, DAVID M. NIEPORENT, ESQUIRE, THE OVERLAWYERED GROUP And OVERLAWYERED.COM Defendants.	:	NO. 2:09-CV-4001 CIVIL ACTION JURY TRIAL DEMANDED

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Defendants' Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com Motion for Protective Order to Stay Discovery, and any response thereto, it is hereby **ORDERED** that the Motion is GRANTED.

BY THE COURT:

_____
Mary A. McLaughlin, J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE Plaintiff, v. WALTER K. OLSON, THEODORE H. FRANK, ESQUIRE, DAVID M. NIEPORENT, ESQUIRE, THE OVERLAWYERED GROUP And OVERLAWYERED.COM Defendants.	:	NO. 09-CV-04001-MAM CIVIL ACTION JURY TRIAL DEMANDED

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO STAY DISCOVERY

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby move, pursuant to Federal Rule of Civil Procedure 26(c), for a Protective Order to Stay Discovery pending this Court's resolution of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), and in support thereof, Defendants state as follows:

BACKGROUND

1. Despite the fact that all claims alleged in connection with this lawsuit are barred by time and the First Amendment, Plaintiff, Arthur Alan Wolk ("Plaintiff" or "Wolk"), commenced the above-captioned action by Writ of Summons in the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, on May 13, 2009. A copy of the Writ of Summons is attached hereto as Exhibit "A."

2. Immediately after filing his Praecipe for a Writ of Summons, Plaintiff served Defendants with wholly unnecessary, improper and overly burdensome requests for pre-complaint discovery, to which Defendants objected. A copy of Plaintiff's Notice of Pre-Complaint Discovery is attached hereto as Exhibit "B."

3. On June 12, 2009, Plaintiff filed a Motion to Compel Pre-Complaint Discovery with the Court of Common Pleas. A Copy of the Motion to Compel is attached hereto as Exhibit "C."

4. On July 2, 2009, the Court of Common Pleas denied Plaintiff's Motion to Compel Pre-Complaint Discovery. A copy of the Court's Order denying Plaintiff's Motion to Compel is attached hereto as Exhibit "D."

5. Plaintiff subsequently filed the Complaint in this matter on August 17, 2009. A copy of the Complaint is attached hereto as Exhibit "E."

6. Plaintiff's Complaint alleges that, as the result of an April 8, 2007 internet posting of a three-paragraph opinion statement authored by Defendant Frank (the "Frank Article"), attached hereto as Exhibit "F", Defendants both defamed Wolk and intentionally interfered with his prospective contractual relations. (Complaint at ¶¶40-45, 54, 58, 62, 73-76).

7. Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims are barred by Pennsylvania's one-year statute of limitations for defamation suits, which expired in April, 2008.

8. Wolk's claims are further barred by the First Amendment because the Frank Article is neither false nor defamatory.

THE INSTANT MOTION TO STAY DISCOVERY

9. Plaintiff is represented by sophisticated counsel and Plaintiff himself is a nationally known, licensed attorney.

10. Plaintiff either knows or should know that his claims are inescapably time-barred pursuant to Pennsylvania's one-year statute of limitations for defamation claims.

11. Plaintiff either knows or should know that his claims are barred by the First Amendment because the Frank Article is neither false nor defamatory.

12. Defendants can only assume that Plaintiff initiated this action for the improper purpose of subjecting Defendants to embarrassment, burden and expense.

13. On September 2, 2009, Defendants timely removed the action to this Court.

14. Also on September 2, 2009, before conducting a Rule 26(f) conference or serving Defendants with Rule 26(a) disclosures, Plaintiff again served Defendants with overly burdensome discovery requests, copies of which are attached hereto as Exhibit "G."

15. On September 9, 2009, Defendants moved to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Rule 12(b)(6) because Plaintiff's claims are time and Constitutionally barred.

16. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is currently pending before this Court.

17. With the instant Motion, Defendants request that this Court issue a Protective Order staying discovery so that Defendants may be spared the undue burden, expense and annoyance of responding to Plaintiff's improper, overbroad and unnecessarily costly discovery

requests, the need for which may be wholly eliminated by this Court's ruling on Defendants' Motion to Dismiss.

18. Courts are empowered under the Federal Rules of Civil Procedure to impose a stay of discovery "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Pearson v. Miller, 211 F.3d 57, 72 (3d Cir. 2000); Weisman v. Mediq, Inc., 1995 WL 273678 at *1 (E.D. Pa. 1995); Fed. R. Civ. P. 26(c).

19. A stay of discovery is proper when the likelihood that a pending motion to dismiss will result in the outright elimination of discovery outweighs the likely harm to be produced by the delay. Weisman at *2 (citing Coca-Cola Bottling Co. v. Grol, 1993 WL 13139559 (E.D.Pa. 1993).

20. When, as here, the pending motion is a challenge as a matter of law, which may dispose of the entire action, and discovery is not needed to rule on that motion, the balance favors granting a motion to stay. Norfolk v. Power Source Supply, Inc., 2007 WL 709312 at *1 (W.D.Pa. 2007) (citing Weisman at *2).

21. In support of his frivolous claims, Plaintiff now seeks, prior to making any of the disclosures required by Fed. R. Civ. P. 26, to take the depositions of Defendants Olson, a resident of the state of New York, Frank, a resident of the state of Virginia, and Nieporent, a resident of the state of New Jersey.

22. In an effort to force Defendants to incur as much expense and suffer as much annoyance as possible, Plaintiff seeks the production of the following documents:

- "All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article."[1]

- "All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third-party, with respect to the subjects covered in the April 7, 2008 [sic] Frank Article, in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article, including but not limited to notes and drafts."

- "All documents and communications that evidence, refer or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article."

- "All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk."

23. Overlawyered.com is an internet weblog with numerous readers.

24. Defendants Olson, Frank and Nieporent access and contribute to Overlawyered.com through multiple servers, and from multiple computers, located in multiple states.

25. Complying with Plaintiff's over-broad, unnecessary and improper requests for documents evidencing: all communications, statistics, input or information, accessed or

[1] The Frank Article was published to the legal weblog Overlawyered.com on April 8, 2007. Throughout his Requests for Production, Plaintiff refers to the Article as the "April 7, 2008 Frank Article." Defendants believe that Plaintiff's error is simply typographical, however, Defendants wish to make clear the fact that the only article authored by Defendant Frank that is relevant to this lawsuit was published on April 8, 2007.

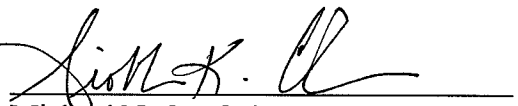
transmitted through any server, browser or search facility, by not only the Defendants, but also any person who ever accessed the Frank Article, if even technologically possible, would be enormously and unduly expensive.

26. Furthermore, Plaintiff initiated a frivolous lawsuit for an improper purpose and therefore, any amount of discovery will subject Defendants to undue annoyance, embarrassment, oppression, burden and expense.

27. Finally, because a favorable decision by this Court on Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) would dispose of Plaintiff's entire claim, and because no discovery is required for the decision of that Motion, a stay pending its decision will not prejudice Plaintiff or cause undue delay.

WHEREFORE, Defendants seek a Protective Order Pursuant to Fed. R. Civ. P. 26(c) staying discovery in this action while Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is pending.

WHITE AND WILLIAMS LLP

BY: 

Michael N. Onufrak
Siobhan K. Cole
Attorneys for Defendants
Walter K. Olson,
Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com

Dated: September 18, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE Plaintiff, v. WALTER K. OLSON, THEODORE H. FRANK, ESQUIRE, DAVID M. NIEPORENT, ESQUIRE, THE OVERLAWYERED GROUP And OVERLAWYERED.COM Defendants.	:	NO. 2:09-CV-4001 CIVIL ACTION JURY TRIAL DEMANDED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO STAY DISCOVERY PURSUANT TO RULE 26(c)

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby move, pursuant to Federal Rule of Civil Procedure 26(c), for a Protective Order to Stay Discovery pending this Court's resolution of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6).

INTRODUCTION

Despite the fact that all of his claims are clearly barred by the applicable statutes of limitation and the First Amendment to the United States Constitution, Plaintiff, Arthur Alan Wolk, ("Plaintiff" or "Wolk"), initiated this lawsuit by writ of summons in the Court of Common Pleas, Philadelphia County, Pennsylvania, and immediately sought to compel extensive pre-complaint discovery from Defendants. The Court of Common Pleas denied Wolk's demand for pre-complaint discovery, whereafter Wolk filed the instant Complaint and once again prematurely and unnecessarily served Defendants with overly broad, overly burdensome and

excessively expensive discovery demands. Defendants timely removed the action to this Court and filed their now pending Motion to Dismiss Wolk's frivolous and improper Complaint pursuant to Rule 12(b)(6).

In the interest of judicial economy and the prevention of unnecessary and expensive discovery, Defendants now respectfully request that this Court exercise its broad discretion pursuant to FRCP 26(c) to impose a stay of discovery pending decision of Defendants' Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the above-captioned action by Writ of Summons in the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, on May 13, 2009. Immediately after filing his Praecipe for a Writ of Summons, Plaintiff served Defendants with wholly unnecessary, improper and overly burdensome requests for pre-complaint discovery to which Defendants objected.

On June 12, 2009, Plaintiff filed a Motion to Compel Pre-Complaint Discovery. On July 2, 2009, the Court of Common Pleas denied Plaintiff's Motion to Compel Pre-Complaint Discovery. Plaintiff subsequently filed the Complaint in this matter on August 17, 2009. Plaintiff's Complaint alleges that as the result of an April 8, 2007 internet posting of a three-paragraph opinion statement, authored by Defendant Frank, (the "Frank Article"), Defendants both defamed Wolk and intentionally interfered with his prospective contractual relations.

Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims are barred by Pennsylvania's one-year statute of limitations for defamation suits, which expired in April, 2008. Wolk's claims are further barred by the First Amendment because the Frank Article is neither false nor defamatory.

Wolk is a nationally-known, licensed attorney, who either knows or should know that his claims are inescapably barred by time and the First Amendment. Defendants can only assume,

therefore, that Plaintiff initiated this action for the improper purpose of subjecting Defendants to embarrassment, burden and expense.

On September 2, 2009, Defendants timely removed the action to this Court. Also on September 2, 2009, before conducting a Rule 26(f) conference or serving Defendants with Rule 26(a) disclosures, Plaintiff again served Defendants with premature and overly burdensome discovery requests. On September 9, 2009, Defendants Moved to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Rule to Rule 12(b)(6).

Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is currently pending before this Court.

ARGUMENT

I. THIS COURT CAN, PURSUANT TO RULE 26(c), STAY DISCOVERY IN ORDER TO PROTECT DEFENDANTS FROM THE ANNOYANCE, EMBARRASSMENT, OPPRESSION, UNDUE BURDEN AND EXPENSE OF PLAINTIFF'S IMPROPER DISCOVERY REQUESTS.

Both the Federal Rules of Civil Procedure and the body of case law applying them clearly state that this Court may, in its broad discretion, stay discovery in this case pending decision of Defendants' Rule 12(b)(6) Motion to Dismiss. Pursuant to FRCP 26(c), courts are empowered to issue protective orders staying discovery, upon good cause shown, "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Pearson v. Miller, 211 F.3d 57, 72 (3d Cir. 2000); Jackson v. Northern Telecom, 1990 WL 39311 at *1 (E.D.Pa. 1990) (staying "possibly unnecessary and expensive discovery" pending decision of a Motion to Dismiss.). Although motions to stay can in some instances create case management problems, such that courts will not automatically stay discovery when a motion to dismiss is filed, "a stay is proper where the likelihood that such motion may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay." Weisman v. Mediq, 1995 WL 273678 at *2 (E.D.Pa. 1995) (citing Coca-Cola Bottling

Co. v. Grol, 1993 WL 13139559 at *2 (E.D.Pa. 1993). In this case, a stay of discovery is not only necessary to protect Defendants from unnecessary annoyance, burden and expense, it is also proper because the likelihood is great that this Court's decision of Defendants' Motion to Dismiss will completely dispose of the entire case.

In order to show good cause why a stay of discovery should issue, courts require a showing of "a particular need for protection." Worldcom v. Intelnet Int'l, Inc., 2002 WL 1971256 at *6 (E.D.Pa. 2002) (citing Pearson v. Miller, 211 F.3d 57, 72 (3d Cir. 2000). Here, Wolk wrongfully initiated this lawsuit by writ of summons, knowing that his claims are inescapably time-barred, and immediately sought improper and unnecessary pre-complaint discovery, merely to subject Defendants to the annoyance, burden and expense of responding. The Court of Common Pleas denied Wolk's demand for pre-complaint discovery, whereafter Wolk filed the instant Complaint, alleging the same time and constitutionally barred claims he supposedly required pre-complaint discovery to develop.

Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims for defamation, false light invasion of privacy and intentional interference with prospective contractual relations are time-barred. The Frank Article was published on April 8, 2007. Consequently, any claim for defamation, false light, or interference with contractual relations Wolk may have had expired in April, 2008. Wolk instituted this action on May 13, 2009, more than a full year after the statute of limitations expired. Wolk's claims are also barred by the First Amendment because the Frank Article is neither false nor defamatory and is, therefore, constitutionally protected, non-actionable, free speech.

Consequently, Defendants moved to dismiss Wolk's Complaint, pursuant to Rule 12(b)(6) for failure to state a claim. Wolk, however, is continuing his quest to cause Defendants

as much expense and annoyance as possible before his meritless claims are dismissed. In furtherance of that goal, Wolk again prematurely[1] served Defendants with overly-broad, overly-burdensome, excessively expensive discovery requests. Specifically, Wolk noticed the depositions of Defendants Olson, Frank and Nieporent for the first week of October, 2009 and served the following requests for production:

- "All documents and communications, including but not limited to searches on the internet that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article."[2]

- "All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third party, with respect to the subjects covered in the April 7, 2008 [sic] Frank Article, in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article, including but not limited to notes and drafts."

- "All documents and communications that evidence, refer or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article."

- "All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk."

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[1] As of this date, Plaintiff has failed to serve Rule 26(a) disclosures, making it improper for him to seek any discovery from Defendants.

[2] The Frank Article was published to the legal weblog Overlawyered.com on April 8, 2007. Throughout his Requests for Production, Plaintiff refers to the Article as the "April 7, 2008 Frank Article." Defendants believe that Plaintiff's error is simply typographical, however, Defendants wish to make clear the fact that the only article authored by Defendant Frank that is relevant to this lawsuit was published on April 8, 2007.

Assuming that compliance with Wolk's demand is even physically and/or technologically possible, of which Defendants are in no way certain, producing all documents evidencing: all communications, statistics, input or information, accessed or transmitted through any server, browser or search facility, by not only the Defendants, but also any person who ever accessed the Frank Article, would cause defendants to incur unnecessarily enormous and unjustified expense and annoyance. Additionally, the fact that Wolk's claims are frivolous and instituted for an improper purpose, disentitles him to any amount of discovery, let alone the extensive amount he demands.

Therefore, Defendants certainly have a particular need, justifying this Court's exercise of its broad discretion pursuant to Rule 26(c), to protect Defendants from the annoyance, undue burden and expense of responding to Wolk's discovery requests, pending decision of their Motion to Dismiss. A stay of discovery is further justified because here the discovery demands are not only improper, they are premature and the need for them is likely to be entirely eliminated by the decision of Defendants' Motion to Dismiss Wolk's constitutionally and time-barred claims.

II. THE LIKELIHOOD THAT DEFENDANTS' MOTION TO DISMISS WILL ENTIRELY ELIMINATE THE NEED FOR DISCOVERY OUTWEIGHS ANY RISK OF HARM PRODUCED BY THE DELAY

When, as here, a party seeks a protective order staying discovery pending the court's ruling on an underlying dispositive motion, courts first ask whether (a) the motion is a challenge as a matter of law, or merely to the sufficiency of the pleadings, such that the pleadings might later be amended to cure the deficiencies, and (b) whether a favorable decision on the motion would dispose of all or only part of the case. Coca-Cola v. Grol, 1993 WL 13139559 at *2 (E.D.Pa. 1993). If the dispositive motion is in fact, a challenge as a matter of law, the favorable

decision of which will dispose of the entire case, courts must then endeavor to balance the harm produced by delay against the possibility that the motion will be granted and entirely eliminate the need for such discovery. Weisman v. Mediq, 1995 WL 273678 at *2 (E.D.Pa. 1995).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), such as that filed by Defendants, tests the legal sufficiency of a complaint. Bell Atlantic v. Twombly, 550 U.S. 554, 573, 127 S. Ct. 1955, 1975 (2007); Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 633, 119 S. Ct. 1661, 1666 (1999). A complaint is legally insufficient and subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. The United States Supreme Court clearly stated that if, for example, relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim. Jones v. Bock, 549 U.S. 199, 215, 127 S.Ct. 910, 921 (2007); See also Lopez-Gonzalez v. Comerio, 404 F.3d 548, 551 (C.A.1 2005) (dismissing a complaint barred by the statute of limitations under Rule 12(b)(6)). Therefore, Defendants' Motion to Dismiss Plaintiff's time-barred Complaint, pursuant to Rule 12(b)(6), is a challenge as a matter of law, the favorable decision of which would dispose of the entire case.

Finally, when balanced against the almost non-existent risk that any harm will be caused by this Court's granting of Defendants' Motion to Stay Discovery, the likelihood that this Court's decision on Defendants' Motion to Dismiss will entirely eliminate the need for any discovery at all, weighs heavily in favor of allowing a motion to stay. Courts are clear that when, as here, a likelihood exists that the favorable disposition of an underlying motion will result in the "outright elimination of discovery, [a stay] outweighs the likely harm to be produced by the delay." Weisman, 1995 WL 273678 at *2 (citing Coca-Cola v. Grol, 1993 WL 13139559 at *2 (E.D.Pa. 1993) and Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (affirming stay

where dispositive motion decided strictly on pleadings); Norfolk v. Power Source Supply, Inc., 2007 WL 709312 at *1 (W.D.Pa. 2007). As more fully explained above, a favorable decision by this Court on Defendants' pending Motion to Dismiss would entirely eliminate the need for discovery. By contrast, even if this Court's decision of that Motion is unfavorable to Defendants, little if any harm would be caused by a delay of discovery.

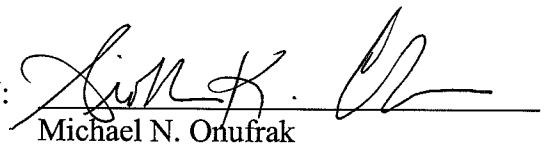
CONCLUSION

In the interest of judicial economy and the prevention of unnecessary and expensive discovery, this Court may properly exercise its broad discretion to impose a stay of discovery while Defendants' Motion to Dismiss is pending. Plaintiff's claims are time-barred and frivolous and the instant discovery requests are calculated merely to harass Defendants by forcing them to endure undue burden and expense. Defendants therefore, have a particular need for this Court's protection pursuant to FRCP 26(c).

WHEREFORE, Defendants, Walter Olson, Theodore Frank, David Nieporent, The Overlawyered Group and Overlawyered.com respectfully request that this Court enter a Protective Order staying discovery pending disposition of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6).

Respectfully submitted,

WHITE AND WILLIAMS LLP

BY: 

Michael N. Onufrak
Siobhan K. Cole
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
(215) 864-6891

Attorneys for Defendants
Walter K. Olson,
Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com

Dated: September 18, 2009

IN THE UNITED STATES DISTRICT COURT

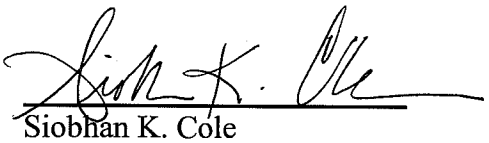
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE Plaintiff, v. WALTER K. OLSON, THEODORE H. FRANK, ESQUIRE DAVID M. NIEPORENT, ESQUIRE THE OVERLAWYERED GROUP and OVERLAWYERED.COM Defendants.	:	CIVIL ACTION NO. 09-4001

CERTIFICATION PURSUANT TO LOCAL RULE 26.1(f)

Siobhan K. Cole, Esquire, on behalf of Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, hereby certifies that the parties, after reasonable effort, are unable to resolve this dispute without intervention from this Court.

WHITE AND WILLIAMS LLP

BY: 

Siobhan K. Cole
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395
Phone: 215.864.7174
Attorneys for Defendants

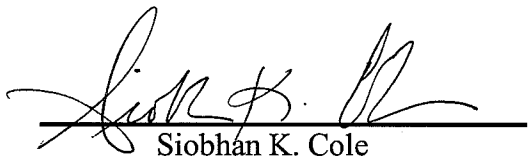
Dated: September 18, 2009

CERTIFICATE OF SERVICE

I, Siobhan K. Cole, Esquire, hereby certify that I have electronically served a true and correct copy of the foregoing Motion to Stay Discovery Pursuant to Rule 26(c) and Memorandum in Support thereof on counsel listed below on September 18, 2009:

Paul R. Rosen, Esquire
SPECTOR GADON & ROSEN, P.C.
Seven Penn Center Plaza
1635 Market Street, 7th Floor
Philadelphia, PA 19103

Andrew J. DeFalco
SPECTOR GADON & ROSEN, P.C.
Seven Penn Center Plaza
1635 Market Street, 7th Floor
Philadelphia, PA 19103



Siobhan K. Cole