

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____)	
KRISTEN GIOVANNI, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION
)	NO. 16-4873
)	
UNITED STATES DEPARTMENT OF)	
THE NAVY,)	
)	
Defendant.)	
_____)	
DOROTHY PALMER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION
)	NO. 17-765
)	
UNITED STATES DEPARTMENT OF)	
THE NAVY,)	
)	
Defendant.)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION TO STAY

Defendant the United States Department of the Navy hereby respectfully requests that this Court stay this case, and all pending deadlines therein, for a period of six months while both the U.S. Government and the Commonwealth of Pennsylvania consider listing perfluorooctane sulfonate (“PFOS”) or perfluorooctanoic acid (“PFOA”) as a “hazardous substance” under their respective authorities. As explained below, the requested stay could substantially narrow the matters to be decided by the Court and avoid needless and duplicative litigation in this case. In support of this motion, the United States states as follows:

1. On October 4, 2019, the United States filed a motion to dismiss Plaintiffs’ First Consolidated Complaint. *See* ECF 43 & 43-1 (“Motion to Dismiss”). On November 1, 2019,

Plaintiffs filed a response to that motion. ECF 45 (“Response”). The United States’ reply is due November 22, 2019. A significant issue raised in that briefing turns on the fact that the two per- and polyfluoroalkyl substances (“PFAS”) identified in Plaintiffs’ Complaint (PFOS and PFOA) are not listed as “hazardous substances” by way of appropriate state or federal action, which the United States argues is necessary to support a claim for medical monitoring under the Pennsylvania Hazardous Sites Cleanup Act. Motion to Dismiss at 23-25.

2. Plaintiffs acknowledge this issue in their Response, which includes a section titled, “The Federal and State Governments are Well on the Way to Classifying PFAS as Hazardous Substances.” Response at 21. In that section, Plaintiffs explain that both the federal and Pennsylvania state governments are in the midst of considering whether such substances should be listed as hazardous. *See id.* at 21-22. Moreover, Plaintiffs call these actions “imminent,” and state in no uncertain terms that “the classification of PFAS as hazardous substances under CERCLA *will become the law within the next year.*” *Id.* at 21 (emphasis added).

3. A determination by federal or state legislative or regulatory bodies that PFOS or PFOA is a hazardous substance could moot the United States’ argument in its pending motion to dismiss that Plaintiffs have failed to state a claim, obviating the need for further briefing – and a Court ruling – on that portion of the United States’ motion to dismiss.

4. By contrast, proceeding to a ruling on the motion to dismiss while these potential determinations are pending could lead to significant inefficiencies in the event PFOA or PFOS is listed as a hazardous substance.

5. First, the Court could be compelled to expend resources to weigh and decide arguments it would not need to reach were this case stayed and listing concluded, including

arguments regarding the proper interpretation of state law. *See* Response at 17-20 (advancing Plaintiffs' interpretation of the interaction of three provisions of state law).

6. Second, in the event the Court concludes that Plaintiffs were required to identify a hazardous substance to bring suit under the Pennsylvania Hazardous Sites Cleanup Act, the Court would likely be compelled to dismiss this case as failing to state a claim under Federal Rule of Civil Procedure 12(b)(6). While the United States has moved for this relief as compelled by law, prematurely deciding the issues when a temporary stay might prevent the need for the parties and the Court to start back at the beginning of litigation process – with new filing fees, new complaints, new motions to consolidate, and so on – is a needless waste of resources. Plaintiffs have already filed five complaints between them and this Court has already invested itself in the substance of this dispute. This investment could be preserved by granting this stay.

7. Finally, the United States' motion to dismiss includes a separate argument that Plaintiffs have failed to identify an applicable waiver of sovereign immunity. *See* Motion to Dismiss at 9-23. While the United States believes the Court could decide this case based on that question alone, a decision that turned instead on Plaintiffs' failure to state a claim under Rule 12(b)(6) would require the parties to re-brief questions concerning sovereign immunity if Plaintiffs' suits were later refiled.

8. Furthermore, while Plaintiffs have claimed that a "hazardous substance" is not necessary to support their claim, their Response states outright that, "Because action at the federal and/or state level to classify PFAS as hazardous substances appears imminent, *it would be appropriate for the court to stay proceedings until such time as this classification takes place,*

or dismiss without prejudice.” Response at 22 (emphasis added). The United States agrees that a stay would be appropriate.¹

9. Proceeding with briefing and a ruling on the motion to dismiss at this time would be wasteful and inefficient, as Plaintiffs’ own statements make plain. A stay, on the other hand, could allow for the legislative and regulatory processes that Plaintiffs have said are “imminent” to reach their conclusion. In the interest of judicial efficiency, the United States proposes a six-month stay, during which time the parties will notify the Court within 30 days of any state or federal action that serves to qualify PFOS or PFOA as a hazardous substance under section 103 of the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S. § 6020.103. The United States further proposes that, in the event state or federal action has not concluded within six months, the parties convene a status conference at that time to discuss whether extending the stay will allow ongoing legislative or regulatory efforts to conclude, or whether there is no longer a prospect of federal or state action.

10. Plaintiffs state that they do not consent to this motion.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court stay this case, and all pending deadlines, for a period of six months. The United States further requests that the Court order the parties to inform the Court within 30 days of any state or federal action that serves to qualify PFOS or PFOA as a hazardous substance under section 103 of the Pennsylvania Hazardous Sites Cleanup Act, or, if no such action is taken, to order the parties to

¹ However, the United States believes dismissal without prejudice would suffer the same needless waste of resources as prematurely deciding the issues.

attend a status conference at the conclusion of the six-month period to discuss whether the stay should be lifted or extended.

DATE: November 19, 2019

Respectfully submitted,

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/s/ Chloe H. Kolman

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