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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTION DEFENSE COALITION, *et al.*,	:	CIVIL ACTION
Petitioners,	:	No. 674 MD 2019
v.	:	
KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth,	:	
Respondent.	:	

REPLY BRIEF IN SUPPORT OF RESPONDENT'S APPLICATION FOR STAY OF DISCOVERY AND PROTECTIVE ORDER

In their Response to the Application of Respondent, Secretary of the Commonwealth Kathy Boockvar ("Respondent" or "Secretary"), for Stay of Discovery and Protective Order, Petitioners identify the wrong legal standard, incorrectly describe this Court's pronouncements, and ignore the fundamental points of Petitioners' Application. Respondent respectfully submits this targeted Reply to draw the Court's attention to Petitioners' errors. Under the law and facts as they are – rather than as they are misstated in Petitioners' Response – a stay of discovery is warranted and should be granted.

I. Petitioners Are Badly Wrong on the Law

A. The "Stringent Four-Part Standard" Petitioners Cite Does Not Apply to Discovery Stays

Petitioners argue that Respondent did not address the following "stringent four-part standard" for a stay:

> [a petitioner seeking a stay must] make a strong showing that he is likely to prevail on the merits … that without the requested relief, he will suffer irreparable injury … [that the] issuance of a stay will not substantially harm other interested parties in the proceedings … [that the] issuance of a stay will not adversely affect the public interest.

Petitioners' Brief in Opp'n to Respondent's Application ("Pet. Br.") at 5 (quoting *Com., Dept. of Pub. Welfare v. Court of Com. Pleas of Philadelphia County*, 485 A.2d 755, 759-60 (Pa. 1984)). Respondent did not address this standard because

it does not apply. This four-part test applies to an entirely different remedy: a *stay of an order pending appeal*. *See DPW*, 485 A.2d at 759 ("The propriety of a grant or denial of a stay is governed by the guidelines enunciated in" *Public Utility Com'n v. Process Gas Consumers Grp.*, 467 A.2d 805 (Pa. 1983)); *Process Gas*, 467 A.2d at 808-09 (four-part test governs "the issuance of a stay pending appeal"); *Toigo Orchards, LLC v. Workers' Comp. Appeal Board*, 156 A.3d 407, 412 (Pa. Commw. Ct. 2017) (*Process Gas* sets forth criteria to "receive a supersedeas"). Petitioners cite no authority for the proposition that these criteria have any bearing on discovery stays or protective orders, and cannot do so.

This is the applicable standard: A court has broad discretion to stay discovery "for the convenience of parties … and in the interest of justice." *Luckett v. Blaine*, 850 A.2d 811, 819 (Pa. Commw. Ct. 2004) (quoting Pa. R. Civ. P. 4007.3). Put simply:

> Every court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. Incidental to this power is the power to stay proceedings, including discovery. How this can best be done is a decision properly within the discretion of the trial courts.

Id. In *Luckett*, this Court found that the trial court did not abuse its discretion when it granted the same relief requested here: a stay of discovery while preliminary objections were pending.

> Here, the interests of justice were served by permitting [defendants] the opportunity to show that the claims raised in the Complaint failed to state a cause of action before burdening them with discovery demands. Fact-pleading functions to narrow the issues. Where the defendant has demurred to the complaint, it cannot be determined whether the discovery sought by the plaintiff is even relevant. In the present case, we discern no abuse of discretion in the trial court's refusal to permit discovery by any party before ruling on the preliminary objections of defendants.

Id. Respondent has shown that it is not in the "interest of justice" to burden the staff of the Department of State ("Department") with wide-ranging discovery on claims that may never go forward while that same staff is in the midst of providing critical services in the midst of a pandemic.[1]

B. This Court's COVID-19 Administrative Order Did Not, as Petitioners Argue, Except All "Election Law Cases"

Petitioners rely heavily on their assertion that this Court has ruled that "election law matters" must go forward while other matters are suspended. *See, e.g.*, Pet. Br. at 1 ("[E]ven the Commonwealth Court excluded election law matters from its wholesale continuance Order issued on March 16, 2020"), *Id.* at 4 ("Respondent's request … is inconsistent with the order of the Commonwealth

[1] Even if the *Process Gas* standard applied to discovery matters, Respondent's Application would meet it. Respondent has made a strong showing that she will prevail on some or all of her Preliminary Objections; engaging in discovery at this point would cause irreparable harm to the Department and its work; staying discovery will not substantially harm Petitioners; and a stay is necessary to protect the public interest.

Court, which … explicitly excluded from that continuance cases[] like this one ….”), *Id.* at 8 (“Just as this Court excluded election law cases from a full continuance in its March 16 Order, Petitioners intend to move this case forward as well.”).

Petitioners misrepresent this Court’s Order, which excepted only hearings on “contest[s] involving the 2020 primary election ballot.” Administrative Order of March 16, 2020, 126 Misc. Docket No. 3. This is not such a case. This litigation does not involve a candidate seeking access to the primary ballot, or attempts to remove a candidate from the primary ballot; in fact, it has no bearing on the upcoming primary election whatsoever. Indeed, as the Court will recall, when Petitioners withdrew their Application for a Preliminary Injunction, they stated that they would seek relief for the November 2020 general election, not for the primary election. *See* Praecipe to Withdraw, filed on Jan. 24, 2020. Accordingly, nothing in this Court’s Administrative Order forecloses a stay of discovery in this case.

II. Petitioners Sidestep Respondent’s Arguments and Focus on Arguments That Respondent Did Not Make

A. Petitioners Do Not Explain Why Respondent and the Court Should Devote Time and Resources to Discovery on Claims That May Well Be Dismissed

Citing an unreported Philadelphia Court of Common Pleas case, Petitioners argue that litigants cannot award themselves a stay of discovery on the basis that

preliminary objections are pending. *See* Pet. Br. at 3, 4-5. This obvious point is a straw man; Respondent is not arguing that discovery *is* stayed, or even that it *must be* stayed, but that the Court *should* stay it. She has shown that such a stay is in the interests of justice because this is a non-expedited proceeding where pending Preliminary Objections may well narrow or end the case. Petitioners have not shown, and cannot show, that it is in the interests of justice to allow them to pursue discovery on claims that will likely be dismissed.

B. Petitioners Appear to Have No Response to Respondent's Evidence That Requiring the Department to Divert Resources to Discovery in the Midst of a World-Altering Crisis Would Harm the Public Interest

Petitioners offer the supposed concession that they are willing, for the time being, to tailor their discovery so it will not "endanger[] anyone involved." Pet. Br. at 7. This is another straw man, because it should go without saying that discovery should not put lives at risk. The issue here, as Respondent explained in her Declaration, is the strain that discovery will put on the time and resources of the Department's personnel, including its senior legal staff, and the resulting impact on the public interest. *See* Declaration of Respondent Kathy Boockvar, Ex. B to Application. Allowing discovery to proceed would impose this burden even if Petitioners eventually agreed to narrow their requests somewhat; Department personnel would still be required to review the requests, determine what

documents and information are available, and direct outside counsel's negotiations with Petitioners. Given the far-ranging and, in many instances, irrelevant scope of Petitioners' discovery, these tasks will take a significant amount of time.[2]

Respondent has shown that this investment of time would come at a cost, not just to the Department but to the public: It would divert key personnel from mission critical election and professional licensing duties at a time when these duties are overwhelming and urgent. Petitioners dismissively characterize this concern as one of "administrative ease," Pet. Br. at 7, but there is nothing "easy" about the situation the Department is in at the moment; it is locked in a battle to protect lives and elections. Petitioners have no explanation of why discovery in a non-expedited case should take priority over the rights – and even the lives – of the public. Respondent respectfully submits that it should not.

[2] As Respondent pointed out in her Application, her outside counsel offered to discuss informal exchanges of publicly available documents with Petitioners, but Petitioners rejected that offer and served discovery instead. *See* Application Exs. C-E. Informal counsel-to-counsel document exchanges could have been carried out with little client involvement; formal discovery responses, however, necessarily require Department personnel themselves to examine and consider every request. That is why Respondent asked Petitioners to refrain from serving discovery at all, and why, when Petitioners forged ahead in the midst of the growing pandemic, Respondent filed her Application.

CONCLUSION

For the above stated reasons, the Secretary respectfully requests that the Court grant her Application.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: April 28, 2020

By: */s/ Michele D. Hangley*
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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non–confidential information and documents.

Dated: April 28, 2020

/s/ Michele D. Hangley
Michele D. Hangley