

ARGUMENT

Local Rule CV-26(a), titled “No excuses,” provides “a party is not excused from responding to discovery because there are pending motions to dismiss....” In the Fifth Circuit, staying discovery while a motion to dismiss is pending “is the exception rather than the rule.” *Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17CV126-RWS-CMC, 2018 WL 5728515, at *2 (E.D. Tex. Apr. 25, 2018), citing *Griffin v. Am. Zurich Ins. Co.*, No. 3:14-cv-2470-P, 2015 WL 11019132, at *2 (N.D. Tex. Mar. 18, 2015); see also *Glazer's Wholesale Drug Co., Inc. v. Klein Foods, Inc.*, No. 3:08-CV-0774-L, 2008 WL 2930482 at *1 (N.D. Tex. July 23, 2008) (Kaplan, J.). A motion to stay discovery is not “automatically granted whenever a motion to dismiss is pending.” *Griffin*, supra; see also *Stanissis v. Dyncorp. Intern. LLC*, 3:14-CV-2736-D, 2014 WL 7183942, at *1 (N.D. Tex. Dec. 17, 2014). “Nor is a stay of discovery permitted merely because defendant believes it will prevail on its motion to dismiss.” *Griffin*, supra. “[H]ad the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.” *Valenzuela v. Crest-Mex Corp.*, No. 3:16-cv-1129-D, 2017 WL 2778104, at *5 (N.D. Tex. June 26, 2017); see also *Glazer's*, supra.

An order staying discovery should only be issued upon showing “good cause” by the movant. *Griffin*, 2015 WL 11019132, at *2; see FED. R. CIV. P. 26(c). Pfizer’s stated reason for a further delay of discovery is that it believes it will prevail on its motion to dismiss. While Pfizer cites several cases reciting the test to determine when discovery may properly be stayed, the sole case it relies upon as an example of the exception in practice is *Von Drake v. Nat'l Broad. Co.*, No. 3-04-CV-0652R, 2004 WL 1144142 (N.D. Tex. May 20, 2004). This comparison was unsuccessfully attempted by two of the Defendants in *Griffin*, supra, and the court offered these illustrative facts explaining why discovery was stayed in *Von Drake*:

Walgreens and American Zurich cite to *Von Drake* in support of their requests for a stay. That case involved a pro se plaintiff who accused NBC and others of race discrimination for failing to select him as a finalist for a singing competition. *Von Drake*, 2004 WL 1144142 at *1. The court noted that the pro se plaintiff had served discovery seeking information about the 6,000 people who applied for the singing competition, federal tax returns for five years, and copies of felony arrest records for certain individuals. In addition to finding that the defendants had the substantial arguments for dismissal, the court found that many of the discovery requests were overly broad and harassing. *Id.* at *2. The court also noted that the plaintiff was a frequent filer of lawsuits who had been chastised for “attempting to make a mockery of the federal system.” *Id.* at n. 2.

Unlike in *Von Drake*, the defendants in this case do not present evidence regarding the breadth of any discovery that is being sought or the burden of responding to that discovery, or any abusive litigation tactics by the plaintiff. As noted in *Stanissis*, district courts often afford plaintiffs an opportunity to cure pleading deficiencies before dismissing a case. 2014 WL 7183942, at *1. Because a stay of discovery is the “exception rather than the rule,” Walgreens and American Zurich have not shown good cause to stay all discovery pending resolution of their motions to dismiss.

Griffin v. Am. Zurich Ins. Co., No. 3:14-CV-2470-P, 2015 WL 11019132, at *3 (N.D. Tex. Mar. 18, 2015).

Here, much like two of the defendants in *Griffin*, Pfizer has presented no evidence of the alleged undue burden that initial disclosures and document production may impose. No burden has been imposed since discovery requests have not yet been issued, nor initial disclosures made. There is no pending burden to speak of, only a pending motion to dismiss, which as the *Griffin* court stated is not a reason to stay discovery. See *Griffin*, supra, at *2 (stating, “Nor is a stay of discovery permitted merely because defendant believes it will prevail on its motion to dismiss.”). Further, Pfizer may not receive a qualified immunity defense, and thus Pfizer cannot compare itself to the “State Defendants” which in *Griffin* were granted a stay of discovery pending resolution of the qualified immunity question. Pfizer has failed to meet its burden to have the exception applied here.

CONCLUSION

For these reasons, and to preserve the status quo, this Court should deny Respondent's motion to continue discovery deadlines, and this case should proceed to initial disclosures and rolling document production as scheduled.

Respectfully Submitted,

/s/ Warner Mendenhall

Warner Mendenhall (Ohio Bar No. 0070165)

MENDENHALL LAW GROUP

190 North Union St., Suite 201

Akron, OH 44304

330.535.9160; f 330.762.9743

Email: warner@warnermendenhall.com

Robert E. Barnes, Esq. (CA Bar No. 235919)

Lexis Anderson, Esq. (TX Bar No. 24127016)

BARNES LAW

700 South Flower Street, Suite 1000

Los Angeles, California 90017

Telephone: (310) 510-6211

Facsimile: (310) 510-6225

Email: robertbarnes@barneslawllp.com

Attorneys for Relator

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent by the Court's Electronic Filing System to all parties of record on 11-29-2022.

/s/ Warner Mendenhall
Warner Mendenhall (Ohio Bar No. 0070165)