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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, NORMA JEAN
VIETH, and SUSAN FUREY,

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA; MARK S.
SCHWEIKER, et al

Defendants.

No. 1: CV 01-2439

~~Judge Rambo, Judge~~

~~Yohn, Judge Nygaard~~

FILED

FEB 26 2002

PER

DEPUTY CLERK

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO STAY ORDER DENYING MOTION TO QUASH**

Plaintiffs oppose the effort of Defendants Jubelirer and Ryan to stay the Order denying their Motion to Quash the Subpoena Duces Tecum directed to Carnegie Mellon University for the reasons briefly noted below.

First, the underlying issue concerns discovery, not admissibility at trial; the Court has not determined that issue and, indeed, the issue may never arise. It is difficult to understand in such a circumstance how Defendants will suffer irreparable harm by a response to the subpoena or why the public interest favors non-disclosure rather than disclosure. It may well be that the Defendants are motivated by their knowledge of the contents of those documents and a desire to prevent others from knowing as well, but that is clearly an insufficient basis to quash a subpoena.

Second, the practical effect of granting the Stay Motion would be to grant the underlying Motion to Quash and to do so, in all likelihood, through the March 11-12 hearing. It is, at best, unclear that the Court of Appeals will have the opportunity to review the matter before the hearing. Under those circumstances -- and particularly in light of the unusual composition of this Court -- it makes most sense for the decision of the Court that has reviewed the matter to prevail unless and until reversed on appeal.

Third, the analogy Defendants rely on between the Speech and Debate Clause and the attorney-client privilege is quite attenuated. The attorney-client privilege exists to foster confidential and therefore candid communications. In contrast, the Speech and Debate Clause exists to prevent legislators from being forced into court to defend their actions. Not only are there dramatic differences between the two issues, but it is far from clear how allowing a subpoena for documents to be honored compromises the Speech and Debate Clause at all.

In this respect, no case holds that the Speech and Debate Clause issue is appealable and it is not clear that the holding of *In Re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997) is applicable. Indeed, the Third Circuit has declined to extend the Ford holding to analogous asserted legislative privileges. See Powell v. Ridge, 247 F.3d 520 (3d Cir. 2001).

In *Powell*, the same legislative defendants as here represented by the same counsel intervened in litigation and subsequently sought to interpose “partial legislative immunity” under which appellants could:

seek discovery but not respond to it; take depositions but not be deposed; and testify at trial, but not be cross examined. Moreover, [Ryan and Jubilirer] presumably believe that when they come upon an aspect of the litigation they find disagreeable, as they find the discovery order at issue here to be, they will be able to pursue an interlocutory appeal in this Court.

247 F.3d at 522. The Court dismissed the appeal, holding that the “Ford rule” did not extend to appeals of discovery orders “beyond the narrow categories of trade secrets and *traditionally recognized privileges such as attorney-client and work product.*” *Id.* at 524 (emphasis in original), quoting *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 57 (3d Cir. 2000). In *Bacher*, the Third Circuit held on this basis that a discovery order requiring disclosure of “sensitive” information on prior insurance settlements was not appealable. The Court in *Powell* held that the asserted legislative privilege at issue did not fit within those “traditionally recognized privileges” that would give rise to appealable interlocutory orders.

As the Court noted in *Powell* in terms that are apt here, “[a] proper invocation of legislative immunity would typically call for the dismissal of a legislator from the lawsuit.” 247 F.3d at 525. Here, quite to the contrary, Ryan and Jubilirer have taken the lead in participating in the litigation. Having forsaken the core of their legislative immunity, Defendants’ efforts to pick and choose when immunity should be honored

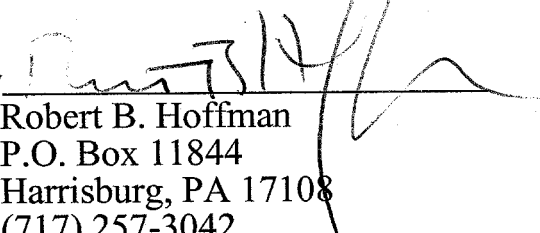
should be viewed skeptically. In this respect, the Stay Motion should be understood as part and parcel of Defendants' strategy of attempting to win this case by excluding Plaintiffs' evidence rather than by offering any testimony actually supporting the legality of the Act 1 map.

Finally, the Stay Motion is moot. CMU has provided the requested documents. See Exhibit A. Thus, the only remaining issue is whether those documents are admissible if and when offered at trial.

For these reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion for a Stay.

Respectfully submitted,

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February 25, 2002

FEDERAL EXPRESS OVERNIGHT DELIVERY

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RE: Vieth v. Commonwealth of Pennsylvania et al.

Dear Mr. Hoffman:

Enclosed is the response to the subpoena. You have confirmed that my understanding reflected in my letter to you of February 12, 2002, is correct as to the scope of the subpoena. Accordingly, as we have discussed I have not provided the final report or our various interim reports or material that would contain substantive content of the PSC's work. It is my understanding that you will provide copies of the enclosed to counsel on the other side.

Very truly yours,

DeFOREST & KOSCELNIK

By 
Walter P. DeForest

WPD:sac

Enclosures

Cc: Linda J. Shorey, Esquire w/o enc.
J. Bart DeLeone, Esquire w/o enc.

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No. 1: CV 01-2439
Judge Nygaard, Judge Rambo
Judge Yohn

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

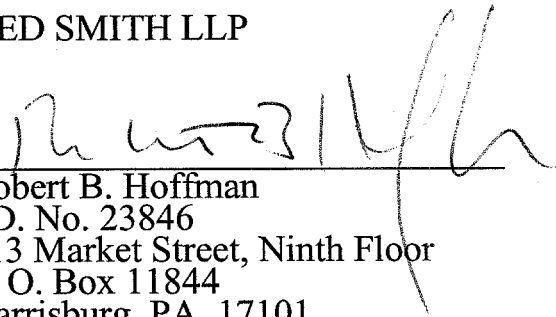
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