IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al.	§	Civil Action No. 9:97 CV 063 (COBB)
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
Lufkin Industries, Inc.	§	
	§	
Defendant.	§	

PLAINTIFFS' OPPOSITION TO EMERGENCY MOTION OF TWO UNIONS FOR STAY

Plaintiffs, Sylvester McClain, et al., oppose the Motion of two unions,[1] the International Association of Machinists & Aerospace Workers, Local Lodge No. 1999, AFL-CIO/CLC ("IAM"), and the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 429, AFL-CIO/CLC ("GMP"), for an emergency stay of this action pending the appeal of those two unions (hereafter "Movants") from the denial of their motion to intervene in this case as of right (hereafter "Emergency Motion").

The Movants do not come close to meeting the standards for a stay in this Court, and their emergency motion can only be understood as going through the motions in order to fulfill the prerequisite for seeking a stay from the Fifth Circuit.[2] However, their appeal to that Court likewise has no basis and will surely be rejected. In light of these facts, the only real purpose and effect of the Movants' motion would be to prevent the Court from conducting trial of this

[1] The third Union which moved to intervene as a defendant herein, International Association of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local No. 587, AFL-CIO/CLC ("Boilermakers"), has not joined in the emergency motion for a stay.

[2] Fed. R. App. Pro. 8(a) requires that a motion for stay be made in the district court as a precondition to filing a motion for stay pending appeal in the Court of Appeals.

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nearly seven-year old case, and delaying trial for many months until the appeal is rejected and this Court can once again carve out time for trial from its busy calendar.

I. STATEMENT OF FACTS AND PROCEEDINGS ON THE MOVANTS' MOTION TO INTERVENE

It is unnecessary to recapitulate in detail the background facts pertinent to the Movants' unsuccessful motion to intervene. Those facts are thoroughly set out in Plaintiffs' Opposition to that motion, filed November 8, 2003, at pp. 3-7. That fact statement is incorporated herein by reference. The Court concisely summarized the pertinent facts in its Memorandum Opinion filed November 18, 2003. To highlight the most important facts, as found by the Court, (1) the Movants were well aware of the case's pendency and issues for several years prior to the filing of their motion to intervene; (2) even if the Movants managed somehow to remain unaware of the failure of mediation and the movement of the case toward trial over the six months' period prior to the filing of their motion, they remained unaware only through a studious effort to avoid obtaining knowledge that was easily available by a telephone call[3] or a trip to the Clerk's office; and (3) the Court has announced repeatedly, on the public record, that it will not entertain any request for relief that would change or reform the unions' collective bargaining agreement with Lufkin or override its seniority provisions – relief the fear of which ostensibly motivated the Unions' belated attempt to intervene in order to participate at trial.[4]

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[3] Plaintiffs' counsel specifically invited the Unions' attorneys to contact them to discuss the case on several occasions in writing, in April – May 2003. See Declaration of Timothy B. Garrigan, filed November 8, 2003, pp. 2-3 and Exhibits 2 and 3. The Unions' counsel did not respond to that invitation. Id. Significantly, Movants continue to ignore and offer no explanation for why they failed to respond to plaintiffs' counsel's repeated invitations to contact them to discuss the case and the Unions' interest in the case.

[4] In addition, plaintiffs have on numerous occasions, on the public record, stated that they do not seek any such relief on behalf of the class, and would notify the unions and not oppose their intervening at any stage of the proceedings at which seniority relief on behalf of individual class members becomes an issue (although this appears unlikely given the Court's statements).

A. Mis-Statements of Fact In Unions' Description of Mediation Proceedings and Settlement Prospects

Plaintiffs must, however, briefly respond to inaccurate, newly recast factual assertions by Movants in their Emergency Motion. First, Movants improperly and inaccurately represent positions taken by plaintiffs during confidential mediation proceedings, including that "class ... counsel recognized that [the Unions] had a legitimate and vital interest in possible remedial aspects of any relief." Unions' Motion for Stay at 2. Without violating the confidentiality of the mediation, plaintiffs deny this assertion. Quite simply, plaintiffs' agreement to allow the Unions to participate in the mediation was for strategic and not substantive reasons. See Declaration of Timothy B. Garrigan In Opposition to Lufkins and Two of the Unions' Motions for Stay. ("Garrigan Decl."), filed herewith, at ¶ 6.

Movants also claim "it was acknowledged that the Unions had considerable interest in certain aspects of the mediation, to wit ... posting and bidding procedures, promotions, job training and dispute resolution." Emergency Motion at 2. Again, without violating the confidentiality of mediation, the Unions' sole articulated "interest of which plaintiffs were aware" until Lufkin's counsel spoke at the November 13, 2003 hearing, as demonstrated by the Unions' original moving papers and the GMP's motion to intervene as amicus curiae, and as witnessed by the Court at the November 13 hearing – was the seniority provision of the Collective Bargaining Agreement. Garrigan Decl. at ¶ 7.

Movants' timeliness argument is premised on their claim that they believed settlement was imminent, supposedly because of the mediation sessions in which they participated and the comments of the Court and counsel for Lufkin and plaintiffs at the March 27 hearing. Movants' revisionist views of the mediation history, however, are not supported by the record. In fact, the Unions participated in only two of the over twenty mediation sessions. The Unions participated in the May 21 and 22, 2002 sessions – nearly a year before mediator Reagan Burch declared the mediation to have failed, even though matters affecting "posting and bidding procedures, promotions, job training, and grievance procedures" explicitly remained under discussion.

Garrigan Decl. at ¶ 8. Once it became clear to the Unions that plaintiffs were not seeking reformation of the seniority provision as a class remedy, the Unions excused themselves from the mediation and thereafter declined invitations for their further participation, noting the Union's view that "there appears no end in sight" not that settlement was imminent as they now claim.[5]

Movants' selective references to the transcript of the March 27, 2003 hearing are misleading. In fact, both parties expressed doubts about the prospects of settlement at that time. Lufkin's attorney, Mr. Hamel, stated, "I don't know whether the case will settle or not," and emphasized the "wide differences of opinion as to what is appropriate in terms of monetary relief," Tr. at 5:16, 14:11-16. Additionally, plaintiffs' counsel, Mr. Garrigan, expressed serious doubts that Lufkin was likely to settle. Id. at 9:19-22, 16:2, 19:21-22. Moreover, at the March 27 hearing, there was far more discussion about the merits, trial preparation, and a Fall 2003 trial setting than there was about settlement. See id. at 6:14-19, 25, 26, 38 and 40. No one – including Movants – could reasonably have read that transcript and remained confident that the case would settle. Nor would a party with any real "interest" in the case continue to sit silently for months and not inquire whether the mediation failed,[6] whether the case had, in fact,[7] settled;

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[5] In a letter dated December 4, 2002, to Reagan Burch, Mr. Tanner, on behalf of the Unions, "decline[d] Mr. Burch's invitation to participate in mediation at this time," and expressed the Unions "surprise[...] to receive [Mr. Burch's invitation] given that the litigants apparently remain far apart on a number of important issues and some key issues have yet to be addressed, notwithstanding the long duration of this mediation." Mr. Tanner added, "Quite frankly, there appears to be no end in sight." Plaintiff's only quote from the letter to correct the record; a copy is not provided because it is marked "Privileged and Confidential Settlement Communication".

[6] As noted in Plaintiffs' Opposition to the Unions' Motion to Intervene at p. 5, plaintiffs' counsel notified Mr. Tanner, liaison counsel for the Unions, on April 4, 2003, that the mediation deadline was May 15, 2003. Movants' attempt to use the subsequent mediation before Magistrate Radford as support for the timeliness of their Motion to Intervene is curious and in the end, disingenuous, since, unless Movants are misrepresenting the timing of their contacts with Lufkin's counsel, Movants would not have known about the September 4, 2003 mediation with Magistrate Radford until after it occurred and failed, and thus that mediation could not have factored in their decision to wait until October 31, 2003 to file their Motion to Intervene.

[7] Movants' counsel are experienced attorneys familiar with class action litigation and surely, know that a class action settlement is accompanied by notice to the class and a fairness hearing.

about the trial schedule or the positions being pursued by the parties; or whether that party's "interest" continued to be affected by the litigation. Yet, this is exactly what the Unions, including the two Movants here, assert that they did.

B. The Court's Order Denying Intervention

The Court properly denied the Unions' motion to intervene in its November 18, 2003 Order Denying Motion to Intervene, for the reasons stated in the accompanying Memorandum Opinion of the same date (collectively referred to herein as the "November 18 Order"). The Court's November 18 Order was based on its finding that the motion failed the timeliness test for intervention under Fed. R. Civ. Pro. 24(a)(2) (non-statutory intervention of right) – the *only* basis for intervention asserted by the Unions in their motion – and relied primarily on Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977). The Court made fact-based findings against the Unions on all four of the factors identified as primary by the Fifth Circuit in Stallworth.[8] In particular, the Court found:

(1) Although the Unions have failed to make clear what if any interest they legitimately have in the outcome of this case as framed by the plaintiffs' remedial demands and the Court's orders, the Unions' delay of at least four to five years after learning that their alleged interests might be affected, before moving to intervene, tends to demonstrate that the motion is untimely. November 18 Order at 7-9.

(2) The long delay by the Unions after learning of their interest in the case – and particularly their delay over the last six months when they must or should have known that the case would not be resolved by mediation, despite their recent and self-serving statements that they did not – would make intervention on the eve of trial "manifestly unfair and prejudicial to the Plaintiffs." Id. at 9-10.

(continued ...)
See Federal Rule of Civil Procedure 23. Had this case settled by the May 15 mediation deadline that fact would have been well known among the employees and Unions at Lufkin. The absence of such information along with knowledge of the mediation deadline date should have prompted a diligent interested party to make inquiries these Movants failed to make.

[8] The analytical framework established by Stallworth remains good law in the Fifth Circuit today. See, Edwards v. City of Houston, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc); Trans Chemical Ltd. v. China Nat'l Machinery Imp. and Exp. Corp., 332 F.2d 815, 821 (5th Cir. 2003).

(3) Denial of intervention would cause no substantial prejudice to the Unions because the Court does not intend to modify the seniority system and because the Unions may be allowed to intervene later at the remedial stage of proceedings, if that stage is reached. Id. at 10-11.[9]

(4) The Unions showed no "unusual circumstances" that would justify their belated attempt to intervene on the eve of trial; neither a naïve belief that the case would settle in mediation, nor the unions' financial concerns,[10] constitutes such circumstances. Id. at 12-13.

In short, in applying the Stallworth factors, the Court found not a single indicator favoring a finding of timeliness, and found every indicator pointed in the opposite direction.

II. MOVANTS FAIL TO SHOW ANY BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO STAY PROCEEDINGS OR FOR THE COURT OF APPEALS TO QUESTION THAT EXERCISE OF DISCRETION.

The Emergency Motion of Unions IAM Local 1999 and GMP Local 429 for Stay ("Emergency Motion") is premised on Fed. R. Civ. Pro. 62 and "the inherent powers of this Court." By its terms, Rule 62 is wholly inapplicable here; it confers on district courts the power to grant a stay of proceedings on a *judgment*. There is no judgment here; indeed, the liability phase of trial has not commenced. Movants' entire argument is premised on the standards for granting stay of a judgment pending appeal pursuant to Rule 62. See Emergency Motion at 4-15. This argument is entirely irrelevant, and without it, Movants have presented no argument applicable to this case as it stands, pending trial.

Movants' Emergency Motion must, therefore, be understood as a request for the Court to exercise its "inherent powers." Without wishing to deny that the Court has such powers – and nowhere more so than at the stage this case has finally reached, calling for the Court to manage its trial calendar and conduct the trial proceedings – plaintiffs submit that there is no basis for the

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[9] Stallworth specifically authorizes and contemplates such remedial-stage interventions. See 558 F.2d at 267. Stallworth is recognized as the leading decision on the issue of timeliness under Rule 24(a)(1). See 6 Moore's Federal Practice, § 24.21[3] at p. 24-78 (3rd ed.).

[10] These concerns do not seem to have prevented the Unions from making a herculean, and doubtless expensive, effort to intervene once they finally decided to try to do so. In the case of the two Movants, at least, that effort and expense continues.

Court to exercise its "inherent powers" in a manner that has no basis in the Federal Rules of Civil Procedure or under applicable authorities, nor should it do so as a matter of discretion.[11]

A. Under the Standards of Rule 62, There Are No Grounds For a Stay Pending Appeal in This Case.

Even if the standards of Rule 62 are applied to the Emergency Motion, there is no basis for a stay pending appeal. Movants correctly recite the four factors to be applied in an appellate court's decision whether to grant a stay, see Emergency Motion at 4-5. See also Drummond v. Fulton County Department of Family & Child Services, 532 F.2d 1001, 1002 (5th Cir. 1976), citing Beverly v. United States, 468 F.2d 732, 741 n. 13 (5th Cir. 1972). However, they do not come close to meeting any portion of the four-part test.

The first factor considered on appeal is the likelihood of Movants prevailing on appeal. In addressing this factor, Movants reiterate the arguments they have previously made before this Court on the timeliness issue, under the four enumerated Stallworth factors. See, Emergency Motion at 5-12. Movants say absolutely nothing new in their discussion of these points, and indeed this Court's November 18 Order cogently disposes of each point rehashed by Movants in their Emergency Motion. Plaintiffs would merely abuse the patience of this Court if they in turn reargued the same points, as Movants have done. We decline to do so, and instead refer the Court back to its own well reasoned November 18 Order.

Movants fall far short of showing any defect or oversight in the Court's reasoning by which it denied their motion, much less any showing that they are likely to prevail on appeal by

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[11] Although Movants cite no authority for the Court's "inherent power" to stay proceedings upon denial of intervention, plaintiffs have found one arguably relevant precedent. In United States v. DeLeon Guerrero, 1992 WL 212272 (D. N. Mar. I. 1992), aff'd sub. nom. United States ex rel Richards v. De Leon Guerrero, 4 F. 3d 749 (9th Cir. 1993), the district court opined that "although no express provision of the Federal Rules of Civil Procedure authorizes a stay of proceedings upon denial of intervention, a court may exercise its discretion in the same fashion as it deals with an injunction pending appeal." However, in that case the district court denied the applicants' motion to intervene, and the Ninth Circuit affirmed that denial under the same abuse of discretion standard of review that, as we argue below, will apply on the appeal Movants have taken in the instant case. 4 F. 3d at 756.

making the same arguments of the same points. In the Fifth Circuit, a district court's denial of an applicant's motion to intervene on the ground of timeliness is reviewed under an abuse of discretion standard. Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 n. 8 (5th Cir. 1992); Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc., 346 F.3d 552, 558-559 (5th Cir. 2003). Unless such an abuse occurs, the denial of intervention will not be overturned on appeal. NAACP v. New York, 413 U.S. 345, 366 (1973). Moreover, as the Fifth Circuit has held, a trial court's decision on the timeliness issue on intervention is fact-specific and should to be made, using a flexible approach, from a practical rather than technical standpoint. United States v. Texas E. Transmission Corp., 923 F.2d 410, 413 (5th Cir. 1991); Edwards v. City of Houston, supra, 78 F.3d at 999.

Under these standards, the November 18 Order – far from constituting an abuse of discretion – is manifestly correct in its application of controlling law, based on indisputable facts showing the extreme untimeliness of the Unions' motion to intervene, and sensitive to the practical facts concerning the prejudice of last-minute intervention to plaintiffs and the havoc that the Unions' participation at trial, or the delay of trial, would create in these already complicated and hotly-contested proceedings. Thus, the chance that Movants will obtain a reversal on appeal of this Court's denial of their motion to intervene is extremely remote.

The second factor governing an appellate stay is whether, in the absence of a stay, Movants will suffer irreparable injury. On this point, Movants' argument – unsupported by any citation to authority, and more notable for its rhetoric than for its reasoning – goes beyond the grounds asserted in the Unions' motion to intervene, and reiterates the afterthoughts argued by the Unions for the first time at the November 13 hearing on their motion. In their pleadings, the Unions based their motion entirely on the false alarm that plaintiffs were seeking and the Court might grant modifications to the seniority system. When the Court in unambiguous terms disabused the Unions of that notion,[12] the Unions – mimicking the creative but unfounded

[12] See, Transcript of Hearing, November 13, 2003, at 4:4-11, 14: 21-16:9, 18:3-11.

suggestion of counsel for Lufkin[13] – then expanded their argument to an amorphous plaint that they have a right to participate fully in the case because matters related in some way or another to subjects of collective bargaining will be mentioned in evidence presented at trial.[14] The Court considered and properly rejected Movants' position in its November 18 Order, when it found that denial of intervention would not prejudice the Unions because "the Court intends neither to reform the CBA nor to overwrite the CBA in any fashion," and because the Unions may intervene at the remedial stage of the case, if reached. Id. at 11-12.

The third factor governing a stay on appeal is whether the existing parties to the litigation would be substantially harmed by the granting of a stay. On this point, Movants optimistically predict that a stay would last only "a matter of months, if not less" (Emergency Motion at 13). Apart from the fact that even a delay this short would burden plaintiffs with tremendous additional expense and create havoc in the Court's and parties' trial arrangements,[15] this prediction underscores how frivolous Movants' position is, and how well they know it. Given the Fifth Circuit's backlog and timetable for resolving appeals, the only way the delay could be that short is if the Court of Appeals summarily denies the appeal without full briefing. Clearly, however, if the Movants' position had any substance, and the Fifth Circuit after deliberating over their appeal granted them intervention, the case would not be remanded for further discovery and trial for one to two years.

Moreover, plaintiffs and class members would be prejudiced by a last-minute stay that would render the notice mailed to class members, published in two newspapers, and broadcast on

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[13] Id. at 19:21-20:22, see remarks of plaintiffs' counsel at 38:11-39:17.

[14] Id. at 30:7-16, 37:16-24.

[15] Plaintiffs' counsel have spent thousands of hours and a small fortune in costs in preparing for a trial, without the Unions' participation, in the last six months alone. See Declaration of Teresa Demchak ("Demchak Decl."), filed herewith, at ¶ 2. Much of this effort and expense would have to be repeated if the trial is continued to accommodate the Movants' pursuit of a long-shot appeal. Id. at ¶¶ 2-3.

local television pursuant to the Court's October 24, 2003 Order as amended by the November 5, 2003 Order inaccurate. Such a stay would cause great confusion among hundreds of class members (and others in the interested community) who received formal notice that trial would begin on December 4, 2003. Demchak Decl., ¶ 5. Such confusion, detrimental to both the administration of justice and public's perception of the justice system, is entirely unnecessary – as is the need for the parties and Court to spend hundreds more hours and thousands of dollars in later notice proceedings occasioned by a later trial date.

The final factor governing an appellate stay is whether the public interest would be served by a stay. Movants make two points; neither is persuasive. First, the Unions raise the spectre that denial of their motion could result in the parties' having "to try the case twice, once without the Union, and a second time with them." Id. at 13-14. Initially, it is questionable whether even that unwelcome outcome would raise any issue of public policy, as opposed to private interest. In any event, a second trial could only occur if the Court of Appeals were to hold that this Court's denial of Movants' intervention was an abuse of discretion. Since as shown above that is not a realistic possibility, neither does Movants' spectre suggest a realistic threat.

The public interest in preventing plaintiffs from finally reaching trial of their seven year old case without further delay is far more substantial than the interest cited by Movants. In the interest of ending discriminatory employment practices, Congress has commanded that the judge assigned to a Title VII case shall have "the duty ... to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." 42 U.S.C. § 2000e-5(f)(5). This policy applies all the more forcefully to a large class action affecting hundreds of protected class workers, like this one. Many of the plaintiffs and class members are approaching the end

of their Lufkin careers[16] Postponement of the granting of injunctive relief will deny many of them the opportunity to work under a non-discriminatory employment system for any part of their work lives; and for other, less senior class members, the delay would subject them to continued discrimination and make more distant the promise of relief from discriminatory work conditions.[17]

Second, Movants invoke the strong national policy favoring collective bargaining and statutes and decisions that favor the protection of bona fide seniority systems as support for the proposition that "it is imperative that the Unions be present at trial." Id. at 14-15. While Movants have correctly identified a strong national policy favoring the protection of bona fide seniority systems, the conclusion they draw from it is wholly misplaced. As the Court has stated, it will not change the seniority system no matter what findings it makes at the trial on liability. Therefore, the policy favoring seniority will be upheld whether or not Movants are present at trial. Their absence, following denial of their motion to intervene, is simply irrelevant to the public interest.

B. This Court Correctly Exercised Its Inherent Powers When It Denied the Unions' Motion to Intervene.

Movants' invocation of the "inherent powers" of the Court in support of their stay request adds nothing to their misplaced re-argument under the standards of Rule 62. The Court must exercise its "inherent powers" in a manner consistent with controlling law. On the timeliness

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[16] Plaintiffs' statistical expert, Richard Drogin, Ph. D., has found that 138 of the 235 African Americans employed at Lufkin's production facility as of December 31, 2000 had already been with the Company for over 20 years. See, Statistical Analysis of Racial Patterns in Lufkin Workforce (October 27, 2003), p. 10, Table 7.

[17] The only party that would benefit from a stay is Lufkin, which would be enabled to continue in its discriminatory ways, and postpone judgment, while plaintiffs' claims languish in procedural delays. Plaintiffs believe that this, rather than any legitimate concern for the interests of the Unions, is what underlies Lufkin's sudden solicitude for the interests of its erstwhile adversaries in collective bargaining. See Plaintiffs' Opposition to Emergency Motion for Stay of Defendant Lufkin Industries, Inc., filed herewith.

issue which was dispositive of the Unions' motion to intervene, the Court was clearly correct in its November 18 Order as discussed above; it would be anomalous to retreat from a clearly correct ruling in an exercise of "inherent powers." Moreover, the invocation of "inherent powers" implicates the Court's discretion. The order denying intervention was within that discretion and not an abuse thereof, as described above; and the standard of appellate review of the timeliness determination defers to that exercise of discretion. Moreover, a trial court's decision whether to grant a stay pending appeal under Rule 62[18] is itself reviewed under an abuse of sound discretion standard. Wildmon v. Berwick Univ. Pictures, 983 F.2d 21, 23 (5th Cir. 1992); Beverly v. United States, 468 F.2d 732, 740-41 n. 13 (5th Cir. 1972). Thus, there is no reason for any different result under the "inherent powers standard than under the Rule 62 factors discussed in Section II.A above.

Contrary to Movants' contention, the Court's proper exercise of its inherent powers requires that the stay request be denied. Fundamental to a trial court's powers is the authority to manage litigation pending before it in the interests of efficiency, economy, and procedural fairness. At no time is this power more important than at the trial stage. The timing and configuration of trial proceedings present a number of mutually interactive issues that cry out for judicial management. The Court's November 18 Order reflects a fair, flexible, and practical weighing of the various interests involved, as well as correct application of controlling legal principles; it is therefore an exercise of appropriate judicial management over trial proceedings.

The first and most overarching of the Federal Rules of Civil Procedure gives the district courts the authority as well as the duty to manage cases "to secure the just, speedy, and inexpensive determination of every action." Rule 1. The Court's "inherent power" must be exercised consistent with that objective. In this case, as it is now possible for the Court to secure the goals of Rule 1, it must do so by proceeding to trial as scheduled, without the further

[18] As stated above, Plaintiffs do not concede that Rule 62 even applies here. However, we address Movants' arguments as they are made.

complication, delay, and expense that would be engendered by a stay of proceedings pending appeal of the November 18 Order.

III. CONCLUSION

The Court should deny the Emergency Motion for a stay pending appeal.

Dated: November 25, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via FAX/hand delivery/United States mail, postage prepaid:

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on this 25th day of Nov, 2003.

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Timothy B. Garrigan