

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

LEAGUE OF WOMEN : No. 159 MM 2017
VOTERS OF PENNSYLVANIA, :
CARMEN FEBO SAN :
MIGUEL, JAMES SOLOMON, :
JOHN GREINER, JOHN :
CAPOWSKI, GRETCHEN :
BRANDT, THOMAS :
RENTSCHLER, MARY :
ELIZABETH LAWN, LISA :
ISAACS, DON LANCASTER, :
JORDI COMAS, ROBERT :
SMITH, WILLIAM MARX, :
RICHARD MANTELL, :
PRISCILLA MCNULTY, :
THOMAS ULRICH, ROBERT :
MCKINSTRY, MARK LICHTY, :
LORRAINE PETROSKY, :
Petitioners :
v. :
THE COMMONWEALTH :
OF PENNSYLVANIA; THE :
PENNSYLVANIA GENERAL :
ASSEMBLY; THOMAS W. :
WOLF, IN HIS CAPACITY AS :
GOVERNOR OF PENNSYLVANIA; :
MICHAEL J. STACK III, :
IN HIS CAPACITY AS LIEU- :
TENANT GOVERNOR OF :
PENNSYLVANIA AND :

PRESIDENT OF THE :
PENNSYLVANIA SENATE; :
MICHAEL C. TURZAI, IN HIS :
CAPACITY AS SPEAKER OF :
THE PENNSYLVANIA HOUSE :
OF REPRESENTATIVES; :
JOSEPH B. SCARNATI III, IN :
HIS CAPACITY AS PENNSYL- :
VANIA SENATE PRESIDENT :
PRO TEMPORE; ROBERT :
TORRES, IN HIS CAPACITY :
AS ACTING SECRETARY OF :
THE COMMONWEALTH OF :
PENNSYLVANIA; JONATHAN :
M. MARKS, IN HIS CAPACITY :
AS COMMISSIONER OF THE :
BUREAU OF COMMISSIONS, :
ELECTIONS, AND LEGISLA- :
TION OF THE PENNSYLVANIA :
DEPARTMENT OF :
STATE, :

Respondents :

ORDER

PER CURIAM

AND NOW, this 9th day of November, 2017, this Honorable Court, having determined that the present case involves issues of immediate public importance requiring this Court's assumption of plenary jurisdiction, it is hereby ordered that Petitioners' Application for Extraordinary Relief is **GRANTED**.

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On October 16, 2017, the Commonwealth Court granted an Application for Stay filed by Respondents Joseph B. Scarnati, President Pro Tempore of the Pennsylvania Senate, Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and the General Assembly of Pennsylvania. This stay is hereby vacated and the case will proceed expeditiously forthwith.

Under the continuing supervision of this Court, the case is hereby remanded to the Commonwealth Court and directed to President Judge Mary Hannah Leavitt for assignment to a commissioned judge of the Commonwealth Court with instructions to conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided. The Commonwealth Court shall file with the Prothonotary of this Court its findings of fact and conclusions of law no later than **December 31, 2017**.

Petitioners' Application for Leave to File a Reply in Support of Petitioner's [sic] Application for Extraordinary Relief, Application for Leave to Supplement the Application for Extraordinary Relief, and Praecipe to Provide Supplemental Authority in Support of Petitioners' Application for Extraordinary Relief, treated as an application for leave to supplement the Application for Extraordinary Relief, are hereby **GRANTED**. The Legislative Respondents' Motion for Oral Argument is hereby **DENIED**.

Jurisdiction retained.

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Chief Justice Saylor, Justice Baer and Justice Mundy note their dissent.

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

LEAGUE OF WOMEN :
VOTERS OF PENNSYLVANIA; CARMEN FEBO SAN : No. _____
MIGUEL; JAMES SOLOMON; :
JOHN GREINER; JOHN :
CAPOWSKI; GRETCHEN :
BRANDT; THOMAS :
RENTSCHLER; MARY :
ELIZABETH LAWN; LISA :
ISAACS; DON LANCASTER; :
JORDI COMAS; ROBERT :
SMITH; WILLIAM MARX, :
RICHARD MANTELL; :
PRISCILLA MCNULTY; :
THOMAS ULRICH; :
ROBERT MCKINSTRY; :
MARK LICHTY; LORRAINE :
PETROSKY; :
Plaintiffs, :
v. :
THE COMMONWEALTH :
OF PENNSYLVANIA; THE :
PENNSYLVANIA GENERAL :
ASSEMBLY; THOMAS W. :
WOLF, IN HIS CAPACITY AS :
GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK :
III, IN HIS CAPACITY AS :
LIEUTENANT GOVERNOR :

OF PENNSYLVANIA AND :
PRESIDENT OF THE PENN- :
SYLVANIA SENATE; :
MICHAEL C. TURZAI, IN :
HIS CAPACITY AS SPEAKER :
OF THE PENNSYLVANIA :
HOUSE OF REPRESENTA- :
TIVES; JOSEPH B. SCAR- :
NATI III, IN HIS CAPACITY :
AS PENNSYLVANIA SEN- :
ATE PRESIDENT PRO :
TEMPORE; ROBERT :
TORRES, IN HIS CAPACITY :
AS ACTING SECRETARY OF :
THE COMMONWEALTH :
OF PENNSYLVANIA; :
JONATHAN M. MARKS, IN :
HIS CAPACITY AS COMMIS- :
SIONER OF THE BUREAU :
OF COMMISSIONS, ELEC- :
TIONS, AND LEGISLATION :
OF THE PENNSYLVANIA :
DEPARTMENT OF STATE; :
Defendants. :

NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DIS-
TRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA:

Defendant Joseph B. Scarnati III, in his capacity
as Pennsylvania Senate President Pro Tempore (“Sen-
ator Scarnati”), by his respective undersigned counsel
and reserving all defenses and objections, hereby gives

notice under 28 U.S.C. §§ 1441 and 1446 of the removal to the United States District Court for the Eastern District of Pennsylvania of the above-captioned action pending against him in the Supreme Court of Pennsylvania. In support of this removal, Senator Scarnati states as follows:

I. PROCEDURAL HISTORY AND PLAINTIFFS' ALLEGATIONS

1. On June 15, 2017, Plaintiffs commenced an action in the Commonwealth Court of Pennsylvania by filing a Petition for Review (Exhibit A), docketed at 261 MD 2017.

2. In the Petition, Plaintiffs alleged that the congressional redistricting plan drafted and adopted by General Assembly and other Defendants in 2011 violated the Pennsylvania Constitution. By way of relief, Plaintiffs request, *inter alia*, that those districts be struck down and redrawn.

3. On October 11, 2017 – while the Petition was still pending in the Commonwealth Court – Plaintiffs filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court (“the Application”) (Exhibit B), docketed at 159 MM 2017, asking the Court to assume plenary jurisdiction over the Commonwealth Court matter.

4. After Plaintiffs filed the Application, but before the Pennsylvania Supreme Court acted on it, on October 21, 2017, the Honorable Tim Murphy resigned

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his seat in Congress as the Representative of the 18th Congressional District in Pennsylvania.

5. Rep. Murphy's resignation created a vacancy in Pennsylvania's U.S. congressional representation.

6. In consequence, on October 23, 2017, under his mandate under the United States Constitution, the United States Code, and Pennsylvania law, *see* U.S. Const. art. I, § 2, cl. 4; 2 U.S.C. § 8(a); 25 P.S. § 2777, Pennsylvania Governor Thomas Wolf issued a Writ of Election setting a special election for March 13, 2018 to fill the vacancy created in the 18th Congressional District (Exhibit C).¹

¹ "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. Const. art. I, § 2, cl. 4.

"Except as provided in subsection (b), the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." 2 U.S.C. § 8(a).

"Whenever a vacancy shall occur or exist in the office of Representative in Congress from this State during a session of Congress, or whenever such vacancy shall occur or exist at a time when the members of Congress shall be required to meet at any time previous to the next general election, the Governor shall issue, within ten days after the happening of said vacancy, or after the calling of an extraordinary session of Congress during the existence of said vacancy, a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held on a date named in said writ, which shall not be less than sixty (60) days after the issuance of said writ. In all other

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7. On November 9, 2017, the Supreme Court of Pennsylvania issued an Order (the “Order”) (Exhibit D) granting the Application, assuming plenary jurisdiction over the matters set forth in the Application, and directing the President Judge of the Commonwealth Court of Pennsylvania to designate a judge of that court to administer the case “[u]nder the continuing supervision” of the Supreme Court’s plenary jurisdiction.

8. The Order further instructed the Commonwealth Court to expedite the matter and have the specially-designated judge file findings of facts and conclusions of law with the Prothonotary of the Supreme Court of Pennsylvania no later than December 31, 2017.

9. As of the date of this filing, no party has yet filed an answer to the Petition for Review.

II. JURISDICTION

10. Federal district courts have “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

cases no such special election to fill said vacancy shall be held. The Governor may fix, in such writ of election, the date of the next ensuing primary or municipal election as the date for holding any such special election.” 25 P.S. § 2777.

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12. Under 28 U.S.C. § 1441, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”

13. Article I, Section 2 of the United States Constitution provides that “[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” U.S. Const. art. I, § 2, cl. 4.

14. This provision of the United States Constitution has been interpreted as a constitutional mandate that requires the relevant governor to timely issue such a writ. *See Jackson v. Ogilvie*, 426 F.2d 1333, 1336-37 (7th Cir. 1970).

15. Additionally, the United States Code sets forth guidelines on filling vacancies in Congress, incorporating directives of state law. *See* 2 U.S.C. § 8(a); *see also* 25 P.S. § 2777.

16. The mandate of Article I, Section 2 was completed by Governor Wolf on October 23, 2017 with the filing of his Writ of Election to fill the vacated seat in Congress for the 18th Congressional District.

17. In consequence, an election is already *in progress* to fill the 18th Congressional seat; indeed, over the weekend, Pennsylvania Republicans picked State

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Representative Rick Saccone to stand as the Republican nominee for the March 13, 2018 special election.

18. Because the special election currently underway to fill the vacancy created in the 18th Congressional District was set in accordance with the dictates of Article I, Section 2 of the United States Constitution as well as the United States Code, the relief Plaintiffs seek cannot be granted without resolving a substantial question of federal law. That question, specifically, is whether a state court under state law can strike down a Federal congressional district in which a state “Executive Authority” has, by Federal constitutional writ and federal law, already mandated and set a special election.

19. Based on the expedited deadline set by the Pennsylvania Supreme Court with the Order (demanding that findings of fact and conclusions of law be submitted by the Commonwealth Court by December 31, 2017), resolution of the pending state court matter will necessarily require resolution of the substantial federal question stated above, since resolution of the matter will seemingly occur before the March 2018 special election set by the Governor’s constitutional writ.

20. Under 28 U.S.C. § 1446, if a case is not removable at its inception, but a subsequent “pleading, motion, order or other paper” has the effect of bringing the action within the ambit of federal jurisdiction, removal may be filed within 30 days after receipt of such

pleading, motion, order or other paper. 28 U.S.C. § 1446(b)(3).

21. Here, the Writ of Election issued by Governor Wolf on October 23, 2017 is an “order or other paper” as contemplated by 28 U.S.C. § 1446 that, for the first time, introduced a new, central federal question squarely into this matter, as set forth above. Moreover, the November 9, 2017 Order of the Pennsylvania Supreme Court makes clear that the substantial federal question now involved must be addressed before the pending state court matter can be resolved.² This dynamic, for the first time, created federal question jurisdiction.

22. This Notice of Removal is filed within 30 days of the “order or other paper” and, accordingly, this removal is timely. *See* 28 U.S.C. § 1446.

III. OTHER PROCEDURAL REQUIREMENTS

23. This Notice meets all of the other procedural requirements of 28 U.S.C. § 1446.

24. *First*, under 28 U.S.C. § 1446(b)(2)(A), all defendants who have been “properly” joined and served

² Furthermore, the expedited deadline set by the Pennsylvania Supreme Court coupled with the expedited deadline already established by this Court in one of the two pending related claims, challenging Pennsylvania’s 2011 congressional districts, *see Agre v. Wolf* 17-CV-4392, creates the real possibility of a due process violation by compelling the same parties in multiple matters to resolve the same substantial federal issues in a compressed fashion.

must consent to a removal; as of the date of this Notice, Senator Scarnati has the consent of Defendants the General Assembly of Pennsylvania and State Representative Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives (collectively, “the General Assembly Defendants”).

25. Upon information and belief, the General Assembly Defendants will be filing written notice of their consent to removal with the Court in the coming days.

26. The consent required under 28 U.S.C. § 1446(b) does *not* require the consent of *every* defendant, *see generally* 28 U.S.C. § 1446(b)(2)(A) (requiring only consent of defendants “properly” joined), and, as such, does not require the consent of so-called “nominal defendants.” Nominal defendants include those “against whom no real relief is sought.” *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002). Furthermore, “[p]arties are not ‘real’ when they are joined ‘only as the designated performer of a ministerial act,’ or have no control of, impact on, or stake in the controversy.” *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 130 (D.D.C. 2013) (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92, (2005)).

27. Against the foregoing, the consent of the Commonwealth of Pennsylvania, Governor Wolf, Lieutenant Governor Michael Stack, Acting Secretary of the Commonwealth Robert Torres, and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan Marks is not required, as they are nominal parties against whom no real relief is sought.

28. *Second*, because Plaintiffs filed the Application in the Pennsylvania Supreme Court's middle district, which encompasses the counties set forth in the margin,³ this case is being appropriately removed to the United States District Court for the Eastern District of Pennsylvania since this is a federal district encompassing the division within which the state court matter is pending. *See* 28 U.S.C. § 1441(a).

WHEREFORE, Senator Scarnati hereby removes this action from the Supreme Court of Pennsylvania to the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441 and 1446.

³ Counties included in the Pennsylvania Supreme Court's middle district are: Adams, Berks, Bradford, Bucks, Carbon, Centre, Chester, Clinton, Columbia, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzern, Lycoming, Mifflin, Montgomery, Montour, Monroe, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, York. *See* County Map by Regions, United Judicial System of Pennsylvania, *available at*: <http://www.pacourts.us/assets/files/setting-3563/file-3267.pdf?cb=20710f>.

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Dated:
November 14, 2017

Respectfully submitted,

/s/ [Illegible]

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Esquire

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Joseph B. Scarnati III

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

LEAGUE OF WOMEN VOTERS	:	
OF PENNSYLVANIA, et al.,	:	
<i>Plaintiffs,</i>	:	
v.	:	No. 17-cv-5137
THE COMMONWEALTH	:	
OF PENNSYLVANIA, et al.,	:	
<i>Defendants.</i>	:	

**EMERGENCY MOTION TO
WITHDRAW NOTICE OF REMOVAL**

(Filed Nov. 16, 2017)

Defendant Senator Joseph B. Scarnati, III hereby requests that the Court deem withdrawn the Notice of Removal in the above matter, and remand this action back to the Pennsylvania Supreme Court. Prior to the filing of the Notice of Removal, Defendant understood from Defendant Representative Michael Turzai's counsel that he consented to removal. This afternoon, we have been advised from counsel that Defendant Turzai does not now consent to the Notice as filed. Accordingly, this matter should be remanded.

Respectfully [sic] submitted,

s/ Matthew H. Haverstick
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Attorneys for Defendant

Sen. Joseph B. Scarnati, II [sic]

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

LEAGUE OF WOMEN	:	
VOTERS OF	:	
PENNSYLVANIA, et al.,	:	Civil Action No.
	:	2:17-cv-5137
Plaintiffs,	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, et al.,	:	
	:	
Defendants.	:	

**DEFENDANT, MICHAEL C. TURZAI'S
RESPONSE TO EMERGENCY MOTION
TO WITHDRAW NOTICE OF REMOVAL**

(Filed Nov. 16, 2017)

Defendant, Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, by and through his undersigned counsel, respectfully submits the within Response to Defendant, Joseph B. Scarnati III's Emergency Motion to Withdraw Notice of Removal (ECF No. 9).

1. On November 14, 2017, Senator Scarnati filed a Notice of Removal of this action from the Pennsylvania Supreme Court in which it was represented to this Court that Senator Scarnati had the consent to removal under 28 U.S.C. § 1441 of Speaker Turzai. (ECF No. 1 at ¶ 24).

2. This representation is false.

3. At no point in time did the undersigned counsel for Speaker Turzai, Kathleen A. Gallagher, ever indicate to counsel for Senator Scarnati, Matthew Haverstick, that Speaker Turzai consented to the removal of this action under 28 U.S.C. § 1441. Indeed, Attorney Gallagher never communicated with Attorney Haverstick regarding the Notice of Removal prior to the filing of the same.

4. To the contrary, on Sunday, November 12, 2017 Attorney Gallagher was advised that Attorney Haverstick believed the action was subject to removal under 28 U.S.C. § 1443, which statute *does not require* the consent of all Defendants prior to removal.

5. Speaker Turzai was not interested in pursuing a removal action.

6. During the afternoon of November 13, 2017, Attorney Gallagher learned that Attorney Haverstick would file a removal solely on behalf of Senator Scarnati.

7. At all times, the only ground for removal ever discussed was under Section 1443.

8. Neither Attorney Gallagher nor Speaker Turzai had any knowledge of the intent to remove this action under 28 U.S.C. § 1441. It was not until the undersigned counsel received the filed copies of the Notice of Removal on Wednesday, November 15, 2017 via e-mail service from Attorney Joshua Voss and a

request for written consent to the same that it was discovered that removal was sought under Section 1441.

9. Indeed, counsel for Speaker Turzai was not provided with the opportunity to review in advance the Notice of Removal prior to its filing.

10. In light of the false representation contained in the Notice of Removal, Attorney Gallagher sent an e-mail to Attorney Haverstick on November 16, 2017 at 12:40 p.m. indicating that “[r]emoval pursuant to Section 1441, however, was never discussed and no consent was given to you or anyone else.” *See* Exhibit A, attached hereto, E-mail dated 11/16/17 to Attorney Haverstick.

11. Accordingly, Attorney Gallagher requested that an amended notice of removal be filed to correct the false statement regarding consent. *See* Exhibit A.

12. Instead of filing an amended notice of removal, Senator Scarnati filed his Emergency Motion to Withdraw Notice of Removal in which, once again, it is improperly represented that counsel for Speaker Turzai “consented to removal” but “does not now consent to the Notice as filed,” implying that Speaker Turzai or his counsel previously consented to the removal as filed. (ECF No. 9).

13. Consequently, Speaker Turzai is left with no choice but to file the within Response in order to correct the record and the false representations made to this Court.

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14. To this end, and to be clear, at no point in time did Speaker Turzai's counsel or anyone else acting on Speaker Turzai's behalf state to Attorney Haverstick, or anyone else acting on Senator Scarnati's behalf, that Speaker Turzai consented to removal pursuant to 28 U.S.C. § 1441.

Dated: November 16, 2017

Respectfully submitted,

CIPRIANI & WERNER PC

/s/ Kathleen A. Gallagher

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*Attorneys for Defendant Michael C.
Turzai, in his official capacity as
Speaker of the Pennsylvania House
of Representatives*

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

[MB]

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al.	CIVIL ACTION NO. 17-5137
v.	
THE COMMONWEALTH OF PENNSYLVANIA, et al.	

ORDER

AND NOW this 16th day of November, 2017, upon consideration of Defendant Senator Joseph B. Scarnati, III's Emergency Motion to Withdraw Notice of Removal (ECF 9), the Motion it [sic] hereby **GRANTED** and it is further **ORDERED** that this matter is **RE-MANDED** back to the Pennsylvania Supreme Court with prejudice. Any request for fees or costs should be filed within fourteen (14) days.

BY THE COURT:

/s/ [Illegible]
MICHAEL M. BAYLSON
United States District
Court Judge

O:\CIVILJ_17\17-5137 League of Women Voters v
Commw of PA\17cv5137 Order re Withdrawal of No-
tice of Removal 11162017.docx

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October 23, 2017

Via Fascimile [sic] (267) 299-5078

Honorable Michael M. Baylson
U.S. District Court Judge
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

**Re: *Agre et al. v. Wolf et al.*, No. 17-cv-04392
(MMB)**

Dear Judge Baylson,

As directed in the Court's letter of this morning, I write to state Defendants' position on Plaintiffs' Motion for Amendment to Pre-Trial Schedule. Defendants

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do not oppose the relief that Plaintiffs seek, provided that the proposed amendment of the Scheduling Order will not result in any postponement of the scheduled trial date.

Respectfully,

/s/ Mark A. Aronchick
Mark A. Aronchick

MAA:gml

Cc (via email): All counsel of record
