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September 19, 2000

Petition Review Board
c/o
Dick Hilton
Enforcement Specialist
U.S. Nuclear Regulatory Commission
Rockville, MD
(Served via Fax. No. 301-415-3431)

Dear Petition Review Board:

This letter provides further documentation that Westinghouse Electric Company, LLC ("WEC") made false statements before the Petition Review Board ("PRB") during the telephone conference call conducted by the PRB on September 14, 2000 related to a petition filed by Mr. Shannon Doyle pursuant to 10 C.F.R. section 2.206. The false statements made by WEC constitute new and independent violations of the Atomic Energy Act's prohibition on a licensee's duty not to submit material false statements to the NRC. The false statements were material to the issue of whether WEC violated 10 C.F.R. Section 50.7. Among the false statements subject to simple verification are the following:

1. WEC alleged that Hydro Nuclear Services has accepted service of process of the complaint filed by Mr. Doyle pursuant to 42 U.S.C. 5851(e) (1988) in federal court. This statement is false. Enclosed please find the official pleading submitted by counsel for WEC, in which these attorneys state, in a document filed according to Federal Rule of Civil Procedure 11 (a rule which also requires parties in civil proceedings to refrain from misleading the court), in which WEC states that Hydro has not been served. After filing this brief, WEC filed numerous other documents with the federal court, and has *never* informed the Court that Hydro has accepted service of process. In fact, the opposite is true. WEC has used the difficultly of serving a company which, on paper, no longer exists, as subterfuge in escaping liability in a proceeding which should have been summary in nature.

2. WEC made statements before the PRC which implied that they had acknowledged that Westinghouse Staffing Services was liable for Hydro. Again, this is a misstatement of fact. In the same pleading referenced above, WEC asserted that the case against WSS should be *dismissed*. Specifically, WEC attempted to hide the fact that Hydro still existed. Mr. Doyle had to research the issue, and document that WSS was, as a matter of law, Hydro. In subsequent pleadings, when it became apparent that WEC's false statement regarding WSS's

liability was exposed, WEC then switched arguments, and asserted that WSS no longer existed! Again, this subterfuge was *intended* to "delay" and obstruct the enforcement of a vital federal law - the nuclear whistleblower protection act.

It is well established as a matter of law that the NRC's enforcement powers concerning nuclear whistleblowers are completely distinct from the rights and obligations imposed upon courts and the Department of Labor pursuant to 42 U.S.C. 5851. Consequently, Mr. Doyle's 2.206 petition is properly before the PRB, and the PRB may review the complete record in this case and take action against WEC.

Thank you in advance for your prompt attention to these matters.

Respectfully submitted,

Stephen M. Kohn

enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SHANNON DOYLE,	)	
	)	
Plaintiff,	)	Civil Action No. 00-CV-1141
	)	
v.	)	
	)	
HYDRO NUCLEAR SERVICES, WESTINGHOUSE STAFFING SERVICES, INC., WESTINGHOUSE ELECTRIC CORPORATION and CBS CORPORATION,	)	CHIEF JUDGE DONALD E. ZIEGLER
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Hydro Nuclear Services ("Hydro"), Westinghouse Staffing Services, Inc. ("WSS"), Westinghouse Electric Corporation ("WEC") and CBS Corporation ("CBS") (collectively the "Defendants"), submit this Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint.

INTRODUCTION

Plaintiff Shannon Doyle ("Doyle") has filed a Complaint seeking enforcement of a Final Decision and Order on Damages ("Order") issued by the Administrative Review Board ("Board") of the Department of Labor in the matter captioned, Shannon Doyle v. Hydro Nuclear Services, Department of Labor Case No. 89-ERA-22. The Order which is the subject of Plaintiff's

enforcement action, a copy of which is attached hereto as Exhibit A,[1] requires Hydro to pay to Doyle in excess of $900,000 as back pay, front, lost benefits, compensatory damages, interest, and attorney's fees. In addition to naming Hydro as a Defendant, Doyle's Complaint names a number of other parties as Defendants to his enforcement action, including WSS, WEC and CBS, even though these parties were not named as respondents in the Order which Doyle seeks to enforce. Doyle has also instituted this action seeking enforcement of the Order even though he has himself filed a petition for review of that Order which is currently pending in the United States Court of Appeals for the Third Circuit.

Defendants have filed a Motion to Dismiss Doyle's Complaint on a number of independent grounds. First, Defendant Hydro has moved for dismissal because it has not been effectively served with process as required by Rule 4 of the Federal Rules of Civil Procedure. Second, Defendants WSS, WEC and CBS have moved for dismissal because they were not named as respondents in the administrative proceedings which resulted in the Board's order, and are therefore not proper defendants to this enforcement action under 42 U.S.C. §5851(e). Finally, all Defendants have moved for dismissal because Plaintiff Doyle lacks standing to seek enforcement of the Board's order because Plaintiff Doyle has filed a petition to review the Order, and therefore,

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[1] Plaintiff's Complaint makes reference to the Board's Order and a number of other matters relating to the procedural history of this dispute, but does not attach copies of the Order or documents relating to the procedural history. Inasmuch as Plaintiff's Complaint makes reference to these matters, and because there is no dispute about the procedural history of the administrative proceedings and the parties' appeals currently pending, it is perfectly proper for the Court to consider these documents in resolving the Company's Rule 12 motion to dismiss, even though Plaintiff failed to attach them to the Complaint. E.g., City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); Pension Benefit Guaranty Corp. v. White Consolidated Industries, 998 F.2d 1192, 1196 (3d Cir. 1993).

as a matter of law he is precluded from seeking enforcement of the Order until final disposition of that appeal.

PROCEDURAL HISTORY

In November 1988, Doyle filed a complaint with the United States Department of Labor against Hydro asserting that Hydro violated the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C.A. §5801 et seq. See Complaint ¶7. In July 1989, the Administrative Law Judge ("ALJ") ruled that Doyle's claim was not a protected activity under the ERA. However, by Opinion and Order dated March 30, 1994, the Secretary of Labor reversed the ALJ's liability ruling and remanded this matter for an assessment of Doyle's damages.[2]

The Board issued its Order on May 17, 2000, setting amounts for back pay, front pay, lost benefits, compensatory damages, pre- and post-judgment interest on front and back pay, as well as attorney's fees. See Complaint ¶¶14-16, 23, 24. The May 17, 2000 Order also included provisions for injunctive relief. As of this date, Hydro has provided all of the injunctive relief ordered by the Board. Accordingly, Doyle's enforcement action in this Court relates solely to the monetary portion of the May 17, 2000 Order.

In his Complaint, Doyle fails to inform the Court that both he and Hydro have filed petitions for review of the Board's May 17, 2000 Order. Specifically, on May 18, 2000 Hydro filed a Petition for Review (Exhibit B hereto) in the United States Court of Appeals for the Sixth Circuit

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[2] Defendant Hydro filed a Motion to Stay contemporaneously with this Motion to Dismiss that provides a detailed factual and procedural history of this matter. Accordingly, Defendants adopt and incorporate the factual background in the Motion to Stay in their Memorandum of Law.

in which Hydro seeks review of the Board's finding of liability and award of damages. On May 19, 2000, Doyle filed a Petition for Review (Exhibit C hereto) in the United States Court of Appeals for the Third Circuit seeking review of those portions of the Board's May 17, 2000 Order that were not favorable to him. These petitions for review were consolidated for appeal pursuant to 28 U.S.C. §2112 and Rules 17.1 and 25.5 of the Rules of the Panel on Multidistrict Litigation.[3] On June 5, 2000, the Judicial Panel on Multidistrict Litigation issued a Consolidation Order (Exhibit D hereto) consolidating the petitions for review in the United States Court of Appeals for the Third Circuit.

ARGUMENT

A. The Complaint Against Defendant Hydro Should Be Dismissed Because Hydro Was Not Properly Served With Process.

Sufficient service of process is a jurisdictional prerequisite to bringing a case in federal court. See Hemmerich Industries, Inc. v. Moss Brown &Co., Inc., 114 F.R.D. 31 (E.D. Pa. 1987). The burden is on the plaintiff to show that service has been made upon a proper agent of the corporate defendant. Id.; Alloway v. Wain-Roy Corporation, 52 F.R.D. 203 (E.D. Pa. 1971). Notice by itself does not validate an otherwise defective service. Tse-Teng Lin v. Pennsylvania Machine Works, Inc., Civ. A. No. 97-5407, 1998 U.S. Dist. LEXIS 2767 (March 3, 1998) (citing Ayres v. Jacobs & Crumplar, 99 F.3d 565, 568 (3d Cir. 1996)). This Court lacks jurisdiction over Hydro because the service to Hydro -- by delivering a copy of the Complaint to Ms. Sally Maybray at her home -- was improper.

[3] Under the Rules of the Panel on Multidistrict Litigation, because both petitions for review were filed within ten (10) days of the Board's May 17, 2000 Order, both petitions for review are considered to have been filed simultaneously. See Rule 20(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

> Under Federal Rule of Civil Procedure 4(h), a corporation may be served:
>
> in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ..

Rule 4 (e)(1) refers to service pursuant to the law of the state in which the district court is located for service upon a defendant in an action brought in the courts of general jurisdiction of the state. The pertinent rule of civil procedure in Pennsylvania provides that service upon a corporation must be made upon:

> (1) an executive officer, partner or trustee of the corporation or similar entity, or
>
> (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
>
> (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Pa. R. Civ. P. 424. Thus, these rules provide overlapping requirements for valid service of a corporate entity. Plaintiff did not meet those requirements in connection with the service of process upon Hydro.

Sally Maybray is an employee of Westinghouse Electric Company LLC, an entity not even named as a defendant in this matter. She is not now, and never was, an executive officer, partner or trustee of Hydro, a manager or other person in charge of any regular place of business or activity of Hydro or its agent authorized to receive service of process.[4] Further, her home, where she

[4] Because of the holiday weekend, an affidavit could not be obtained from Ms. Maybray in time to permit it to be filed on July 3, 2000 when Hydro's responsive pleading was due. An affidavit for Ms. Maybray verifying the factual matters set forth herein will be filed on or before (continued...)

was served, is not and has never been a recognized business location for Hydro. Under these circumstances, it is clear that Plaintiff has not properly served Hydro, and the action against it should be dismissed.

Other courts faced with similarly defective service have not hesitated to dismiss the complaint for lack of jurisdiction. See Tse-Teng Ling, supra (service on receptionist improper); Hemmerich, supra (no showing by plaintiff that person served was authorized to accept service); and Alloway, supra (service on Parts Manager improper). See also, Smeltzer v. Deere and Company, 252 F. Supp. 552 (W.D. Pa. 1966) (case dismissed where person served was not authorized to receive service of process).

Accordingly, the Complaint against Hydro should be dismissed.

B. WSS, WEC, And CBS Are Improper Parties To Doyle's Enforcement Action.

Section 211(e) of the ERA expressly provides that an action seeking enforcement of an order under the Act may be filed only against the person to whom such order was issued:

> Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order.

42 U.S.C. §5851(e)(1) (emphasis added). A review of the Board's Order which Plaintiff Doyle seeks to enforce in the instant action demonstrates that the only respondent named in the Order is Defendant Hydro. See Exhibit A hereto. It is therefore undisputed that Defendants WSS, WEC and

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[4](...continued)
July 8th.

CBS were not parties to the administrative proceedings below, and are not named as respondents in the Order Doyle seeks to enforce. It follows that the Complaint against these Defendants not named in the administrative proceedings below should be dismissed, because Doyle can only seek to enforce the Board's Order against Hydro, "the person to whom such order was issued." 42 U.S.C. §5851(e)(1).

Doyle attempts to avoid the import of the clear language of Section 211(e) by alleging that WSS, WEC and CBS are successor corporations to Hydro. See Complaint at ¶¶8-13. Doyle's effort in this regard should be rejected. Doyle's efforts to expand the group of Defendants to include alleged successors of Hydro is inconsistent with the clear and unambiguous language of Section 211 of the ERA, which unequivocally provides that enforcement actions can be filed only against those persons to whom the administrative order was issued.

This proceeding has been pending for more than twelve years. During that twelve-year period, Doyle made absolutely no effort to add any additional parties to the administrative proceeding. Doyle had ample opportunity to seek leave to add these other entities as respondents to his administrative complaint prior to the Board's issuance of its final order, and having failed to avail himself of that opportunity, Doyle should not be permitted to add additional parties as defendants at this time. Because WSS, WEC and CBS were not named as parties to the Order issued by the Board, Doyle's enforcement complaint against those Defendants should be summarily dismissed.

C. Doyle's Complaint Seeking Enforcement Of The Board's Order Should Be Dismissed Because Of The Appeals From Such Order Currently Pending In The United States Court Of Appeals For The Third And Sixth Circuits.

It is axiomatic that a party cannot, on one hand, file an appeal from a judgment or order and, at the same time, seek enforcement of the order while that appeal is pending. This logical proposition has been repeatedly recognized by federal courts, including the United States Supreme Court more than 137 years ago:

> They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree.

Bronson v. LaCrosse R.R. Co., 68 U.S. (1 Wall.) 405, 410 (1863). Numerous courts have followed the Bronson court's observation, ruling that an appeal by the prevailing party suspends the execution of the judgment.

For example, in Tennessee Valley Authority v. Atlas Machine and Iron Works, Inc., 803 F.2d 794, 797 (4th Cir. 1986), the Fourth Circuit ruled that a judgment creditor's filing of an appeal operates as an automatic supersedeas, obviating the need for the party against whom the judgment was entered to file a supersedeas bond "because the execution of the judgment has already been superseded by the prevailing party's appeal." In reaching that conclusion, the Fourth Circuit expressly ruled that "where the prevailing party in the lower court appeals from that court's judgment, the appeal suspends the execution of the decree." 803 F.2d at 797.

Similarly, in Sealover v. Carey Canada, 806 F.Supp. 59, 62 (M.D. Pa. 1992), rev'd on other grounds, 996 F.2d 42 (3d Cir. 1993), the district court recognized the "long standing rule

of law which precludes a litigant from accepting 'all or a substantial part of the benefit of a judgment' while simultaneously challenging 'unfavorable aspects of that judgment on appeal.'" 806 F.Supp. at 62 (citation omitted). See also Advent Systems, Ltd. v. Unisys Corp., 1990 U.S. Dist. LEXIS 2321 (E.D. Pa. 1990) ("Since plaintiff has appealed from the judgment in its entirety . . . it seems clear that plaintiff is not in a position to seek enforcement of the judgment until the appeal is decided.")

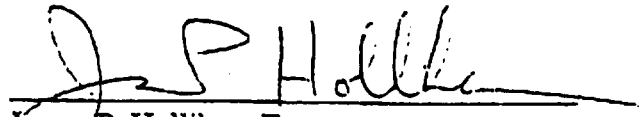
Application of the principles discussed above to the instant case compels dismissal of Plaintiff's Complaint seeking enforcement of the Board's May 17, 2000 Order. Both parties have appealed the Order by filing petitions for review which are currently pending in the United States Court of Appeals for the Third Circuit pursuant to a consolidation order entered by the Judicial Panel on Multidistrict Litigation. The Case Summary filed by Doyle in the Third Circuit (Exhibit E hereto) and the Preargument Statement filed by Hydro in the Sixth Circuit (Exhibit F hereto) demonstrate that both Doyle and Hydro are raising significant and substantive issues concerning the validity of several significant aspects of the Board's Order. Under these circumstances, Doyle's Complaint seeking enforcement of the Order should be dismissed pending final disposition of those appellate proceedings.[5]

[5] It should be noted that Doyle will not be prejudiced in any way by dismissal of this enforcement action pending resolution of the appeals filed by both parties seeking review of the Board's May 17, 2000 Order. As set forth in detail in Hydro's alternative Motion for Stay of Money Judgment Pending Appeal, Hydro has notified Doyle in writing on several occasions that it is willing to post a bond to secure the monetary portion of the Board's May 17, 2000 Order. Hydro has also filed concurrently with this Motion to Dismiss a motion to stay further proceedings in this case until final disposition of the pending appeals. In its motion for stay, Hydro offers to post a supersedeas bond in the amount of $900,000.

CONCLUSION

For the reasons discussed above, Defendants respectfully request that this Court grant their Motion to Dismiss, and dismiss the Complaint against all Defendants.

Respectfully submitted,



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Dated: July 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SHANNON T. DOYLE,	
Plaintiff,	
v.	
HYDRO NUCLEAR SERVICES, et al.,	**Civ. Action No. 00-1141 (DEZ)**
Defendants.	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR JUDGMENT ON THE PLEADINGS AND HIS MOTION FOR EXPEDITED HEARING ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF THE CASE

This is a summary enforcement action filed pursuant to Section 210 of the Energy Reorganization Act ("Section 210"), 42 U.S.C. § 5851 (1988).[1] On May 17, 2000, the U.S. Department of Labor's ("DOL") Administrative Review Board ("ARB") issued its Final Decision and Order on Damages and Denial of Stay Pending Judicial Review ("Order") in Plaintiff's case.[2] The Order is "administratively final" and enforceable. Doyle, 2000 WL 694384, at *20. In this Order, the DOL required Hydro Nuclear Services ("Hydro") to provide various relief to Plaintiff. Id. Hydro has refused to provide this relief and on June 12, 2000, Plaintiff filed the instant action in the United States District Court for the Western District of

[1] A copy of Section 210 is attached as Exhibit 1.

[2] Attached as Exhibit 2.

Pennsylvania, seeking enforcement of the DOL's final Order.

This enforcement action is summary in nature, requiring the Court to perform a ministerial function in enforcing the ARB's Order. See Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1514-15 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986).

FACTS

On December 1988, Plaintiff mailed a complaint to the DOL, alleging that Hydro, a division of Westinghouse Electric Corporation, had violated the employee protection provision of Section 210 of ERA. See Doyle, 2000 WL 694384, at *1. Upon the filing of the initial complaint, several administrative proceedings and hearings were commenced, culminating on May 17, 2000, when the ARB issued its administratively final decision, holding that "Hydro violated the employee protection provision of the ERA when it declined to hire Doyle...." Id. at *20.

The ARB awarded Plaintiff legal and equitable relief, id. at *21, and denied Hydro's request for a stay. Id. at *6-7. Hydro has failed to adhere to the Order by (1) failing to pay Plaintiff's $218,378 back pay award; (2) failing to pay Plaintiff's $154,695 front pay award; (3) failing to pay prejudgment interest on both front pay and back pay; (4) failing to pay postjudgment interest on both front pay and back pay; (5) failing to pay Plaintiff's $45,000 lost benefits award; (6) failing to pay Plaintiff's $80,000 compensatory damages award; (7) failing to pay Plaintiff's counsel $259,674.02 attorney's fees award; and (8) failing to pay Plaintiff's counsel's $30,353.45 costs award.

STATUTORY BACKGROUND

Section 210 of ERA provides for an administrative adjudication of nuclear whistleblower cases within DOL. Exhibit 1, 42 U.S.C. § 5851(b). After an Administrative Law Judge issues a recommended decision, the Secretary of Labor[3] ("Secretary") must issue a final decision under the provisions of 42 U.S.C. § 5851(b). Id. The Secretary "must take one of three actions: he must grant relief, deny relief, or enter into a settlement with the parties."[4] Carolina Power and Light Co. v. U.S. Dept. of Labor, 43 F.3d 912 (4th Cir. 1995) (citing Macktal v. Secretary of Labor, 923 F.2d 1150, 1153 (5th Cir. 1991)). Thus, the Secretary must either issue a decision finding a violation of Section 210, or a decision terminating the complaint. In this case, the Secretary issued an order granting relief to Plaintiff. See Doyle, 2000 WL 694384, at *20-21.

Most employers found guilty of violating Section 210 voluntarily comply with the orders issued. In a rare case such as this one, the employer ignores the Secretary's order and forces the employee to seek judicial relief in order to obtain enforcement of the order. Under Section 210, an employee may seek enforcement of the Secretary's decision in federal district court. 42 U.S.C. § 5851(e)(1). An enforcement proceeding is ministerial in nature. See Brock, 780 F.2d

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[3] The Secretary created the ARB in 1996. See 61 Fed. Reg. 19978 (May 3, 1996). The Secretary directly delegated to the ARB its authority to issue final agency decisions under a broad range of federal labor laws, including cases Section 210 of the ERA, 42 U.S.C. § 5851. See generally Administrative Review Board: Executive Mission and Members (visited June 14, 2000) <http://www.dol.gov/dol/arb/public/mission.htm>.

[4] Section 210 states, in relevant part: "Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement agreement entered into by the Secretary and the person alleged to have committed such a violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." 42 U.S.C. § 5851(b)(2)(A).

at 1515. A district court has no authority to review the merits of the Secretary's order.[5] See 42 U.S.C. § 5851(c)(2) ("An order of the Secretary...to which review could have been obtained [in the court of appeals,] shall not be subject to judicial review in any criminal or other civil proceeding."); Brock, 780 F.2d at 1515 ("An appeal of the Secretary's decision can lie only with the court of appeals.").

Therefore, in accordance with Section 210, a district court is required to enforce a final order issued by the Secretary, 42 U.S.C. § 5851(e)(1), and may not reopen or reconsider the substantive ruling of the Secretary. See 42 U.S.C. § 5851(c)(2); Wells v. Kansas Gas & Elec. Co., No. 84-2290, slip. op. at 2 (D. Kan. Oct. 15, 1984), aff'd sub nom. Kansas Gas & Elec. Co. v. Brock, 780 F.2d (10th Cir. 1985).

ARGUMENT

I. PLAINTIFF IS ENTITLED TO JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, TO SUMMARY JUDGMENT.

A. Standard for Granting Judgment on the Pleadings.

A court may grant judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure when the movant has clearly established that no material issue of fact remains to

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[5] Judicial review of a Section 210 case may be obtained in the United States court of appeals. See 42 U.S.C. § 5851(c)(1). Both Plaintiff and Defendant Hydro have sought review with the court of appeals. However, the law is very clear. Filing an appeal pursuant to § 5851(c)(1) does **not** "operate as a stay of the Secretary's order." Id. Thus, an enforcement action may proceed while review of the Secretary's decision is pending. Id. Plaintiff may secure enforcement of the Secretary's Order while review is before the court of appeals is pending. Significantly, in this case the Secretary explicitly denied Hydro's request for a stay pending appeal. See Doyle, 2000 WL 694384, at *6-7.

be resolved, and that he is entitled to judgment as a matter of law. See Institute for Scientific Info., Inc. v. Gordon and Breach Science Pubs., Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991); Regalbutto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D. Pa. 1995), aff'd 91 F.3d 125 (3d Cir. 1996); City of Philadelphia v. Public Emp. Ben. Servs. Corp., 842 F. Supp. 827 (E.D. Pa. 1994). The district court must view the facts and inferences in the pleadings in the light most favorable to the non-moving party. See National Iranian Oil Co. v. Mapco Int'l, Inc., 863 F.2d 289, 290-91 (3d Cir. 1988).

B. Plaintiff is entitled to judgment on the pleadings.

Plaintiff is entitled to judgment on the pleadings because no material issue of fact remains to be resolved. This action is brought pursuant to 42 U.S.C. § 5851(e)(1), to require Defendant Hydro to comply with the Order issued in Plaintiff's Section 210 ERA case before the Secretary. A district court entertaining an enforcement action under Section 210 must "enforce the Secretary's order...." Brock, 780 F.2d at 1514-15. Because the court's duty is "ministerial," id. at 1515, no material issue of fact remains to be resolved. Thus, Plaintiff is entitled to judgment as a matter of law, since a final order was issued by the Secretary in Plaintiff's case, and this Court has the statutory authority to enforce the order. Accordingly, the Court should grant judgment on the pleadings for Plaintiff.

When a party has failed to comply with an order issued by the Secretary, either the Secretary or "any person on whose behalf an order was issued may commence a civil action in the appropriate United States district court." 42 U.S.C. § 5851(e)(1) & (d). A district court entertaining an enforcement action under section 210 of ERA must "enforce the Secretary's order," its duty being a "ministerial one." Brock, 780 F.2d at 1515.

Brock, the only reported case on § 5851(e)(1), concerned an appeal of a district court decision to enforce an order by the Secretary of Labor. Id. at 1508. The district court in that case stated:

> [Section 5851(d)] is clear on its face that the district court has jurisdiction to grant appropriate relief through its enforcement of an order by the Secretary. It cannot be interpreted to authorize this court to inquire into the appropriateness of the relief ordered by the Secretary.

Wells v. Kansas Gas & Elec. Co., No. 84-2290, slip op. at 2 (D. Kan. Oct. 15, 1984), aff'd sub nom. Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985) (Exhibit 3). The district court granted plaintiff's motion for judgment on the pleadings, ordering the defendant to "comply with the order of the Secretary of Labor." Id. at 3. The court of appeals, in turn, affirmed the district court's summary order to enforce the Secretary's order.[6] See Brock, 780 F.2d at 1515.

Here, the Court must enforce the Secretary's order issued in Plaintiff's case. The Court has the proper statutory authority to secure the enforcement of the order issued by the Secretary, see 42 U.S.C. § 5851(e)(1), awarding Mr. Doyle back pay, front pay, lost benefits, compensatory damages, attorneys' fees and costs. See Doyle, 2000 WL 694384, at *21. Notably, the Secretary has reached the following final determinations:

1) Hydro violated the employee protection provision of the ERA when it declined to hire

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[6] Cf. Martin v. Yellow Freight Sys., Inc., 793 F. Supp. 461, 473-74 (S.D.N.Y. 1992), aff'd 983 F.2d 1201 (2d Cir. 1993) (affirming the district court's order to enforce an order of reinstatement in a Surface Transportation Assistance Act whistleblowing case); Martin v. Castle Oil Corp., No. 92 Civ. 2178, 1992 U.S. Dist. LEXIS 4568, at *14 (S.D.N.Y. 1992) (enforcing the Secretary's order by granting a preliminary injunction), dismissed on other grounds, 983 F.2d 1201 (2d Cir. 1993).

Mr. Doyle and then blacklisted him from employment in the nuclear power industry;

2) That Mr. Doyle prevailed on the merits of his complaint;

3) That Mr. Doyle will be harmed by delay because due to his lack of funds he is unable to purchase needed medications and obtain medical treatment;

4) That Mr. Doyle is entitled to $218,378 in back pay principal, $154,695 in front pay principle, interest on front and back pay as set forth in the order, $45,000 in lost benefits, $80,000 in compensatory damages, $259,674.02 in attorney fees, and $30,353.45 in costs.

Id. at *1, *7, *20-21. No material issue of fact remains to be resolved because the Secretary's order is valid, and because this Court has the requisite authority to enforce it. Thus, Plaintiff is entitled to judgment as a matter of law. Accordingly, Plaintiff is entitled to judgment on the pleadings or, in the alternative, to summary judgment.

II. FOLLOWING 42 U.S.C. § 5851(e)(1) AND BROCK, THE COURT IS REQUIRED TO ISSUE AN ORDER ENFORCING THE RELIEF AWARDED BY THE SECRETARY IN PLAINTIFF'S SECTION 210 CASE.

The Court should issue an order enforcing the relief awarded to Plaintiff by the Secretary. See 42 U.S.C. § 5851(e)(1); Brock, 780 F.2d at 1514-15. The Court should require Defendant Hydro to make full payment of all damages owed to Plaintiff within five business days. Further, the Court should require Hydro to hand-deliver the checks to Plaintiff's counsel's offices in Washington, D.C. Because this "lengthy litigation," Doyle 2000 WL 694384, at *17, has gone on since 1988, and because Hydro has been fully aware of its obligation to comply with the Secretary's Order since its issuance on May 17, 2000, hand delivery within five business

days is appropriate.

The Secretary ordered Hydro to pay postjudgment interest, setting forth the statutory formula to calculate the interest. Doyle, 2000 WL 694384, at *21. The Court should require that Hydro calculate said interest and submit the amount via hand-delivery to Plaintiff's counsel's offices in Washington, D.C., within five business days.

Section 5851(e)(2) authorizes a court to award costs of litigation, including reasonable attorney fees, for commencing a civil action under § 5851(e)(1) to enforce a final order by the Secretary. 42 U.S.C. § 5851(e)(2). In Wells, for example, the court determined that plaintiff was entitled to attorney's fees and costs for expenses related to filing an enforcement action. Wells, No. 84-2290, slip op. at 3.[7] Accordingly, the Court should likewise find that an award of attorney's fees is appropriate in the instant case, and award said fees for the cost and expense related to filing this enforcement action.[8]

III. PLAINTIFF'S MOTION FOR EXPEDITED HEARING ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED.

Plaintiff's Motion for Expedited Hearing on Plaintiff's Motion for Judgment on the Pleadings ("Motion for Expedited Hearing") should be granted. Plaintiff is presently being harmed due to the lack of a prompt disposition in his case. Doyle, 2000 WL 694384, at *7. Before the DOL, Hydro filed a motion for a stay pending judicial review. The motion was

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[7] The court of appeals in Brock affirmed the entire order issued by the district court in Wells, including the attorney's fees award. 780 F.2d at 1515 ("[W]e AFFIRM the district court's order enforcing the Secretary's remedial order entered on behalf of Wells.")

[8] Plaintiff hereby requests leave to file a petition for attorney's fees for the present enforcement action.

denied on the merits. See Doyle, 2000 WL 694384, at *6-7. Since the ARB issued its May 17, 2000, Order, Hydro has willfully failed to comply with its terms. Hydro's noncompliance materially and irreparably harms Plaintiff:

> Doyle will be harmed if a stay is granted, because he will have to wait even longer to be paid the damages owed to him. Although in some cases the posting of a supersedeas bond possibly could serve fully to protect the complainant's rights, in this case the guarantee of future payment of the damages is not sufficient to prevent harm to Doyle. **Doyle has stated under oath that because of lack of funds he is unable to purchase needed medications and obtain medical treatment**.... With the compelling reasons Doyle has presented in this case, we find readily that he will be harmed if a stay is granted.

Id. at *7 (emphasis added). Based on this conclusion, which cannot be reviewed by this Court, see 42 U.S.C. § 5851(c)(2), the Court should grant Plaintiff's Motion for Expedited Hearing. Also, given the ministerial nature of this enforcement action, see Brock 780 F.2d at 1515, it is not unreasonable for the Court to grant Plaintiff's Motion for Expedited Hearing. Accordingly,. good cause exists for granting Plaintiff's Motion for Expedited Hearing and summarily dispose of this proceeding.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that his Motion for Judgment on the Pleadings be granted. Further, Plaintiff respectfully requests that his Motion for Expedited Hearing on Plaintiff's Motion for Judgment on the Pleadings be granted.

Respectfully submitted,

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June 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SHANNON T. DOYLE, Plaintiff, v. HYDRO NUCLEAR SERVICES, et al., Defendants.	Civil Action No. 00-1141 (DEZ)

PLAINTIFF'S REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

On June 12, 2000, Plaintiff, Shannon T. Doyle, filed the above captioned action, pursuant to Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(e)(1) (1988), to secure enforcement of the Final Decision and Order Denying Stay Pending Judicial Review ("Order") issued by the U.S. Department of Labor ("DOL") in Plaintiff's Section 210 case. See Doyle v. Hydro Nuclear Servs., No. 99-041, 2000 WL 694384 (Adm. Rev. Bd. May 17, 2000). Defendants have filed a Motion to Dismiss Plaintiff's Complaint. This reply memorandum of law is in opposition to Defendants' Motion.

FACTS

On December 9, 1988, Plaintiff initiated the underlying administrative proceeding by filing a complaint with the DOL pursuant to Section 210 of the ERA. Plaintiff named as the respondent in the underlying administrative claim Hydro Nuclear Services ("Hydro"), and

explicitly identified Hydro as "another division of Westinghouse...." See Letter from Shannon T. Doyle to Larry Monk (Dec. 9, 1988), at 1, attached as Exhibit 1.

At all times relevant since the genesis of Plaintiff's complaint in 1988, Hydro was a division of Westinghouse. This fact was confirmed by Hydro's attorneys during the underlying DOL proceeding. For example, on March 17, 1989 attorneys for Hydro put on-the-record before the DOL their initial notice of appearance. In that official notice, Hydro's attorney explicitly identified her client in the following manner:

> **I have been retained by Hydro Nuclear Services, a division of Westinghouse, in connection with the subject matter.**

See Letter from Donna S. Kahn to ALJ Richard D. Mills (Mar. 17, 1989), attached as Exhibit 2 (emphasis added).

The administrative proceeding arose from Hydro's requirement that Plaintiff execute a document which illegally mandated him to waive certain rights as a whistleblower within the nuclear industry. Doyle, 2000 WL 694384, at *1. This document, which was attached to Plaintiff's original complaint, identified Hydro as a division of Westinghouse. See Authorization for Release of Information and Records ("Release Form"), part of Exhibit 1, at 9-10. This Release Form, refers to Hydro as "part of the Radiological Services, Division of Westinghouse." Id. (see bottom of page).

In 1996 Westinghouse Electric Corporation ("WEC") filed an official corporate response to and inquiry from the U.S. Nuclear Regulatory Commission ("NRC") concerning Hydro's illegal discrimination against Plaintiff. *See* Letter from N.J. Liparulo to James Lieberman,

Director, Office of Enforcement (Nov. 8, 1996), attached as Exhibit 3. In this correspondence, WEC set forth the relevant corporate history of Hydro:

> On December 31, 1988, Hydro Nuclear's name was changed to Westinghouse Radiological Services, Inc. (WRS) and the decontamination business was combined with that of Westinghouse's health physics and staff support services business, Numanco, Inc. and its radiological transportation company, Hittman Transportation Services, Inc. Effective March 8, 1990, WRS's name was changed to Westinghouse Staffing Services, Inc. . . . Today WSS primarily provides, either through its own "call list" or third party subcontractors, casual labor and staff augmentation to support Westinghouse's field service activities at nuclear power plants.

Ex. 3, App. at 1 n.1.

The WEC-NRC filing is consistent with the representations made in Exhibits 1 and 2. Hydro was a division of Westinghouse's radiological services component. On December 31, 1988, just three weeks after Plaintiff Shannon Doyle filed his Section 210 complaint, Hydro's "name was changed to Westinghouse Radiological Services, Inc." Id. Thereafter, on March 8, 1990, Westinghouse Radiological Services, Inc.'s "name was changed to Westinghouse Staffing Services, Inc." Id.

The representation concerning the relationship between Hydro and Westinghouse Staffing Services ("WSS") provided to the NRC was also confirmed in corporate disclosure forms obtained from the State of New Jersey on May 22, 2000. In these forms, the New Jersey Department of Treasury, Division of Revenue, lists WSS as an foreign "active" corporation conducting business in New Jersey. See Status Report, attached as Exhibit 4. Also in this form, Hydro is identified as a "previous name" for WSS. Id.

On June 13, 2000, at 1:35 p.m., WSS was served with a complaint and summons for Civil Action No. 00-1141. See Villasefior Proof of Service, attached as Exhibit 5, at 2. In its

motion to dismiss filed on July 3, 2000, WSS did not contest this service of process. Additionally, on June 13, 2000, Hydro was served a copy of the enforcement action, both in Washington, D.C., and in Pennsylvania.[1] See Ex. 5 at 1; Reidinger Proof of Service, attached as Exhibit 6. Hydro did not raise any objection to the service of process executed in Washington, D.C., but did object to the service of process executed in Pennsylvania. Finally, WEC was served in Washington, D.C. See Ex. 5. WEC did not raise any objection to this service of process.

ARGUMENT

I. WSS IS A PROPER DEFENDANT TO THE INSTANT ENFORCEMENT ACTION.

A corporation, "upon [a] change in its name, is in no sense a new corporation, nor a successor of the original one, but remains and continues to be the original corporation." Bankers Life and Casualty Co. v. Kirtley, 338 F.2d 1372, 1384 (5th Cir. 1964). Moreover, once a corporation "has been merged out of existence, its rights, privileges, and very identity are merged into the remaining corporation." Beam v. Monsanto Co., 414 F. Supp. 570, 579 (W.D. Ark. 1976). "[T]he separate corporate existence of a constituent corporation ceases upon merger and the emerging corporation is the only corporation with the capacity to be sued." Sevits v. McKiernan-Terry Corp., 264 F.Supp. 810, 811 (S.D.N.Y. 1966).

Here, WSS is properly named as a defendant in the instant complaint. Tracing its corporate history, it is undisputed that WSS is Hydro under a different name. In 1988, Hydro

[1] The facts concerning service of process of the instant complaint and summons in Pennsylvania is more fully discussed infra, part II.C.

merely changed its name to Westinghouse Radiological Services. Subsequently, in 1990 Westinghouse Radiological Services merely changed its name to WSS. Consequently, WSS is a properly named defendant in this action. Defendants' motion to dismiss WSS as a defendant in this matter should be denied.

II HYDRO WAS PROPERLY SERVED WITH PROCESS.

Under Rule 4(h)(1) of the Federal Rules of Civil Procedure, a plaintiff may serve a defendant corporation in a judicial district pursuant to Rule 4(e)(1), or "...by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process..." Fed. R. Civ. P. 4(h)(1); see also Kumar v. Temple Univ. Cancer Ctr., 1996 WL 363915, at *1 (E.D. Pa. Jul. 1, 1996). If a plaintiff does not allege he served a defendant corporation pursuant to Rule 4(h)(1), he "must establish that he served the corporation in the manner prescribed for individuals by [Rule 4](e)(1)." Lennon v. McClory, 3 F. Supp.2d 1461, 1463 (D.D.C. 1998) (citation & internal quotation marks omitted).[2]

Courts have construed Rule 4(h) liberally, stating that "despite the language of the Rule, service of process is not limited solely to officially designated officers, managing agents, or agents appointed by law for the receipt of process." Direct Mail Specialists, Inc., v. Eclat Computerized Techns, Inc., 840 F.2d 685, 688 (9th Cir. 1988). See also Indictor v. Tucker

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[2] In this case, Plaintiff alleges that all Defendants were served pursuant to the second clause of Rule 4(h)(1) quoted above. Defendant inaccurately assumes that Plaintiff served Hydro pursuant to Rule 4(e)(1). See Defs. Memo. in Support of Motion to Dismiss at 5. Thus, proper analysis of service of process upon Hydro should be conducted according to the second clause of Rule 4(h)(1).

Leasing Capital Corp., 1992 WL 46883, at *2 (E.D. Pa. Mar. 5, 1992) (quoting Direct Mail); Schwartz & Assocs. v. Elite Line, Inc., 751 F. Supp. 1366, 1370 (D.D.C. 1990) (same).

A. Service Upon WSS Constituted Service Upon Hydro.

Hydro was properly served with notice of this complaint through service upon WSS. As set forth above, see supra part I, it is incontestable that WSS is, as a matter of law, Hydro. Specifically, as set forth above, when a corporation changes its name, it "is in no sense a new corporation, nor a successor of the original one, but remains and continues to be the original corporation." Kirtley, 338 F.2d at 1384.

Thus, for purposes of service of process, service upon WSS is equivalent to service upon Hydro. The change in name did not impact the corporate identity of Hydro in any cognizable legal matter. WSS did not contest service upon itself. Consequently, Hydro was served through WSS. Thus, Hydro has been properly served in this matter.

B. Hydro raised no objections to service of process care of WEC's registered agent for service of process in Washington, D.C.

On June 13, 2000, Hydro was served with a summons and a copy of the instant complaint in Washington, D.C., care of WEC's official agent for service of process. See Ex. 5. Hydro, in its July 3 filings did not object to this service. Consequently, Hydro has waived any objection to service of process in this enforcement action.

C. Service of process upon Hydro via Ms. Maybray satisfies the requirements of Rule 4(h)(1).

A person constituting a "managing or general agent" for purposes of Rule 4(h) typically performs necessary duties for the corporation and acts as a responsible person in charge of a significant aspect of the corporate operation. Gottlieb v. Sandia Am. Corp., 452 F.2d 510, 513

(3d Cir. 1971). Determining whether a person served is a managing agent "depends on a factual analysis of that person's authority within the organization." Id. (quoting Goldberg v Mutual Readers League, Inc., 195 F. Supp. 778, 783 (E.D. Pa. 1961)).

For example, a person may qualify as a general or managing agent if "his position is one of sufficient responsibility so that it is reasonable to assume he will transmit notice of the commencement of the action to his organizational superiors." Alloway v. Wain-Roy Corp., 52 F.R.D. 203, 204 (E.D. Pa. 1971) (citation omitted). Additionally, a good faith reliance on the apparent authority of an individual to accept service on behalf of a business can satisfy the requirement. Ayres v. Jacobs & Crumplar, P.A., No. 94-658-SLR, 1995 WL 704781, at *3 (D. Del. Nov. 20, 1995), aff'd 99 F.3d 565 (3d Cir. 1996). Cf. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1103, at 113 (2d Ed. 1987) (stating that "a subordinate employee may be treated as a general or managing agent if the corporation has held him out to have that status"). The court inquires into whether the person's role in the corporation made service of process upon the individual was fair and reasonable. Ayres, 1995 WL 70481, at *3.

Here, service upon Hydro via Ms. Maybray was proper under Rule 4(h)(1). Plaintiff served Ms. Maybray, an authorized "managing or general agent" for Hydro. Fed. R. Civ. P. 4(h)(1); see also Maybray Affidavit, attached as Exhibit 7; Maybray Deposition, attached as Exhibit 8; Letter from Sally Maybray to Choice Point (May 25, 2000), attached as Exhibit 9.

Ms. Maybray is a Human Resources Manager employed by Hydro's "former corporate parent," WEC. See Ex. 7 at 1. Ms. Maybray qualifies as Hydro's "agent" for purposes of Rule 4(h) for several reasons. First, she was Hydro's representative at a deposition in Plaintiff's case

before the DOL on January 18, 1999. See Ex. 8. Further, Ms. Maybray stated in an affidavit prior to her deposition, that she had the requisite authority to "make this Affidavit in support of Hydro's Memorandum of Law...in Support of Hydro's Cross-Motion for Summary Judgment and In Opposition to the Motion for Summary Judgment of Complainant Shannon Doyle...." Ex. 7 at 1. Finally, Ms. Maybray is a responsible person charged with a significant aspect of Hydro's corporate operations. See Gottlieb, 452 F.2d at 513. As a Human Resource Manager in charge of WEC's divisions, Ms. Maybray complied with the equitable relief mandated by the DOL in its May 17, 2000, Order. Doyle, 2000 WL 694384, at *21.

Considering Ms. Maybray's role throughout Plaintiff's case at the DOL, service upon her was "fair and reasonable." Ayres, 1995 WL 704781, at *3. Plaintiff had a good faith reliance on Ms. Maybray's apparent authority, see id., to accept service on behalf of Hydro.[3] Thus, service upon Hydro was proper under Rule 4(h)(1) of the Federal Rules of Civil Procedure.[4]

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[3] Cf. Meoli v. Massage Ctr. USA, No. 96-CV-7469, 1998 U.S. Dist. LEXIS 15489 (E.D. Pa. Sept. 25, 1998), which stated: "Defendant has failed to suggest any fashion in which Plaintiff could have more fairly or more reasonably served process on the Defendant corporation than by serving the General Manger of its successor corporation. The service on [the General Manager] was both fair and reasonable, given the circumstances; Plaintiff acted reasonably in relying on Dailey's apparent authority to accept service for Defendant." Id. at *5 (emphasis added). Here, analogously, Hydro has failed to suggest who could more fairly or reasonably be served with process for Hydro than Ms. Maybray. Ms. Maybray has the apparent authority to accept service for Hydro because she has acted as Hydro's corporate agent by appearing at a deposition in this case and by being the person who complied with the equitable relief granted to Plaintiff by the DOL. Hydro has not produced any other corporate representative in connection with Plaintiff's case at the DOL. Therefore, service upon Ms. Maybray was "both fair and reasonable, given the circumstances." Id.

[4] Should service upon Hydro be defective, the Court should simply quash the defective service. Dismissal of actions for improper service is "not invariably required," and the plaintiff may attempt to serve defendant again. National Expositions, Inc. v. DuBois, 97 F.R.D. 400, 403

Defendants' Motion to Dismiss Plaintiff's Complaint due to improper service upon Hydro is frivolous, and should be denied.

III. WEC IS A PROPER DEFENDANT TO THE INSTANT ENFORCEMENT ACTION.

It is well established in the Third Circuit that a "division of a corporation is not a separate entity but is the corporation itself." In re Sugar Indus. Antitrust Litig., 579 F.2d 13, 18 (3d Cir. 1978); see also Western Beef, Inc. v. Compton Invs. Co., 611 F.2d 587, 591 (5th Cir. 1980); Great Dane Trailers, Inc. v. Gelco Rail Servs., No. CV484-132, 1984 U.S. Dist. LEXIS 24298, at *4-5 (S.D. Ga. Aug. 16, 1984) (quoting Sugar Indus. & Western Beef). This principle of law becomes applicable so that "a guilty corporation [can] not shield itself from liability by channeling its activity through a division." United States v. ITT Blackburn Co., 824 F.2d 628, 632 (8th Cir. 1987) (interpreting Sugar Indus.).

Here, the record indicates that Hydro and WSS are divisions of WEC. Specifically, in Hydro's original notice of appearance in the underlying administrative claim, counsel for Hydro indicated that Hydro was a division of WEC. Because Hydro is a "division" of WEC and thus not a separate entity from it, WEC is properly named as a defendant in the instant enforcement action.[5]

(W.D. Pa. 1983) (citing Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (3d Cir. 1945)). See also Landes v. FBI, 1985 WL 3421, at *1 (E.D. Pa. Nov. 1, 1985) (quashing defective service without dismissing the complaint). Further, Plaintiff has 120 days, from June 12, 2000, to serve the complaint upon Hydro. See Fed. R. Civ. P. 4(m). Dismissal of the complaint would be premature at this point.

[5] Furthermore, service upon WEC effectuated service upon Hydro because Hydro is a division of WEC.

IV. CBS CORPORATION IS A PROPER DEFENDANT TO THE INSTANT ENFORCEMENT ACTION.

At this time, the record is unclear as to CBS' liability. However, as set forth in the complaint, given the prior relationship between WEC and CBS, and the ambiguous nature of CBS's responsibility for WEC's liability, it is premature to dismiss CBS from the instant action. Additionally, should this Court find any ambiguity in the potential liability of WEC or WSS, dismissal is inappropriate. It is well settled that Plaintiff should be entitled to discovery in order to establish the requisite facts to demonstrate that WSS and/or WEC are fully responsible for Hydro and that WSS and WEC currently constitute Hydro.

V. SECTION 5851(e)(1) EXPLICITLY GIVES PLAINTIFF STANDING TO BRING THE INSTANT ACTION TO SECURE ENFORCEMENT OF THE DOL'S ORDER.

It is well established that a "plaintiff may invoke the jurisdiction of a federal court only pursuant to a statutory grant of authority to adjudicate the asserted claim." Leuthe v Office of Fin. Inst. Adjudication, 977 F. Supp. 357, 361 (E.D. Pa. 1997) (citing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1021 (3d Cir. 1997)). Section 5851(e)(1) explicitly grants authority to any person, on whose behalf the DOL issues an order, to enforce said order in federal district court. Section 5851(e)(1) states:

> Any person on whose behalf an order was issued under paragraph (2) subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties to enforce such order.

42 U.S.C. § 5851(e)(1).

Two requirements must be met in order for a person to bring an enforcement action under § 5851(e)(1).[6] First, a person must have obtained an order from the DOL under § 5851(b)(2), awarding him relief. Second, the person against whom the order is issued must fail to comply with its terms.

Here, Plaintiff has the requisite standing to bring the present action against Defendants to secure enforcement of the DOL's Order. Plaintiff, thus, "may invoke the jurisdiction" of this Court pursuant to 42 U.S.C. § 5851(e)(1) "to adjudicate [his] asserted claim." Leuthe, 977 F. Supp. at 361. Plaintiff satisfies the two requirements imposed by § 5851(e)(1). First, an "administratively final" order was issued by the DOL, concluding, pursuant to § 5851(b)(2), that Defendants "violated the employee protection provision of the ERA when it declined to hire Doyle ..." Doyle, 2000 WL 694384, at *20. Second, Defendants have failed to comply with the DOL's Order. Therefore, Plaintiff possesses the requisite standing under § 5851(e)(1) to bring the instant action to secure enforcement of the DOL's Order.

Defendants' assertion that Plaintiff may not bring the instant enforcement action while simultaneously petitioning for judicial review of the DOL's Order is without merit. See Defs. Memo. in Support of Motion to Dismiss at 8-9. Nothing in the plain language of Section 210 of ERA disallows bringing simultaneous actions to secure the enforcement, and to obtain judicial review, of final agency decisions. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of

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[6] Additionally, under Section 210 the Secretary of Labor may also bring an enforcement action against a person who fails to comply with an order issued by the DOL. 42 U.S.C. § 5851(d).

the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Inst., 467 U.S. 340, 345, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984), quoted in Thunder Basin Co. v. Martin, 969 F.2d 970, 972 (10th Cir. 1992).

Section 210 contains one judicial review provision, stating the proper forum where review of a DOL decision shall take place, 42 U.S.C. § 5851(c), and two enforcement provisions, 42 U.S.C. § 5851(d) & (e)(1), stating where such actions may be commenced. The express language of Section 210 only precludes judicial review of DOL final decisions in "any criminal or other civil proceeding[s,]" other than before the court of appeals. 42 U.S.C. § 5851(c)(2). Apart from this specific interdiction, Section 210 does not expressly forbid bringing simultaneous actions to obtain judicial review and to enforce a final order by the DOL. Further, the legislative history of Section 210 does not suggest that bringing simultaneous actions is forbidden. See S. REP. No. 95-848, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7303-04.

Moreover, the language of Section 210 itself clearly supports the proposition that an enforcement action may be maintained even if the underlying administrative decision is under appeal. Section 210 explicitly states that "the commencent of [an appeal before the court of appeals] shall not, unless ordered by the court operate as a stay of the Secretary's order."[7] 42

[7] Defendants cite to a number of cases for the proposition that an appeal of a judgment automatically acts to stay the judgment. Defs. Memo in Support of Motion to Dismiss at 8-9. These cases are inapplicable. First, they are not Section 210 cases and do not interpret the controlling statutory language. Second, they do not concern stays of administrative decisions. The rules governing stays of administrative decisions are distinct from the rules that govern of claim heard on its merits in federal district court. Compare Fed. R. App. P. 18 with Fed. R.

U.S.C. § 5851(c)(1). Thus, Congress explicitly addressed the issue of whether filing an appeal acts to stay the enforcement authority of a district court. The answer was categorically "no."

Congress' intent to expedite the final enforcement of ruling in support of whistleblowers under Section 210 is completely consistent with the legislative history of the statute, and Congress' inclusion within the statute of very strict time limits. See Doyle, 2000 WL 694384, at *7 (finding that an administrative stay of the Secretary's final order in the Doyle matter would not serve the public interest).

Thus, Section 210 of ERA does not preclude simultaneous judicial review in a court of appeals, and securement of an order, through an enforcement action, in a district court. In fact, the language used in the statute itself authorizes such action.

App. P. 8. The DOL, in ruling for an employee under Section 210, serves the public interest and is the respondent at the court of appeals in any appeal filed of a DOL's final order. The DOL has rejected Hydro's request that a stay be granted and that ruling of the DOL may not be collaterally attacked, for any reason, by any party, in this Court. See 42 U.S.C. 5851(c)(2) ("An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding."). Thus, the mere fact that any person filed an appeal with the court of appeals does not grant jurisdiction upon this Court to "review" the merits of the DOL's Order denying Hydro's request for a stay. This Court must merely enforce the DOL's Order, including that part of the Order which found Hydro's request for a stay completely without merit.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss Plaintiff's Complaint be denied.

Respectfully submitted,

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July 22, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SHANNON DOYLE,	)	
	)	
Plaintiff,	)	Civil Action No. 00-CV-1141
	)	
v.	)	
	)	
HYDRO NUCLEAR SERVICES, WESTINGHOUSE STAFFING SERVICES, INC., WESTINGHOUSE ELECTRIC CORPORATION and CBS CORPORATION,	)	CHIEF JUDGE DONALD E. ZIEGLER
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Hydro Nuclear Services ("Hydro"), Westinghouse Staffing Services, Inc. ("WSS"), Westinghouse Electric Corporation ("WEC") and CBS Corporation ("CBS") (collectively the "Defendants"), submit this Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint.

INTRODUCTION

Plaintiff Shannon Doyle ("Doyle") has filed a Complaint seeking enforcement of a Final Decision and Order on Damages ("Order") issued by the Administrative Review Board ("Board") of the Department of Labor in the matter captioned, Shannon Doyle v. Hydro Nuclear Services, Department of Labor Case No. 89-ERA-22. The Order which is the subject of Plaintiff's

enforcement action, a copy of which is attached hereto as Exhibit A,[1] requires Hydro to pay to Doyle in excess of $900,000 as back pay, front, lost benefits, compensatory damages, interest, and attorney's fees. In addition to naming Hydro as a Defendant, Doyle's Complaint names a number of other parties as Defendants to his enforcement action, including WSS, WEC and CBS, even though these parties were not named as respondents in the Order which Doyle seeks to enforce. Doyle has also instituted this action seeking enforcement of the Order even though he has himself filed a petition for review of that Order which is currently pending in the United States Court of Appeals for the Third Circuit.

Defendants have filed a Motion to Dismiss Doyle's Complaint on a number of independent grounds. First, Defendant Hydro has moved for dismissal because it has not been effectively served with process as required by Rule 4 of the Federal Rules of Civil Procedure. Second, Defendants WSS, WEC and CBS have moved for dismissal because they were not named as respondents in the administrative proceedings which resulted in the Board's order, and are therefore not proper defendants to this enforcement action under 42 U.S.C. §5851(e). Finally, all Defendants have moved for dismissal because Plaintiff Doyle lacks standing to seek enforcement of the Board's order because Plaintiff Doyle has filed a petition to review the Order, and therefore,

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[1] Plaintiff's Complaint makes reference to the Board's Order and a number of other matters relating to the procedural history of this dispute, but does not attach copies of the Order or documents relating to the procedural history. Inasmuch as Plaintiff's Complaint makes reference to these matters, and because there is no dispute about the procedural history of the administrative proceedings and the parties' appeals currently pending, it is perfectly proper for the Court to consider these documents in resolving the Company's Rule 12 motion to dismiss, even though Plaintiff failed to attach them to the Complaint. E.g., City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); Pension Benefit Guaranty Corp. v. White Consolidated Industries, 998 F.2d 1192, 1196 (3d Cir. 1993).

as a matter of law he is precluded from seeking enforcement of the Order until final disposition of that appeal.

PROCEDURAL HISTORY

In November 1988, Doyle filed a complaint with the United States Department of Labor against Hydro asserting that Hydro violated the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C.A. §5801 et seq. See Complaint ¶7. In July 1989, the Administrative Law Judge ("ALJ") ruled that Doyle's claim was not a protected activity under the ERA. However, by Opinion and Order dated March 30, 1994, the Secretary of Labor reversed the ALJ's liability ruling and remanded this matter for an assessment of Doyle's damages.[2]

The Board issued its Order on May 17, 2000, setting amounts for back pay, front pay, lost benefits, compensatory damages, pre- and post-judgment interest on front and back pay, as well as attorney's fees. See Complaint ¶¶14-16, 23, 24. The May 17, 2000 Order also included provisions for injunctive relief. As of this date, Hydro has provided all of the injunctive relief ordered by the Board. Accordingly, Doyle's enforcement action in this Court relates solely to the monetary portion of the May 17, 2000 Order.

In his Complaint, Doyle fails to inform the Court that both he and Hydro have filed petitions for review of the Board's May 17, 2000 Order. Specifically, on May 18, 2000 Hydro filed a Petition for Review (Exhibit B hereto) in the United States Court of Appeals for the Sixth Circuit

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[2] Defendant Hydro filed a Motion to Stay contemporaneously with this Motion to Dismiss that provides a detailed factual and procedural history of this matter. Accordingly, Defendants adopt and incorporate the factual background in the Motion to Stay in their Memorandum of Law.

in which Hydro seeks review of the Board's finding of liability and award of damages. On May 19, 2000, Doyle filed a Petition for Review (Exhibit C hereto) in the United States Court of Appeals for the Third Circuit seeking review of those portions of the Board's May 17, 2000 Order that were not favorable to him. These petitions for review were consolidated for appeal pursuant to 28 U.S.C. §2112 and Rules 17.1 and 25.5 of the Rules of the Panel on Multidistrict Litigation.[3] On June 5, 2000, the Judicial Panel on Multidistrict Litigation issued a Consolidation Order (Exhibit D hereto) consolidating the petitions for review in the United States Court of Appeals for the Third Circuit.

ARGUMENT

A. The Complaint Against Defendant Hydro Should Be Dismissed Because Hydro Was Not Properly Served With Process.

Sufficient service of process is a jurisdictional prerequisite to bringing a case in federal court. See Hemmerich Industries, Inc. v. Moss Brown &Co., Inc., 114 F.R.D. 31 (E.D. Pa. 1987). The burden is on the plaintiff to show that service has been made upon a proper agent of the corporate defendant. Id.; Alloway v. Wain-Roy Corporation, 52 F.R.D. 203 (E.D. Pa. 1971). Notice by itself does not validate an otherwise defective service. Tse-Teng Lin v. Pennsylvania Machine Works, Inc., Civ. A. No. 97-5407, 1998 U.S. Dist. LEXIS 2767 (March 3, 1998) (citing Ayres v. Jacobs & Crumplar, 99 F.3d 565, 568 (3d Cir. 1996)). This Court lacks jurisdiction over Hydro because the service to Hydro -- by delivering a copy of the Complaint to Ms. Sally Maybray at her home -- was improper.

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[3] Under the Rules of the Panel on Multidistrict Litigation, because both petitions for review were filed within ten (10) days of the Board's May 17, 2000 Order, both petitions for review are considered to have been filed simultaneously. See Rule 20(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Under Federal Rule of Civil Procedure 4(h), a corporation may be served:

> in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ..

Rule 4 (e)(1) refers to service pursuant to the law of the state in which the district court is located for service upon a defendant in an action brought in the courts of general jurisdiction of the state. The pertinent rule of civil procedure in Pennsylvania provides that service upon a corporation must be made upon:

> (1) an executive officer, partner or trustee of the corporation or similar entity, or
>
> (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
>
> (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Pa. R. Civ. P. 424. Thus, these rules provide overlapping requirements for valid service of a corporate entity. Plaintiff did not meet those requirements in connection with the service of process upon Hydro.

Sally Maybray is an employee of Westinghouse Electric Company LLC, an entity not even named as a defendant in this matter. She is not now, and never was, an executive officer, partner or trustee of Hydro, a manager or other person in charge of any regular place of business or activity of Hydro or its agent authorized to receive service of process.[4] Further, her home, where she

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[4] Because of the holiday weekend, an affidavit could not be obtained from Ms. Maybray in time to permit it to be filed on July 3, 2000 when Hydro's responsive pleading was due. An affidavit for Ms. Maybray verifying the factual matters set forth herein will be filed on or before (continued...)

was served, is not and has never been a recognized business location for Hydro. Under these circumstances, it is clear that Plaintiff has not properly served Hydro, and the action against it should be dismissed.

Other courts faced with similarly defective service have not hesitated to dismiss the complaint for lack of jurisdiction. See Tse-Teng Ling, supra (service on receptionist improper); Hemmerich, supra (no showing by plaintiff that person served was authorized to accept service); and Alloway, supra (service on Parts Manager improper). See also, Smeltzer v. Deere and Company, 252 F. Supp. 552 (W.D. Pa. 1966) (case dismissed where person served was not authorized to receive service of process).

Accordingly, the Complaint against Hydro should be dismissed.

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B. WSS, WEC, And CBS Are Improper Parties To Doyle's Enforcement Action.

Section 211(e) of the ERA expressly provides that an action seeking enforcement of an order under the Act may be filed only against the person to whom such order was issued:

> Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order.

42 U.S.C. §5851(e)(1) (emphasis added). A review of the Board's Order which Plaintiff Doyle seeks to enforce in the instant action demonstrates that the only respondent named in the Order is Defendant Hydro. See Exhibit A hereto. It is therefore undisputed that Defendants WSS, WEC and

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[4](...continued)
July 8th.

CBS were not parties to the administrative proceedings below, and are not named as respondents in the Order Doyle seeks to enforce. It follows that the Complaint against these Defendants not named in the administrative proceedings below should be dismissed, because Doyle can only seek to enforce the Board's Order against Hydro, "the person to whom such order was issued." 42 U.S.C. §5851(e)(1).

Doyle attempts to avoid the import of the clear language of Section 211(e) by alleging that WSS, WEC and CBS are successor corporations to Hydro. See Complaint at ¶¶8-13. Doyle's effort in this regard should be rejected. Doyle's efforts to expand the group of Defendants to include alleged successors of Hydro is inconsistent with the clear and unambiguous language of Section 211 of the ERA, which unequivocally provides that enforcement actions can be filed only against those persons to whom the administrative order was issued.

This proceeding has been pending for more than twelve years. During that twelve-year period, Doyle made absolutely no effort to add any additional parties to the administrative proceeding. Doyle had ample opportunity to seek leave to add these other entities as respondents to his administrative complaint prior to the Board's issuance of its final order, and having failed to avail himself of that opportunity, Doyle should not be permitted to add additional parties as defendants at this time. Because WSS, WEC and CBS were not named as parties to the Order issued by the Board, Doyle's enforcement complaint against those Defendants should be summarily dismissed.

C. **Doyle's Complaint Seeking Enforcement Of The Board's Order Should Be Dismissed Because Of The Appeals From Such Order Currently Pending In The United States Court Of Appeals For The Third And Sixth Circuits.**

It is axiomatic that a party cannot, on one hand, file an appeal from a judgment or order and, at the same time, seek enforcement of the order while that appeal is pending. This logical proposition has been repeatedly recognized by federal courts, including the United States Supreme Court more than 137 years ago:

> They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree.

Bronson v. LaCrosse R.R. Co., 68 U.S. (1 Wall.) 405, 410 (1863). Numerous courts have followed the Bronson court's observation, ruling that an appeal by the prevailing party suspends the execution of the judgment.

For example, in Tennessee Valley Authority v. Atlas Machine and Iron Works, Inc., 803 F.2d 794, 797 (4th Cir. 1986), the Fourth Circuit ruled that a judgment creditor's filing of an appeal operates as an automatic supersedeas, obviating the need for the party against whom the judgment was entered to file a supersedeas bond "because the execution of the judgment has already been superseded by the prevailing party's appeal." In reaching that conclusion, the Fourth Circuit expressly ruled that "where the prevailing party in the lower court appeals from that court's judgment, the appeal suspends the execution of the decree." 803 F.2d at 797.

Similarly, in Sealover v. Carey Canada, 806 F.Supp. 59, 62 (M.D. Pa. 1992), rev'd on other grounds, 996 F.2d 42 (3d Cir. 1993), the district court recognized the "long standing rule

of law which precludes a litigant from accepting 'all or a substantial part of the benefit of a judgment' while simultaneously challenging 'unfavorable aspects of that judgment on appeal.'" 806 F.Supp. at 62 (citation omitted). See also Advent Systems, Ltd. v. Unisys Corp., 1990 U.S. Dist. LEXIS 2321 (E.D. Pa. 1990) ("Since plaintiff has appealed from the judgment in its entirety . . . it seems clear that plaintiff is not in a position to seek enforcement of the judgment until the appeal is decided.")

Application of the principles discussed above to the instant case compels dismissal of Plaintiff's Complaint seeking enforcement of the Board's May 17, 2000 Order. Both parties have appealed the Order by filing petitions for review which are currently pending in the United States Court of Appeals for the Third Circuit pursuant to a consolidation order entered by the Judicial Panel on Multidistrict Litigation. The Case Summary filed by Doyle in the Third Circuit (Exhibit E hereto) and the Preargument Statement filed by Hydro in the Sixth Circuit (Exhibit F hereto) demonstrate that both Doyle and Hydro are raising significant and substantive issues concerning the validity of several significant aspects of the Board's Order. Under these circumstances, Doyle's Complaint seeking enforcement of the Order should be dismissed pending final disposition of those appellate proceedings.[5]

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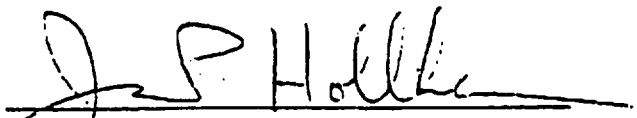
[5] It should be noted that Doyle will not be prejudiced in any way by dismissal of this enforcement action pending resolution of the appeals filed by both parties seeking review of the Board's May 17, 2000 Order. As set forth in detail in Hydro's alternative Motion for Stay of Money Judgment Pending Appeal, Hydro has notified Doyle in writing on several occasions that it is willing to post a bond to secure the monetary portion of the Board's May 17, 2000 Order. Hydro has also filed concurrently with this Motion to Dismiss a motion to stay further proceedings in this case until final disposition of the pending appeals. In its motion for stay, Hydro offers to post a supersedeas bond in the amount of $900,000.

CONCLUSION

For the reasons discussed above, Defendants respectfully request that this Court grant their Motion to Dismiss, and dismiss the Complaint against all Defendants.

Respectfully submitted,



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