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Issue Date: 14 July 2005

Case No.: 2005-CAA-11

In the Matter of:

EDWARD A. SLAVIN, JR.,
Complainant

vs.

UCSB DONALD BREN SCHOOL &
DEAN DENNIS J. AIGNER
Respondents.

ORDER

PROCEDURAL BACKGROUND

This matter arises from a complaint filed by Edward A. Slavin, Jr. (Complainant) against the University of California at Santa Barbara (UCSB) and Dean Dennis J. Aigner (Respondents)[1] based on the employee protection provisions of the Clean Air Act (CAA)[2], the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)[3], the Federal Water Pollution Control Act (WPCA)[4], the Safe Drinking Water Act (SDWA)[5], the Solid Waste Disposal Act (SWDA)[6], the Toxic Substances Control Act (TSCA)[7], and the applicable regulations.[8]

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[1] Complainant's filings have indicated that this action is brought against both UCSB and Dean Aigner. All documents filed by Respondent's counsel have had captions reflecting UCSB as the sole respondent and like wise referred in the text to UCSB as a singular respondent. This raises an issue as to whether counsel represents UCSB solely, or both UCSB and Dean Aigner in his official and/or personal capacity. For simplicity, unless otherwise indicated I will refer to UCSB and Dean Aigner as Respondents in the collective sense and assume that counsel's filings and motions were on behalf of both.

[2] 42 U.S.C. § 7622(2004)

[3] 42 U.S.C. § 9610(2004)

[4] 33 U.S.C. § 1367(2004)

[5] 42 U.S.C. § 300j-9(2004)

[6] 42 U.S.C. § 6971(2004)

[7] 15 U.S.C. § 2622(2004)

[8] 29 C.F.R. Part 24(2004)

On 15 Dec 04, Complainant filed an administrative complaint with the Occupational Safety & Health Administration (OSHA). OSHA issued a report of investigation on 22 Mar 05. The report recommended that the complaint be denied.[9] On 12 Apr 05, Complainant served interrogatories and requests for documents on Respondents. He filed a request for a formal hearing on 18 Apr 05. I was detailed to the case and received Complainant's request for hearing on 22 Apr 05. I issued a notice of hearing order the same day, setting the hearing for 21 Jul 05 and directing both sides to complete discovery by 23 Jun 05. I subsequently amended the discovery completion date to 5 Jul 05.

On 27 Jun 05, Respondents mailed a motion for summary judgment.[10] It was received on 30 Jun 05. Complainant filed his initial opposition on 5 Jul 05 and supplemented it via fax on 7 Jul 05.[11] Both sides have filed pre-hearing statements. Complainant has filed additional motions seeking relief for discovery violations by Respondents, and to compel the production of witnesses. Respondents have filed a motion for either a continuance or permission to take witnesses by telephone.

POSITIONS OF THE PARTIES

The Complaint

Complainant's formal complaint discloses the specific bases for his claim.[12]

> First, he alleges that Respondents work for and receive funds from the Department of Energy (DOE), the Environmental Protection Agency (EPA), and Southern California Edison (SCE).
>
> Second, he states that he has a "history of environmental and labor investigatory reporting and advocacy exposing several of the same institutions that Respondents …work for and receive funds from…." He then lists his specific protected whistleblower activities. They are:

[9] As this is a de novo review, the substantive aspects of the OSHA findings are not relevant. However, the fact that OSHA determined that the complaint should be denied and the matter closed may be relevant for the limited purposes of considering whether the federal agency continued to be involved in investigating and prosecuting the case or whether the case is being pursued solely by a private party. That question relates to the sovereign immunity issue raised by Respondents, *infra*

[10] *Cf"*summary "decision" 29 C.F.R §18.40 (2004).

[11] Generally, filing by fax requires prior approval or specific statutory or regulatory authorization. *Id.*, at §18.3(f).

[12] Complainant's "consolidated complaint" incorporates his OSHA complaint letter.

That he (1) commenced investigation of DOE in June 1981 and has never stopped; (2) won declassification of a pollution event on 17 May 83; (3) testified before congressional representatives on 11 Jul 83, calling for criminal prosecutions; (4) published numerous articles; (5) represented clients; and (5) offered Senate testimony on 22 Mar 2000.

That he (1) won a 14 Jun 96 precedent terminating the EPA inspector general in December 1996; (2) won compensatory and punitive damages against EPA in formal administrative hearings in 2002 and 2003.

That he obtained an appellate reversal of a 1995 administrative law judge's ruling and thereafter obtained a settlement from SCE in 1996.

That he won a record verdict against the Tennessee Valley Authority (TVA) in 1990 and then won punitive damages from TVA in 2002.

Complainant further alleges that (1) in September of 2004 he applied for a Corporate Environmental Management position advertised by Respondents in the London Economist, and for any other pending vacancies; (2) the application materials he provided Respondents included notice of his whistleblower activities; and (3) in November 2004 he was informed by Respondents that he was not suitable for the position.

Complainant seeks an extensive range of remedies which he apparently copied in large part from another case and partially modified. The list extends from *a* to *w* and includes remedies which are clearly inapplicable to this case.[13] Nonetheless, it is clear that Complainant seeks all monetary and non-monetary relief available to him under the law.

Respondents' Motion for Summary Decision

Respondents' motion argues that summary decision is justified on six separate grounds. (1) Respondent UCSB has sovereign immunity. (2) Actions undertaken in the course of representing clients does not give counsel whistleblower status. (3) Complainant's prima facie case fails because he cannot show he engaged in protected activity. (4) Complainant's prima facie case fails because he cannot show he was qualified for the position *ab initio* and therefore suffered an adverse action. (5) Complainant's prima facie case fails because he cannot show causation between whistleblower activity and Respondents' decision to not hire him. (6) Complainant can

[13] *E.g,* Complainant asks for training and education since 1998, including a Ph.D. and all living expenses, tuition, and housing costs, which she has been denied..

present no evidence that Respondents' articulated non-discriminatory, legitimate reason is incredible or that discriminatory reasons were more likely to have formed Respondents' motive.

In support of its motion, Respondents filed nine exhibits. (1) A document, which on its face appears to be a print out of the on-line listing for the position in question; (2) The application for the position sent to Respondents by Complainant; (3) A letter from Respondent Aigner to Complainant acknowledging the application and requesting three writing samples; (4) Complainant's submission of those samples; (5) Respondent Aigner's letter to Complainant stating that Complainant was not suitable; (6) Complainant's complaint letter to OSHA; (7) Respondent Aigner's letter to OSHA responding to the complaint (8) A document appearing to list the qualifications for distinguished professors; and (9) A letter from Respondent Aigner to OSHA attaching the redacted summaries of the five finalists for the position.

Complainant's Response

Complainant initially opposes the motion on three general grounds. First, he argues to strike the motion as untimely. Second, he argues that Respondents' failure to participate in discovery requires the denial of the motion. Finally, he argues that the motion fails because the supporting materials filed by Respondents contain no affidavit, authentication, or declaration.

Complainant also addressed the sovereign immunity grounds offered by Respondents. He argues that sovereign immunity does not apply under the applicable statutes. He further submits that even if it did, it has been waived and California is collaterally estopped from raising it.

DISCUSSION

Complainant's General Objections

Timeliness of the Motion

Complainant suggests that Respondents' motion should be summarily denied as untimely. He argues that the applicable regulation requires the filing of such a motion 20 or more days before hearing.[14] Documents are deemed filed when received by the Chief Clerk at the Office of Administrative Law Judges. When documents are filed by mail, five days are added to any prescribed period.[15] Complainant argues that means the period becomes 25 days instead of 20.

[14] 29 C.F.R. §18.4 (2004).
[15] *Id.*, at §18.4(c)(1).

In this case the hearing is set for 21 Jul 05 and the last day for filing such motions by mail would have been 25 days prior or 26 Jun 05. However, since that day was a Sunday the deadline would go to the next business day.[16] Consequently, under Complainant's view the nominal time limit for summary decision motions filed by mail in this case expired on Monday, 27 Jun 05, which is in fact the date the motion was mailed, but not received.

However, such an interpretation is contrary to the general regulatory scheme, which contemplates giving more, not less time, when filing is by mail. It also would lead to a nonsensical situation in which motions filed by mail would have to be received by the clerk five days earlier than those filed in person, regardless of when or how service was perfected upon opposing counsel.[17] Consequently, I find that the additional five days for filing added to the 20 day prescribed period which would have expired on 1 Jun 05 means the filing period actually expired on 6 Jun 05. Accordingly, the motion was timely and the motion to strike is denied.

However, even if I were to find that Complainant's interpretation controlled and the filing were not timely under the rule, I would still deny the motion based on my power to "modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby."[18]

I would base such a ruling on the following: (1) Respondents' motion was filed in time to meet the normal 20 day deadline. (2) Complainant was able to fully respond[19] to the motion and suffered no harm in his ability to litigate that motion or any other part of the case. (3) The only prejudice suffered by Complainant would be the loss of a procedural windfall of striking the motion and forestalling a ruling until the formal hearing. (4) Granting the motion would simply delay the ruling until the parties have borne the additional expense of a formal hearing. (5) Given the narrow legal grounds of the basis for my ruling herein, and the fact that for the purposes of the ruling I have made no factual determinations beyond those proffered by Complainant, it is in the interests of justice to consider the motion on its merits. To refuse to do so would mean that the issue would be considered in virtually the same context after a formal hearing that would add nothing of relevance to the record.

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[16] *Id.*, at §18.4(a).
[17] Mailing is sufficient to constitute service and start an opponent's response clock and could be a consideration in requiring early mailing. However that is already allowed for by affording the opponent extra time if served by mail. *Id.*, at § 18.4(c)(3).
[18] *Id.*, at §18.1(b).
[19] A total of 55 pages in his response and supplement.

Failure of the Respondents to Cooperate in Discovery

The administrative law judge may enter summary decision for either party on an issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[20] When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials of the pleading. Such response must set forth specific facts showing that there is a genuine issue of material fact for the hearing.[21]

However, Complainant is generally correct in asserting that in those instances where the party moving for summary decision has failed to provide complete access to discovery, the motion should be denied. That is because it would be unfair to require a party to show that a genuine issue of material fact exists when the party did not have full access through the discovery process to obtain those materials that would allow it to do so.

However, in this case the ruling is based on an assumption that the facts offered in Complainant's pleadings are true, and is not based on any facts proffered by Respondents. Consequently, I need not address the question of whether Respondents have in fact provided full discovery to Complainant.

Failure of the Respondents to Support the Motion with Sworn Materials

Since this ruling does not rely on any materials offered by Respondents in support of the motion, this ground for objection and denial is moot.

Sovereign Immunity

Factual Assumptions

For the purposes of this issue and motion only, I consider the salient facts as alleged or otherwise proffered in the complaint and other filings by Complainant. Specifically:

1. Complainant engaged in what would otherwise be considered protected activity under the statutes applicable in this case.[22]

[20] 29 C.F.R. §18.40(d) (2004).
[21] *Id.*, at §18.40(c) (2004).
[22] *See supra* notes 1-6.

2. Respondents have received federal funding in nuclear weapons and environmental work.

3. Respondents have done work for and accepted funds from public and private entities that had interests in the areas addressed by Complainant's protected activities.

4. Complainant applied and was qualified for a position as a professor on Respondent UCSB's faculty.

5. Respondents knew of Complainant's protected activity and did not hire him because of it.

6. Complainant filed a complaint with OSHA.

7. OSHA dismissed the complaint.

8. Dean Aigner no longer is a UCSB officer.

Legal Background

State Immunity in General

A basic tenet of American constitutional law is that states enjoy sovereign immunity from private suits.[23] Congressional attempts to subject states to lawsuits brought by private parties have been held unconstitutional.[24] That immunity applies in administrative proceedings.[25] It also applies whether the suit is brought for monetary damages or some other type of relief.[26] The question whether a particular state agency is an arm of the state and therefore entitled to Eleventh Amendment immunity is a question of federal law. The University of California has been determined to be an arm of the state and entitled to immunity.[27]

[23] U.S. Const. amend. XI.
[24] *See, e.g.,* Alden v. Maine 527 U.S. 706 (1999).
[25] Federal Maritime Comm'n v. South Carolina State Ports, 535 U.S. 743 (2002); Ohio Envtl. Prot. Agency v. United States Dep't of Labor, 121 F.Supp.2d 1155 (S.D.Ohio 2000); Rhode Island v. United States, 115 F.Supp.2d 269 (D.R.I. 2000).
[26] *Federal Maritime Com'n*, 535 U.S. 743 (2002).
[27] Regents of the University of California v. Doe , 519 U.S. 425 (1997).

Abrogation

There is an exception to the general principle of state sovereign immunity. "…[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[28] Thus, Congress may authorize private parties to pursue lawsuits against states if doing so would further those federal constitutional interests.[29] However, in order to properly subject states to suits by individuals, Congress must make "its intention unmistakably clear in the language of the statute."[30] "[A] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[31]

Waiver

Such immunity is not jurisdictional and may be waived by the state by either (1) an expressed provision in statute or constitution or (2) participation in federal funding programs.[32]

Explicit Waiver

However, any statutory or constitutional waiver cannot be implied but must be unequivocally expressed.[33] A state is not deemed to have waived its immunity unless the waiver is "stated by the most express language or by such overwhelming implication from the text as (will) leave no room for any other reasonable construction."[34] Such a waiver must also clearly indicate the intention of the state to subject itself to suit in federal court.[35]

Constructive Waiver

Similarly, while a waiver may be contained in a state's agreement to accept federal funds or to participate in a federal program that makes the state's waiver a condition of payment or participation, the mere receipt of federal funds cannot establish that a state has consented to suit in federal court. Acceptance of federal funds and/or participation in

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[28] *See, e.g.,* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Clark v. State of Cal.,123 F.3d 1267 (9th Cir. 1997).
[29] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999).
[30] *Kimel*, 528 U.S. at 73 ((quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting *Atascadero*, 473 U.S. at 242)).
[31] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55-56 (1996) (quoting *Atascadero*, 473 U.S. at 246).
[32] Litman v. George Mason University 186 F.3d 544 (4th Cir. 1999).
[33] U.S. v. Mitchell, 445 U.S. 535 (1980).
[34] Edelman v. Jordan, 415 U.S. 651, 673 (1974).
[35] *Atascadero*, 473 U.S. at 247; Smith v. Reeves, 178 U.S. 436 (1900).

a federal program alone is insufficient to establish a waiver.[36] Likewise, a federal government agreement to indemnify a state instrumentality against the costs of litigation, including adverse judgments does not divest the state of Eleventh Amendment immunity.[37] Mere state participation in a federally assisted program is insufficient to waive immunity.[38] The federal program must include a clear expression of Congressional intent to condition participation on a state's waiver of immunity and a corresponding "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." [39]

Estoppel

The courts have considered estoppel claims against the federal government with a degree of reluctance bordering on outright refusal.[40] Courts generally view with less disfavor the use of offensive collateral estoppel, but trial courts are given broad discretion to determine when it should be applied. "The general rule should be that in cases where … the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[41]

A state which does not assert immunity at the administrative investigation is not estopped from raising it at the adversarial hearing.[42] Sovereign immunity is not an affirmative defense that a party must raise within a certain time frame in order to avoid waiver. Rather, it is total immunity from the suit itself.[43] A state may assert its immunity at any time.[44]

Individual Liability of State Officers

State immunity extends to officers who act on behalf of the State.[45] However, the immunities do not foreclose an action against a state official, in his or her official capacity, seeking solely prospective relief.[46] Nor does the immunity foreclose an action against an individual state official, in his or her individual capacity, seeking damages

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[36] *Atascadero*, 473 U.S. 234 (1985).
[37] Regents of the University of California v. Doe, 519 U.S. 425 (1997).
[38] Edelman v. Jordan, 415 U.S. 651 (1974).
[39] *Atascadero*, 473 U.S. at 238 n.1, 247.
[40] *See, e.g.*, Lee v. Munroe & Thornton, 11 U.S. (7 Cranch) 366 (1813); "Opinions have differed on whether this Court has ever accepted an estoppel claim in other contexts … but not a single case has upheld an estoppel claim against the Government for the payment of money" Office of Personnel Management v. Richmond 496 U.S. 414, 426-427 (1990).
[41] Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979).
[42] *Federal Maritime Comm'n*, 535 U.S. 743.
[43] Ewald v. Commonwealth of Virginia, Dept. of Waste Management, 1989-SDW-1 (ARB Dec. 19, 2003)
[44] *Edelman*, 415 U.S. 651.
[45] *See,e.g.*, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 142-47 (1993); Farricielli v. Holbrook, 215 F.3d 241, 245 (2nd Cir. 2000).
[46] *See, e.g.,* Ex parte Young, 209 U.S. 123 (1908).

payable solely by the individual state official. Such officials do, however, have qualified immunity from such claims.[47] When enjoying qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[48] Even if a complaint adequately alleges the commission of acts that violated clearly established law, summary judgment is appropriate if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.[49]

Analysis

In this case, Complainant seeks relief under six federal statutes: CAA, CERCLA, WPCA, SDWA, SWDA, and TSCA. Trial and appellate authorities have examined the statutes and found none contain the unequivocal language required to find a federal abrogation of state sovereign immunity. Federal courts have addressed the CAA, WPCA, and SWDA.[50] In a very recent decision, the Administrative Review Board has reviewed all six applicable statutes and found state sovereign immunity to apply in each one.[51] Consequently, state sovereign immunity has not been abrogated and applies in this case.

Complainant has cited no expressed California constitutional provision or statute which demonstrates a clear intent to waive its immunity. Accordingly, there is no explicit waiver of immunity.

Finally, a review of the applicable statutes discloses no language which evinces an unequivocal Congressional intent that any type of state action constitutes a waiver of state sovereign immunity. Complainant has not identified or cited any such language.[52] As a result, the principle of constructive waiver of immunity does not apply.

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[47] *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974).
[48] Harlow v Fitzgerald, 457 US 800 (1982).
[49] Mitchell v. Forsyth, 472 U.S. 511, 525-527 (1985).
[50] Connecticut Dept. of Environmental Protection v. O.S.H.A., 356 F.3d 226 (2nd Cir. 2004): *Rhode Island v. U.S.*, 301 F.Supp.2d 151.
[51] Powers v. Tenn. Dep't of Environment and Conservation and Tenn. Military Dep't, 2003-CAA-8, 2003-CAA-16 (ARB June 30, 2005); *see also Ewald*, 1989-SDW-1.
[52] *Cf.* 42 U.S.C. § 12202 (2004) (Americans with Disabilities Act: "A State shall not be immune under the eleventh amendment.") *and* 42 U.S.C. § 2000d-7(a)(1) (2004) (Rehabilitation Act of 1973: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.").

In short, there is no legal basis upon which to find that Respondent UCSB is not immune from this adversarial administrative process. Complainant's reliance upon *New Star Lasers*[53] is misplaced, as it is a case involving a suit for declaratory relief concerning patent infringement. Likewise, *Clark v. State of California*[54] deals with an unambiguous and explicit Congressional abrogation of immunity.[55]

In an attempted use of offensive collateral estoppel, Complainant suggests that Respondent UCSB is bound by a holding that whistleblower statute language including a state in its definition of a person is sufficient to find abrogation of immunity[56]. The Administrative Review Board has specifically rejected that logic in a much more recent case,[57] and I decline to apply it here under the guise of collateral estoppel.

Complainant's final argument as to Respondent UCSB is that even if it enjoyed immunity, its failure to raise it previously prevents it from doing so now. That position is contrary to clearly established law.[58]

Respondent UCSB is immune and must be dismissed as a respondent in this matter.

On the other hand, Respondent Aigner does not enjoy the same immunity. It is true that with Respondent UCSB dismissed and Respondent Aigner no longer an official, equitable relief is no longer available to Complainant and his only available remedy is monetary damages. However, at this stage in the proceedings, without addressing the merits of Complainant's allegations that he has been denied discovery, it is impossible to determine if a genuine issue of fact exists as to whether Respondent Aigner is entitled to qualified immunity or entitled to summary decision on any other grounds submitted by counsel.

Moreover, the dismissal of UCSB as a respondent raises other issues.[59] It is not at all clear from the styling and text of the filings whether counsel were acting on behalf of UCSB and Dean Aigner, or UCSB alone. Current counsel must provide notice as to whether they intend to remain on the case appearing for Respondent Aigner in his personal capacity and clarify whether all prior filings were also on his behalf. If current counsel do not intend to represent Respondent Aigner, he must give notice of his intentions as to counsel.

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[53] New Star Lasers, Inc. v. Regents of the University of California, 63 F.Supp.2d 1240 (E.D.Cal. 1999).
[54] Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997).
[55] *See supra,* note 38.
[56] McMahan v. California Water Quality Control Board, 1990-WPC-1 (ALJ Feb. 5, 1991)
[57] Ewald v. Commonwealth of Virginia, Dept. of Waste Management, 1989-SDW-1 (ARB Dec. 19, 2003)
[58] *See supra,* notes 38-40.
[59] *See supra,* note 1.

In addition, the amended status of the parties affects issues presently pending. For example, the dismissal of UCSB as a party and the fact that Respondent Aigner is no longer an officer of UCSB may impact Complainant's motions to compel the production of various documents and witnesses. Sanctions for non-production that may have been appropriate against UCSB, had it not been immune, may or may not be applicable to Respondent Aigner.

Finally, the unavailability of any remedy other than monetary damages means that Complainant no longer has a compelling interest in securing a ruling before the position is filled. Consequently, while both Complainant and Respondent Aigner are entitled to a timely decision, there is no externally driven deadline for action, and no reason to sacrifice a full and fair discovery and pre-hearing process for speed.

Accordingly, it would be contrary to the interests of justice to retain the current hearing date or set a new hearing date until Dean Aigner's counsel status is clarified and both parties have an opportunity to revisit discovery/pretrial motion issues in light of the dismissal of UCSB.

DECISION & ORDER

The complaint as to Respondent UCSB is dismissed. The order setting the formal hearing for 21 Jul 05 is vacated and the hearing is continued. Not later than five days after the date of this order, Counsel and/or Respondent Aigner will file notice, consistent with this ruling, of whether all previous filings were on behalf of Dean Aigner as well as UCSB, and who, if anyone, will represent Respondent Aigner for the rest of this action. Twenty days after the filing of that notice, both parties shall file anew any motions for sanctions or to reopen, compel, or foreclose discovery. In doing so, the parties may refer to earlier filings and incorporate applicable sections by reference. The parties may not simply incorporate previous motions in their totality.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge